

UNIVERSITY OF SOUTHAMPTON

CAUSING FORCED MIGRATION AND  
INTERNATIONAL RESPONSIBILITY:

A FUNCTIONAL PERSPECTIVE ON THE SUBJECT  
AND THE IDENTIFICATION OF WRONGFULNESS.

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Submitted as a thesis for the degree of Doctor of Philosophy

Faculty of Law

University of Southampton

The month of October, of the year 1996

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF LAW

Doctor of Philosophy

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The general aim of this research is to investigate the possibilities of imposing international responsibility on those who cause forced migration. In this context, the subjects will be identified in Chapter 2 and given the term 'forced migrants', although this term does not have a legal definition. It will include both transboundary and internally displaced persons, thus requiring an evaluation of a new perspective and approach. The imposition of responsibility would also depend on the causes and the identification of wrongfulness. Chapter 3 will therefore identify the causes and desired solutions. Instead of rehearsing the usual root causes or specific-headings methods of other research, this chapter seeks to propose certain underlying considerations that are identifiable with root causes. It also identifies the elements occurring in the causes of forced migration, thus leading to the discussion on solutions and the emphasis on legal solutions. Part III introduces the regime of international responsibility, with the aim of bridging the causes of forced migration with the causes of action under international law and to identify those who are capable of being held internationally responsible.

The next two chapters then deal with the legal responses, namely the identification of wrongfulness, the allocation of legal interest and standing, and the enforcement measures applicable to states, individuals and other organisations. The element of wrongfulness in causing forced migration has never been clearly articulated and has certainly never been combined with both transboundary and internal displacement. Chapter 4 therefore specifically identifies the wrongfulness of individual acts that cause forced migration, as well as proposing that causing forced migration itself may be an international wrongful act. International and domestic enforcement measures may be discussed after identifying the element of wrongfulness. Chapter 5 then evaluates the basis for enforcement action and the types of action from the perspective of states, individuals and other organisations. This chapter seeks primarily to confirm that international law does have 'teeth' and the legal basis to apply coercive inter-state action. International law even supports the empowering of individuals to enforce the violations of international norms in the domestic sphere. The final chapter discusses the need for political will in applying legal tools.

This thesis thus hopes to contribute to the appraisal of existing instruments in international law in protecting against human rights violations through the institution of international responsibility. It hopes further to contribute to the understanding of the causes of forced migration, the specific application of international law to ameliorate or prevent the causes of forced migration, and to encourage the application of global solutions for both transboundary and internally displaced persons.

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## PREFACE

This thesis has attempted to cover the diverse issue of forced migration, starting from the need for a new concerted perspective that identifies the subjects based on certain elements that includes the nature of their movement, the causes of their flight, as well as their need for protection. It also attempts to identify the underlying causes of forced migration and the solutions that may be applicable towards protection and amelioration of forced migrants, emphasising the identification of wrongfulness and the institution of a regime of international responsibility. This included the suggestion that legal claims exist from the causing of forced migration and concludes with an investigation into the enforcement mechanisms applicable to complete the regime of international responsibility. Consequently, many of the multi-disciplinary and multi-dimensional issues concerning forced migration may have only been briefly alluded to. One important issue that merits comment are the individuals themselves. Whether as part of a collectivity or alone, their suffering, indignities, unjust and reprehensible treatment, whether in transit, detention in third states, or mistreatment in their 'home' states (state of origin). Personalised accounts of such suffering are only briefly discussed, thus it must be clearly acknowledged that it is their plight that established the foundation for the work on this thesis, and it is for their ultimate recognition and benefit that this research was conducted.

Although this research has referred to the issue of international criminal law, it is a vast and developing specialism of international law that runs almost parallel to international 'civil' responsibility. The potential of a regime of international criminal responsibility in providing solutions for forced migration and the general violations of fundamental human rights is tremendous. However, this specialism remains better dealt with in its own domain. The on-going determinations of the International Tribunal for the Former Yugoslavia, the consequences of its findings on prospective heads of states and leaders, their complicity in the violation of international criminal laws, the fact-finding, evidence gathering, and enforcement mechanisms, all deserve separate consideration. Thus this thesis has attempted to limit the significance of criminal responsibility to only as applicable towards a comprehensive plan of action in Chapters 3, 4 and 5, namely for international responsibility. It should however be noted that the contribution of the international tribunal and criminal

responsibility generally, would significantly affect any future consideration of the overall comprehensive solution.

Two other areas need to be highlighted because of their potential effect on the issue of forced migration. The prospects of judicial review and the establishment of accountability within the UN system, particularly for Security Council determinations, by the International Court of Justice may profoundly alter the course of global security and UN constitutional perspectives. It is still a dream to envisage an ordered international society where the checks and balances under the rule of law would apply equally among all states and between states and international organisations, yet that move finds some realistic optimism in developing case-law through the international court, particularly from the recent *Lockerbie cases*. The potential effect on collective action particularly for forced migrants may be significant. Secondly, domestic constitutions have received brief mention in Chapter 5, although further detailed research in this area is needed. Domestic constitutions may have the potential to found domestic remedies for violations of human rights, particularly in states not party to the UN human rights treaties or any regional mechanisms, for example the Southeast Asian states. Constitutional safeguards within such states may provide a fruitful basis for protecting the individual, where case precedents could be established and the will to litigate these 'rights' could be encouraged.

This thesis will aim to encapsulate the entire situation of forced migration by: proposing a new perspective on the subjects; identifying the areas of wrongfulness based on the causes; and investigate mechanisms to prevent and ameliorate the causes of forced migration - thus to contribute to a comprehensive plan of action where legal tools would play an active and effective role. It is hoped that this thesis will act as a model for the application of international law to specific subject-matters, which in this case are forced migrants. International law, whether public or private, or a combination of both, is a tool for the alleviation of suffering and not the mechanism for oppression. The principles, the instruments and the methods of enforcement are in existence, although they need the input of political will to fully implement the system. The international law does work, although its consistent application remains a daunting challenge to all international lawyers. It is therefore hoped that this thesis will add to the already well trod path that confirms the applicability of international law within domestic and international spheres to redress violations, to provide concrete remedial and protective actions.

## ACKNOWLEDGEMENTS

This study would not have been possible without the contribution and support of the University of Southampton, Faculty of Law, studentship, and the CVCP, Overseas Research Studentship. It would also not have been possible without the support and encouragement of my family, colleagues and friends, who fed, clothed, counselled, endured much whinging, and cuddled me during the many depressing and psychologically draining moments.

Special mention should go to my wife, Charmaine, whose presence, love, assistance and comfort I could not do without; to my parents, for they are always there whatever my needs; to my brother, who provided the work-horse - my computer; to my supervisor and friend, Dr Rachel Trost, whose efforts, guidance and understanding established the foundation from which all work was conducted; to the Refugee Studies Programme, which houses the largest and most generous collection of documents on forced migration in the UK; to Dr Barbara Harrell-Bond, whose support and encouragement before and after commencing this research gave me the confidence to pursue this thesis; to Dr Luke T. Lee, whose work on refugees inspired my initial proposal and for his invaluable support during the final stages; to Dr Ralph Beddard, whose emphasis on human rights and grammar awakened me from complacency; and to Mrs Aloma Hack, my hero in the technical field, whose assistance, service and friendship went way beyond the call of duty.

All glory and honour however, belong to my God.

## ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
Aga Khan, 1981 report	Report of the Special Rapporteur Prince Sadruddin Aga Khan on Human Rights and Mass Exodus, UN Doc. E/CN.4/1503 (1981).
ASEAN	Association of South-East Asian Nations
ATS	Alien Tort Statute (US)
CEAFRD	Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Coles, 1992 study	Coles, <i>State Responsibility in relation to the Refugee Problem, with Particular Reference to the State of Origin</i> (1992)
CSCE	Conference on Security and Co-operation in Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
Experts Report	Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, UN Doc. A/41/324 (1986).
Friendly Relations Res.	Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) 24 October 1970
FSIA	Foreign Sovereigns Immunity Act
GA	General Assembly
GAOR	United Nations General Assembly, Official Records
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHI	Independent Commission on International Humanitarian Issues
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILC	International Law Commission

ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
LIBERTAD Act	Cuban Liberty and Democratic Solidarity Act of 1996
LNTS	League of Nations Treaty Series
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
PCIJ	Hague, Permanent Court of International Justice
Res.	Resolution
RGDIP	Revue Generale de Droit International Public
RIAA	United Nations, Reports of International Arbitral Awards
SC	Security Council
SICJ	Statute of the International Court of Justice
Sub-commission	Sub-commission on the Prevention of Discrimination and the Protection of Minorities
TAM	Recueil des Decision des Tribunax Arbitraux Mixtes
UK	United Kingdom (and also known in earlier cases as GB - Great Britain)
UN	United Nations
UNC	Charter of the United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US (USA)	United States of America
Yrbk ILC	Yearbook of International Law Commission

# CHAPTER 1

## INTRODUCTION

First they came for the Jews  
and I did not speak out -  
because I was not a Jew.  
Then they came for the communists  
and I did not speak out -  
because I was not a communist.  
Then they came for the trade unionists  
and I did not speak out -  
because I was not a trade unionist  
Then they came for me  
and there was no one left  
to speak out for me.<sup>1</sup>

People move for a variety of reasons, usually amid complex and intricate psychological and physical pressures, motives and desires.<sup>2</sup> When one speaks of forced migration, the element of coercion overrides all other considerations, whether the element of coercion is overt and direct or covert and indirect.<sup>3</sup> The human dimension of forced migration cannot be overemphasised,<sup>4</sup> particularly the suffering that is inevitable with coerced movements of any kind. These millions of homeless people, whether homeless in another state or within the borders of their national state, suffer physical and emotional trauma, implicit in their state of instability and upheaval, their suffering ‘... far surpasses a

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<sup>1</sup> Attributed to Lutheran Pastor Martin Niemuller, arrested in 1937 for anti-Nazi activities, quoted in, *The Guardian Education*, 31 January 1995, 12.

<sup>2</sup> Goodwin-Gill, ‘Different Types of Forced Migration Movements as an International and National Problem’, in Rystad (ed), *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990), 15. (Hereinafter, Rystad (ed), the uprooted)

<sup>3</sup> See Appendices, A2, stages of forced migration. The term ‘forced migration’ is used generally to describe the victims of coerced movements whether across international borders or internally displaced within state borders, and apart from the elements that identify these subjects, discussed below in Chapter 2, there is no legal significance to the term itself.

<sup>4</sup> See generally, Hocke, Jean-Pierre, ‘Beyond Humanitarianism: The Need for Political Will to Resolve Today’s Refugee Problem’, in Loescher and Monahan (eds), *Refugees and International Relations* (1989), 37 (hereinafter, Loescher and Monahan (eds)), who identifies also the ‘victim-oriented approach’, at 43.

simple issue of charity: in every sense, it is a major international political issue.<sup>5</sup> In political terms, refugees do affect the economies of receiving states, and receiving states perceive their interest to lie in the repatriation of refugees or resettlement in another state.<sup>6</sup> The rights of the individual must therefore be viewed from the perspective of his or her relationship with the state of origin, and this perspective is applicable equally to those outside their state of origin, as well as within.

The political will of states in addressing the issues of forced migration is pertinent to the overall comprehensive solution and should be addressed on the international plane, rather than based on the domestic self-interest of states who initiate controls on immigration. A recent call for action and press release of the 1995 Global Ecumenical Consultation on Forced Displacement of People,<sup>7</sup> clearly identified a three point action approach: 'to defend and accompany all uprooted people; to prevent the causes of their forcible displacement; [and] to strengthen advocacy for their rights.'<sup>8</sup> This call is in line with global impetus for the addressing of root causes, through political will and legal mechanisms. Similarly, in identifying three areas of concern, the shadow Foreign Secretary (UK) Robin Cook raised similar issues.<sup>9</sup> He was reported to have said, that the restoration of democracy and the addressing of human rights issues is one way of reducing asylum applications, whilst the asylum determination mechanisms in existence did not truly reflect the situation faced by applicants; foreign policy had a clear part to play in removing the pressure of refugee movements and human rights should be at the centre of foreign policy; and economic sanctions, although painful for the nationals of the sanctioned state, was nevertheless the best way to show condemnation of human rights abuses.<sup>10</sup>

These observations correspond to commentators who recognise that '[s]o long as immigration policies are in place with their explosive social and political sensibilities they

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<sup>5</sup> *Ibid*, at 70, although the author refers primarily to refugees.

<sup>6</sup> Coles, G.J.L., 'Refugees and human rights' 91/1 *Bulletin of Human Rights* 63, 69-70. (Hereinafter, Coles, bulletin)

<sup>7</sup> Global Ecumenical Consultation on Forced Displacement of People, Addis Ababa, Ethiopia, 11 November 1995.

<sup>8</sup> Sarah Stephens, Consultation Press Officer.

<sup>9</sup> Goodwin, Stephen, 'US veto could stall Nigeria oil embargo', *Independent*, 17 November 1995, 7.

<sup>10</sup> *Ibid*. Referring primarily to the situation in Nigeria.

will continue to feed internal xenophobic sentiments. This danger will persist, must be acknowledged and countered.’<sup>11</sup> This raises morally difficult issues, but such is the subject of forced migration that it does affect all states, *albeit* in different ways. It should be acknowledged, for example, that although refugees may have an impact on the socio-economic and even political conditions of a state, they have also made contributions in culture, education and economic stability. Historically, refugees have richly enhanced the societies that they have entered and shown a remarkable capacity to survive and prosper, despite dire circumstances.<sup>12</sup> It does seem clear that immigration policy, although a prerogative of the state, does significantly affect racial intolerance. Despite the harsh immigration policy and control mechanisms, the number of refugee and asylum-seekers around the world have increased, inferring that the problem lies with the lack of political leadership in the face of human adversity.<sup>13</sup>

Addressing transboundary movement extends beyond merely restricting influxes within specific territories, but concerns a wider need for investigating root causes within the state that generates transboundary movements. This wider approach requires consideration of the treatment of persons within a state and the enforcement of international law, particularly the implementation of international human rights norms. This approach requires a corresponding political will and a clear indication that political concern with the determination of asylum seekers do not reflect the reality of their situation and therefore a regime that addresses root causes needs to be reconsidered.<sup>14</sup> In the past, when people were forced to flee their state, the conditions of the Cold War created a situation where asylum was granted without scrutiny for the reasons or causes of flight.<sup>15</sup> Where the state of origin could call on the protection of one of the superpowers, the reasons for flight could be obscured. The pillar of state sovereignty also shielded the state from intervention

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<sup>11</sup> Weiler, J.H.H., ‘Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique’ (1992) 3 *Eur. J. Int’l. L.* 65, 67.

<sup>12</sup> ICIHI, *Refugees: The Dynamic of Displacement* (1986), foreword by Aga Khan and Hassan bin Talal.

<sup>13</sup> Nobel, P., ‘Blurred Vision in the Rich World and Violations of Human Rights - A Critical Assessment of the Human Rights and Refugee Linkage’ 91/1 *Bulletin of Human Rights* 74, 81 (Swedish Ombudsman against Ethnic Discrimination).

<sup>14</sup> *Ibid.*

<sup>15</sup> See generally, Panjabi, R.K.L., ‘International Politics in the 1990s: Some Implications for the Human Rights and the Refugee Crisis’ (1991) 10 *Dick. J. Int’l. L.* 1; and Hathaway, J.C., ‘The Evolution of Refugee Status in International Law: 1920-1950’ (1984) 33 *Int’l. & Comp. L.Q.* 348.

concerning human rights violations or discrimination. However, the concept of popular sovereignty, the move away from human rights being exclusively domestic jurisdiction, particularly in the case of repression of minorities and discrimination, permits a reconsideration of the wider issue of causes of forced migration. The climate today reveals certain truths: the coerced movement of persons is now recognised as a serious, global issue, that will not go away in time; that this issue is related to and affected by all the concerns of international relations, international law and international organisations; and the end of the Cold War and the dissolution of communism signals the beginning of a new era, this era could either foreshadow the end of the community of states, or it could be the epoch of a new world order as identified by former President Bush.

It is time to reaffirm the objectives set out in the Preamble of the United Nations Charter,<sup>16</sup> to develop the mechanisms that will hold states and individuals responsible for their actions in international law and to fulfil the peaceful determination accorded to ‘peoples of the United Nations’ through the concerted actions of all governments and authorities of the states of the UN. It would seem that the Charter is basically a set of principles that seeks to benefit the ‘peoples’, through the regulation of state conduct and the specific promotion of human rights.<sup>17</sup> There are however, several fundamental obstacles to the implementation of these goals. The tension caused by the conflicting self-interests between states; the concept of the sovereign state; and the control and maintenance of power within a state, that may be motivated by greed for financial or political supremacy. Gandhi is claimed to have said, ‘[t]he resources of the Earth will always be sufficient for man’s need but never for his greed.’<sup>18</sup>

The status of the individual to espouse claims based on the violation of international law is a further factor in the overall issue of forced migration. They are the beneficiaries of rights and obligations, and the victims of violations. They should be given a voice to recognise their role, whether on the domestic or international sphere. The participation of individuals in judicial process has much value because, ‘[f]ull individual participation can reduce human rights abuses by confronting the repressive goal of silencing victims,

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<sup>16</sup> See Appendices, A1.

<sup>17</sup> This is so, even if the individual may not derive directly enforceable rights from the Charter.

<sup>18</sup> Quoted by Nobel, *supra*, at 81.

developing social acceptance of peaceful solution of conflicts, and enriching judicial proceedings.’<sup>19</sup> Such participation would lead to the social acceptance of judicial solutions as a significant contributor to conflict resolution, where faith in the judicial system may be enhanced because victims may confront their oppressors for redress.<sup>20</sup> As Ogata so aptly put it, the concerns, causes and effects of forced migration are urgent and ‘[t]he world cannot reach a new order without effectively addressing the problem of human displacement.’<sup>21</sup> Thus a comprehensive response to the issues of forced migration ‘... emphasizes the need to strengthen the state’s responsibility for its own citizens, within an international framework and according to internationally accepted standards. The link between state responsibility and the international agenda is human rights.’<sup>22</sup>

Massive population movements have occurred and been documented even before Moses led the people of Israel out of Egypt. This thesis is however, not concerned with voluntary or customary migratory practices, but with forced and coerced movements. This thesis seeks to investigate the capacity with which international law might attach international responsibility to the causing of population movements. Thus, a precise definition may not be desirable. What is necessary is the identification of a group of people, nationals or habitual residents of a state, who are forced, directly or indirectly, to leave their homes and homelands, whether or not they cross international boundaries. The dual emphasis of international responsibility here, is to address and ameliorate the causes of mass exodus before they occur, as well as after they have occurred.<sup>23</sup>

It is emphasised that this thesis does not relate to general migratory practices found in nomadic cultures, or deal with migratory practices of individuals or groups. These practices are perhaps better considered under immigration discussions or migration issues. In other words, this investigation does not deal with voluntary migration, but limits its

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<sup>19</sup> Grossman, ‘Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation’ (1992) 15 *Hastings Int’l. & Comp. L. Rev.* 363, 382.

<sup>20</sup> *Ibid*, at 383.

<sup>21</sup> UNHCR, *The State of the World’s Refugees: The Challenge of Protection* (1993), ‘Forward’. (Hereinafter, UNHCR, state of the world’s refugees).

<sup>22</sup> *Ibid*, at 140, although specifically on refugees, is also applicable to forced migration generally.

<sup>23</sup> Gilbert, G., ‘Root Causes and International Law: Refugee Flows in the 1990s’ (1993) 11 *Neth. Q. Hum. Rts.* 413, although the author does not advocate for the use of state responsibility. See also Appendices, A2, identifies the applicability of international preventative action at every stage.

jurisdiction to practices of coerced movement, initiated by an intention to cause the movement, whether internally or across international boundaries.<sup>24</sup> This thesis pursues the identification of causes of forced migration as international wrongful acts, the investigation of possible solutions and enforcement measures.

## 1.1 IDENTIFICATION OF OTHER WORK IN THIS AREA

There have been several initiatives and studies in transboundary and internal forced migration which have also discussed the possibilities of imposing international responsibility on states of origin. On the transboundary dimension, the following documents represent the major works: the Document prepared for Legal Action by the League of Nations on behalf of the Jews and Non-Aryans in Germany (1940s);<sup>25</sup> the report to the Commission on Human Rights by Special Rapporteur Aga Khan (1981);<sup>26</sup> the Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees (1986) to the UN General Assembly;<sup>27</sup> the draft declarations and studies of the International Committee on the Legal Status of Refugees for the International Law Association;<sup>28</sup> and the study conducted on behalf of UNHCR in 1992 by Coles.<sup>29</sup>

The study by Aga Khan concentrated on establishing the link between human rights violations and mass exodus, and identified the obligations of both states of origin and other states in contributing to 'push' and 'pull' factors. Despite the indication that human rights violations dominated the cause of mass exodus, the study has not significantly altered the way minority groups have been treated or clarified the principles that may be used to

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<sup>24</sup> See further section 3.6, 'Elements Occurring in the Causes of Forced Migration'.

<sup>25</sup> 'Establishing the Historical Precedents and Legal Grounds for International Action by the League of Nations on behalf of the Jews and Non-Aryans in Germany', Attachment A, annexed in Coles, *State Responsibility in relation to the Refugee Problem, with Particular Reference to the State of Origin* (1992), a study prepared for the UNHCR (hereinafter, Coles, 1992 study). Originally annexed to McDonald's letter of resignation, dated December 27, 1935, in League documents, C.13, M.12, 1936, Annex

<sup>26</sup> Report of the Special Rapporteur Sadruddin Aga Khan on the *Study on Human Rights and Massive Exoduses*, UN Doc. E/CN.4/1503, 31 December 1981 (hereinafter, Aga Khan, 1981 report).

<sup>27</sup> UN Doc. A/41/324 (1986).

<sup>28</sup> Which resulted in a Declaration of Principle of International Law on Mass Expulsion, Sixty-second Conference, Seoul, 1986; and a Draft Declaration of Principles of International Law on Compensation to Refugees, Sixty-fifth Conference, Cairo, 1992.

<sup>29</sup> Coles, 1992 study.

impose obligations on causing states.<sup>30</sup> This thesis therefore draws from the findings of the Special Rapporteur and apply it with further analysis to a modern context. The Experts Report also identified causes with human rights violations and included defined headings.<sup>31</sup> The Experts Report however stopped short of implicating governments with international responsibility and instead, advocated the diplomatic approach of international co-operation,<sup>32</sup> thus reflecting the sensitivity of human rights issues predominate at that time.

The ILA study and declaration, although identifying existing principles applicable to refugee flows, did not clarify who constituted a refugee and why. The declaration also suffers several difficulties apart from the lack of identification of the subjects, which prejudices the identification of potential claimants. It limited discussion of remedies to only compensation, which is claimable only by the UN on behalf of refugees, suggesting the UNHCR to hold such a mandate without considering the potential detrimental effect on UNHCR's ability to provide assistance by being non-political. It dealt solely on states of origin, ignoring the fact that other states and organisations could have potential liability for 'indirect' causes of forced migration.<sup>33</sup> Finally, imposing financial sanctions against states that might already be in turmoil or economic upheaval, seems pointless when this might perpetuate the debt cycle of a developing state. The ILA declaration is perhaps the clearest statement of state of origin responsibility for causing refugees. However, Coles suggested that the document in support of the letter of resignation of Mr McDonald - former High Commissioner for Refugees - was possibly the first systematic effort to document responsibility from the perspective of states of origin; whilst his own 1992 report was the first major in-depth study of state responsibility for refugees.<sup>34</sup> Coles however places much emphasis on the right to freedom, which is only one principle that might found a basis for imposing international responsibility.

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<sup>30</sup> This is a failure due more to the political climate in the 1980s, rather than anything else, as much of the report holds true in contemporary contexts as it did in the 1980s.

<sup>31</sup> See Lee, L.T., 'Towards a World without Refugees: The United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees' (1986) 57 *Brit. Yrbk. Int'l. L.* 317, 323-325; Aga Khan, 1981 report; and Experts Report.

<sup>32</sup> This is also possibly related to the political climate of the 1980s.

<sup>33</sup> See further section 3.6.2, 'Coercion'.

<sup>34</sup> Coles, 1992 study, 5 and annex A.

Similar work concerning the internally displaced include: the ILA's International Committee on the Internally Displaced;<sup>35</sup> the reports of the UN Secretary-General's Representative, Deng;<sup>36</sup> studies and resolutions of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities under the topic 'Freedom of Movement';<sup>37</sup> and other initiatives such as the First International Conference on Development Induced Displacement (1995).<sup>38</sup> Individual commentators have also identified and discussed the issues of international responsibility from the states of origin.<sup>39</sup> Initially, it was envisaged that the scope of forced migrants be limited to transboundary movements, however, this was extended to include those internally displaced. The purpose for including a wider subjects interest than previously contended, is to further the objective of investigating the value of imposing obligations against those who cause movements through human rights abuses and evaluating the possible enforcement mechanisms. It was also clear that a significant preventative solution to transboundary movements was to address the situation within each state, thus such interventionist measures could be similarly applied for internally displaced persons.

What does this study have to offer in light of what has already been done? Firstly, linking the concerns of internally displaced persons with the traditional concept of refugees, and identifying their common characteristics, is a clear first step towards unifying protection regimes to reflect the reality of many situations of forced migration. Groups that suffer human rights violations, natural disasters or armed conflicts are hardly distinguishable on the basis of whether they do or do not cross international borders, because among other

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<sup>35</sup> Ongoing work chaired by Dr L.T. Lee.

<sup>36</sup> Deng, Francis, *Protecting the Internally Displaced: A Challenge for the United Nations* (A Report by the Special Representative of the Secretary-General on Internally Displaced Persons to the UN Commission on Human Rights 1993); Francis M. Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993) (hereinafter, Deng, protecting the dispossessed).

<sup>37</sup> In particular Resolution 1994/24, UN Doc. E/CN.4/Sub.2/1994/56, at 67; adopted without a vote. See Appendices, A3.

<sup>38</sup> Papers available at the Refugee Studies Programme - Documentation Centre, Queen Elizabeth House, University of Oxford.

<sup>39</sup> For example, Gilbert, *supra*; Plender, R., 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 Int'l. J. Refugee L. 345; Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1996) (hereinafter, Gowlland-Debbas (ed)), which discusses issues pertaining to both transboundary and internal movements; and Beyani, C., 'State Responsibility for the Prevention and Resolution of Forced Population Displacement in International Law' (1995) Int'l. J. Refugee L. - Special Edition 130.

things, their needs are similar. Deng's study identified existing principles under both human rights provisions and humanitarian law for the protection of the internally displaced, but concluded that the principles for their protection and the available mechanisms remained unclear and required re-statement. In other words, the gaps in the protection of the internally displaced ran parallel to those of transboundary forced migrants.

The second contribution rests with the identification and clarification of general principles that impose international responsibility. Such principles need to be clearly stated from a legal perspective - cause of action linked to causes - so that it can act, not merely as an instigator for legal action, but as a visible standard to guide conduct. A comprehensive set of existing principles need to be investigated and applied to forced migrants as causes of action, to compliment the first general contribution. This second contribution will then act as a link to evaluate enforcement measures.

The third general contribution lies in the investigation and clarification of mechanisms for the enforcement of principles concerning the protection of forced migrants. The prospects of inter-state dispute resolution considerations often obscure the possibility of claims based on international law being conducted in domestic tribunals. The use of domestic courts to enforce the violations of international law therefore need further investigation. Further research might also suggest that coercive enforcement mechanisms that include sanctions or the removal of governments may be a significant means of removing the causes of forced migration. It is clear from the studies that prevention and amelioration go hand in hand,<sup>40</sup> without ignoring the in-between measures for the temporary protection and provision of assistance to those in need. It also seems clear that there are existing norms and principles to attach to causing states for imposing international responsibility. Thus this thesis will concentrate on investigating the 'machinery and practice',<sup>41</sup> which are the specific causes of action and enforcement measures. This thesis

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<sup>40</sup> Lee, 'Toward a World without Refugees: The United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees' (1986) 57 *Brit. Yrbk. Int'l. L.* 317.

<sup>41</sup> Lee, 'The United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees - Part II' (1987) 81 *Am. J. Int'l. L.* 442, 443; and Deng, F., 'Report of the Representative' (1995) 14 (1&2) *Refugee Survey Quarterly*, 192, 224 and 274, para. 271.

hopes to fill the gaps by clarifying the holes identifiable from previous studies in the application of existing measures.<sup>42</sup>

## 1.2 PROPOSING A PERSPECTIVE ON THE SUBJECTS

This thesis will propose an alternative perspective to the traditional receiving and settlement state perspective, that dominated the various provisions on refugee issues.<sup>43</sup> The proposed perspective is not merely a cause-related approach, but a completely revolutionary way of perceiving the subjects themselves. This approach does not merely accord rights, although this is a necessary by-product, but identifies the elements of wrongfulness and gives emphasis to certain identifiable elements. These elements - based upon causes and circumstances - define the subjects, identifies wrongfulness in law, then identifies the measures that may be applied. The difficulties with terminology and definition will have to be investigated, to identify who are forced migrants and what circumstances make them forced migrants, and why they are distinguishable from other forms of displacement.

The trend of defining a refugee in a wider dimension, to include those internally displaced, is not necessarily the best way forward if the entire perspective on forced migration is not also altered. Even with respect to transboundary movements, Coles noted that the inherited way of thinking was not suitable to contemporary movements, although the necessary adaptation was taking place, '*albeit slowly and painfully*'.<sup>44</sup> It may be necessary to consider a complete legal regime that places emphasis back on those who are the victims, where their circumstances are caused by the violation of international norms. Durieux noted that, '[t]he problem of displaced persons, which is but the reverse of the refugee problem, is also its dark side. It is high time that it be exposed to the light of day.'<sup>45</sup> Thus the suggested perspective would link the two groups, because there are no real reasons why the regime of international responsibility should not be applied for either of

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<sup>42</sup> Petrasek, D., 'New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach' (1995) 14 (1&2) *Refugee Survey Quarterly*, 285, 285-88.

<sup>43</sup> See section 2.2, 'The Traditional Definition of a Refugee' and Chapter 2 generally.

<sup>44</sup> Coles, G., 'Approaching the Refugee Problem Today', in Loescher and Monahan (eds), at 373 (*italic added*).

<sup>45</sup> Durieux, J-F., 'The Hidden Face of the Refugee Problem' (1996) 103 *Refugees* 3, 7.

their benefit. They suffer similarly and in some instances, their distinction is blurred, for example when the Kurds camped on the borders of Iraq and Turkey.

Two objectives emerge when addressing causes of forced movements, both from the human rights and development perspectives, namely, preventive action and reconstructive action.<sup>46</sup> Very often reactive responses to assist victims only cures the symptoms, if at all. A need does exist to deal with causes with a 'preventative refugee policy',<sup>47</sup> or indeed, an overall preventive policy towards the violation of international norms protecting human rights, to prevent circumstances that cause coerced movements, transboundary or internal. This theme can in turn be divided into three perspectives. Firstly, encouragement to define areas of positive obligations, to assist states in their compliance with international law by financial, trade and other development assistance, and generally to promote economic, social, educational, political and legal global co-operation. Secondly, deterrence by clarifying the principles of international responsibility and the consequences of violating those principles, to provide standards by which governments may fall back upon. Thirdly, enforcement against violations to obtain reparation through litigation or within the UN mechanisms, whether individuals, international organisations or states; to obtain compensation; to change governments; or to declare the unlawfulness of specific conduct, either on the international or domestic spheres.

To achieve a comprehensive solution to the problem of forced migration, many considerations and factors have to be integrated within the ambit of a solution. Foreign policy, trade policy, human rights enforcement, education, poverty, and inter-state relations with the UN have to be addressed. Responsibility lies with the community, not merely states of origin.<sup>48</sup> Economic inequality, the sale and supply of arms, internal factionalism,

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<sup>46</sup> Goodwin-Gill, 'Refugees and Human Rights: Challenges for the 1990s' (1990) *Int'l. J. Refugee L.* - Special Edition 29, 34. Although the reconstructive issue is vital towards the overall solution, it will not be an emphasis in this thesis, see however, United Nations Research Institute for Social Development, 'Rebuilding Wartorn Societies', Report of the workshops on The Challenge of Rebuilding Wartorn Societies and The Social Consequences of the Peace Process in Cambodia, Geneva, 27-30 April 1993; and 'Refugees Returning Home', Report of the Symposium for the Horn of Africa on the Social and Economic Aspects of Mass Voluntary Return Movements of Refugees, Addis Ababa, 15-17 September 1992.

<sup>47</sup> Horst-Wolfram Kerll, 'New Dimensions of the Global Refugee Problem and the Need for a Comprehensive Human Rights and Development Oriented Refugee Policy' (1990) *Int'l. J. Refugee L.* - Special Edition 237, 240.

<sup>48</sup> UNHCR, state of the world's refugees, at 10.

and political efforts within a state assisted by other states may contribute towards repression of individuals. This thesis hopes to address some of these problems, but primarily to focus on the issue of relating the subject, who are the victims, to the causes of their plight, and to the solutions available to them and the international community, through the regime of international responsibility. A comprehensive plan of action is multi-dimensional and this thesis aims to investigate the potential contribution of international law to a comprehensive plan of action.

A significant part of this perspective would thus be to investigate if international law has any 'teeth'.<sup>49</sup> The 1989 round table conclusions of UNHCR and the International Institute of Humanitarian Law at San Remo were summed up by Coles as follows.<sup>50</sup> Amongst the many initiatives, they found *inter alia* that solutions and protection were interdependent issues and that protection should govern the entire process that leads to solutions; and therefore, the solutions should encompass the prevention of conditions and the redress of conditions within a state that compels its nationals to move.<sup>51</sup> This aspect of enforcement mechanisms is necessary because a remedy or right in law without a means of enforcement is not a remedy in reality. Thus the system, to be credible, must have some form of enforcement measures. The close of the Cold war and the dissolution of communism, provides a basis to establish and re-establish '... a variety of procedures to induce and even compel states to carry out their legal obligations.'<sup>52</sup> This thesis will thus attempt to draw from a variety of sources, that may be applicable both by individuals and states, and draw from the significant 'how to' approach of human rights commentators,<sup>53</sup> to develop an understanding of the causes of action in the international arena for states, individuals and other international organisations.

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<sup>49</sup> A term used by Coles, 1992 study, at 9.

<sup>50</sup> Coles, bulletin, at 67-68.

<sup>51</sup> *Ibid.*

<sup>52</sup> Schachter, O., 'United Nations Law' (1994) 88 Am. J. Int'l. L. 1, 10.

<sup>53</sup> Namely, Hannum, H. (ed), *Guide to International Human Rights Practice* (2nd edn., revised, 1992) (hereinafter, Hannum (ed)).

### 1.3 JUSTIFYING A REVIEW OF INTERNATIONAL SOLUTIONS

During the discussions preceding the adoption of the GA resolution concerning the Experts Report, many states identified that the causing state was to be primarily obliged to accept responsibility for finding a solution.<sup>54</sup> It is effectively the country of origin that has set in motion ‘the tragic sequence of events’ and is the most important actor in the complex relationship.<sup>55</sup> Some states even advocated forceful action against the causing state.<sup>56</sup> This call for durable solutions has resounded and inspired this research, because the use of legal mechanisms will contribute to durable solutions if the political will to institute them exists and the clearer the tools, the more likely their possible use.<sup>57</sup> Coles also emphasised the use of legal solutions, by imposing a regime of international responsibility<sup>58</sup> because,

‘[a] study of State responsibility provides the much needed opportunity to reconceive the assumptions of refugee law and to determine, in the light of modern realities, the general purposes and principles of that law. More basically, it provides the opportunity to structure the approach according to general principles of law and of good governance, thus preventing it from degenerating into an incoherent amalgam of *ad hoc* considerations of immediate political expedience.’<sup>59</sup>

In the modern context, the quest for a solution to the many who are displaced has reached unprecedented urgency. The end of the Cold War ushered in a new era where hope is given to greater international co-operation, evidenced perhaps by the increasing number of UN sponsored intervention in states, such as Somalia, Liberia, Haiti, the former Yugoslavia, and Cambodia. Yet despite the increase in international co-operation in economic and commercial matters, the development and consolidation of branches of international law that hold entities responsible for their wrongful acts seem to move at a much slower pace. This is so despite the renewed interest in international criminal law and the establishment of two international tribunals for the prosecution of alleged international

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<sup>54</sup> (1981) 35 Yrbk. U.N. 1052, discussing GA Res. 36/148, 16 December 1981, adopted without a vote.

<sup>55</sup> Tomuschat, C, ‘State Responsibility and the Country of Origin’, in Gowlland-Debbas (ed), at 59.

<sup>56</sup> (1981) 35 Yrbk. U.N. 1053, for example China was in favour of forcing those responsible to abide by UN resolutions and to sending fact-finding missions; Democratic Kampuchea favoured exerting pressure on the culprits; and the Philippines claimed the necessity to deal directly with the acts of states.

<sup>57</sup> The General Assembly clearly called for durable solutions in, GA Res. 41/124, 4 December 1986, (1986) 40 Yrbk. U.N. 835. See Appendices, A6.

<sup>58</sup> Coles, 1992 study, at 7.

<sup>59</sup> *Ibid*, at 8 (italic added).

criminals. Yet, the leaders of states, such as Saddam Hussein of Iraq, continue to rule their countries, despite overwhelming evidence of genocidal tendencies and widespread gross violations of human rights.

International criminal law, although a potential contributor to an overall comprehensive solution, is still a developing concept and belongs to a study specifically catered to its specialism. This thesis will thus concentrate on solutions that do not have the content of criminal responsibility although its significance has to be acknowledged. Apart from arbitration and other litigious solutions, non-judicial measures will be considered as complimentary to legal solutions, for example the application of coercive collective measures through the UN system. Although such measures, which are based on the principle of international responsibility may not be the most favoured solutions, their impact on removing the causes of forced migration may be one of the most effective and long-lasting solution, and thus merit some attention. Essentially, the application of such measures is dependant on an international wrongful act, based on the foundation of international responsibility for violations of international law.

The investigation of international responsibility might further strengthen the use of legal tools to avert causes of forced migration, rather than committing the settlement of problems with forced migration entirely within the realm of political expediency or notions of 'comity', which are dated and provide an inadequate array of possible solutions. The dependency on political instruments is at best discretionary and might lead to the veiling of those who are truly to blame for the suffering of human beings, because of their political standing. The perpetrators of wrongful acts should be made accountable and grievances should be given some form of redress against them. However, to ignore political implications as a contributor to the overall solution is naive, particularly when the application of legal tools depends on the political will of those in power. In this respect, it will be an aim to evaluate and develop a set of principles that may be applicable generally or specifically to encompass the concepts of hard positive norms, with 'unanchored and free-floating norms'<sup>60</sup>. Most importantly, to fulfil the perspective that '[r]ules and principles are to be given appropriate priority and, if more attention were paid to the legal consequences

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<sup>60</sup> Brownlie, *System of the Law of Nations: State Responsibility* (1983), at 87. (Hereinafter, Brownlie, state responsibility)

attached to rules and principles, a greater sense of order and of priorities would be introduced.’<sup>61</sup> Thus it is hoped that the identification of principles of international responsibility may contribute to the development of policies and procedures on national and international levels, that monitor and ameliorate forced migration. For it has been noted, ‘[t]he challenge of the 1990s is to develop these concepts beyond existing rhetoric and integrate them fully into the warp and woof of international action based on humanitarian concern.’<sup>62</sup>

#### 1.4 IDENTIFYING THE WAY FORWARD

A lot has been written about the plight of refugees, their status and the on-going work concerning protection and assistance.<sup>63</sup> The issue of internally displaced persons, although less well commented upon, nevertheless also produces an extensive amount of literature.<sup>64</sup> There is little doubt that the legal framework exists and if applied, would act as a guide for policy-makers, a means of dispute resolution, a means to obtain redress for harm done, a means to make accountable the leaders of a state, a means to give effect to the concepts of justice and equality, as well as to encourage real international peace and security through the enforcement of international law. As was noted, ‘[e]mpathy coupled with political will is the way to address the problem of the uprooted.’<sup>65</sup> Essentially, this is empathy with the plight of those in need and the political will to implement the legal framework to redress their plight.

This thesis will therefore attempt to establish a new perspective for defining the subjects; to identify the causes of forced migration and its nature from certain underlying considerations inherent in root causes; to connect the causing of forced migration with

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<sup>61</sup> *Ibid*, at 88.

<sup>62</sup> Beyer, Gregg A., ‘Monitoring Root Causes of Refugee Flows and Early Warning: The Need for Substance’ (1990) *Int’l. J. Refugee L. - Special Edition* 71, 72.

<sup>63</sup> See for example, Loescher, G., ‘Introduction: Refugee Issues in International Relations’, in Loescher and Monahan (eds), 1, 4-7.

<sup>64</sup> See for example, Petrusek, D., ‘New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach’ (1995) 14 (1&2) *Refugee Survey Quarterly*, 285; Durieux, *supra*, 3; Rystad (ed), *the uprooted*; Deng, F., ‘Report of the Representative’ (1995) 14 (1&2) *Refugee Survey Quarterly*, 192; and Lee, L.T., ‘Internally Displaced Persons and Refugees: Towards a Legal Synthesis?’ (1996) 9 *J. Refugee Studies* 27 (hereinafter, Lee, internally displaced persons).

<sup>65</sup> ICIHI, *supra*, forward, xv.

international responsibility; and to evaluate the potential for enforcement measures both on the international and domestic spheres, for states, individuals and other organisations. In essence, an examination of the overall situation, based on the growing concern for the value of the human person,<sup>66</sup> and the positive steps towards firmer inter-state co-operation to settle disputes, such that international law and the accountability regime of international responsibility be placed within the context of a comprehensive solution for forced migration. This includes promoting good governance, respect for human rights and the human person, and the supervision of aid and supply of arms. In this light, to foster greater confidence and reliance on international law, and to further the understanding of its role in the world today. In essence, to investigate a sequence of stages, from the identification of the subjects and the causes of their predicament, to the enforcement of solutions.<sup>67</sup>

In the extreme, the ideal position would be to maintain a global police force to contain widespread violations of human right, to maintain peace, to facilitate the enforcement of remedies and the settlement of disputes. The provisions of the UNC under Chapter VII provide for this, but the international community has never had the political will to fully implement the provisions. Could the legal system provide the solution? This study seeks to investigate the potential for imposing international responsibility based on causes of action for causes of forced migration, to identify the wrongfulness and eventually to suggest measures for the enforcement of rights against the violations of international norms. It is hoped therefore that this thesis will establish the value of international law as a mechanism for preventative and ameliorative action - in preventing the occurrence of forced migration, in facilitating the return to normality of those displaced away from their homes, in providing adequate measures to secure the redress of grievances and the provision of remedies.

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<sup>66</sup> Evidenced by the 1992 Conference on Human Rights and the election of the Human Rights Commissioner; and the 1995 Beijing Conference on Women's Rights.

<sup>67</sup> See Appendices, A6.

## CHAPTER 2

### NEW PERSPECTIVE FOR DEFINING THE SUBJECTS

#### 2.1 INTRODUCTION

Today the definition of a refugee remains as contentious - morally, politically and legally - as it was a hundred years ago. The effects of mass population movement remain equally disturbing, as it exacerbates already poor economic, social and political conditions in countries that receive such populations. Yet the solutions to the ever growing refugee population remain the same now, as it was fifty years ago - voluntary repatriation, settlement in the country of asylum or settlement in some third state.<sup>1</sup> There are tremendous problems with these solutions, for example the latter two require the integration between refugee and indigenous populations, which is a practice described as 'illusory'.<sup>2</sup> Voluntary repatriation on the other hand, acknowledged as the preferred solution,<sup>3</sup> is also difficult to achieve, although there have been a few recent successes, such as the return of refugees to Cambodia.<sup>4</sup> Among the many factors that need to be considered, is the fundamental need to address the root causes of mass population movement.<sup>5</sup>

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<sup>1</sup> See GA Res. 319(V), 3 December 1949; and recognised by Aga Khan, 1981 report, UN Doc. E/CN.4/1503, 31 December 1981, para. 3, as no longer an answer in every case.

<sup>2</sup> Nanda, Ved P., 'International Law and the Refugee Challenge: Mass Expulsion and the Internally Displaced People' (1992) 28 Willamette L. Rev. 791. (Hereinafter, Nanda, international law).

<sup>3</sup> See generally, UNHCR Statute para. 9, which calls for the High Commissioner to seek 'permanent solutions for the problems of refugees... to facilitate the voluntary repatriation of refugees...' and to '... promote voluntary repatriation...'; GA Res. 428(V), adopting the Statute; and Note on International Protection of the Forty-first Session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/C.96/750, (1991). In 1992 UNHCR helped some 2.4 million refugees return home voluntarily, see UNHCR, state of the world's refugees, at 172.

<sup>4</sup> The most successful example of voluntary repatriation in a large scale was ten million East Pakistan people returning to an independent Bangladesh. It also provides an extreme example of the changes that have to occur to facilitate the return; also note the repatriation of Ethiopian refugees from Djibouti in 1983, discussed by Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues', in Loescher and Monahan (eds), 253, 265ff.

<sup>5</sup> Repatriation which has to be voluntary, has clear advantages for the returnees, but the initial motivation for departure has to be addressed, see Panjabi, R.K.L., 'International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis' (1991) 10 Dick. J. Int'l. L. 1, 10-22, discussing security and human development, as well as generalised violence.

Addressing root causes directs attention towards long term solutions, a movement increasingly favoured by executives within the UNHCR. Emeka Ayo Azikiwe commented;

‘In the short run, we must provide emergency assistance, relief and protection to refugees and displaced persons. In the medium term, we should stabilize them in areas of first asylum and ensure their access to basic facilities. In the long run, durable solutions will invariably involve elimination of poverty, promotion of sustainable development and the establishment of conditions for peace, security and enhanced international cooperation.’<sup>6</sup>

There is on the positive side general agreement, on the root causes of mass exodus, as well as the need to address them with long term perspectives and the imposition of responsibility on the states of origin.<sup>7</sup> Why then can a definition of a refugee not reflect this agreement? Why has the concentration not been to postulate a definition that addresses the causes of refugees? Why should the emphasis continue to be placed on the receiving states when this has been acknowledged to be a less desirable and merely temporary solution?

The contemporary definition of a refugee founded in conventional law, directs attention more towards regulating the conduct of states that receive refugees, rather than upon states that cause the out-flow. What seems thus to have evolved is the intermediate action of building barriers to control the admission of persons, conflicting with the humanitarian need to protect refugees. The resulting mechanism is simply not sufficient to halt flows or redress the situation. As Loescher confirmed;

‘During recent years, Western Europe has been building barriers, first, by revising immigration laws and asylum regulations and procedures, second, by adopting restrictive practices and deterrent measures to curb new arrivals of asylum seekers and other migrants, and third, in the run-up to 1992, by ‘harmonizing’ asylum practices in an attempt to construct a system for joint European external borders (The Schengen Agreement and the Dublin Convention on Asylum).’<sup>8</sup>

Often the motives for movement are not clear, creating suspicion against the claim for refugee status, because the expenses for supporting refugees are high, compared to the

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<sup>6</sup> In, *Refugees* No. 87, October 1991, at 43.

<sup>7</sup> See, UN Doc. A/41/324, Experts Report; Panel Discussion, ‘Human Rights and the Movement of Persons’ (1984) 78 *Am. Soc’y. Int’l. L. Proc.* 339ff (hereinafter the Seventy-eighth Proceedings); and the Report of the International Committee on the Legal Status of Refugees, Report of the Sixty-fifth Conference of the International Law Association (1992).

<sup>8</sup> Loescher, G., ‘Mass Migration as a Global Security Problem’, in US Committee for Refugees, *World Refugee Survey - 1991* (1991), 13.

domestic issues of high unemployment and recession.<sup>9</sup> The restrictive presumption against according refugee status, not reflecting the real need for protection, influenced the twin themes underlying this thesis.<sup>10</sup> That is, the redirection of importance and attention towards root cause issues, and the attachment of responsibility to those that cause displacement in violation of international law. These themes cannot be over emphasised, and a definition that corresponds to this perspective is crucial to the consideration of root causes and international responsibility.

This chapter will therefore investigate the definition of a refugee from the perspective of holding responsible states that cause forced migration.<sup>11</sup> For too long, states have been applying their own criterion for a definition of a refugee, because of a perceived need to limit the number of people entering their borders. It will be proposed that the traditional definition should be distinguished, by relocating the defining perspective to that of the causing state. The onus of protecting the refugees would then be placed mainly and primarily upon the states which cause rather than states which receive. Further, it will be advocated that defining the subjects - who are the victims - from this perspective, may have the consequence of enhancing the overall protection of human rights, by specifically implicating acts of states as root causes of forced migration. Two perspectives of protection exist, it is the basis of this chapter to direct attention on those that cause rather than those that receive.<sup>12</sup>

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<sup>9</sup> Martin, 'The New Asylum Seekers', in Martin, David A. (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (1988), 6-7 and accompanying footnotes. (Hereinafter, Martin (ed), new asylum seekers).

<sup>10</sup> See generally, Grahl-Madsen, A., 'Protection of Refugees by Their Country of Origin' (1986) 11 *Yale J. Int'l. L.* 362, 364-366, who identified that protection under general international law includes general diplomatic protection, which seeks to improve the conditions of persons at large, and particular diplomatic protection which seeks to safeguard or advance the interests of particular persons; as well as contractual protection, which depends on the agreements between states or international organisations, for the interests of individuals, particularised or at large.

<sup>11</sup> The causing state referred to here could be the state of origin, or third party states that act as aggressors, invaders, or participate in some way that contributes to coerced movements of populations, for example in the provision of arms or aid knowing that they will be used to violate the human rights of nationals within the state of origin. The term forced migration is discussed further below at section 2.4, and Chapter 3, particularly section 3.6, suffice to note that it is used to identify the subjects and the elements of unlawfulness.

<sup>12</sup> Nanda, Seventy-eighth Proceedings, at 339-340, noted, traditionally mass displacement has taken the perspective of ameliorative concerns, but what is needed are long-term durable solutions, that feature the obligations of states of origin.

Perhaps a major difficulty with this subject stems from the term 'refugee' itself. In the past, it has often been argued that there is only one group of refugees deserving legal protection. The inclusion of all other groups became a highly controversial issue.<sup>13</sup> These other groups of people not designated 'refugees' were given terms like, development refugees, war or war-like conditions refugees, environmental refugees, economic refugees, constructive refugees and *de facto* refugees. The use of the term refugee to identify the general situation, as is currently practised, is not satisfactory, simply because it fails to reflect the nature of the circumstances occurring. It will be proposed that the acts, the deeds or the causes, of coerced movements should be the focus for a definition. Consequently, consideration should be given to developing a different perspective that identifies the subjects whilst maintaining the classic or traditional definition of a refugee. A preferable term to identify persons who are made to leave their homes or places of abode will be, 'forced migrants'.<sup>14</sup>

It has been a constant claim that a paradox exists between the legitimate pursuit of state interest and their obligation to protect asylum seekers or persons fleeing life and death situations.<sup>15</sup> This perceived conflict or tension would not exist in the situation that this study proposes because, the concern rests not with imposing obligations upon the receiving state, but upon the state(s) that causes forced migration. The shift in focus is not entirely new, yet, the basic studies on this matter have hardly affected the definition.<sup>16</sup> This study will therefore seek to propose a different perspective based upon existing principles of international law and not merely suggest a new definition. International law should not only react to the situation, but be in the position to develop structures that encourage decision-

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<sup>13</sup> See generally, Perluss and Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Va. J. Int'l. L. 551; and Parrish, 'Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee' (1992) 92 Colum. L. Rev. 923.

<sup>14</sup> As mentioned above, the term is simply used without legal constrictions.

<sup>15</sup> The pursuits of legitimate interests of states being acts that are within the domestic jurisdiction, for political, economic, social and cultural welfare; see generally the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October, 1970; and the Charter on Economic Rights and Duties of States, GA Res. 3281(XXIX) (19774), *reprinted in*, (1975) 14 I.L.M. 251. See further, Arboleda, E. and Hoy, I., 'The Convention Refugee Definition in the West: Disharmony of Interpretation and Application' (1993) 5 Int'l. J. Refugee L. 66, 89.

<sup>16</sup> See the Experts Report; the ILA, Draft Declaration of Principles of International Law on Compensation to Refugees, (April 1992); and Aga Khan, 1981 report.

makers to take more notice,<sup>17</sup> be influenced and guided by. In other words, to develop a system where decision-makers would consider the law before acting and naturally seek to comply with those existing norms. The firmer the foundation upon which the definition rests in international law, the greater the expectations against the states that cause forced migrants, the larger the deterrent value becomes. The effect of the international law on the national arena also permits legitimate expectations. States are expected by nationals, to comply with international norms, thus they may apply pressure to governments to comply with these norms. Governments may similarly, cite compliance with international law to satisfy national concerns and to promote support for policies that seek to comply with such norms. It will therefore be an underlying concern that a different perspective be proposed as a valid alternative to viewing the issues of forced migration.

## 2.2 THE TRADITIONAL DEFINITION OF A REFUGEE

Historically,<sup>18</sup> the term 'refugee' was first used in France in 1573 with respect to Calvinists who were suffering religious oppression, leading to *le grand de'rangement*. By 1797, the English were using the term to describe American Tories who fought on the British side during the American Revolution and who fled the colony.<sup>19</sup> In more modern times, the definition of a refugee was made on an *ad hoc* basis, which depended upon whether there was a large group of people deserving aid. It was because of the displacement of Eastern Europeans after World War I, that the need for an international definition of a refugee found international recognition.<sup>20</sup>

The first institutionalised international effort was found from the creation of the High Commissioner for Refugees under the League of Nations in 1921.<sup>21</sup> The primary and

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<sup>17</sup> Jon van Dyke, Seventy-eighth Proceedings, at 351.

<sup>18</sup> See generally, Grahl-Madsen, A., *The Status of Refugees in International Law* (1966); Hathaway, J.C., *The Law of Refugee Status* (1991); and Goodwin-Gill, G., *The Refugee in International Law* (1983) (hereinafter, Goodwin-Gill, the refugee).

<sup>19</sup> For a truly western background, Zolberg, 'The Roots of American Refugee Policy' (1988) 55 Social Research 649, 650-2.

<sup>20</sup> Gunning, I.R., 'Expanding the International Definition of Refugee: A Multicultural View' (1989/90) 13 Fordham Int'l. L.J. 35, 41.

<sup>21</sup> (1921) 7 League of Nations O.J. 755-8; and generally, Holborn, L., *Refugees: A Problem of Our Time* (vol. 1, 1975), 5-8.

only focus of the High Commissioner was on Russian refugees, who no longer enjoyed the protection of the then Soviet Union. Concerns relating to famine, war or persecution were ignored. The key was in the unavailability of state protection. In 1938 when the number of Germans flowing out became large enough, the League adopted the Convention Concerning the Status of Refugees Coming from Germany,<sup>22</sup> and a few years later, the Additional Protocol to the Provisional Arrangement and the Convention of 1938, to deal with Austrian refugees.<sup>23</sup>

The first co-ordinated effort during World War II was when the Allied Powers set up the UN Relief and Rehabilitation Administration (UNRRA) under the Agreement for the UNRRA in November, 1943.<sup>24</sup> The objectives of UNRRA were almost purely temporary humanitarian efforts and the preparation of returning exiles to their country of origin. The UNRRA was replaced in 1946 by the International Refugee Organisation (IRO) under the Constitution of the IRO, 15 December, 1946.<sup>25</sup> The definition of a refugee was very specific, focusing on the dominant causes of forced migration. It included, victims of Nazis or other regimes that opposed the UN,<sup>26</sup> persons of Jewish origins,<sup>27</sup> and persons facing or fearing persecution.<sup>28</sup> As with previous trends, the provisions were directed towards people who lacked state protection and who were in need of protection.

The IRO was replaced in 1950 by the UNHCR.<sup>29</sup> The definition of a refugee took legal form as a multilateral Convention in 1951.<sup>30</sup> The definition provided by this convention was still limited in time and geographically specific,<sup>31</sup> but once again, it

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<sup>22</sup> 192 L.N.T.S. 59; and generally, Goodwin-Gill, the refugee, at 3.

<sup>23</sup> 198 L.N.T.S. 141.

<sup>24</sup> Grahl-Madsen, *The Status of Refugees in International Law* (Vol. 1, 1966), 18.

<sup>25</sup> 18 U.N.T.S. 3; see generally, Holborn, *supra*, at 29-43.

<sup>26</sup> Annex I, part 1, s.A(1)(a), 18 U.N.T.S. 18.

<sup>27</sup> Annex I, part 1, s.3A(3), 18 U.N.T.S. 18; see also Goodwin-Gill, the refugee, at 4, who cites other specific categories.

<sup>28</sup> Annex I, part 1, s.C(1)(a)(i), 18 U.N.T.S. 19.

<sup>29</sup> GA Res. 428, 5 UN G.A.O.R. Supp.(No.20) at 46, UN Doc. A/1775 (1950).

<sup>30</sup> Convention Relating to the Status of Refugees, 1951, 189 U.N.T.S. 150. As of 1994, 113 states have ratified both Convention and Protocol, 3 have ratified only the Convention and 4 have ratified only the Protocol.

<sup>31</sup> Article 3(3)(i)(a), applying only to the World War II situation or specifically 'to events occurring in Europe before January 1, 1951.'

addressed the need for protection. Other agreements were drafted and ratified to provide assistance to individuals and groups that were not covered. For example, to refugee seamen,<sup>32</sup> and stateless persons.<sup>33</sup> In addition, the GA also passed special resolutions to provide assistance to other forced migrants, not legally classified as refugees. For example, Hungarians in 1956,<sup>34</sup> and the Chinese in Hong Kong.<sup>35</sup> By the mid 1960s, the international community realised that the limitations imposed under the 1951 Convention were not satisfactory. Thus came about the 1967 Protocol,<sup>36</sup> which amended the temporal and geographical limitations.

### 2.2.1 The Convention Refugee

The 1951 Convention and 1967 Protocol defined a refugee as a person who, 'owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'<sup>37</sup> The Convention refugee is perceived almost entirely from the perspective of the receiving state. Any guidance to states is given in relation to the determination of a refugee. The legal status in turn defined the rights and obligations that were owed to the refugees, from the receiving and other third states. Therefore, the legal recognition of a refugee does not make the person a refugee, but declares him/her deserving of the rights and obligations thereto owed.

During the discussion of the 13 nation *ad hoc* committee,<sup>38</sup> the US wanted a refugee definition specifying particular nationalities, the French wanted the widest possible

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<sup>32</sup> Hague Agreement Relating to Refugee Seamen, 23 November 1957, 506 U.N.T.S. 125.

<sup>33</sup> Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 U.N.T.S. 117, in force, 1960; and the Convention on the Reduction of Statelessness, 30 August 1961, 989 U.N.T.S. 175, in force, 1975.

<sup>34</sup> GA Res. 1129, 11 UN G.A.O.R. Supp.(No.17) at 63, UN Doc. A/3572 (1956).

<sup>35</sup> GA Res. 1784, 17 UN G.A.O.R. Supp.(No.17) at 34, UN Doc. A/5217 (1962).

<sup>36</sup> Protocol Relating to the Status of Refugees, 1967, 606 U.N.T.S. 267, the amending provisions are Article 1(2) and (3).

<sup>37</sup> 1951 Convention, Article 1(A)(2); and 1967 Protocol, Article 1(2),

<sup>38</sup> Report of the *Ad Hoc* Committee on Statelessness and Related Problems, UN Doc. E/1618, E/AC.32/5, Annex (1950); *reprinted in*, (1950) Yrbk. U.N. 569.

protection, whilst the USSR and Poland walked out because of representation from the Republic of China (ROC).<sup>39</sup> The classic definition that evolved out of the 1951 Convention definition, is that; (i) persons must be outside their home country; (ii) they must be unwilling or unable to return to their home country to avail themselves to the protection of the government; (iii) they must be unable to return because of a well-founded fear of persecution on account of race, religion, nationality, or membership of a particular social group or political opinion.<sup>40</sup>

### 2.2.2 The OAU Definition

The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, September 10, 1969,<sup>41</sup> also dealt with the definition. It defined a refugee to be, 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality or origin.'<sup>42</sup> The definition accords legal protection to a wider prospective group of persons and includes situations that the 1951 Convention and 1967 Protocol did not; namely, situations of armed conflict. However, this regional convention only binds the states party to the convention and it does not deal with the causes of forced migration. It does however, extend the definition of a refugee.

This definition was followed by the Cartagena Declaration on Refugees in 1984.<sup>43</sup> Having considered the OAU Convention in relation to massive refugee flows occurring in Central America at that period, the Declaration included additional elements to the 1951 Convention and 1967 Protocol: 'persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal

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<sup>39</sup> See generally, Cox, T.N., "'Well-founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status' (1984) 10 Brook. J. Int'l. L. 333, 342-4.

<sup>40</sup> Miranda, C.O., 'Toward A Broader Definition of Refugee: 20th Century Development Trends' (1990) 20 Cal. W. Int'l. L.J. 315, 319.

<sup>41</sup> 1001 U.N.T.S. 45.

<sup>42</sup> Article 1(2).

<sup>43</sup> Cartagena de Indias, 22 November 1984, OAS/Ser.L./V.II.66, Doc. 10, rev. 1, 190-93.

conflict, massive violation of human rights or other circumstances which have seriously disturbed public order.’<sup>44</sup> The declaration is not binding *per se*, but together with the OAU Convention, is perhaps indicative of trends to extend the classic definition. It is also a further indication of state practice that might be capable of evincing custom and does enter the domain of international law.<sup>45</sup> Yet neither of these definitions address the causes of mass exodus, nor the allocation of international responsibility from the perspective of the causes of mass exodus.

### 2.2.3 A Reflection

As the 1951 Convention, the 1967 Protocol, the OAU definition and the Cartagena Declaration clearly show, the system of international protection has tended towards the reactionary approach. They concentrated on the issues concerning events after refugees were created, rather than the causes of refugees *per se*. The focus as summed up in the Experts Report was, ‘the twofold one of granting humanitarian protection and assistance and of finding durable solutions, mainly the solutions of voluntary repatriation to the country of origin and, where repatriation was impossible, of resettlement and integration in the country of first refuge or in a third country.’<sup>46</sup> The focus since the dawn of institutionalised protection of refugees has been on imposing - *albeit* in the interest of refugees - obligations on receiving states. Yet, even the Experts Report found, ‘caring for refugees is important but not sufficient.’<sup>47</sup> This acknowledgement is by no means revolutionary. When James G. McDonald wrote to the Secretary-General of the League intimating his resignation from the Office of the High Commissioner for Refugees coming from Germany, he said, ‘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.’<sup>48</sup>

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<sup>44</sup> Miranda, *supra*, at 324, note 53.

<sup>45</sup> UNHCR, state of the world’s refugees, Annex II.9, 166.

<sup>46</sup> Experts Report, para. 8.

<sup>47</sup> *Ibid*, para. 9.

<sup>48</sup> Letter dated December 27, 1935, in League documents, C.13, M.12, 1936, Annex.

Conduct that causes forced migration should be the central consideration for any solution,<sup>49</sup> and be the emphasis of any international instruments. As Jennings once said, the lawyer must ask 'how far that conduct is in accord with or contrary to the recognised rules of international law?'<sup>50</sup> This is the basis from which further study should proceed. It is the evaluation of conduct in relation to its legality in international law. There is no doubt that a wider definition will not be consented to if it forced states to admit people beyond their discretionary control. On the other hand, a definition is necessary to reflect the circumstances of people who are literally kicked out by their state or forcibly removed from their homes. As was observed by one author;

'Refugees differ from other spontaneous or sponsored migrants, largely in the circumstances of their movement out of one area to another, and the effects they have on them in the settlement and adjustment phases of their relocation. Refugees are forced to leave their homes because of a change in their environment which makes it impossible to continue life as they have known it. They are coerced by an external force to leave their homes and go elsewhere.'<sup>51</sup>

The general circumstances of coercion in movement seems largely ignored. The 1951 Convention itself excludes a very large proportion of displaced persons. For example, during the civil war in El Salvador in 1983, the US Department of State categorised the people fleeing El Salvador into three groups; first, political refugees, who were the smallest group; secondly, poor peasants displaced by the fighting; and thirdly, 600,000 economic migrants.<sup>52</sup> A definition should express the legitimate expectations of those it seeks to identify and reflect the reality of the state of affairs. It should not be used to conceal or legitimise violations of international law. A forced migrant should not be labelled a refugee in order to deserve international protection.<sup>53</sup> A forced migrant is created, not by a label, but by the circumstances that he/she finds him/herself in. These circumstance include violations of basic human rights, wars, civil unrest or even environmental degradation and

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<sup>49</sup> See further below section 5.5, 'Coercive Action and Action to Remove a Government'.

<sup>50</sup> Jennings, R.Y., 'Some International Law Aspects of the Refugee Question' (1939) 20 *Brit. Yrbk. Int'l. L.* 98, 110.

<sup>51</sup> Olson, M.E., 'Refugees as a Special Case of Popular Redistribution', in Gosling, L.A.P. and Lim, L.Y.C. (eds), *Population Redistribution: Patterns, Policies and Prospects* (1979), 130.

<sup>52</sup> US Committee for Refugees, *World Refugee Survey 1983* (1983), 43.

<sup>53</sup> Aga Khan noted that many aid agencies sometimes find difficulty obtaining contributions unless they could attach the refugee 'label'. This had the effect of 'turning' people into refugees to obtain funds; Aga Khan, 1981 report, para. 87.

natural disasters.<sup>54</sup> However above all else, the circumstances fundamental to the forced migrant is the lack of available or effective protection from their own state authorities, therefore deserving of international intervention.<sup>55</sup> This lack of protection is perhaps the only circumstance universally recognised by all the instruments, yet no instrument articulates a solution recognising this unacceptable lack of protection.

The identification of the subjects of a study or the beneficiaries of rules and principles is critical for the application of standards. Yet controversy exists because the determination of a refugee requires the application of a standard. This standard in turn provides grounds for claiming a very special benefit, which is ‘a right of relocation’.<sup>56</sup> As a consequence of obtaining a right, a remedy can then be legitimately claimed - *ubi jus, ibi remedium*.<sup>57</sup> States are wary of according such rights, applicable *en masse*, thus they generally reserve much control and discretion. The nature of these arguments and their directions are basically similar, they seek to accord measures of protection for refugees, yet balance the internal sovereign control of the receiving state. Thus the application of this standard will inevitably vary between states, depending on the strength or weakness of the political climate within a state. Inevitably, a value judgement is placed upon forced migrants creating a situation where only those perceived to be within the standard, receive the award of refugee status; whilst those who do not are ill-judged as being fraudulent and rejected. Yet forced migrants generally share the same causal circumstances, whether or not they are specific targets for ‘persecution’, or suffer generally applied and tremendously oppressive treatment. They all need protection because they are all forced to leave, whether they are subjected to persecution as individuals, as perceived by receiving states, or to the general suffering of civil conflicts.

A further problem with the definitions constructed in the existing instruments, is that a recognised refugee in one state or region, may not be so recognised in another. In other words, there is really no uniformity in the perception and practical application of the

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<sup>54</sup> The causes of forced migration are discussed further below, Chapter 3.

<sup>55</sup> The legal interest and jurisdictional competence of states to act are discussed in Chapter 5 below.

<sup>56</sup> Martin, D.A., Seventy-eighth Proceedings, at 350, a right to be relocated within a state of refuge or some other third state.

<sup>57</sup> Schneebaum, S.M., ‘Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy’ [1982] Mich. Yrbk. Int’l. Legal Studies 373.

definition of refugee. The two regional instruments obviously provided a wider definition, which would accord more persons under the umbrella of protection. The application of the definition as between states will seem to be in conflict. Yet although the refugee problem is an international concern, a refugee recognised under the regional instruments may not have that same status from states applying the 1967 Protocol. The terms of reference used should reflect some consistency in application and certainty in definition. The problem lies in the fact that refugee issues, as determined by states, are dealt with primarily as political issues rather than as a legal concern. Tension is created when a monopoly is sought within domestic politics for issues such as employment, welfare, housing and immigration, thereby objecting to international competence to deal with such issues. As a result, the application and interpretation of any refugee definition lies with individual states who apply it to suit their own particular self interest. Therefore, international obligations are shrouded in political rhetoric that enhance the inherent discretion of domestic authorities. So keeping refugee issues within the jurisdiction of domestic politics is a negative aspect and an added problem. It affirms the need for a different perspective in dealing with root causes and legal responsibility, to encourage consistency and uniformity.

It should be noted, that away from politics, forced migrants in camps share a general circumstance. Their only criterion for assistance is need. Not reasons, race or whether international borders have been crossed, but simple neediness. Refugee camps sometimes also house mixed populations that are also deserving of assistance and international protection. Situations of complex refugee problems exist, where a state is an importer as well as an exporter of forced migrants. An example is Liberia, which has a Sierra Lorne refugee population, yet also exports refugees. Another particular example is Hartisheik refugee camp in eastern Ethiopia.<sup>58</sup> By 1993, a population of about 250,000 Somalis, Ethiopians (some of Somalis stock), local people and soldiers, demobilised after the defeat of the Mengistu regime, had congregated in the camps. All these people share the same needs, so why can this same need not be the basis of a clearer perspective?

It is suggested that from these considerations, it might be argued that the post World War II, the OAU and even the Cartagena definitions require updating. Yet it is not

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<sup>58</sup> UNHCR, *state of the world's refugees*, at 25.

simply a new definition that is required, but the fundamental recognition that a different perspective is significantly appropriate.<sup>59</sup> Instead of imposing obligations to protect upon the receiving states, a system imposing obligations upon the states that cause forced migration could be developed. The definition has also to be studied in relation to the issues of protection against the causing state.<sup>60</sup> This leads on to the consideration of formulating a definition based on a functional point of view. A move away from the use of the term 'refugee' to describe the situation, but to use it as a functional reflection of the situation instead.<sup>61</sup> Thus if the term 'refugee' is to be used, it should reflect the causes and circumstances, rather than act merely as a label that accords privileges.<sup>62</sup> The term 'functional' is used simply to denote a point of view of the subjects of this topic. An approach that accounts for factors such as the causes of movement and the circumstances that the subjects of this topic find themselves in. It is not merely a cause-related approach, but a perspective that combines the considerations of causes and circumstances of forced migration, their elements, the wrongfulness in the causes of forced migration, and the regime of international responsibility that may flow from the wrongfulness.

For example, if persons are forced to leave their homes but are relocated in better accommodation with provisions for housing and employment, it might be argued that they are in a better position than when they started. Therefore, simply looking at the causes, which might be forced relocation, is not sufficient. Consideration must also be given to the circumstances of the persons who are coerced into moving, particularly the conditions to which they are subjected to. In short, the term is used to accord a practical position with respect to forced migrants. Deng whilst dealing with the internally displaced commented that, a 'flexible working definition' was preferred, one that 'provides indicators for identifying those needing protection and assistance, without adopting a conclusive or rigid

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<sup>59</sup> For example, Hocke, in Loescher and Monahan (eds), at 41, called for a global approach to the overall refugee problem, where a solution is considered in the context of the 'best interests of all states', and the 'victim-oriented approach'.

<sup>60</sup> For example, Hocke, in Loescher and Monahan (eds), at 43, who uses the guiding principle that humanity trumps the interests of states in the 'victim-oriented approach'.

<sup>61</sup> Used by the Experts Report, para. 24, for 'delineating the phenomena dealt with.'

<sup>62</sup> The definition is highly contentious, for example a symposium in 1990 deliberately avoided definitional issues, preferring to address the more important concerns of the victims than the terminology used to define them; Gilkerson, 'Human Rights and Refugees in Crisis: An Overview and Introduction' (1990) *Int'l. J. Refugee L. - Special Edition* 1, 2-3.

definition. What is important is that needy people not be excluded. It is better to err on the side of inclusion than exclusion.’<sup>63</sup> The functional approach is consistent with the studies of the ILA and the Experts Report.

### 2.3 THE PERSPECTIVE UNDER CUSTOMARY INTERNATIONAL LAW

In 1939, Jennings defined a refugee to be one who is;

‘the victim of a pathological state of society in which the government which would normally form the link between him and international law not only fails to perform that function, but goes out of its way to embarrass him, so that he is actually in need of protection against it. It is this lack of protection, in fact, which is the test of a refugee adopted in all the arrangements and convention [pre 1939].’<sup>64</sup>

The perspective identified by Jennings resembles the proposition in this chapter. The cause of exodus becomes the critical element of a refugee, but the reason for the intervention of the international community is clearly the lack of protection from the state of origin. Yet in order for this approach to be fully appreciated, it needs to be established as a principle in law. Therefore it is necessary to show state practice and *opinio juris* sufficient to evidence customary international law. It is also possible here to show that a functional approach is consistent with international norms concerning human rights, and the spirit of the UNC itself.

By the adoption of the Protocol in 1967, the international community responded to the changing nature of forced migration at that time, which was described as, ‘... a positive expansion of the legal definition of refugee, eliminating temporal and geographic limitations, while adopting a universal, cause-related definition.’<sup>65</sup> This universal definition, although cause-related, nevertheless left much room for states to apply discretion in according protective status. In relation to receiving states, this was a necessary landmark. On the other hand, by concentrating on the obligations of receiving states and putting pressure on them to delimit admissions, judgement against causing states were excluded. In fact, the consequence of forcing other states to accept the burden of population movements went to the extent of accepting certain acts that caused mass exodus as inevitable, thereby

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<sup>63</sup> Deng, protecting the dispossessed, at 164.

<sup>64</sup> Jennings, *supra*, at 99.

<sup>65</sup> Gunning, *supra*, at 45.

excluding the victims of such acts from any international protection. For example, where there was no evidence of persecution, but merely a civil conflict, refugee status would not be given. This view that the Protocol was inadequate is reflected by many commentators.<sup>66</sup> However, it is possible to argue that this, combined with the expansive approach of the Cartagena Declaration and OAU definition, is evidence to support a contention that state practice favoured an expansive definition based on cause relation.

The emphasis from the perspective of the receiving state is valid where refugee flows amount to nothing more than mere temporary inconveniences. However this is clearly not the case. It was sometimes suggested that when the decolonisation process was completed, involuntary movements would cease.<sup>67</sup> Contemporary examples of refugee flows and international studies have, however proved this to be incorrect. Nationalism to the extent of racism, political and economic oppression, have been identified as root causes, and their persistence as an international concern still exists today, as do their part in causing mass exodus. Practice has shown that a wider definition is necessary if it were to properly reflect the root causes. The OAU states certainly found a wider definition desirable, although not all the member states have ratified the 1969 Convention.<sup>68</sup> At the very least, these states will have the obligation not to violate the object and purpose of the Convention.<sup>69</sup> In fact, under Article II(1) of the Convention, obligations are placed on 'member states' rather than merely 'contracting states'.<sup>70</sup> Similar concerns with widening the definition was also expressed by the states involved with the Cartagena Declaration. A general conclusion that may therefore be drawn from the international instruments, is that although the application of the definition remained contentious, states recognised that the circumstances that cause refugees were wider than merely 'persecution' under the 1951 Convention and 1967 Protocol.

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<sup>66</sup> For example, Goodwin-Gill, 'The Language of Protection' (1989) 1(1) Int'l. J. Refugee L. 6, 7-8 (hereinafter, language of protection), who called it impracticable and unworkable.

<sup>67</sup> Ngolle, E., *The African Refugee Problem and the Distribution of International Refugee Assistance in Comparative Perspective: An Empirical Analysis of the Policies of the Office of the United Nations High Commissioner for Refugees 1960-1980*, (a Ph.D. Thesis, 1985), at 42-3, cited by Gunning, *supra*, at 46, note 43.

<sup>68</sup> 41 of the 42 independent African states in the OAU have signed the Convention; see generally Bowman and Harris, *Multilateral Treaties: Index and Current Status*.

<sup>69</sup> Vienna Convention on the Law of Treaties, 1969, Article 18.

<sup>70</sup> As observed by Holborn, *supra*, at 188, 197-8.

The UN and the Specialised Agencies have also applied a wider definition of refugees. The GA has over the years often extended the competence of the UNHCR to include non-Convention refugees.<sup>71</sup> In fact, UNHCR has sometimes been specifically awarded general competence to extend good offices at their discretion.<sup>72</sup> In 1975, the GA authorised the UNHCR to act on behalf of non-Convention refugees who were victims of man-made events over which they had no control.<sup>73</sup> Thus the practice here supports two propositions. Firstly, the need for a wider definition that reflects contemporary needs. Secondly, it shows that a wider definition has already been accepted by states, whether under the auspices of the GA, or individually.<sup>74</sup> The latter proposition is to some extent shown by state approval via GA authority, if not directly, at the very least by tacit agreement. Further, states show their support through the uniform provision of voluntary contributions to UNHCR, which implies approval of UNHCR conduct.

The general practice of states, in accepting the international instruments specifically dealing with refugees and the support given to the UNHCR, is evidence of the growing acceptance of the wider cause related approach. The practice of individual states would arguably also reflect this. For example, in the US, defectors from Eastern Europe were not always politically persecuted, but were in fact suffering only poor living conditions.<sup>75</sup> Although in reality an example of how politics have dictated the admissibility of persons seeking protection, it also shows how inadequate the existing perspective really is. In fact, the discussions at the Conference of Plenipotentiaries recommended in the Final Act, that states should not apply the 1951 Convention strictly.<sup>76</sup> Similarly, it has been argued that the history of international refugee law mirrors in its definition of a refugee, the dominant

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<sup>71</sup> For example, the Afghan refugees in Pakistan who were experiencing war or war-like conditions; *Report of the UNHCR*, 36 UN G.A.O.R. C. 3 (53rd mtg.) para. 1-2, UN Doc. A/C.3/SR.53 (1981); and 37 UN G.A.O.R. Supp.(No. 12) at 70, UN Doc. A/37/12 (1982).

<sup>72</sup> For example, 28 UN G.A.O.R. Supp.(No. 30) at 84, UN Doc. A/1903 (1973). In fact it was in 1957, for the Chinese refugees in Hong Kong, that the GA first called for the UNHCR to extend its good offices to aid those falling outside the definition; GA Res. 1167, 12 UN G.A.O.R. Supp.(No. 18) at 20, UN Doc. A/3805 (1957).

<sup>73</sup> GA Res. 3454, 30 UN G.A.O.R. Supp.(No. 34) at 92, UN Doc. A/10034 (1975).

<sup>74</sup> Gunning, *supra*, at 51.

<sup>75</sup> Zolberg, *supra*, at 658ff.

<sup>76</sup> Goodwin-Gill, *the refugee*, at 13.

circumstances that create forced migration.<sup>77</sup> However one looks at the definition, the functional approach in relating cause to subject has always been advocated, although it is the perceived need to reserve a discretion for admission, that has diverted the application of this main focus.

Can a different perspective be supported in international law? The difficulty in locating a different perspective in custom is that although state practice supports it, the actions of states are not done as a matter of law. Thus the requirement of *opinio juris* may not be present. On the other hand, it may be argued that it is the legal obligation of all states to promote the respect and enjoyment of fundamental human rights. The violation of these basic rights have been identified as root causes for mass exodus, thus the eradication of these root causes is a legal obligation.<sup>78</sup> A perspective directed at addressing these root causes can therefore be supported as a legal obligation, because it is a necessary step in addressing human rights provisions. The root causes cannot be eliminated if the causes remain unaddressed, and the causes cannot be dealt with if the perspective directing attention is not supported. If the obligation to eliminate human rights violations exists in law, then so too would the perspective. The existence and effect of specific provisions that may be used to hold responsible states that cause mass exodus will be discussed below, suffice to conclude here, that the perspective on states of origin is supported by international law. A cause related perspective is well recognised by state practice, whilst as a proposition in law, the protection and promotion of human rights clearly supports the perspective as a legal proposition.

In effect, the approaches taken towards refugees have been constantly changing over the years. Coles noted that the formal structures of the 'old approach' was codified in the 1950 Statute of the Office of the UN High Commissioner for Refugees and 1951 Convention.<sup>79</sup> In this approach, persecution and political application was the norm, resulting in discrepancies of application by many non-western states, who either denounced

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<sup>77</sup> Gunning, *supra*, at 49.

<sup>78</sup> See generally, UNC, Article 2(4), 1(3), 55 and 56, the UDHR, ICCPR, and other international instruments, including regional instruments that provide the foundation for human rights protection.

<sup>79</sup> Coles, in Loescher and Monahan (eds), at 374, which identified the individual, not the group, who was outside the country of origin, and advocated for external re-settlement.

the approach, or applied their own mechanisms.<sup>80</sup> In fact, the practice of states shows many instances where the non-applicability of this approach was declared.<sup>81</sup> The practice of re-settlement in third states, has never had the universal acceptance of states.<sup>82</sup> In fact, the only consistency in the old approach, seems to be the application of the political self-interest of states in limiting and controlling the influx of persons into their territory. Thus, the functional perspective would consolidate this self-interest and direct it, not towards controls of admission policies, but in addressing the fundamental conditions that cause persons to flee.<sup>83</sup>

Support for this perspective may also be found from various commentators. Jennings wrote that customary international law has little to say about individual refugees, '[b]ut there is one aspect of the refugee problem to which the general and customary international law is relevant, and that is the consideration of the legality or illegality of the conduct of the state which creates a refugee population.'<sup>84</sup> As Jennings noted, the definition itself is not certain in international law, but the conduct of states that cause mass exodus are regulated by international law. If Jennings' proposition be accepted, then the perspective of a definition focusing upon conduct, must also be supportable. This is not an area of sudden interest, but has been under consideration since the 1800s, when the concept of human rights and even of humanitarian intervention were discussed.<sup>85</sup> The international obligations of states of origin can significantly contribute to a comprehensive solution in the resolution of root causes of forced migration. If it can be said that a normal individual who is a citizen of a state, should enjoy the protection of the government of that state, then the implication is that the interests and protection of the individual should be a primary concern of the

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<sup>80</sup> *Ibid*, at 375-376.

<sup>81</sup> *Ibid*, at 376-377, for example, by the UK concerning Chinese exodus into Hong Kong, and by France concerning the Algerian insurrection.

<sup>82</sup> *Ibid*, generally, and cites Asian states and Arab states who only applied temporary refuge even when acceding to the 1951 Convention, at 378-381.

<sup>83</sup> *Ibid*, at 387, who noted, '... the modern refugee problem is not one of eligibility ... of immigration controls; the problem is, basically, that of the adverse conditions within the country of origin which are forcing people to flee. If the refugee problem is to be solved, the solution must basically be sought among those adverse conditions.'

<sup>84</sup> Jennings, *supra*, at 110.

<sup>85</sup> Bernard, M., *On the Principle of Non-Intervention* (1860); and Grotius, Hugo, *De Jure Belli ac Pacis Libri Tres* (1646) (Whewell trans., 1853).

state. The peculiarity of a refugee's position is that he/she does not enjoy the protection of the government of his/her state of origin, whether legally entitled to such protection or not. A consequence of this presumption is that the conduct of the state and the accountability for that conduct becomes an important issue, which places human rights principles squarely on the agenda.<sup>86</sup>

Would a perspective focusing on the state of origin violate the sovereignty of the state of origin or other states that cause forced migration? There is some suggestion that competing claims exist, for on one side lies the principles of state sovereignty, territorial supremacy and self-preservation, whilst on the other, the principles concerned with the protection of human rights and fundamental freedoms.<sup>87</sup> Both are principles in international law, yet would the proposed perspective offend the rule prohibiting intervention in domestic affairs? The perspective that this chapter advocates would not offend international law for the following reasons. Firstly, the sovereignty of states affected by the outflow of refugees are upheld and their rights for redress affirmed. The pressure and conflicts of internal domestic issues such as employment and welfare are relieved because the need to accept forced migrants will be reduced or eliminated. In fact, it might permit the development of a system whereby a receiving state and the victims of human rights abuses may claim compensation from the causing state. Secondly, the proposed perspective seeks to address the issues of sovereignty within a state. That is of 'popular sovereignty', as opposed to sovereigns' sovereignty.<sup>88</sup> The idea that it is the interests of the individuals within a state that make up the legitimacy of the government.<sup>89</sup> Thirdly, the proposed perspective seeks to address the root causes of forced migration by establishing an emphasis against the states that cause mass exodus. The root causes generally have as their source the violation of human rights. Thus the perspective compliments international law, particularly the UNC, in addressing the violations of human rights. The shield of Article

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<sup>86</sup> Goodwin-Gill, 'Editorial' (1989) 1 Int'l. J. Refugee L. 2, who emphasised, that refugee law is a part of the law of human rights.

<sup>87</sup> Goodwin-Gill, *the refugee*, at 215.

<sup>88</sup> Reisman, W.M., 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 Am. J. Int'l. L. 866, 869

<sup>89</sup> Any violation against the individual or group would therefore effectively remove from the government its legitimacy. The removal of an illegitimate government is supported in international law, and state sovereignty is no longer an effective shield to hide behind. See further below, Chapter 5 and 6.

2(7) cannot now operate to deny intervention in a state that violates human rights and all states are now concerned with upholding obligations owed *erga omnes* - an interest in upholding the rule of law itself.<sup>90</sup>

The proposed perspective is clearly consistent with the spirit and aims of the UNC. It is directed at promoting international peace, human rights and fostering equality and self-determination. There is little doubt that refugee flows do affect international peace. It was suggested that a strong factor influencing India's decision to intervene in East Pakistan, was the massive flow of refugees into India.<sup>91</sup> Many other states have also expressed tension at the influx of refugees. For example, Malaysian newspapers described Vietnamese refugees 'as a weapon of war as a softening-up raid by waves of bombers.'<sup>92</sup> A US commentator referred to Cuban refugees as 'bullets aimed at this country.'<sup>93</sup> In both cases, refugees were equated with acts of aggression. As Gunning noted, an expanded definition must incorporate territorial sovereignty as well as extraterritorial responsibility in order to reflect the multicultural nature of international law.<sup>94</sup> Despite the fact that her arguments were directed primarily upon receiving states, the call for extraterritorial responsibility holds equal emphasis for arguments proposing to establish a perspective that imposes obligations on causing states.

There are good reasons for directing attention away from receiving states, apart from the human rights and international angle. US officials commenting on Haitian refugees claimed, 'there is no question that the flood of asylum claimants presents extremely difficult problems for immigration law and policy. Most come not from the Soviet bloc but from nations with which the United States has, or until recently had, close political ties. These nations, such as Haiti and El Salvador, would bitterly resent our granting asylum to their

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<sup>90</sup> See further section 5.3, 'Obligations Owed *Erga Omnes* as a Basis for Action'.

<sup>91</sup> On 21 November 1971, there were 10 million refugees in India, thus self-defence was claimed as this affected its social system and economy, 26 UN S.C.O.R., 1606th mtg., 4 December 1971, para. 158-163.

<sup>92</sup> Garvey, 'Towards a Reformation of International Refugee Law' (1985) 26 Harv. Int'l. L.J. 483, 486; and Loescher, in Loescher and Monahan (eds), at 13, citing ASEAN officials who claim the deportations were an attempt to create economic and racial instability in Southeast Asian states.

<sup>93</sup> Garvey, *supra*, at 486; and Loescher, in Loescher and Monahan (eds), at 13.

<sup>94</sup> Gunning, *supra*, at 76.

citizens.<sup>95</sup> This statement implicitly recognises that granting asylum would affect international relations, making the process of granting asylum a politically sensitive issue. It suggests that granting asylum would be perceived as making a moral judgement on the activities of the state of origin. The proposal for a functional approach may not entirely eliminate all the political and moral difficulties, but it might provide a legal standard to which a greater degree of politics and morality might be excluded.<sup>96</sup> When the identification of a group of persons depends upon the cause of their flight and the circumstances that they are in, then the elements of coercion and the need for protection may be incorporated. Thus allowing a more practical standard that focuses on the elements that form the functional perspective.

The advocated approach of prevention rather than cure has firm precedence in the work of several agencies, such as the study by Aga Khan on behalf of the UN Human Rights Commission, the 1986 Experts Report, and the study by Coles in 1992 on international responsibility. This would suggest that a perspective focused upon the states causing mass exodus is supported in customary law. It is also clearly in conformity with and complementary to principles of international law pertaining to sovereignty and the international protection of human rights. It is therefore necessary to consider the functional approach as a perspective capable of entrenchment in international law.

## **2.4 THE ELEMENTS THAT FORM THE FUNCTIONAL PERSPECTIVE**

Certain key elements of contemporary refugee issues, that would affect the development of any system concerned with forced migrants, may be identified. Firstly, past systems took account of natural barriers, such as vast oceans, which kept the population of asylum seekers tolerably low. Third World refugees were distant from the West, whilst Eastern Europeans faced strict internal exit controls. This permitted the ignoring of two basic tensions: the tension between the obligation to accept asylum seekers, and the

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<sup>95</sup> Quoted by Schuck, 'The Transformation of Immigration Law' (1984) 84 Colum. L. Rev. 1, 40.

<sup>96</sup> As Brownlie, 'Causes of Action in the Law of Nations' (1979) 50 Brit. Yrbk. Int'l. L. 13, 40, stated, there is no rubicon between law and morality. Morality and politics do have much influence in legal principles, although it might be argued that a legal standard, once established, might eliminate some of the need to constantly apply political or moral standards.

sovereign right to decide who could enter its territory in the best interest of its citizens.<sup>97</sup> Secondly, the old system ‘provided certain *guarantees of refugee bona fides* that seemed to operate almost automatically’, without the requirement of clarity or precision in distinguishing refugee from other sorts of migrants.<sup>98</sup> An example of this is the acceptance of Cuban boat people instead of Haitians, or even the mass acceptance of those who came from communist states, who did not face persecution of any kind. Thirdly, the ‘power’ lay in the label itself, for the label attached sympathy and created exemptions to normally restrictive immigration policies. However, when the label itself comes under doubt, all these unquestioned privileges would be lost. Hence the reluctance to expand the definition.<sup>99</sup>

It is claimed that traditional refugees deserve their label because they suffer the indignation of time spent in transitional camps, whilst new asylum seekers disturb this situation by going directly to the state of refuge.<sup>100</sup> In the eyes of the Western public, the special quality that built and sustained the unique position of refugees is lost. In fact, these doubts magnify xenophobic tendencies and exacerbate racial tension, because the alien is then accused of stealing scarce resources of the state. The label creates this position, arguably because it does not identify the circumstances that a forced migrant faces, but is somehow governed by political tensions.<sup>101</sup> The process of defining subjects is naturally restrictive, as limits are necessarily placed in the process of conceptualising a definition. It will be argued that a definition, although restrictive, should reflect the circumstances of forced migration and incorporate the concern with imposing international obligations on states that cause people to flee. The definition of a refugee, it is claimed, has evolved into a term of art.<sup>102</sup> The concentration of the application of the term has been to deter or prevent

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<sup>97</sup> Martin, in Martin (ed), new asylum seekers, at 8.

<sup>98</sup> *Ibid*, at 9.

<sup>99</sup> *Ibid*, at 10; note however, Lee, internally displaced persons, at 30; who argues that the definition of internally displaced persons may be moving towards a legal synthesis with refugees.

<sup>100</sup> See Martin, in Martin (ed), new asylum seekers, at 7, and accompanying footnotes on the Sri Lankan lifeboats off the Canadian coast in August 1986.

<sup>101</sup> Note Panjabi, *supra*, at 5, who says, ‘[c]learly, refugees are no longer welcome in most nations of traditional refuge.’ For example in Southeast Asia, the policy of humane deterrence, and the Refugee Reform Act and the Refugee Deterrents and Detention Act (Canada) of 1988.

<sup>102</sup> Miranda, *supra*, at 315; see also Goodwin-Gill, language of protection, 6; and note Plender, ‘The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced’, in Gowlland-Debbas (ed), 119, at 120.

the provision of assistance that would otherwise be legally required. The main purpose of this section is therefore to redirect the focus back to the reasons for flight. Instead of defining persons as stowaways, boatpeople, economic migrants, or illegal aliens, with the aim of identifying their legal status, the functional approach will incorporate the situation imposed on persons. The function would therefore be to identify the victims from the causes and circumstances.

States that seek to address population movements across borders generally attempt first to make the situation manageable without adversely affecting their self-interests. They do this by defining the subjects, and consequently, limiting the scope of action.<sup>103</sup> This rigid approach of defining the area of concern clearly restricts not only the options available to assist and protect within the defined subjects - refugees - but it also removes from international concern, the vast numbers of other displaced persons. Although distinguishing and delimiting may have been necessary to facilitate the competence of UNHCR and other international institutions, as well as satisfy the demands of sovereign self-interest.<sup>104</sup>

It would seem undesirable that the refugee definition be used as a mark to delimit the universe of moral concern. If a person were deemed a refugee, then the claims to human rights violations or persecution, in whatever form, would deserve our moral sympathy and hence, our help. Conversely, if not so deemed, then their return to the state of origin marks the end of our effort and involvement. The perspectives of two groups dealing with refugees may be identified.<sup>105</sup> The first group may be described as the liberals or humanitarian seekers. They view the refugee in relation to whether the situation in the state of origin evokes their sympathy and concern. If it does, then the person would be viewed as a refugee and consequently deserving of assistance. Here, an arbitrary system of changing values and themes govern the construction of the definition.<sup>106</sup> The second group may be described as those seeking conservative or restrictionist ends. Here the refugee

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<sup>103</sup> Goodwin-Gill, 'Different Types of Forced Migration Movements as an International and National Problem', in Rystad (ed), *the uprooted*, 15, at 21.

<sup>104</sup> *Ibid.*

<sup>105</sup> Martin, *Seventy-eighth Proceedings*, at 350.

<sup>106</sup> For example, a person suffering under a regime supported by this group, would not be accorded the same treatment as one who comes from an 'enemy' regime. The latter people may by purely arbitrary judgement receive less sympathy.

definition also coexists with the bounds of moral concern. But if the person were found not to be a legal refugee, the group would automatically bear no obligation, which would lead to the dismissal of claims and return to their state of origin. In both cases, the definition of the refugee not only accords status, but actually sets the limits of involvement.

It is therefore argued, that to reduce the definition of the refugee to a standard for determining who would be deserving of help, is morally reprehensible. To use it as a device to evade addressing the violations of international norms or the recognition of international injustices - as in the form of human rights violations - is politically reprehensible. To use it as a means of denying legal responsibility, whether upon receiving, originating or contributing states, is no longer tolerable. It cannot be acceptable to equate legal status with the view of avoiding responsibility. On the other hand, responsibility requires the initial act of wrong-doing, which a definition has to take into account. The functional approach, which applies an objective, situation-based, legal foundation to a definition, is proposed, an approach that recognises the elements of coerced movements.

Although there is some justification for not adjusting the existing definition of the refugee and for not reconsidering the term itself, this author does have a preferred term of use, which is 'forced migrants'. It is used simply to distinguish persons who seek migration on a purely voluntary basis, or those who move on a customary basis, from those who are forced physically, psychologically or financially to move.<sup>107</sup> The distinction between voluntary and coerced movement is sometimes controversial, and could depend on the availability of evidence to prove an assertion of coercion.<sup>108</sup> The use of this term identifies the circumstances that created the situation these people find themselves. The people are identified by a term that is based upon the circumstances that created their position. The perspective of the functional approach directs attention to the causes, which means less significance is paid to the label and more significance is paid to whether there is cause for movement beyond the control of the persons. In other words, the main concern would be

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<sup>107</sup> See generally Experts Report, para. 25.

<sup>108</sup> For example, in *The Tacna-Arica Question* (1925), 2 R.I.A.A. 921, artificial stimulation of immigration was found to be permissible, but the forcing of an outflow of persons was held unlawful, thus the incentives to Chilean moving into the territory was permissible, but the conscription of Peruvians to persuade their departure from the territory was unlawful (*per* Arbitrator Coolidge).

the factors that caused people to flee, be it violations of human rights, persecution of some sort, war or civil unrest.

The term forced migration has no strict definition and came into existence merely from usage. It has been used as a subordinate term of 'migration', related to 'evacuation', 'flight' and 'mass exodus', and has 'forced relocation' - another term for forcible internal displacement - as its subordinate term.<sup>109</sup> Forced migration covers a wider perspective than the conventional definition of refugee. It is preferable to the term displacement, because it explicitly suggests the movement of persons against their will. The term 'displaced persons' commonly means those who are not considered convention refugees, but are nevertheless outside their state of origin, and are distinguished from those who are internally displaced.<sup>110</sup> To migrate, is to move from one country or area to another. Thus forced migration is a movement, through coercion, from one country or place to another, which includes the perspective of internally displaced persons.<sup>111</sup> A term must be available to identify persons who are forced to move, for whatever reason, be it the narrow confines of persecution, or the wider perspective of war and civil unrest, or actions simply amounting to human rights abuses. A definition should reflect the nature of things as they exist, and although there is logic in limiting those who would be perceived to deserve protection from receiving states, it is artificial, and is designed to limit, rather than reflect the nature of existing affairs. Protection should be given, not because of the definitional criterion of a refugee, but the function of according to those who are in reality deserving, based on criteria that reflect the actual state of affairs.

A new definition is not advocated, nor are the terms of a refugee as it exists being denied. Although '[d]efinitions always limit the scope for action',<sup>112</sup> it may limit positively or exclude negatively. Whatever the philosophical arguments for or against the use of definitions, the terms in this investigation will nevertheless be limited by definitions, although it is the perspective and approach that is being redefined. The distinction between

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<sup>109</sup> International Refugee Documentation Network, *International Thesaurus of Refugee Terminology* (London, 1989), 222 and 261.

<sup>110</sup> Goodwin-Gill, the refugee, at 18.

<sup>111</sup> Elaborated below section 2.4.1.1, 'The Internally Displaced'.

<sup>112</sup> Goodwin-Gill, in Rystad (ed), the uprooted, at 21.

involuntary and voluntary migration may not always be clear, but the subjects would clearly be identified because of essential elements based upon the functional approach. The elements of the functional approach are population movement itself, the issue of protection or the lack of it, and the root causes of flight.<sup>113</sup>

#### 2.4.1 POPULATION MOVEMENT AS AN ELEMENT

Implicit in the perspective of forced migration, is the element of population movement. In this respect, whether there is a massive flow of persons or simply one or two individuals, is less relevant.<sup>114</sup> To make a distinction based on whether the movement is massive or individualistic is superfluous and a dichotomy should not be maintained.<sup>115</sup> If a distinction were maintained, it would be with respect to the sort of remedies, as the aims in seeking redress for an individual's needs, may be different in the situation of massive movements.<sup>116</sup> Theo van Boven noted that both individuals and collectivities are victims of

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<sup>113</sup> In comparison, Mooney identified five core elements typifying 'population transfer', Erin Mooney, 'Population Transfer: A Suitable Synonym for So-called 'Ethnic Cleansing'?' Draft Paper presented to the Socio-Legal Studies Association Annual Conference, Southampton, 1-3 April 1996; described as, large-scale movements of people into or out of the affected area; involuntary coercive movements, not necessarily forceful, but clearly without choice or consent; movement based on systematic and deliberate actions; with intention to move, whether direct or implied; and with an aim or motivation to cause the movement.

<sup>114</sup> As will be discussed below, it is the causes of movement and the detrimental circumstances caused by the movement that identifies the 'subjects' who are the victims. However, there may be substantial difference between an individual who is forced to move because of persecution based on political opinion and the individual who is part of a group escaping the breakdown of law and order or persecution based on a policy of racial discrimination, see Goodwin-Gill, G., 'Voluntary Repatriation: Legal and Policy Issues', in Loescher and Monahan (eds), 255, 256.

<sup>115</sup> For this thesis and otherwise mentioned, the identification of mass flows, includes individuals whether in groups or not.

<sup>116</sup> Where only an individual is concerned, there may be less impetus to aim for a precedent setting procedure, for example D'Amato's illustration of reuniting a husband and wife, see D'Amato, A., 'The Relation of the Individual to the State in the Era of Human Rights' (1989) 24 Tex. Int'l. L.J. 1, 5 (hereinafter, D'Amato, relation of the individual), where the immanent need was to prevent death by starvation, whilst if a group is concerned, there may be a need to prove the government's guilt and set a precedent, see Hannum, 'Implementing Human Rights: An Overview of Strategies and Procedures', in Hannum (ed), at 25; the distinction was also observed by the Special Rapporteur on the Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedom, Theo van Boven, 'Review of Further Developments in Fields with Which the Sub-Commission has been Concerned', UN Doc. E/CN.4/Sub.2/1991/7, 25 July 1991, at para. 3-4, noting that the study would deal with both individual claims as well as, collective claims, as the causes emanate from similar sources. On the other hand the possibility of mass tort claims within domestic measures providing for class action for violations of human rights, see Steinhardt, R.G., 'Fulfilling the Promise of *Filartiga*: Litigating the Human Rights Claims Against the Estate of Ferdinand Marcos' (1995) 20 Yale J. Int'l. L. 65, 92-93, citing the *Marcos* litigation and consequent class action for violations during martial law in the Philippines. However, mass tort actions are not

gross violations of human rights,<sup>117</sup> thus including in his study, victims of both types as well as, families and dependants, of those suffering direct harm and those suffering harm in the process of assisting or preventing victimisation.<sup>118</sup> He gave special interest to ‘indigenous peoples’ who are relocated and those suffering environmental damage as collectivities whose claim to reparations should take a collective form.<sup>119</sup> The Experts Report quantified ‘massive’ flows to be a relative concept that depended upon the effects of the flow itself.<sup>120</sup> The effects that then became elements for consideration were the extent of economic and/or political destabilisation on the receiving state.<sup>121</sup> Lee similarly concluded that, ‘[a]dmittedly, the concept of massiveness is a relative one. It must take into account not only the political, social and economic environment in which expulsion occurs, but also the effects of such expulsion.’<sup>122</sup> This relative approach thus identifies that it is the particular causes of movement rather than the quantity of the movement that is significant and is also consistent with the study conducted by Aga Khan in 1981.<sup>123</sup>

A significant criterion before receiving refugee status is the requirement of a person being outside his/her own state.<sup>124</sup> Should the functional approach consider the crossing of international boundaries as a precondition for delimiting concern? The extent of imposing international responsibility cannot rest with the requirement of first needing a transboundary movement. In the spirit of furthering the development of international protection of human rights, the reactionary system should give way to a preventative

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necessarily desirable, see Transgrud, R.H., ‘Mass Trials in Mass Tort Cases: A Dissent’ (1989) 1989 U. Ill. L. Rev. 69.

<sup>117</sup> Theo van Boven, ‘Final Report of the Special Rapporteur’, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, at para. 14 and 15.

<sup>118</sup> *Ibid*, at para. 15 and adopting the notion of victim under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, 29 November 1985, para. 1 and 2.

<sup>119</sup> Theo van Boven, ‘Final Report’, at para. 17-18, and at 137(7), recommending that besides reparations to individuals, collective reparations includes, opportunities for self-development and advancement for groups.

<sup>120</sup> Experts Report, at para. 27.

<sup>121</sup> *Ibid*, at para. 28.

<sup>122</sup> Lee, Seventy-eighth Proceedings, at 342.

<sup>123</sup> Aga Khan, 1981 report, para. 25.

<sup>124</sup> Although some commentators are reconsidering the criteria of a transboundary movement; see Plender, R., ‘The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced’ (1994) 6 Int’l. J. Refugee L. 345; and Lee, internally displaced persons, 27.

system. Should a definition then seek to address internally displaced persons? Should we take into consideration that the same position would exist for those who are locked within their borders, as those who because of direct or indirect state actions are forced to leave? Can we apply a separate parallel regime for those who have not crossed international borders, as those who have? If obligations are based upon causes, then these same causes exist, even if people are prevented from leaving the state. The same need for protection may inevitably exist.<sup>125</sup>

#### 2.4.1.1 The Internally Displaced

The humanitarian tragedy associated with those who leave their state of origin are very similar to those trapped within their own state boundaries.<sup>126</sup> The distinction between those who are termed refugee and those called internally displaced is functionally not so wide, with respect to causes or suffering.<sup>127</sup> A unique factor of the refugee is the lack of protection from the state of origin. This lack of protection makes them an identifiable group deserving of protection from the international community. Likewise, the internally displaced may not have the protection of their state and since they do not, their circumstances deserve concern similar to those outside their states. The two groups have been recognised as being inter-linked and equally deserving of concern by the High Commissioner for Refugees, Ogata who noted;

‘Very often, repatriating refugees return to areas with a significant internally displaced population. Many of the internally displaced may have fled their place of origin for the same reasons that refugees fled. Many have the same security and reintegration problems as the repatriates in their countries of origin, upon their return. And some may even be close family members separated during flights. Moreover, repatriating refugees often unable to return to their *places* of origin and, in effect, may become displaced persons once back in their own countries.’<sup>128</sup>

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<sup>125</sup> An example of how human rights violations can be deliberately kept within domestic boundaries are Stalin’s policies in the 1930s, when he shut the Ukrainians in, see generally, Conquest, R., *The Harvest of Sorrow* (1986).

<sup>126</sup> Two documented cases of internally displaced persons are; 500,000 Liberians, see US Committee for Refugees, *Uprooted Liberians: Casualties of a Brutal Civil War* (Issue Paper, February 1991); and over 600,000 Yugoslavs, see US Committee for Refugees, *Yugoslavia Torn Asunder: Lessons for Protecting Refugees from Civil War* (Issue Paper, February 1991).

<sup>127</sup> See generally, Lee, internally displaced persons, 27; and Plender, R., ‘The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced’ (1994) 6 Int’l. J. Refugee L. 345.

<sup>128</sup> Refugee Policy Group, *High Commissioner’s Statement to the Refugee Policy Group in Human Rights Protection for Internally Displaced Persons: An International Conference*, June 24-25, 1991, Appendix 2-3 (1991), quoted by Nanda, international law, at 804.

UNHCR is already authorised to assist the internally displaced in many instances,<sup>129</sup> to link efforts for refugees with the internally displaced where their expertise may contribute towards 'the prevention or the solution of refugee problems',<sup>130</sup> and upon the occurrence of natural disaster.<sup>131</sup> A report to the UNHCR identified five situations where the internally displaced would be assisted; (a) returnee programmes for the re-establishment of repatriated refugees; (b) special programmes pursuant to the requests from the GA or Secretary-General; (c) arrangements to provide humanitarian assistance to specific regions;<sup>132</sup> (d) situations exemplified by the Kurdish refugees in Iraq; and (e) preventative efforts aimed at addressing the causes of refugee movements.<sup>133</sup> UNHCR has also been documented assisting the internally displaced in Sudan, Guinea-Bissau, Mozambique, Angola, Laos and Chad.<sup>134</sup> It would seem, that in so far as consideration for a preventative, functional approach is concerned, it should encompass the internally displaced, for an integrated, comprehensive solution.<sup>135</sup>

A conservative estimate suggests there are about 24 million internally displaced persons world wide.<sup>136</sup> A figure that is more significant than the refugee population of 17 million.<sup>137</sup> The similarities between the refugee and the internally displaced is clearly visible. In fact the CSCE Helsinki Document of 1992, accords the same rights to refugees as they do those who are internally displaced, in Europe.<sup>138</sup> To make a distinction between the two,

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<sup>129</sup> For example, GA Res. 2956 (XXVII) (1972); and see Durieux, *supra*, at 6, who lists 30 operations undertaken by UNHCR concerning the internally displaced since 1971

<sup>130</sup> GA Res. 48/116 (1993).

<sup>131</sup> GA Res. 45/100.

<sup>132</sup> For example, SARRED in 1988, The International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa and, CIREFCA in 1989, The International Conference on Central American Refugees.

<sup>133</sup> Jackson, I. and Young, G., 'The Role of UNHCR on Behalf of Internally Displaced Persons' (Unpublished report to UNHCR, 27 November 1991), quoted by Nanda, *international law*, at 806.

<sup>134</sup> Lawyers Committee for International Human Rights and Americas Watch, *El Salvador's Other Victims: the War on the Displaced* (1984), 252-55; note also, GA Res. 37/175, 38/91, 39/105, 40/133 - Ethiopia; and GA Res. 39/106, 40/136 - Chad.

<sup>135</sup> Lee, *internally displaced persons*, at 40, note 1.

<sup>136</sup> Deng, Francis, *Protecting the Internally Displaced: A Challenge for the United Nations* (A Report by the Special Representative of the Secretary-General on Internally Displaced Persons to the UN Commission on Human Rights 1993).

<sup>137</sup> *Ibid.*

<sup>138</sup> Helsinki Document, 10 July 1992, Decisions, Pt. VI, Para. 39-46.

would be to pay emphasis to terminology. The causes of forced migration, whether within or across borders, are essentially the same. Both situations could potentially attract international responsibility and both causes of action would affect the legal interests of all states where they concerned violations of human rights. The causing of mass exodus across borders would affect another set of legal obligations owed between states, but the distinction would merely be in the cause of action and legal interest. Where the focus were on the protection of the people concerned, based upon the causes of flight, then there would be no causal difference between the refugee and the internally displaced. It may be further argued that a distinction would apply to the remedies that may be claimed. Since the perspective seeks to link causes with responsibility, there is no reason not to include the internally displaced and logical reason to include them. Whilst concentrating only on refugees, Coles admitted that causing internal displacement could raise similar issues of state responsibility.<sup>139</sup>

The 1951 Convention and even the 1967 Protocol reflected the consensus particular to the realities existing during that period.<sup>140</sup> The factors of significance was that a continuous flow of people from Eastern Europe were seeking resettlement in the West, that war-torn states who previously welcomed settlers were refusing entry on economic grounds, and that there was an increase in tension between East and West.<sup>141</sup> It was a fact of critical importance when borders were crossed, however, the events in Iraq (Kurds), the Horn of Africa, Somalia, Rwanda, and the former Yugoslavia beg a reconsideration of the historical perspective.<sup>142</sup> As was vividly noted by Bolton who visited the Turkish-Iraq border, one hundred metres inside or out, meant very little.<sup>143</sup> In the former Yugoslavia, borders and control over territory are constantly changing, making any distinction between refugee and internally displaced ludicrous. In fact, the internally displaced are in a worse position than other forced migrants. As Aga Khan noted;

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<sup>139</sup> Coles, 1992 report, at 16.

<sup>140</sup> Bolton, John R., 'Role of International Organisations: Rethinking the Refugee Definition and the UN Role', in Lee, L.T. (ed), *The Second Annual Refugee Day* (30 October 1991), 57.

<sup>141</sup> Kennedy, D., 'International Refugee Protection' (1986) 8 (1) *Hum. Rts. Q.* 1, 3.

<sup>142</sup> Lee, internally displaced persons, at 30-33; and also identified that the pre-Second World War historical perspective was that refugees need not have crossed international border to deserve protection or assistance.

<sup>143</sup> Bolton, *supra*, at 58.

'Internally displaced persons may flee their homes for exactly the same reasons as refugees. But because they remain within the borders of their own country, they are not afforded similar protection by the international system. Instead they must look to their own governments. Too often there is an assumption that governments will fulfil their obligations responsibly. In many cases, however, it is their own governments that are the source of the problem for displaced people; in other instances, these governments lack the resources to assist them.'<sup>144</sup>

Aga Khan goes so far as to claim '[w]e should also encourage the development of international standards for humanitarian intervention on behalf of those uprooted within their own borders, as a result of government abuse or internal conflict.'<sup>145</sup> The right to humanitarian intervention is however controversial and its status as a principle in international law is doubtful, especially in the form of armed intervention.<sup>146</sup> It does however have some moral imperative in that it seeks to accord protection to nationals being abused by their own state. The only crucial distinction between those internally displaced and those outside the state of origin, is that the former may still have recourse to the protection and assistance of their state authorities.<sup>147</sup> This is not true of all situations, particularly in three types of cases. Firstly, where civil order has completely collapsed and no single authority controls the state - for example, Liberia. Secondly, where an oppressive regime exists and the cause of flight is the discriminatory oppression of specified religious or ethnic groups, and the internally displaced are this group - for example the Kurds of Iraq. Thirdly, where isolated acts of oppression occur, justified under the banner of economic development - for example in the development of rural areas which will cause the displacement of indigenous populations. In each of these circumstances, the displaced persons have no effective protection from their own state authorities.

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<sup>144</sup> Aga Khan, 'Looking into the 1990s: Afghanistan and other Refugee Crisis' (1990) Int'l. J. Refugee L. - Special Edition 14, 26. Examples where governments have deliberately created an internally displaced population; Stalin in the Ukraine, Pol Pot in Cambodia, Indonesia and the Corines, Iraq against the Kurds, the US and their treatment of American Indians.

<sup>145</sup> *Ibid*, at 27 (emphasis added).

<sup>146</sup> See further below section 5.5, 'Coercive Action and Action to Remove a Government'.

<sup>147</sup> The internally displaced may have some recourse to the procedural mechanisms to seek redress of grievances. If these mechanisms fail or fail to protect, the internally displaced then need international protection. Where the state is violating human rights of the internally displaced, then it is unlikely that they would then have recourse to any protection from their government.

The UNHCR has recognised that there can be no consideration for voluntary repatriation without changes of situation from within the state of origin.<sup>148</sup> A vital element for change would be the elimination of human right abuses, and consequently also the problems faced by the internally displaced. Although often emphasised that UNHCR does not have a general mandate to assist the internally displaced, they often do, not just for humanitarian provisions, but to avert further displacement.<sup>149</sup> Recent examples of such activities are in the former Yugoslavia, in Somalia, Kenya, in Open Relief Centres in Sri Lanka, and in Tajikistan.<sup>150</sup>

The distinction between refugees and internally displaced persons may not be as clear as the 1951 Convention, OAU or Cartagena Declaration imply. Lee considered the historical perspective of the refugee definition and concluded that fundamentally, the need for a transboundary movement was a product of the Cold War, and that it was time to return to a 'commonsensical definition' that removed the prerequisite of crossing borders.<sup>151</sup> In fact, Lee provides cogent - practical-based - arguments why there should be no dichotomy between refugees and those internally displaced.<sup>152</sup> He also emphasises the equality and inherent worth of all individuals - the foundation of human rights - the violation of which is no longer a matter exclusively within the domestic jurisdiction of a state.<sup>153</sup> In effect, Nanda identified that post-Second World War references to 'refugees' included those inside or outside a country who did not enjoy the protection of the authorities of the state.<sup>154</sup>

#### **2.4.1.2 Conceptual Difficulties With the Internally Displaced**

Intervention on behalf of the nationals of a state is always a thorny issue, as it is often perceived as intervention in the domestic affairs of a state, violating the sovereignty

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<sup>148</sup> UNHCR, state of the world's refugees, at 13.

<sup>149</sup> *Ibid*, at 175.

<sup>150</sup> *Ibid*.

<sup>151</sup> Lee, internally displaced persons, at 33.

<sup>152</sup> *Ibid*, at 33-34.

<sup>153</sup> *Ibid*, at 36-38.

<sup>154</sup> Nanda, Ved P., 'Comments On: Legal Basis of International Jurisdiction to Act with Regards to the Internally Displaced', in Gowlland-Debbas (ed), at 136-137.

of the intervened state.<sup>155</sup> Tension is bound to arise between the right of states to act in the interests of its own perceived welfare, and the interest of certain individuals who make up a group. For example if the development of a dam would benefit the nation as a whole in terms of economic growth, then the relocation of farmers within that area seems permissible. This would be true if the interests of the farmers were to some extent fulfilled by the provision of adequate compensation. However, it seems indefensible to permit the interference of the international community in this matter which does seem entirely within the domestic jurisdiction.<sup>156</sup> Yet on the other hand, if the movement was based upon discrimination (apartheid), or if coercion were applied, and if adequate compensation did not follow, would the situation then permit international intervention? These difficulties have to be addressed if the internally displaced, who deserve protection, are to be included in the functional approach.

What answer could be given where a state claims the sovereign right to develop its natural resources as it sees fit? This is a right that is guaranteed under international law and affirmed through consensus by the international community.<sup>157</sup> In fact, under the arguments on the economic right to development, the control of resources within a state is entirely within the jurisdiction of that state.<sup>158</sup> If a source of valuable minerals were discovered, then a state would naturally seek to exploit this find even if it meant relocating a population of say indigenous nomadic herdsman. Can and should the international community interfere? It is arguable that they could and should if the relocation amounted to the denial of basic

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<sup>155</sup> It should be noted that there are also practical difficulties when dealing with internally displaced persons, see, Durieux, J-F., 'The Hidden Face of the Refugee Problem' (1996) 103 *Refugees* 3, 4, who identified *inter alia*, the fact that governments resist intervention on behalf of their nationals, and that operations for the internally displaced are closer to the conflicts and consequently, more dangerous and insecure.

<sup>156</sup> For example, several GA resolutions confirm the inherent right of states to deal absolutely with their natural resources although the issues concerning compensation of nationalisation is controversial; Permanent Sovereignty over Natural Resources, GA Res. 3171 (XXVIII) (1973); Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI) (1974); and Charter on Economic Rights and Duties of States, GA Res. 3281 (XXIX) (1974).

<sup>157</sup> See *op. cit.* GA resolutions, and GA Res. 1803 (XVII) (1962); see generally, Rich, 'The Right to Development as an Emerging Human Right' (1983) 23 *Va. J. Int'l. L.* 287, 328, who suggested that whether such rights were emerging or *lex ferenda* depended on the perspective of the value of GA resolutions.

<sup>158</sup> See generally, M. Bedjaoui, 'Some Unorthodox Reflections on the "Right to Development"', in Snyder and Slinn (ed), *International Law of Development: Comparative Perspectives* (1987), 87.

human rights. For example, if they were relocated into slums, without provision of basic human provisions like employment, housing, sanitation or compensation.

The problems associated with the internally displaced in situations of urban development or exploitation of natural resources is not exclusive to developing states. The idea of internal displacement is not confined to developing countries that are faced with armed conflicts or environmental degradation. Developed countries also coerced populations into relocating. For example, during the 17th Century in Briton, the English army subjugated Ireland and much of the population were removed for absentee landlords; in the 18th Century, thousands of highland Scots were removed for rich lowlanders; in the 19th Century, 'Poor Laws' were implemented to remove people who could not support themselves by admitting them in prison-like institutions.<sup>159</sup> The European invasion of America and Australia necessarily involved the displacement and relocation of indigenous populations. The process of colonialisation itself involved restrictions of movements and the redistribution of populations for strategic control.

The coercive authority to control movement is still effective in western market economies. The use of compulsory purchase of land for road building and other development plans, for defence installations, or for urban re-housing programmes.<sup>160</sup> Financial processes coupled with judicial mechanisms, may be more common a practice than brute force to secure compliance. However, ultimately, the people who are affected are those without political or economic influence and they can be moved against their will.<sup>161</sup> Four types of population movements within borders may be identified. Firstly, spontaneous redistribution, where there is no direct intervention from governments; secondly, managed redistribution, where intervention is present in the form of employment counselling and jobs creation; thirdly, sponsored redistribution, where a combination of threats and inducements are made to encourage population relocation; and fourthly, compulsory redistribution, where force is used.<sup>162</sup> It is more likely to find the use of the first three methods amongst industrialised states, facilitated by a variety of legislative, legal and

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<sup>159</sup> ICIHI, *supra*, at 74.

<sup>160</sup> *Ibid*, at 75.

<sup>161</sup> *Ibid*.

<sup>162</sup> *Ibid*, at 82-3.

administrative procedures. These states also have the financial stability to provide economic incentives and counselling. Few governments in the developing world have these resources, yet they too use population redistribution as a means to resolve social and economic problems. In fact, it is argued that in the past, industrialised states resorted to coercive methods of population redistribution for economic benefit; and it must surely be a domestic prerogative of a state to develop policy, planning and structural initiatives for the well-being of the state. If population movements be one of those necessary elements, then it is entirely for the state to decide and implement, as a sovereign right.

Clearly the types of internal movements have to be distinguished. Relocation programmes that cause human suffering, that violate provisions protecting human rights or are discriminatory in nature, cannot be left unaccountable. A state, although within its sovereign right to determine its best interest, cannot disregard the interest of its own nationals. Who are the internally displaced worthy of international concern is thus a further conceptual difficulty, as the definition of the internally displaced is still non-specific.<sup>163</sup> Most suggested definitions include the common criterion of persons being forced to leave their homes because their lives or security were threatened by violations of human rights, armed conflicts, man-made or natural disasters and who have not crossed international borders.<sup>164</sup> It is therefore proposed that the functional approach include in its perspective, those who are internally displaced. As a conceptual issue, the approach would identify the class of persons who require international protection, the same as those who are forced to leave the boundaries of their states. The perspective links cause with responsibility. Thus if the cause attracts responsibility, then the class of persons would necessarily be included. Undoubtedly, not all the causes of internal displacement will attract responsibility, but the distinction between those that do and do not, will be inherent in the functional approach, as this approach identifies with causes and circumstances. Therefore, although controversy also exists on the issue of who is an internally displaced person, this author will maintain

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<sup>163</sup> For example, Deng, *protecting the dispossessed*, at 164, chose to maintain a working definition.

<sup>164</sup> Lee, *internally displaced persons*, at 28-29; *Analytical Report of the Secretary-General on Internally Displaced Persons*, UN Doc. E/CN.4/1992/23, at 5; International Conference on Central American Refugees (Guatemala City, 1989), *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America* (CIREFCA), 14; and generally discussed in, Deng, (1995) 14 (1&2) *Refugee Survey Quarterly*, at 227-31.

the functional perspective for both refugees and the internally displaced, by identification based on causes, elements and nature of forced migration.

#### 2.4.2 CAUSES OF FLIGHT AS AN ELEMENT

The causes of flight is an element in the functional approach because it is a vital link to identify those who need protection, thus enabling the link with international responsibility.<sup>165</sup> A fundamental cause of mass exodus is expulsion, and '[b]y 'expulsion' is meant use of coercion, direct or indirect, with the intention and effect of securing departure of people against their wills from their homeland.'<sup>166</sup> In fact, '[t]he notion of 'home' and the loss of it for reasons beyond one's control, the alienation and suffering that follows, are the main components of 'uprootedness'.<sup>167</sup> The discussions during the creation of the Office of the High Commissioner for Refugees,<sup>168</sup> shows 'the extent to which refugees were hapless, helpless pawns in a game considered to involve higher stakes than their lives and well-being.'<sup>169</sup> These are the circumstances of forced migration, the loss of home, the lack of control over their own lives, and the compulsion, direct or indirect, causing their movement.

The studies by the Experts Report, the ILA and Aga Khan have clearly identified the many causes of mass exodus. The Experts Report in avoiding the definition problem, chose to include a wide spectrum of cause related situations of 'coerced movements'.<sup>170</sup> They highlighted certain elements of concern relevant to a definition, namely: coercion, direct and indirect; the importance of relating to root causes; the element of 'massiveness'; and the element of transboundary effect. Coercion or compulsion was to be 'understood in a wide sense covering a variety of natural, political and socio-economic causes or factors which directly or indirectly force people to flee from their homelands in fear for life, liberty

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<sup>165</sup> The causes of flight, underlying considerations, nature and circumstances are discussed further below in Chapter 3.

<sup>166</sup> Lee, Seventy-eighth proceeding, at 343.

<sup>167</sup> ICIHI, *supra*, Editorial Note, xvi.

<sup>168</sup> Goodwin-Gill, in Rystad (ed), *the uprooted*, at 22-29.

<sup>169</sup> *Ibid*, at 29.

<sup>170</sup> UN Doc. A/41/324 (1986).

and security.<sup>171</sup> Since causes delineated the definition, then causes became a criterion for the definition. Causes were divided into man-made,<sup>172</sup> and natural causes.<sup>173</sup> Under man-made causes were direct political attributes such as, wars and armed conflicts;<sup>174</sup> colonialism and the refusal to permit self-determination;<sup>175</sup> unequal treatment in oppressive regimes;<sup>176</sup> violations of human rights;<sup>177</sup> and forcible expulsions.<sup>178</sup> Further, under this heading were also socio-economic factors which included structural problems of development,<sup>179</sup> prolongation of underdevelopment,<sup>180</sup> and other effects.<sup>181</sup> The inclusion of natural disasters enforces the establishment of the causes approach, as it excludes moral judgement in terms of persecution. The basis for protection was on the cause of movement, whether man-made or natural disaster. This in fact laid the basis for viewing the definition from a functional perspective. Yet the final conclusion was a political compromise, as the 'traditional' definition was not affected.

The emphasis on causes was also adopted by the ILA, who developed this approach by specifically distinguishing direct and indirect causes of coerced movements.<sup>182</sup> Once again, the term refugee was used within the context of coerced movements caused by either direct or indirect government activities. Importance did not lie with the term itself, but with the situation. Thus the term did not identify the situation, but was incorporated into the situation. The crucial element was the situation, which is the cause of flight. This is perhaps

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<sup>171</sup> Experts Report, para. 26.

<sup>172</sup> *Ibid*, para. 30-40.

<sup>173</sup> *Ibid*, para. 40-44.

<sup>174</sup> *Ibid*, para. 31, included also, acts of aggression, alien domination, foreign armed intervention and occupation, acts of which endangered life, placed excessive restrictions on the exercise of human rights, compounded by the fear of losing national, cultural or religious identity.

<sup>175</sup> *Ibid*, para. 32.

<sup>176</sup> *Ibid*, para. 33.

<sup>177</sup> *Ibid*, para. 35, noted as the principle causes.

<sup>178</sup> *Ibid*, para. 36, interesting to note that this was a heading on its own, and is possible that the Group were aiming at genocide without wishing to verbalise the contention.

<sup>179</sup> *Ibid*, para. 38.

<sup>180</sup> *Ibid*, para. 39.

<sup>181</sup> *Ibid*, para. 40, *inter alia* indebtedness, unfair trade terms, drought and inflation.

<sup>182</sup> Draft Declaration of Principles of International Law on Compensation to Refugees, Report of the International Committee on the Legal Status of Refugees, Sixty-fifth Conference, Cairo, 1992, Commentary to Principle 1.

the best study and proposal for a definition that takes the perspective of imposing obligations against states that cause transboundary forced migration. Responsibility cannot be discussed without reference to coercion and root causes or the circumstances of the persons who are forced to flee. It is not the definition that identifies the group, but their circumstances and the factors that cause the movement.

Despite the reality of these causes, the only institution designed to provide assistance and protection developed a policy avoiding such concerns. The approach of UNHCR Protection Officers has been to avoid determination of the causes of mass exodus. They remove the political context by maintaining the image of UNHCR as a legal institution. This is because the mandate for the institution is linked to the definition of the individual refugee. Protection Officers then link institutional concern with the attributes of the individual refugee. Therefore the institution would not be moved except when triggered by the attributes of the individual or by the specific request of the GA. As a consequence, '[o]nce conditions of political oppression are transposed into attributes of refugees, the mandate discussion appears to be legal, neutral and international, but must remain cut off from any analysis of the causes of refugee flows.'<sup>183</sup> This is not a comfortable state of affairs, because it again emphasises that a legal claim for a refugee depends upon recognition of refugee status, which is not fundamentally based upon the causes of flight.<sup>184</sup>

#### 2.4.3 THE ISSUES OF PROTECTION AS AN ELEMENT

The UNHCR approach to refugees is to provide a clear legal status by the allocation of a classification - 'refugee' - thereby justifying the substitution of sovereign protection.<sup>185</sup> The problem however is that protection does not commence with flight or cause, but with certification as a refugee.<sup>186</sup> This is the perspective that the functional approach seeks to alter. Protection should be given on the basis of need, which comes from the lack of protection and a determination based upon the circumstances which are the causes of flight. There are basically three issues on protection. Firstly, the lack of protection

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<sup>183</sup> Kennedy, *supra*, at 15-16.

<sup>184</sup> *Ibid*, at 39.

<sup>185</sup> *Ibid*, at 4.

<sup>186</sup> *Ibid*, at 5.

based upon diplomatic interposition, a means not available to the forced migrant; secondly, the fact that protection has traditionally been viewed from the perspective of all states except the causing state; and thirdly, the fact that the instances of forced migration are on the increase and the protection available to them is inadequate and does not incorporate long term solutions.

It has been said that, '[t]he main feature of refugee status is that refugees do not enjoy the protection of any government, either because they are, as stateless persons, unable or, having a nationality, unwilling for political reasons to avail themselves of the protection of their country of origin.'<sup>187</sup> The element that sets forced migrants apart from other needy people is that they cannot look to their own governments for protection or assistance. The unique character of the forced migrant is exactly the same, the lack of protection from the state of origin. In most instances, these people flee from the abuse of their own state officials. The state is entirely powerless to prevent the abuse, or the authorities have lost effective control.<sup>188</sup> It is well accepted,<sup>189</sup> that the special characteristics of a forced migrant is the need for protection from the international community because protection is unavailable from the state of origin. Although the precise limits of protection and the consequences of the omission of protection are not clear, all states, especially the state of origin have an obligation to fulfil their responsibilities. It is clear that UN organs do try to make up for the lack of protection accorded to persons, whether they come under the 1951 Convention, the Protocol, the OAU Convention or the Cartagena Declaration.<sup>190</sup> This criterion, the lack of protection, is clearly shared by all forced migrants.

There are three main types of protection-relations.<sup>191</sup> Firstly, protection by the community against states perceived to be obliged to protect refugees, but refuse to receive

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<sup>187</sup> Weis, P., 'The Development of Refugee Law', in Levy, D.M. (ed), *Transnational Legal Problems of Refugees* (1982), 27.

<sup>188</sup> UNHCR, state of the world's refugees, at 5 and 11.

<sup>189</sup> By UNHCR, state of the world's refugees; Goodwin-Gill, language of protection, 6; and Grahl-Madsen, 'Protection of Refugees by Their Country of Origin' (1986) 11 *Yale J. Int'l. L.* 362.

<sup>190</sup> Goodwin-Gill, language of protection, at 12.

<sup>191</sup> Although note, Grahl-Madsen, A., 'Protection of Refugees by Their Country of Origin' (1986) 11 *Yale J. Int'l. L.* 362, 364, who identified the spectrum of protective activities to include *inter alia*, negotiating and concluding agreements for the benefit of individuals and corporations; soliciting

refugees, or violate a principle protecting refugees.<sup>192</sup> This protection obligation is aimed primarily at all states except the causing state. Secondly, protection by the community against states of origin, states that expel their citizens or persons who naturally habituate within their borders. Thirdly, protection by the community against third states who facilitate the violations of human rights, or participate in the creation of refugees. The latter two types of protection specifically impose obligations on the causes of forced migration, by addressing the issue of responsibility. When the perspective of addressing root causes is taken, other issues particularly the issue of preventative protection and possibility of providing a remedy for the victims who are the forced migrants are also addressed. This would effectively alter the focus towards the situation and circumstances that create forced migration.

Yet international protection of refugees exists mainly in the first perspective, directed only at receiving states. It has been claimed that this practice has evolved from humanitarian needs.<sup>193</sup> As Goodwin-Gill puts it, '[t]he purpose of international protection must be to support refugees, and to try to restore their dignity so as to enable them to exercise their essential rights.'<sup>194</sup> Unfortunately, the restoration of the dignity has generally been concentrated in the context of receiving states. It defeats logic to continue imposing obligations on receiving states when sources of obligations might exist to hold states, that cause forced migration, internationally responsible.

The perspective in holding causing states responsible also contributes to the long term solution. It has been claimed that voluntary repatriation is not possible without changes within the state of origin.<sup>195</sup> By emphasising the issue of protection of forced migrants against the causing state, the long term solution is necessarily dealt with. Why should the protection of human rights be limited by classification of individual attributes? As Goodwin-Gill noted, '[f]undamental principles of human rights rule out the selective

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benefits for categories of persons; taking up cases against authorities of a foreign state; and pressing claims for reparation against foreign states.

<sup>192</sup> For example the principle of non-refoulement under Article 33, 1951 Convention.

<sup>193</sup> Goodwin-Gill, language of protection, at 7.

<sup>194</sup> *Ibid*, at 9.

<sup>195</sup> See above section 2.1, 'Introduction'.

provision of international protection according to category, even as the present inadequate system of law falls short of demanding durable solutions from sovereign States.<sup>196</sup>

International protection is in principle, conceived from the interest of the individual person, rather than from the national interests of any particular country. Protection from the perspective of the Convention refugee is inadequate. The numbers of those needing assistance and protection continue to increase, the moral demands irrespective of legal criteria for aid grows, as do the images of suffering people flashed across newspapers and television sets. The traditional approach cannot address the long term needs for protection. Goodwin-Gill noted, '[t]o know who is a refugee, know who is asking, and why. Alternatively, and consistent with refugee and human rights instruments, ask instead whether protection is needed, and by whom; with respect to people outside their country, or those internally displaced; and what is it that they require?'<sup>197</sup> The issue of protection must therefore remain an essential element of the functional approach.

#### **2.4.4 RECAPITULATING THE FUNCTIONAL APPROACH**

This perspective seeks therefore to address the inadequacies of the humanitarian and protective objectives of the past. It seeks to develop the existing definition by proposing an alternative conceptual basis for the definition, and thereby introducing a functional perspective that would only offend states that cause forced migration. Thus the elements that were proposed by both the Experts Report and the ILA are affirmed. As concluded by Lee, the consensus was for 'looking at the reality of the refugee situation in its work. At the same time, it must respect the right of governments to adhere to the narrower definition in their own programmes. In short, *different definitions may be appropriate for different purposes.*'<sup>198</sup>

Past and current methods of dealing with refugees do not adequately address the problem of forced migration. The use of the term 'refugee' to accord legal status as a

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<sup>196</sup> Goodwin-Gill, language of protection, at 13.

<sup>197</sup> Goodwin-Gill, Guy S., 'Refugees and Human Rights: Challenges for the 1990s' (1990) Int'l. J. Refugee L. - Special Edition 29, 33.

<sup>198</sup> Lee, L.T., Report of the International Committee on the Legal Status of Refugees, *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986), para. 6(d), 544 (italic added).

precondition to protection and assistance is artificial and does not reflect the true circumstances of flight. The perspective of imposing obligations primarily on states receiving is not capable of taking into account the causes of flight. It is accepted that the application of a definition is necessarily restrictive, although the proposition of the functional approach is aimed at altering the focus of attention and perspective towards the states that cause forced migration. The functional approach does have certain essential elements which are: the movement of persons, whether within or across international borders; the identification of the causes of flight, which must include the element of coercion, whether direct or indirect; and the recognition of the need for protection, which may be given by other states or the international community co-operatively.

The functional approach is not limited only to holding states responsible, but to addressing the causes of forced migration, which may include international responsibility of international organisations and individuals. An example of the functional approach was proposed by Schneebaum, who advocated that refugees be given civil remedies against the individuals who violate their human rights.<sup>199</sup> Inspiration for this proposition was taken from the US case of *Filartiga v. Pena-Irala*.<sup>200</sup> The case is used as an example of how international law may provide a basis for obtaining remedies in domestic civil jurisdictions. This is an approach that would be useful where violations of international norms have taken place and an individual can be identified, served with a writ, and has assets within jurisdiction for judgement to be enforced.<sup>201</sup> Consistent therefore with the functional approach is the commencement of an action based on the cause, and linking the cause with causes of action under the principles of international responsibility. Thus it is argued that the definition of a refugee is not irrelevant, but the act or deed that produced the situation that the person is in is more relevant.

Having studied all the various instruments that provide definitions,<sup>202</sup> the Experts Report concluded that it was inappropriate and precarious to develop a new refugee

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<sup>199</sup> Schneebaum, S.M., 'Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy', in Levy (ed), *Transnational Legal Problems of Refugees* (1982), 373ff.

<sup>200</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>201</sup> See further on section 5.7, 'Empowering the Individuals to Enforce International Norms'.

<sup>202</sup> Experts Report, Annex II.

definition, as ‘... by adding to or subtracting from existing legal definitions might affect their protective value to the detriment of refugees.’<sup>203</sup> They then went on to consider the term, not as defining scope, but as to causes and hence, delineating the phenomena itself.<sup>204</sup> This approach was also subsequently adopted by the ILA in its final draft.<sup>205</sup>

## 2.5 ARE ECONOMIC MIGRANTS FORCED MIGRANTS?

The case of the so-called ‘economic migrant’ offers an opportunity to investigate and develop the functional approach. The refugee is often compared with and distinguished from the economic migrant. Depending on the definition that is adopted to describe the economic migrant, a general distinguishing feature is the element of coercion versus voluntary characteristics.<sup>206</sup> This distinction is not always clear, as the Experts Report found, when including socio-economic factors as a form of coercion. On the other hand, economic migrants have been described as those who lack a sense of urgency beyond their control, who are not in dire straits, who only face poverty and not death.<sup>207</sup> Similarly, the ILA also confirmed that a distinction had to be made between those seeking to be ‘upwardly mobile’ and those who were in a ‘dire necessity’ situation.<sup>208</sup>

On the other hand, if the functional approach were used, any activities by governments, direct or indirect that coerced people to move, would ‘automatically’ identify these people as forced migrants. If a government initiates strict controls over economic avenues and measures are taken to restrict access to employment, or if employment is deliberately re-allocated without consent, then a political event has taken place.<sup>209</sup> This political event can be translated into an act of coercion which would make the economic

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<sup>203</sup> *Ibid*, para. 22, referring to GA Res. 36/148 which addressed the inviolability of ‘existing international instruments, norms and principles relevant.. to the status and the protection of refugees.’ (7th preambular para.)

<sup>204</sup> *Ibid*, para. 24.

<sup>205</sup> *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986), 543 and 544; and 1992 Draft Declaration of Principles of International Law on Compensation to Refugees.

<sup>206</sup> Frelick, ‘The Twilight of Refugee in the West’, in *World Refugee Survey: 1987 in Review*, at 25; and Gunning, *supra*, at 38.

<sup>207</sup> Gunning, *supra*, at 39.

<sup>208</sup> *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986), Report of the International Committee, at 553.

<sup>209</sup> Tsamenyi, “‘The Boat People’: Are They Refugees?” (1983) 5 Hum. Rts. Q. 349, 360.

migrant a forced migrant. As a result, many so-called economic migrants would be considered forced migrants, because it is the circumstances that they are in and the cause of their circumstances that is relevant. The cause of the circumstances may be the prevention of employment or the prevention of remuneration sufficient to attain an adequate standard of living, whether applied against individuals or groups. Further considerations on this issue is whether there is provision of adequate food sources, for example, the provision of basic need, education, land and water resources. It is possible as well in this instance to consider the culpability of states other than the state of origin. For example, states that deliberately pursue a policy of restricting the development of developing states, states that practice unfair trade terms, or states that support governments that fail to provide adequate food to their populations.

The consequence of this wider approach serves two purposes. Firstly, it imposes upon states a clear message that the treatment of their nationals will come under international scrutiny. Secondly, it imposes upon developed states an obligation not to contribute towards the violation of human rights, that might generate conditions that cause forced migration.<sup>210</sup> The identification of the part played by economic measures, positive and negative, may also affect the arguments against the universality of human rights, by developing the common concern for the economic well-being of states as an essential part of the promotion of human rights.<sup>211</sup>

If the traditional definition were applied, the applicant seeking status would have to show a well-founded fear of persecution, on the basis of race, religion, nationality, membership of a particular social group or political opinion.<sup>212</sup> Thus for an economic migrant to be a Convention refugee, some form of persecution has to be identified and fear of it has to be evidenced. This may be possible in states where the concept of economic proscription has been accepted as '[a] less well-known form of persecution used by governments [which] consists of preventing citizens from earning a livelihood by any lawful

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<sup>210</sup> Whether it is the supply of aid or arms to governments that practice human rights violations, or in contributing to unfair trade terms and such economic inequalities.

<sup>211</sup> See further below section 4.9, 'Advocating Against the Use of Human Rights Provisions' and section 5.5.2, 'Sanctions'.

<sup>212</sup> Article 1(A)(2), 1951 Convention.

means.<sup>213</sup> This is a situation that usually occurs in states that consistently violate basic human rights. Proscription by economic means merely provides a more creative tool to continue human rights violations. Examples of such proscription are, dismissal from employment, confinement to menial jobs and preventing employment in the public or private sector, by means of direct and indirect coercion on the employers. A clear distinction may be drawn between those who leave to avoid material hardship, and those who leave because they are left with no choice. Various decisions by the Canadian Immigration Appeal Board, provide guidelines for distinguishing the two types of situations.<sup>214</sup> The basis for bestowing refugee status is based on economic proscription amounting to persecution, applied in response to political opinion or affiliation in a particular social group.

There is little doubt that two situations exist, those who are voluntary migrants seeking a better life, and those who are caused to move through economic proscription. The cause of flight is the key that will identify the forced migrant, and the cause of flight will be the central issue for determination. There will be some overlap between the traditional definition and the functional approach, although the latter approach concerns itself fundamentally on the circumstances and situation that created the exodus.

## 2.6 CONCLUSION

A significant issue concerning refugees is that, ‘... it is on the territory of States and within their jurisdiction, that the practical problems of protection, assistance and solutions must be worked out.’<sup>215</sup> The fact that the cause is primarily within a state is crucial and has to be addressed. ‘Traditionally the world community has dealt with the refugee problems by focusing on its ameliorative aspects, *i.e.*, by providing emergency relief and humanitarian assistance. Such ad hoc and temporary measures have proven inadequate.’<sup>216</sup> One of the

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<sup>213</sup> Hathaway, J.C. and Schelew, M.S., ‘Persecution by Economic Proscription: A New Refugee Dilemma’ (1980) 28 Chitty’s L.J. 190.

<sup>214</sup> *Ibid*, at 191, note the examples provided.

<sup>215</sup> Goodwin-Gill, language of protection, at 13.

<sup>216</sup> *Per Nanda*, Seventy-eighth Proceedings, at 339.

approaches that has been pursued is to avoid tampering with the UN definition.<sup>217</sup> Instead, the concept of human rights violations which might lead to the recognition of a refugee are expanded.<sup>218</sup> On the other hand, simply widening the ambit of the definition is in itself insufficient. If states were permitted to maintain the ultimate discretion in interpreting the application of the definition, then the limitations that exist now would merely continue. What is needed, is a consistent application of existing norms.<sup>219</sup>

The interpretation of a definition by receiving states have to be artificially limiting, because it depends upon the self-interests of individual receiving states. The definition itself has to be constrained and the application of the definition dependent upon the political environment existing within a state, which might have to be restrictive. The only option has to be a different perspective, one that incorporates long term solutions, reflects the reality of the nature of things, and addresses the responsibility of those who create the causes of forced migration. Providing a new definition as a legal criterion is perhaps superfluous in many respects.<sup>220</sup> What is needed is a different perspective altogether, to emphasise the causes and the obligations consequent upon those causes. Goodwin-Gill uses the term 'refugee' as a term of art; as one that posses 'a content verifiable according to principles of general international law.'<sup>221</sup> This study proposes that this term of art definition only applies to the limited application of the 1951 Convention and Protocol, which applies only to assistance and containment after the fact and does not address causes. Goodwin-Gill further concluded that refugee law is incomplete.<sup>222</sup> The proposed perspective seeks to identify the means for making it complete in international law, by linking causes with responsibility, and by identifying mechanisms for the enforcement of rights and obligations.

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<sup>217</sup> Although UNHCR's mandate is clearly wider than the strict definition, Recommendation E, appended to the Convention; GA Res. 1388 (XIV), 20 November 1959; and Plender, in Gowlland-Debbas (ed), at 120-121.

<sup>218</sup> Martin, Seventy-eighth Proceedings, at 349.

<sup>219</sup> Lentini, E.J., 'The Definition of Refugee in International Law: Proposals for the Future' (1985) 5 B.C. Third World L.J. 183, 185. These norms include the protection of basic human rights, under the UNC and under conventions, for example, the Genocide Convention.

<sup>220</sup> Although any movement towards a legal synthesis, between the definition of refugees and internally displaced persons, is recognised as having a valuable contribution towards a comprehensive plan of action.

<sup>221</sup> Goodwin-Gill, the refugee, at 1.

<sup>222</sup> *Ibid*, at 215.

Seeking to address the conflicting interests of receiving states by imposing further obligations or increasing their existing obligations, is not the solution to the refugee question and has even been called ‘insidious’.<sup>223</sup> It has been claimed ‘naive’ and even ‘foolish, to think that a country implementing its own laws in its domestic setting will not take its own nationals and foreign policy interests into consideration at least to some degree.’<sup>224</sup> Perhaps seeking a new terminological definition is not acceptable either,<sup>225</sup> as the bottom-line seems not in resolving the definition, but in the development of international principles addressing the root causes. Krenz claimed, ‘[a]s long as men remain intolerant of his fellowmen, flight will continue to be the only alternative of the persecuted.’<sup>226</sup> The need for international accountability is amplified because, groups that are denied human rights and constantly oppressed, will either choose flight or claim a right to self-determination. The alternatives are bleak, the fragmentation of states or flight. On the other hand, the fundamental message is that human worth and human rights must be promoted. As Aga Khan noted;

‘It is abundantly clear that unless ways can be found to counteract the withholding of, or outright violations of, human rights, unless there is a more equitable sharing of the world’s resources, more restraint and tolerance, the granting to everyone, regardless of race, religion, membership of a particular social group or political party, the right to belong - or alternatively to move in an orderly fashion to seek work, decent living conditions and freedom from strife - the world will continue to live with the problem of mass exodus. This problem, if left unchecked, will increasingly pose a threat to peace and stability around the globe.’<sup>227</sup>

What is called for is the clarification and development of the foundation in common principles.<sup>228</sup> Writing in 1966, Krenz defined the law as ‘a method of regulating the conduct of those to whom it applies. Its purpose does not lie in itself, it constitutes a means towards an end: certainty and order.’<sup>229</sup> The law shapes acceptable conduct, it solicits uniform compliance, which is the goal of developing the principles and the mechanisms for

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<sup>223</sup> Coles, 1992 report, at 18.

<sup>224</sup> Lentini, *supra*, at 195.

<sup>225</sup> Note generally, Lee, internally displaced persons, who identified the possible move towards a legal synthesis of the definition of refugees and internally displaced.

<sup>226</sup> Krenz, E.F., ‘The Refugee as a Subject of International Law’ (1966) 15 Int’l. & Comp. L.Q. 90.

<sup>227</sup> Aga Khan, 1981 report, para. 9.

<sup>228</sup> Goodwin-Gill, language of protection, at 17.

<sup>229</sup> Krenz, *supra*, at 93.

enforcement. As the Experts Report found, there are many things that states can do to prevent mass flows of refugees.<sup>230</sup> This chapter has been directed at focusing attention onto the causing state, by altering the perspective concerning issues of transboundary and internal displacement. It cannot be over emphasised that the principle player in any concern with forced migration lies with the state of origin,<sup>231</sup> and it is with the causing states that responsibility and accountability be imposed.

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<sup>230</sup> Experts Report, para. 66-71.

<sup>231</sup> Garvey, Jack I., 'The New Asylum Seekers: Addressing Their Origins', in Martin (ed), *New asylum seekers*, 184.

## CHAPTER 3

# IDENTIFYING CAUSES AND SOLUTIONS FOR FORCED MIGRATION

### 3.1 INTRODUCTION

A distinction has to be drawn between the various types of displacement and forced migration *per se*. This chapter will seek to maintain the perspective that focuses on those coerced into leaving their homes and who suffer detrimental consequences. The investigation into the elements of causes seeks to identify what actions create the situation of forced migration, what are the root causes that coerce persons to the extent that they must take flight and the considerations implicit in those activities.<sup>1</sup> It is from the identification of causes, that solutions can then be suggested and investigated in Part II. Understanding the nature of forced migration will influence the search for durable, comprehensive and long-term solutions. It will in this respect, be suggested that legal solutions contribute significantly to the foundation for long-term durable solutions, thus Part III will elaborate on the regime of international responsibility as a legal solution. This chapter seeks to investigate the causes of forced migration, the underlying considerations of root causes, the elements that occur in forced migration, and the solutions legal and non-legal, that might address the situation of forced migration.

### PART I - CAUSES

### 3.2 DISTINGUISHING FORCED MIGRATION

The incentives to move are vast and variable, they include all sorts of complex inputs, including psychological and physical factors. This thesis is primarily concerned with

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<sup>1</sup> For example, Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues', in Loescher and Monahan (eds), 255, 256, noted that the causes of flight vary and a substantial difference may exist between the individual who flees because of persecution against political opinion, and the individual who is part of a group fleeing the breakdown of law and order or a generalised policy of persecution based on discrimination.

the elements of coercion that compel persons to leave their normal situation whether it is within the boundaries of their state of origin, or across to another state. The investigation of the 'driving force' to take flight,<sup>2</sup> has to be limited in order to maintain the distinction between forced migration and other forms of displacement and migration. The Bible records two examples of early movement that may be compared, the expulsion of Adam and Eve from the 'Garden of Eden',<sup>3</sup> and the exodus of Israelites from Egypt under the leadership of Moses and Aaron.<sup>4</sup> Adam and Eve were the cause of their own expulsion by disobeying a rule set out by God, illustrating that some forms of expulsions may be permissible. Although the couple were compelled to leave and enter a situation of hardship, the reason for their expulsion needs to be justified.<sup>5</sup> The exodus out of Egypt on the other hand was voluntary, to find their 'promised land'. In fact it is recorded that the Egyptians did not want them to leave and pursued them for many miles.<sup>6</sup> Although it may be argued that the exodus was attributable to the suffering of slavery and oppression in Egypt, ultimately, the Israelites left in search for a better life, led by a desire to improve their social and economic state. These two examples may be compared with the historic 17th Century, *le grand dérangement*, Huguenots movement into England, Holland and Switzerland, which was due primarily to the religious persecution of French Protestants.<sup>7</sup> The cause and nature of movement is of vital importance to any discourse on forced migration, whether transboundary or internal.

The distinction between voluntary and involuntary migration is sometimes difficult to make. The position of the individual and his psychological makeup are complex, and a wide variety of factors may lead him to decide to move, considerations that are subject to his individuality. Conditions that seem totally intolerable to one person might be tolerable to another. Yet the determination of whether displacement was voluntary or not may depend, not on whether the individual finds it intolerable, but whether the community

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<sup>2</sup> Goodwin-Gill, 'Different Types of Forced Migration Movements as an International and National Problem', in Rystad (ed), *the uprooted*, 15.

<sup>3</sup> Genesis 3:23-24 (New International Version).

<sup>4</sup> Exodus 12:31-50 (NIV).

<sup>5</sup> Genesis 3:21-23 (NIV), explains why Adam and Eve had to be banished.

<sup>6</sup> Exodus 7:8-14:31 (NIV).

<sup>7</sup> ICIHI, *supra*, at 2.

deems it is intolerable. It may be that the circumstances the community deems to produce unbearable conditions are limited by social and political restraints, which was the road the legal definition of a refugee took.<sup>8</sup> Therefore the identification of causes has to take account of variable factors that relate to individual cases, yet possibly also to identify underlying considerations that occur in root causes and further, to identify certain elements that occur in forced migration. Every situation of forced migration has its own specific set of circumstances and participants, thus should not be denigrated to a generalised picture that is all encompassing. However, certain root causes may be identified and common denominators may be evident, sufficient to establish a link between a variety of causes and causes of action for international responsibility. In every situation of forced migration, it may be impossible to identify all the specific factors that cause the movements, but possible to identify certain underlying considerations and certain elements inherent in the causes.

Two elements that distinguish forced migrants are coercion and detrimental consequences. These two elements may provide the foundation to identify the unlawfulness in the causing of forced migration.<sup>9</sup> The coercive element may in itself be unlawful, whilst the detrimental consequence may assist in distinguishing acts which *prima facie* seem coercive, but which nevertheless results in a more favourable situation for the persons involved. On the other hand, the difference between what is a better situation is relative to the normal situation. For example persons fleeing a civil war in the Sudan may enter a neighbouring country that provides them with better medical facilities and safer living environments, as compared with the 'normal' situation of over a decade of bloody civil war and famine. In such a situation, the victims are still nevertheless in a detrimental situation, because they have no homes, no realistic long-term expectations for employment, and exist almost entirely on foreign aid. Thus a detrimental situation, although better than the 'normal' situation, must relate with what would normally be expected as a minimum standard of living conditions.<sup>10</sup>

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<sup>8</sup> See Chapter 2 above on the definition.

<sup>9</sup> See further below Chapter 4 on the identification of wrongfulness.

<sup>10</sup> Controversy does exist as to the constituents of what are minimum standards. Inadequate as it may be, the minimum standards required here refer to basic necessities, means of subsistence, housing, means of effective legal redress, and good governance, based upon a lawful constitution, and the rule of law. See further below Chapter 6.

Certain generalisations may be identified with the occurrences of forced migration, that further distinguish them from other types of migrations. For example, where the movement takes place under highly stressful conditions amounting to the total disruption of life and livelihood. In comparison, voluntary migrants usually have time to plan their move, although one can plan to leave coerced by the circumstances of the environment, for example the gradual application of persecution, like total exclusion from employment. In a sense, the Israelite exodus out of Egypt sits in the grey area situation between voluntary and involuntary migration. Perhaps in contrast to forced migrants who really have no option but to leave, the Israelites were granted several audiences with the Pharaoh and allowed dialogue with the rulers. In that sense, they had other options besides flight. On the other hand, a long term plan aimed at the exclusion from employment or participation in government, could be construed as a cause of forced migration. Essentially, it will not be the term that identifies the subjects, but the circumstances and causes which will identify and distinguish the forced migrant. The investigation of causes and circumstances is therefore also an important part of the overall scheme contributing to a comprehensive programme of action.

### 3.3 DYNAMICS OF FORCED MIGRATION

Involuntary migration is not a new phenomenon. The slave trade of the 15th to 19th Century were one of the largest examples of forced population movements. It is estimated that the Atlantic slave trade alone involved at least 10 million Africans who were subjected to the most appalling conditions,<sup>11</sup> although they were to enrich and contribute to the societies they entered.<sup>12</sup> Many historical instances of forced migration served mainly to further the self-interests of the ruling elite.<sup>13</sup> Colonial expansion involved mass movements

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<sup>11</sup> ICIHI, *supra*, at 1.

<sup>12</sup> Similarly, the 250,000 Protestants who fled from France to escape religious persecution also made significant contributions to the economic and cultural life in the countries where they settled, see ICIHI, *supra*, at 2; and Jewish expellees from the Iberian Peninsula during the late 15th Century who were received by Muslim countries, Italian city states, and the Netherlands, also made valuable contributions to their adopted countries, see Marrus, Michael R., 'The Uprooted: An Historical Perspective', in Rystad (ed), *the uprooted*, 50.

<sup>13</sup> See Panjabi, R.K.L., 'International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis' (1991) 10 *Dick. J. Int'l. L.* 1, 4-5.

of population and as new territories were occupied, indigenous populations were expelled, military conscription and forced labour uprooted many, and indentured labourers were transferred from country to country to satisfy labour demands.<sup>14</sup> In the first half of the 20th Century, the major causes of displacement were wars, territorial realignment, political upheavals and the emergence of newly independent states. A consequence of decolonialisation was the inheritance of ‘... artificial boundaries, fragile national unity, brittle political systems and distorted economies. The political and economic instability which resulted led to an unprecedented proliferation of tensions and conflicts.’<sup>15</sup> This scenario seems to be repeated in any radical change in government or political ideology. Further problems existing in the 1970s compounded the post-colonial era. Scarce resources were depleted by arms spending,<sup>16</sup> inappropriate development projects, economic mismanagement and international recession. This was combined with oil price increases leading to large expenditures from non-oil producing states; massive debts leading to the implementation of austerity programmes; and economic crisis leading to ecological crisis, because deforestation and desertification for short-term economic wealth leads to environmental degradation.<sup>17</sup>

In the modern era, five fundamental changes to refugee problems were identified by Ogata.<sup>18</sup> Firstly, nationalistic, ethnic or communal tension leading to internal conflict, causes flight more now than ever before. Secondly, the decline in authoritarian regimes and the destructive effects of civil conflicts cause serious strains on a fragile state structure,

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<sup>14</sup> ICIHI, *supra*, at 2.

<sup>15</sup> *Ibid.*

<sup>16</sup> Dieng, A., ‘Addressing the Root Causes of Forced Population Displacement in Africa: A Theoretical Model’ (1995) Int’l. J. Refugee L. - Special Edition 119, 127, who documents briefly the impact of arms trading in Africa.

<sup>17</sup> ICIHI, *supra*, at 2-3; and also identified in, Aga Khan, 1981 report, UN Doc. E/CN.4/1503, 31 December 1981, para. 2, who claimed, ‘[i]n the last 35 years, with the emergence from colonialism of about a hundred new states, often after a considerable struggle and with an inheritance of artificial national boundaries, fragile national unity, underdeveloped economies, too few cadres and boundless logistical problems, the world has seen an unprecedented proliferation of tensions and conflicts. New ideologies misunderstood by and unacceptable to portions of the population, blatant racial discrimination, civil wars, the terror tactics of more than one dictator, foreign invasion or acute economic hardship have caused millions to decide that any life outside their own country must be more bearable than the present one.’

<sup>18</sup> UNHCR, state of the world’s refugees, ‘Forward’.

leading to the fragmentation of states into territories, such as in Liberia, Somalia, and Bosnia and Herzegovina. Thirdly, the number of internally displaced now exceed those who manage to escape across borders and they have the same need for protection. Fourthly, widespread deprivation continues to afflict many people, exacerbating social and political instability, creating the push factor for migrants to leave their homes in search of better lives. Fifthly, 'confronted by rising numbers of refugees and migrants, the traditional system for protecting refugees has come dangerously close to breaking down. The massive number of people on the move has weakened international solidarity and endangered, at times seriously, the time-honoured tradition of granting asylum to those in genuine need of protection.'<sup>19</sup>

A vicious cycle does seem to perpetuate itself, with root causes like armed conflicts or famine causing mass exodus to neighbouring states with a weak socio-economic infrastructure, leading to ethnic tension, more environmental degradation and pressures on the socio-economic system, leading again to the perpetuation of root causes and flight.<sup>20</sup> Tension and conflicts easily arise especially where the displaced persons and local population do not share ethnic, linguistic or religious backgrounds.<sup>21</sup> The incoming population also affects political alliances and stability.<sup>22</sup> It cannot be overemphasised that the reasons for flight are complex and vast. It will differ between individuals or families and circumstances. The overt reasons may be persecution, armed conflicts, campaigns of repression, or the collapse of civil order.<sup>23</sup> Yet other pressures also operate in an interrelated and deeper manner, affected by the natural environment, human rights, economic, religious, ethnic and political conditions. All these factors often blur the distinction between international and domestic affairs. Combine these factors with indirect

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<sup>19</sup> *Ibid.*

<sup>20</sup> See, Aga Khan and Hassan bin Talal, 'Foreword', in ICIHI, *supra*, xv.

<sup>21</sup> For example, in Ethiopia, nomadic Afars moved into the central highlands of Wollo province with their cattle and the ensuing competition for grazing land left many people killed; in 1983, tension between local Hindus in Assan and an incoming population of Muslim Bengali erupted in fatal violence, see ICIHI, *supra*, at 17.

<sup>22</sup> For example, in Pakistan, the influx of Afghan Islamic fundamentalist has added to instability, whilst in Sri Lanka, the movement of Tamils has consolidated the division on the island, see ICIHI, *supra*, at 17.

<sup>23</sup> UNHCR, state of the world's refugees, at 13.

actions of states, fulfilling policies that further their self-interests, and a new more intense dimension appears. It has been noted that,

‘[t]he refugee problems of the 1990s are characterized by their complexity. They cannot be treated in isolation from the conditions that give rise to them - nor can those conditions be isolated from refugee concerns. If left unresolved, the problems of the displaced rebound upon the societies that send and receive them. Refugees often become an integral part of the dynamics that created them in the first place.’<sup>24</sup>

The dynamics of forced migration and the underlying considerations associated with causes therefore need reconsideration and evaluation.

### 3.4 REVIEWING THE ROOT CAUSES

Root causes have been identified and elaborated by several studies,<sup>25</sup> which have divided and sub-divided causes into various headings, many of which are related and often do overlap. For example, the Experts Report divided causes into man-made and natural causes; sub-dividing man-made into political,<sup>26</sup> and socio-economic factors.<sup>27</sup> In fact, all the considerations in the political causes may be summarised as armed conflicts and human rights violations. Arguably, socio-economic causes are also related to the underlying concern of denying human rights, in particular the right to development and other economic, social and cultural rights. In so far as natural disasters are concerned, the causes have generally been acknowledged to be a combination of political, socio-economic and natural disasters.<sup>28</sup> Whether the initial cause was purely an act of nature or not, the circumstances of suffering leading to forced migration can usually be mitigated. For example, in an earthquake the use of technological advances in building and materials may

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<sup>24</sup> *Ibid.*

<sup>25</sup> See above, section 1.1, ‘Identification of other work in the area’ and section 2.4.2, ‘Causes of Flight as an Element’; Experts Report; and Aga Khan, 1981 report.

<sup>26</sup> Experts Report, para. 30-36, under political factors were, wars and armed conflicts which included alien domination and armed intervention; colonialism; apartheid; unequal treatment under oppressive regimes; forcible expulsions; and the principal causes of which were, violations of human rights and fundamental freedoms.

<sup>27</sup> *Ibid*, para. 37-40, socio-economic factors are numerous and include, prolonging underdevelopment, structural developments leading to threats against the person, indebtedness and unfair trade terms.

<sup>28</sup> *Ibid*, para. 44.

decrease the devastation, or abate subsequent injuries by providing early warning mechanisms and acting upon them.<sup>29</sup> This thesis will, however, exclude the situations where a purely natural circumstance causes displacement, because essentially this would not amount to forced migration.<sup>30</sup>

Other authors have suggested alternative models of causes, for example proposing primary, secondary and auxiliary factors.<sup>31</sup> Primary factors include racial, religious, political and social elements; secondary factors include military, ideological and ethnic considerations; and auxiliary factors include economic, ecological and demographic factors.<sup>32</sup> Clearly, a common acceptance amongst all writers is that the causes are complex and numerous. Aga Khan noted that the underlying factor instigating mass exodus was the violation of human rights. Although this combined with a variety of other 'push' and 'pull' factors, it was the overall cause of mass exodus - an issue that the Experts Report was also in agreement with. All reports also suggest that whatever the applicable cause was, underlying considerations played a role in root causes.

### 3.5 CONSIDERATIONS IDENTIFIED WITH ROOT CAUSES

All root causes have underlying considerations, whether acting jointly or separately.<sup>33</sup> These underlying considerations may be influenced by both internal and

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<sup>29</sup> An example is the total evacuation of populations facing possible volcanic eruptions or mudslides, thus even if property is lost or damaged, the cost in loss of life or in physical injury is completely abated. However, where discrimination is applied in the refusal to fund projects that would have prevented the mudslides, then the potential for responsibility might arise, although the complicity of state authorities will be difficult to prove. On the other hand, where a project authorised by the state causes the mudslide, then responsibility has higher prospects of attaching. See further below section 3.5.3, 'Environmental Considerations'.

<sup>30</sup> For example, people who have to move because their homes are near a volcanic eruption, these situations would in any event, generally not contain the elements of forced migration. See further below section 3.6, 'Elements Occurring in the Causes of Forced Migration'.

<sup>31</sup> Suhrke, A., 'Global Refugee Movements and Strategies of Response', in Kritiz, M.M. (ed), *U.S. Immigration and Refugee Policy: Global and Domestic Issues* (1982), 157-173; and see generally, Rizvi, Z., 'Causes of the Refugee Problem and the International Response', in Nash, A. (ed), *Human Rights and the Protection of Refugees under International Law* (1989), 107.

<sup>32</sup> Goodwin-Gill, in Rystad (ed), *the uprooted*, at 16.

<sup>33</sup> For example, Loescher, G., 'Introduction', in Loescher and Monahan (eds), at 18, noted that underlying factors of refugee outflows were nationalism, ethnic conflict, arms sales, foreign intervention, incompetent governance, and widespread violations of human rights, making it impossible to determine exact 'root causes'.

external factors, like the supply of aid or arms by an external source, that contribute to the causes of forced migration. Five categories of considerations may be identified, namely political considerations, economic considerations, environmental considerations, human rights considerations, and other considerations, such as the need to maintain arbitrary distinctions between persons or groups.

The identification of considerations underlying causes is consistent with the functional perspective, because it seeks to avoid the presentation of a list of so-called root causes which will inevitably be headings that will be used to identify the subjects called forced migrants. These underlying considerations may provide a better understanding of the circumstances that create forced migrants, as they explain why an armed conflict or economic oppression occurs. These underlying considerations may also be seen as the definitive root causes, overtaking the headings previously adopted. However, in order to maintain a distinction with the so-called root causes, this thesis will refer to them as considerations that underlie root causes, because that is simply what they represent.

### 3.5.1 Political Considerations

A vast array of political considerations affect the creation of forced migration. Fighting for political and organisational control of a state, the provision of privileges and the command of power are all political considerations that underlie armed conflicts and revolutions.<sup>34</sup> Where violations of human rights are conducted, any form of grouping could be used as a pretext to accord or deny human rights, when the underlying reason is to segregate those who are perceived to be opponents or supporters of the authority in control of state-mechanisms. Virtually any social, economic, political or religious groups can be identified as dissidents, traitors or opponents of the state,<sup>35</sup> whilst opposition groups might

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<sup>34</sup> *Ibid*, at 8, who noted that, '[r]efugees are usually created as the direct result of political decisions taken by sovereign states, with consequences that extend beyond national borders.'

<sup>35</sup> For example, in Cambodia under Pol Pot, it was the professional class, doctors and lawyers, see Klintworth, G., *Vietnam's Intervention in Cambodia in International Law* (1989), 7 and 60-1; in Iraq, the Kurdish people; and in Idi Amin's Uganda, it was persons with Asian origins, see UNHCR, *State of the World's Refugees*, at 14.

also contribute to a state of confusion sufficient to encourage flight.<sup>36</sup> The considerations in these cases are political power and control over the state.

The struggle for power within a state could be caused by other factors, the lack of mechanisms to redress disputes, the lack of central authority, years under an oppressive regime, discriminatory laws, corruption and the consistent violations of human rights. Simply not having a particular group exercising authority can also create mayhem and chaos that induce people to leave. For example for many years, Somalia suffered civil conflict resulting in the fragmentation of the country into zones controlled by several warlords. No government, no real system of justice, no structures and institutions that would normally be expected in a democratic nation-state existed.<sup>37</sup> Yet a state in anarchy is not the only area where political considerations intervene. In Guatemala and Turkey, forced migration occurred because of indiscriminate bombings of civilian areas as a part of government counter-insurgency tactics,<sup>38</sup> although clearly the underlying consideration is political.

The rivalry of the Cold War superpowers also affected the internal struggles for power, leading to mass movement.<sup>39</sup> The provision of military aid, the patronage of superpower-states on a particular leader within the state, increased the destructive effect of the internal conflict. Yet, the end of the Cold War also produced political conflicts that have caused flight. The fall of authoritarian regimes, fragmentation of nation-states, heightened xenophobic tendencies through nationalistic propaganda, all act to create an environment where groups struggle for power. The bitter fighting in the former Yugoslavia and the former USSR (in particular Tajikistan) are examples of these occurrences.<sup>40</sup>

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<sup>36</sup> For example, the Shining Path in Peru, the Khmer Rouge in Cambodia and nationalistic groups in Bosnia and Herzegovina.

<sup>37</sup> See generally, Amnesty International, *Amnesty International Annual Report, 1992* (London, 1992); and Africa Watch, *Somalia: No Mercy in Mogadishu* (Washington: Human Rights Watch, 1992).

<sup>38</sup> Deng, (1995) 14 (1&2) *Refugee Survey Quarterly*, 219.

<sup>39</sup> See generally, Panjabi, *supra*, 1. Many states had superpowers intermeddling in their affairs, for example, the former USSR in Afghanistan, China and the US in Vietnam, the USSR and the US in Cuba, and the USSR in Angola.

<sup>40</sup> See UNHCR, *state of the world's refugees*, at 123-134.

Whether from external or internal sources, instability and social divisions within a state seem the easiest means from which opportunists can exploit chaos for political gain.<sup>41</sup> It has been noted that, '[m]any of the world's poorest countries are locked into a vicious circle of repression. Their governments rule not in the interests of the nation as a whole, but to serve a small ruling elite, often drawn from one region, religion or social group.'<sup>42</sup> Therefore, although armed conflicts or violations of human rights are applied causes of forced migration, political considerations do underlie such actions.<sup>43</sup>

### 3.5.2 Economic Considerations

The effects of economic considerations in root causes are perhaps less obvious than political considerations, but nevertheless equally significant. The difficulties with approaching this topic is that quite often an uneasy balance has to be drawn between the welfare of the state and the welfare of certain groups of people. Where the economic infrastructure of a state requires development, the interests of certain groups may be relegated to a low priority, possibly even forgotten completely. That is not to say that all development projects are wrong or that all movements from such projects necessarily violate principles of international law, however, economic considerations ought not to be an acceptable justification for forced migration. Examples of projects that could create displacement and contribute towards ecological disasters are dams, highways and pipeline constructions, maximising export by mechanising and favouring less labour intensive production, traditional land use outlawed as a hindrance to economic growth, and populations relocated to areas of less economic demand.<sup>44</sup>

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<sup>41</sup> *Ibid*, at 15.

<sup>42</sup> ICIHI, *supra*, at 12; For example, in 1920, the League of Nations condemned Liberia as 'a republic of 12,000 citizens and 1,000,000 subjects.' See US Committee for Refugees, *Uprooted Liberians: Casualties of a Brutal War* (Washington, American Council for Nationalities Service, February 1992), 4.

<sup>43</sup> On the other hand, Loescher, in Loescher and Monahan (eds), at 10-11, notes that commitment to multilateral solutions devices are difficult to achieve and states are unwilling to co-operate to respond towards contemporary refugee incidents, but resort to unilateral exclusion methods. Despite the obvious need for concerted unified policies.

<sup>44</sup> ICIHI, *supra*, at 11.

Placing economic goals on a plateau before all other considerations can have drastic consequences as drastic changes to the natural environment do increase the risks of, or makes it more prone to, natural disasters. Rapid population growth, over-cultivation, deforestation, and the transfer of food crops to cash crops, all act in varying combinations to encourage displacement.<sup>45</sup> The recipients of such negative effects are usually the poorest, nomadic or subsistence farmers and landless labourers.<sup>46</sup>

The World Bank recently estimated that in the last decade, some 90-100 million people have been displaced by urban, irrigation and power development projects alone.<sup>47</sup> Development induced displacement increase with infrastructure projects, although not all forms of displacement would amount to forced migration. Such displacement without adequate resettlement or compensation would amount to forced migration. The Oxford Conference in 1994 found that, '[t]he failure to avoid displacement or opportunely mitigate involuntary resettlement will increase impoverishment, unemployment, exhaust natural resources, and lead to social and cultural disintegration of large segments of national populations.'<sup>48</sup> Impoverishment takes many forms, which include homelessness, landlessness, increased morbidity, loss of access to common property, and social disintegration. Human rights abuse allegations do generally follow the lack of clear government policy to minimise or avoid displacement, and to provide adequate resettlement or compensation. Resettlement programmes that are inadequate and badly implemented exacerbate impoverishment, which seem particularly to affect mainly the poorer, more vulnerable and socially discriminated. The consequential displacement may even become internationalised by transboundary movements.

Surprisingly, the recommendations of the Oxford Conference seem to be points that one might have expected as the common practice of states where development induced

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<sup>45</sup> *Ibid.*

<sup>46</sup> For example, Survival International reports that two million tribal people in India are threatened with displacement by hydropower projects; whilst in the Kalahari Desert of Namibia, bushmen were evicted for a national park designed to attract tourists; and in the Amazonian region of Ecuador, commercial enterprise and new settlers have pushed out indigenous communities, see ICIHI, *supra*, at 12.

<sup>47</sup> See Downing, Theodore E., 'Findings and Recommendations of the First International Conference on Development-Induced Displacement and Impoverishment' 3 to 7 January 1995, Refugee Studies Programme, Oxford, UK. Copy with author.

<sup>48</sup> *Ibid.*

displacement is unavoidable. This included the need to ensure the provision of employment, compensation for losses, and the recovery of social and cultural disruptions. Despite the results of the conference, the World Bank has been accused of participating directly in development induced displacement. A report compiled by Michael Cernea of the World Bank outlined that two million people will be forced off their lands under 134 World Bank projects, and another two million will be moved in projects due to be approved by 1996.<sup>49</sup> Although under guidelines from the World Bank, relocation can only be conducted where resettled persons could raise equivalent income and standards of living, that is not the reality.<sup>50</sup>

The effects of such displacements are also disturbing on the social structure of communities. Families are weakened or dismantled, vital cultural knowledge are lost, indigenous groups lose their self-respect, their cultural identity, and quite possibly, their livelihoods.<sup>51</sup> The consequences of such inequitable development within a state, has the potential to ignite internal strife. Those who benefit disproportionately will wish to divorce themselves from the others and wish to be free from the drag of less progressive elements. This might cause expulsions or violations of human rights. On the other hand, the 'have nots' resent the position they are in and seek a better life, often turning to violence. Thus both confrontations may and usually do result in armed conflict, or at the very least, increased instability within the state, perpetuating the poverty cycle and further devastating economic structure of the state.<sup>52</sup>

Development projects that require relocation through coercive means, without adequate provisions of the means of subsistence or accommodation, is a matter of forced

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<sup>49</sup> Chatterjee, Pratap, 'Development: Dramatic rise in people forced off lands by World Bank' 1994, Inter Press Service Feature. Copy with author. These projects include dam reservoirs, canals, roads, mines, reforestation, wildlife parks and sanctuaries.

<sup>50</sup> See Kate de Selincourt, *Forced to Move*, a report on resettlement published by the Panos Institute in London. Note however, the operation of the World Bank Panel, further below.

<sup>51</sup> Downing, *supra*.

<sup>52</sup> An example of violence following social and economic decline occurred in Zaire after abandoning economic reforms in 1990, see DHA News, Special Edition: 1993 in review, No. 7 January-February 1994, at 50.

migration.<sup>53</sup> Any developmental projects that do not promote social integration, employment and respect for human rights and dignity, within their resettlement programme, may be categorised as forced migration. The opposite end of the spectrum, underdevelopment also causes displacement.<sup>54</sup> The loss of skilled manpower to developed states, inadequate social and welfare provisions, the steep rate of population growth,<sup>55</sup> unfair trading mechanism, global food insecurity, inflation and unemployment, contribute significantly as 'push' factors encouraging mass exodus.<sup>56</sup> These push factors, although part of the wider economic considerations, may not be elements that occur within the model of forced migration, unless the deprivations occurring were intentionally applied so as to encourage mass movements.

Internal displacement for economic reasons may amount to forced migration, although an example of a relative success was the urban relocation programme in China between 1968 and 1975 of over 12 million city dwellers during the Cultural Revolution.<sup>57</sup> It is argued that relocation was necessary for post-war economic reasons, namely the re-distribution of economic and human resources. Yet in most programmes, they were 'invariably implemented with scant regard for the human rights of those affected.'<sup>58</sup> The largest programme of land settlement was conducted by the Indonesian government between the late 1960s and 1984, where 2.6 million people were affected, and between 1984 and 1989, where some 3.5 million people were affected.<sup>59</sup> During this time, either force or false inducements were used to encourage movement.<sup>60</sup> These underlying economic considerations clearly play a significant role in the causes of forced migration.

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<sup>53</sup> For example, since 1989, it is estimated that over one million persons in Myanmar, have been forcibly relocated without compensation or assistance, into areas more akin to detention centres, for a variety of development projects, see *Internally Displaced Persons*, Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1993/95 and 1994/68, (1995) 14 (1&2) Refugee Survey Quarterly, 192, 219.

<sup>54</sup> Aga Khan, 1981 report, para. 67-74.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, at para. 74.

<sup>57</sup> Aga Khan and Hassan bin Talal, *Refugees: The Dynamics of Displacement*, A Report for the Independent Commission International Humanitarian Issues (1986), 101-112, at 105.

<sup>58</sup> *Ibid.*, at 104.

<sup>59</sup> *Ibid.*, at 110.

<sup>60</sup> *Ibid.*, at 110-111.

### 3.5.3 Environmental Considerations

Whether natural or man-made, disasters that affect the environment also cause the movement of persons.<sup>61</sup> People forced to flee environmental degradation or natural disasters do need international protection. Perhaps not of the kind envisaged for violations of human rights, but nevertheless where their own authorities cannot or will not help or in fact, caused the movement. Deterioration of the natural environment also affects economic stability: when rural agricultural bases give way to urban development; when food crops give way to cash crops; and when combined with demographic pressures and chronic poverty; then political, ethnic and social pressures may be magnified, affecting the stability of a state and ultimately, its economic situation. Reforming the cycle of depression. Considerations of the environment do affect root causes of displacement, but not all have an impact on the issue of forced migration. For example where a natural disaster occurs, like a volcanic eruption, inhabitants of the volcanic island may have to leave for their safety. Such forms of displacement may not have the elements of forced migration. On the other hand, environmental degradation may be used as a tool of persecution, for example where governments destroy crops, pollute rivers and lakes, or do so by gross negligence.<sup>62</sup> Further, armed conflicts and famine are generally accompanied by soil erosion, drought and other major environmental problems.<sup>63</sup>

Natural disasters that are purely natural may not be preventable, but the resulting damages might be. For example, in the Kobe earthquake of 1994, it is possible that the use of certain architectural designs might have mitigated the number of lives lost and the extent of damage caused. Thus, the category of natural disasters can be sub-divided to purely natural causes and man-assisted causes. Where it is purely natural without any contribution by man, it may still be possible to investigate the legal issue of an obligation to help. For example, Shelton argues that under certain sources of international law, states may have an

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<sup>61</sup> For example, the catastrophes in Chernobyl, at Mount Pinatubo, or even gradual processes, like in desertification or the retreat of forests, see UNHCR, state of the world's refugees, at 18.

<sup>62</sup> For example, where a state permits mining for minerals without Environmental Impact Statements, and later toxic minerals are discharged into rivers and streams.

<sup>63</sup> UNHCR, state of the world's refugees, at 18.

obligation to help, where they can do so without severe detrimental effects upon themselves.<sup>64</sup>

Disaster migration cannot be divorced from development issues, as one disaster could cause immense economic and social losses, as well as critically damage developmental plans. As Aga Khan observed,

‘[e]ven those who escape floods and famine conditions may have to do so because neither their government nor the international community at large has been able to avert the situation or bring them succour. Where land has been appropriated, social and cultural customs suppressed and only such alternatives offered are deemed unacceptable, disaffection may be total. Yet these measures are usually carried out in the name of modernization and progress. Herein lies much of the crux of the matter.’<sup>65</sup>

Perhaps two active situations exist. Where a state is unable or unwilling to assist when a natural disaster occurs, or where the state has contributed to the disaster. A failure to protect, to assist or seek assistance, may amount to a reckless application of coercion, sufficient to be forced migration. Where a state through corruption or negligence fails to provide proper conditions for safety, for example where construction codes or industry laws do not provide for the protection of the environment,<sup>66</sup> then the resulting damage may be attributed to the state. There is little doubt that environmental considerations do explain the causes of involuntary displacement which may, where certain elements are present, amount to forced migration.<sup>67</sup>

Environmental considerations concerning management may exclude persons and cause forced migration. For example, in debt-for-nature schemes, projects that favour the preservation of forests may have an unfavourable effect on indigenous populations living within those forests.<sup>68</sup> Thus, a policy that seeks to preserve the natural forests may

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<sup>64</sup> Shelton, D., ‘The Duty to Assist Famine Victims’ (1985) 70 Iowa L. Rev. 1309.

<sup>65</sup> Aga Khan, 1981 report, para. 63.

<sup>66</sup> See generally, Peter Hansen, Under-Secretary-General United Nations Department of Humanitarian Affairs; UN Press Release DH/1650, 23 May 1994; and (Jan-Feb 1994) No.7 DHA News, Special Edition.

<sup>67</sup> On elements, see further below section 3.6, ‘Elements Occurring in the Causes of Forced Migration’.

<sup>68</sup> See generally, Wee, L.C.W., ‘Debt-for-Nature Swaps: A Reassessment of Their Significance in International Environmental Law’ (1994) 6 (1) J. Env’t. L. 57.

inevitably require relocation of indigenous populations whose traditional life-style are harmful to the environment.<sup>69</sup> Thus the effects of such environmental considerations draw similar circumstances to development induced migration and might, with the existence of certain elements, amount to forced migration. Clearly however, root causes of forced migration may have underlying environmental considerations.

### 3.5.4 Human Rights Considerations

Human rights violations are a significant cause of forced migration.<sup>70</sup> Several international organisations have concluded that ‘large exoduses of persons and groups are frequently the result of violations of human rights.’<sup>71</sup> The SC has recently deemed internal repression and refugee flows to be a threat to international peace and security.<sup>72</sup> It is claimed as a matter of fact by various organisations that the only recourse to violations of human rights is to ‘seek opportunities elsewhere’.<sup>73</sup> In many instances, whether individuals are singled out or not, ‘they are simply alienated and feel that their country can no longer provide them with a supportive future.’<sup>74</sup> This is an area where both direct and indirect actions may be involved. Supporters of governments that perpetuate the denial or violations of human rights are accomplices and equally guilty.<sup>75</sup> Whether they are political, economic, social or cultural rights, denial or violations do play an extremely significant role in causing forced migration. In many situations, the violations have themselves been the primary cause of flight.

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<sup>69</sup> For example, groups that practice slash and burn techniques.

<sup>70</sup> Gilbert, *supra*, at 417; Feliciano, F.A., ‘Coerced Movements of People Across State Boundaries: Some Problems of International Humanitarian Law’ (1983) 58 *Philippine L.J.* 256, 262; Fein, ‘Lives at Risk’, in Schmid and Jongman (ed), *Monitoring Human Rights Violations* (1992), 41; and Aga Khan, 1981 report, para. 37-60, who clearly established a correlation between the violation of UDHR articles and mass exodus.

<sup>71</sup> Commission on Human Rights Res. 30 (XXXVI) , 11 March 1980.

<sup>72</sup> SC Res. 688 (1991), which deals with the situation in Iraq.

<sup>73</sup> Aga Khan 1981 report, para. 36, organisations including Amnesty International, the International Committee of the Red Cross, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and the Commission on Human Rights.

<sup>74</sup> Aga Khan, 1981 report, para. 62.

<sup>75</sup> See further below section 4.5.3, ‘Supply of Arms or Aid’.

### 3.5.5 Other Considerations: Making Arbitrary Distinctions between Persons

Another consideration that underlies root causes is the need to maintain distinctions within a community or group. The distinction may be based on ethnic, cultural, religious, social or economic differences, but the underlying consideration is the need to make and maintain such distinctions. The sociological and psychological context of this behaviour is beyond the scope of this thesis, but it is necessary to acknowledge that divisions within a group do occur, sometimes explainable with political considerations<sup>76</sup> or with economic considerations.<sup>77</sup> Thus a related issue of particular concern, as a consideration contributing to forced migration, is internal tension created by these artificial divisions.

The concept of discrimination is often seen as the division of subjects, whether they be men and women, different religions, ethnic groups, or languages. The subjects themselves identify the legality of the discrimination. Hence it is permissible generally to discriminate between nationals and non-nationals, but not lawful as between ethnic or religious groups. Discrimination should perhaps be determined by what it is intended to do, and what it in fact does. Discrimination builds divisions based on irrelevant criteria that prejudice the individual's rights and the inherent value of a human person. Whether discriminating between nationals, or between nationals and non-nationals, the individual's worth is not evaluated, but is categorised by irrelevant values, such as where he/she was born. Thus, discrimination should be abhorred, based on what it is intended to do and what it in fact does - the creation of arbitrary divisions and unfair preferences.

In relation to ethnic division, very few modern states are ethnically homogenous and some independent states may be home to around 5,000 different ethnic groups. Ethnic tension is a root cause of flight because it is easily exploited for political gain, and because ethnic identity may be used to define the characteristics of nationality.<sup>78</sup> The apartheid regime in South Africa defined the non-white population out of citizenship, but provided 'homelands' for non-white groups. The exploitation of ethnic tension is not a new concept,

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<sup>76</sup> For example colonial powers distinguished between groups to further the divide and rule policy.

<sup>77</sup> For example between North and South Yemen for control of economic resources.

<sup>78</sup> For example, ethnic Albanians and Bosnian Muslims do not feature in the nationalistic vision of an Orthodox Christian 'Greater Serbia', see UNHCR, state of the world's refugees, at 20.

and genocide defines and outlaws the exploitation unto death of such ethnic tensions. The Cold War, like European colonialism, fostered ethnic tension by creating alliances with local factions and exploiting ethnic differences.<sup>79</sup> In Liberia, so-called ancient hatreds were in fact invented with the importation of Americo-Liberians - hatreds which did not exist until then.<sup>80</sup> In Liberia, hostility arose between the indigenous population and the perceived colonising force of manumitted American slaves, who settled in 1820.<sup>81</sup> An example of the building of ethnic tension can be seen in the situation created by the Bhutan government against ethnic-Nepalese.<sup>82</sup> The refugees who arrived in Nepal from Bhutan since 1990 fit into the generic label of 'Nepalese' who are mostly Hindu and are commonly known in Bhutan as 'Lhotshampas'. This grouping sets them apart from the northern population of Buddhist Drukpas in Bhutan. According to refugees from Bhutan, they were forced to leave as a result of the revocation of citizenship, confiscation of property, discrimination, persecution, torture and rape. The government of Bhutan denies these allegations and claims many are illegal immigrants. Essentially, the fear that the Drukpas might become a minority in Bhutan is exploited.

Acts of discrimination do emphasise ethnic distinction and increase tension. For example, in Bhutan, a retroactive nationality act was introduced in 1989 that affected citizenship of spouse and children; introduced regulations compelling the wearing of national dress; and removed the Nepalese language from primary school curriculum. Although many Lhotshampas have never visited Nepal, many do consider Nepal to be their original home. However, the situation in Nepal is not stable, as poverty and underdevelopment exists and local resentment in Nepal is also on the rise because of the influx of persons coming from Bhutan. The regulations within a state may actively encourage discrimination, exploiting ethnic distinctions and increasing xenophobic tendencies. Ethnic minorities become easy targets for mass expulsion. For example, in

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<sup>79</sup> For example, the Hmong in Laos or the Miskitos in Nicaragua were recruited as fighter, thus exposing the entire group to retribution, or the use of fighters from regions like the Nimbo County in Liberia for Taylor's regime.

<sup>80</sup> See generally, 'Liberia' (1994) 13 (2&3) *Refugee Survey Quarterly*, 49.

<sup>81</sup> *Ibid*; and US Committee for Refugees, *Uprooted Liberians: Casualties of a Brutal War* (Washington, American Council for Nationalities Service, February 1992), 2.

<sup>82</sup> UNHCR, *state of the world's refugees*, at 21.

1972, thousands of persons of Asian origins were expelled from Uganda for economic considerations, and in 1982, 80,000 persons of Rwandan origin were expelled amidst political allegations.<sup>83</sup> The cause of ethnic-Chinese fleeing Vietnam in the late 1970s was due mainly to their relative prosperity, as the authorities closed all private business, 80 per cent of which were owned by ethnic-Chinese, yet no formal decree of expulsion was ever issued.<sup>84</sup>

Although the focus in this part has been primarily with ethnic situations, it is perhaps arguable that the underlying consideration with any conflict between groups within a state may be attributed to a fundamental need to distinguish privileges, or to gain self-interested positions of power. It is arguable that the so-called ethnic conflict in Rwanda is not merely a 'race war', but a conflict which involves political considerations, which go back to its former colonial days. The colonial power in seeking to maintain disunity in the country, established inferiority and superiority distinctions between Hutus and Tutsis based more on wealth than on true ethnic distinctions.<sup>85</sup> Thus economic and political considerations bear deep significance even if the root cause is ethnic conflict. For example, the genocidal actions against the Armenians in the Ottoman empires shows how ethnic, religious and nationality claims were used as a pretext for the destruction of a people.<sup>86</sup> The main aim in eliminating the Armenians was for the internal security of the Turkish empire and the expropriation of Armenia property.<sup>87</sup> The stated reasons were however for national security during war-time, to suppress nationality claims and for religious fervour.<sup>88</sup> The harsh emergency measures taken against the Tamils in Sri Lanka has also caused massive disruptions and shortages of all supplies to areas occupied by Tamils, leading to mass

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<sup>83</sup> ICIHI, *supra*, at 86-7.

<sup>84</sup> *Ibid.*

<sup>85</sup> For example one means of distinguishing a Hutu was that he owned 10 cows, thus all who owned less, were considered Tutsis. Subsequent governments have also used this method of distinction since independence.

<sup>86</sup> See generally, Dadrian, V.N., 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 Yale J. Int'l. L. 221.

<sup>87</sup> *Ibid.*, at 273.

<sup>88</sup> *Ibid.*

exodus and internal displacement.<sup>89</sup> The conflict in Sri Lanka may be attributed to the disillusionment of Tamils initially seeking federal self-government, which was rejected after the independence of Sri Lanka and which ultimately led to claims for a separate state.<sup>90</sup> The sociological aspects of this proposition cannot be investigated here, but sufficient to note that other considerations exist in causing forced migration.

### 3.5.6 Combination of Considerations

Generally, it is a combination of considerations that underlie the causes of forced migration. For example, extreme deprivation from economic or social well-being breeds resignation, as it does resistance.<sup>91</sup> Conflicts may be ignited because of the unequal economic positions of groups and the advancement of a group at the expense of another. Economic considerations may mingle with political considerations, when leaders try to divert blame for economic deterioration by identifying scapegoats, and minority groups become convenient targets.<sup>92</sup> These considerations specifically direct attention towards the situation within the state of origin, as '[a] number of combined factors get people on the move. Whether political or economic in nature, exodus could be prevented or circumscribed only if conditions were to be drastically different at the point of departure.'<sup>93</sup> For example, the dissolution of the former USSR has ignited ethnic and nationalistic problems, causing minority groups to be expelled or flee discrimination and conflict.<sup>94</sup> Although some of the causes of movement are to escape ethnic tension and war, the majority move because of economic and political reasons. The Federal Migration Service (FMS) reported that discrimination, prejudice and aggressive nationalism are rampant against ethnic Russians in the former Soviet Union.<sup>95</sup> These movements may be instigated by numerous factors, thus a determination of whether they are in fact instances of forced

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<sup>89</sup> Hyndman, P., 'Sri Lanka: A Study in Microcosm of Regional Problems and the Need for More Effective Protection of Human Rights' (1992) 20 *Denv. J. Int'l. L. & Pol'y.* 209, 286.

<sup>90</sup> *Ibid.*, at 284.

<sup>91</sup> UNHCR, state of the world's refugees, at 15.

<sup>92</sup> *Ibid.*

<sup>93</sup> Aga Khan, 1981 report, para. 34.

<sup>94</sup> UNHCR, state of the world's refugees, at 123.

<sup>95</sup> *Ibid.*, the FMS was set up in June 1992 as an independent government agency.

migration must depend on clearly outlined elements, rather than generalisation based on root cause assertions.

There are broad patterns that occur in most instances of forced migration, even if the actual catalyst is unique to each specific incident.<sup>96</sup> Certain elements would occur in all instances of forced migration. These elements occurring in the causes of forced migration would furnish the distinguishing features of the forced migrants from other migrants, and provide the ingredients that might tie causes with possible causes of action.

### **3.6 ELEMENTS OCCURRING IN THE CAUSES OF FORCED MIGRATION**

Whatever the reasons or circumstances for movement, whether it is political, socio-economic, ethnic tension or war, certain elements will inevitably exist within the causes of forced migration. These elements are: the intention to cause the movement; the element of coercion in causing the movement, whether it be the threat or use of force, violations of human rights, removal or denial of the means of subsistence, and whether the element of coercion is applied directly or indirectly; and the element of detrimental consequence of the movement, whether that detriment is upon the forced migrant, the states receiving, international organisations or the international community at large. These elements generally exist in the causes of forced migration, whether the movement is internal or transboundary.

#### **3.6.1 INTENTION**

The intention to cause movement is important to a claim of forced migration. Two types of intention may be distinguished, intention to harm and intention to cause forced migration. Jennings claimed in 1939 that the intention to harm receiving states was

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<sup>96</sup> For example, in Iraq, it was the government's brutal crackdown of a failed rebellion, as it was also in the civil wars in Liberia; in the former Yugoslavia, it was localised, co-ordinated acts of terror against ethnic opponents; in Somalia, it was the disintegration of law and order leading to the disruption of production and distribution of food, as it was in Ethiopia; in Sudan and in Yemen, it was the imposition of laws that were unacceptable to a segment of the population leading to secessionist struggles; in Haiti, a military coup; in Afghanistan, the intervention of the Soviet Union leading to increased violence in a civil war, see UNHCR, *state of the world's refugees*, at 23-4.

irrelevant.<sup>97</sup> However in the instance of causing forced migration, the intention to cause is necessary. The intention may be explicit, for example in mass expulsion situations or in relocating populations for development projects. Or it may be implied because of negligence or recklessness, for example in failing to prevent the movement through negligent conduct, or recklessly failing to give consideration that the inevitable consequence of a particular activity would cause displacement, or deliberate eye-shutting. The principle of strict liability may apply in this situation, although its general acceptance as an overriding principle in international responsibility is controversial. Thus a significant aspect of showing intention is proving the intention or linking it with third party complicity.

Third parties may be implicated, although there is not a direct intention to cause by assisting or supporting a party that seeks to cause forced migration. Complicity might be implied where the third party has the intention to support or assist the causing of forced migration, and applies indirect coercion.<sup>98</sup> The presence of many Afghan refugees in Iran and Pakistan may also be attributed to Soviet politico-military intervention in Afghanistan.<sup>99</sup> The issue of complicity of third parties is by no means certain in international law, but sufficient to note here that the elements would be similar.

Often the intention to cause forced migration in unlawful circumstances is clear from the actions themselves. In some instances, the intention is defended as a legitimate exercise of sovereign rights, for national security or during times of war, for the alleged safety of civilians. Thus to discern an unlawful intention may be difficult. Finding the intention to cause forced migration may possibly be compared with the 'intent' requirement under the Genocide Convention,<sup>100</sup> although a detailed analysis cannot be conducted

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<sup>97</sup> Jennings, *supra*, at 110-111; and see below section 4.9, 'Advocating Against the Use of Human Rights Provisions', which declines to treat refugees as noxious substances.

<sup>98</sup> For example, it is alleged that the US Central Intelligence Agency acts in many countries for the interests of US policy, such as in the support for a regime in Guatemala that allegedly killed more than 100,000 civilians after the overthrow of a leftist government, see Watson, R., *et. al.*, 'What are 'Necessary Evils'?', *Newsweek*, 10 April 1995, 36.

<sup>99</sup> Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80 *Am. J. Int'l. L.* 532, 558.

<sup>100</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article II.

here.<sup>101</sup> Lack of this requirement has been previously claimed by Paraguay when accused of genocide against the Aché Indians.<sup>102</sup> Where intention is contested, it may be implied from the existence of government publications or declarations, from the *prima facie* existence of coercion and movement, and from the application of unlawful acts or acts that violate the prohibition on the abuse of rights.

Where there is mass expulsion, the intention to move is evident, particularly if it is against the will of the persons involved,<sup>103</sup> but the question is whether it is an inherent right of each sovereign state. If it is a sovereign right of states, are there any limits, for example where it is exercised for an unlawful purpose like discrimination or expropriation without compensation? For example, the expulsion of Asians from Uganda in 1972 was clearly based upon ethnic and racial considerations that are discriminatory.<sup>104</sup> It is claimed that expulsion is lawful where firstly, it is essential for the interests of the state; and secondly, to preserve *ordre public*.<sup>105</sup> To expel for other reasons, like genocide, confiscation of property, or unlawful reprisals, would be a violation of international law.<sup>106</sup> Expulsions also require legitimate justifications, thus the expelling authority does have to show 'reasonable cause'.<sup>107</sup>

'The power of expulsion is a sovereign right, in that it pertains to every State for that State's protection, but it is a power which is controlled and limited, particularly by treaty obligations, and generally by the obligations imposed by customary international law.'<sup>108</sup>

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<sup>101</sup> See generally, LeBlanc, L.J., 'The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding' (1984) 78 Am. J. Int'l. L. 369-385, who provides an analysis of the 'intent' requirement.

<sup>102</sup> Arens, R. (ed), *Genocide in Paraguay* (1976).

<sup>103</sup> Note, ILA Declaration on the Principles of International Law on Mass Expulsion (1986), which states in the preamble, '... that 'expulsion' may be defined as an act, or a failure to act, by a State with the *intended* effect of forcing the departure of groups or categories of persons *against their will* from its territory.' (Emphasis added)

<sup>104</sup> Although it was also to perpetuate the unlawful expropriation of property amounting to some 100 million to 500 million pounds sterling, see Goodwin-Gill, 'The Limits of the Power of Expulsion in Public international Law' (1974-75) 47 Brit. Yrbk. Int'l. L. 55, 82-4.

<sup>105</sup> *Ibid*, at 154.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*, at 155.

<sup>108</sup> *Ibid*, at 156.

There is therefore a need to investigate and assess each case of mass expulsion, and the *onus* on the expeller to show cause.<sup>109</sup>

The true intentions of the authority are sometimes hidden behind some pretext or another, like the declaration of non-nationality, although this issue cannot be used to avoid showing reasonable cause in affecting expulsion.<sup>110</sup> John Stuart Mill observed and noted in 1849, ‘... the sentiment of nationality [in parts of Europe] so far outweighs the love of liberty that the people are willing to abet their rulers in crushing the liberty and independence of any people not of their race and language.’<sup>111</sup> The emergence of national identity can be traced to the French Revolution where it defined in broad categories those who belonged to the state and relegated the rest as outsiders.<sup>112</sup> In effect, ‘[n]ationalist ideologists cultivated the view of outsiders as inimical to the health of the nation - a threat to its security, cultural cohesion, or way of life.’<sup>113</sup> Thus the concept of nationality has often been a pretext for unlawful expulsion and exclusion.

Although it is a sovereign right of each state to expel, grant or deny nationality, the exercise of such rights are bound by the principle prohibiting the abuse of rights.<sup>114</sup> Violating this principle would probably not in itself found a cause of action in international law, but may be used to identify the intention behind the causes of movement of persons and be applied as a standard to limit the exercise of sovereign rights.

### 3.6.1.1 Prohibition of the Abuse of Rights

The prohibition of the abuse of rights was postulated as a theory by Politis in 1925, in a series of lectures on ‘*Le probleme des limitations de la souveraineté et la théorie de*

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<sup>109</sup> Too often, the underlying reason for expulsion is not legitimate for example, for political considerations, like in 1980, when 125,000 ‘undesirable’ were induced to leave Cuba, out of which, 3,000 were a mixture of common criminals, psychiatric patients and other ‘aliens’, see ICIHI, *supra*, at 88. See further below section 4.5.1, ‘Mass Expulsion and the Removal of Nationality’.

<sup>110</sup> Simpson, J.H., *Refugees: A Preliminary Report of a Survey* (1938), 59, noted that Hitler and the Third Reich used ethnicity or blood-lines to define nationality by declaring that, ‘the members of the nation may be citizens of the State. None but those of German blood... may be members of the nation’.

<sup>111</sup> As cited by Howard, M., *War and the Liberal Conscience* (1978), 50-51.

<sup>112</sup> Marrus, in Rystad (ed), *the uprooted*, 51.

<sup>113</sup> *Ibid.*

<sup>114</sup> See further below section 4.5.1, ‘Mass Expulsion and the Removal or Nationality’.

*l'abus des droit dans les rapports internationaux*,<sup>115</sup> although he was not the first or last to refer to this concept. During the drafting of the Statute of the Permanent Court by the Advisory Committee of Jurists, the Italian member referred to a principle 'which forbids the abuse of rights' as a 'general principle of law recognized by civilized nations'.<sup>116</sup> The prohibition has been considered a basic element in the international law of torts,<sup>117</sup> a basic principle of international law described as 'world-wide abuses either of the right of national protection or of the right of national jurisdiction', and emphasised that 'no international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible with the general rules and principles of international law.'<sup>118</sup> Evidence of similar concepts are also found in international conventions.<sup>119</sup>

The principle prohibiting the abuse of rights does find support in international law, from authors, international arbitration and judicial awards,<sup>120</sup> even if its precise context and perspective are controversial. The debate concerning the content of the prohibition may be divided into three groups. In its widest formulation, the first group sees it as an extension

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<sup>115</sup> Politis, *'La theorie de l'abus des droit'* (1925) 6 Recueil des Cours 5.

<sup>116</sup> Proceeding of the Advisory Committee of Jurists (16 June to 24 July 1920), 315-16; as cited by Garcia-Amador, Fifth Report of the ILC, UN Doc. A/CN.4/125, [1960] ii Yrbk. I.L.C. 41, 58.

<sup>117</sup> Lauterpacht, H., *The Function of Law in the International Community* (1933), 298. (Hereinafter, Lauterpacht, function of law).

<sup>118</sup> *Opinion of the Commissioners* (US-Mexico General Claims Commission) (1927), 23; as cited by Garcia-Amador, Fifth Report, *supra*, at 59.

<sup>119</sup> For example, Geneva Convention on the High Seas (1958), Article 2, which requires reasonable regard for the interests of other states.

<sup>120</sup> For example, in the *Fur Seal Arbitration* (GB v. US) (1893) 1 R.I.A.A. 755, 889-890; as cited by Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 121-2, it was articulated as a rule, that a cause of action did arise where the exercise of a right was for a malicious purpose, to cause injury to others and was approved, not merely by the President of the tribunal, but also by both Agents; in the *Free Zones of Upper Savoy and the District of Gex Case* (France v. Switzerland) (Judgement) [1932] P.C.I.J. Ser. A/B. No. 46, at 167, the PCIJ claimed, '[a] reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon.' It was admitted by the German Government that the exercise of a right for no other motive than to injure others constitutes an abuse of rights, in the case of *Certain German Interests in Polish Upper Silesia* [1926] P.C.I.J. Ser. C. No. 11-I, at 136; and in the *Anglo-Norwegian Fisheries Case* (UK v. Norway) [1951] I.C.J. Repts. 116, 141-2, the ICJ applied the 'reasonableness' test as a standard in determining if 'manifest abuse' had occurred; various dissenting and separate opinions have also referred to the principle, see Cheng, *supra*, at 121, note 2.

of the international law of torts.<sup>121</sup> It has thus been expressed as a substantive element prohibiting the exercise of rights 'in such a manner that its anti-social effects outweigh the legitimate interests of the owner of the right'.<sup>122</sup> This group attributes a wide context to which the principle could be applied, particularly as a tortious cause of action.

A second group accepts the existence of the concept of abuse of rights, but argue a narrower perspective that operates to prohibit the exercise of a 'power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used.'<sup>123</sup> The ILA provided an even more restrictive approach which claimed, '[n]o one may exercise his rights in such a manner as to damage another when causing this damage is the purpose of exercising such rights.'<sup>124</sup> An act became wrongful only where the intention was to injure another, effectively saying, an abuse of right would not occur if some element of self-interest was the main purpose of actions that caused the damage.<sup>125</sup> This position creates two difficulties, firstly, the exercise of a right to cause an injury on another state without some self-interested motive is very rare; and secondly, 'it is difficult to establish what is supposed to amount to an abuse, as distinct from a *harsh but justified use*, of a right under international law.'<sup>126</sup>

Whilst the first group operates on the basis of an international tort, the second group requires malicious or deliberate intent to use the exercise of a right to injure others. A final third group on the other hand rejects the concept, denying its function in the decision making process by denying its applicability in international law.<sup>127</sup>

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<sup>121</sup> Lauterpacht, function of law, at 298; Cheng, *supra*, at 121-36; and Separate Opinion of Judge Ammoun who described the prohibition similarly as an 'international tort' like the denial of justice, *Barcelona Traction Case* (Belgium v. Spain) [1970] I.C.J. Repts. 324;

<sup>122</sup> Friedmann, Wolfgang, 'The Uses of 'General Principles' in the Development of Public International Law' (1963) 57 Am. J. Int'l. L. 279, 288.

<sup>123</sup> Taylor, 'The Content of the Rule against Abuse of Rights in International Law' (1972-3) 46 Brit. Yrbk. Int'l. L. 323, 352.

<sup>124</sup> ILA, 'Report of the Committee on Legal Aspects of the Conservation of the Environment', Report of the Fifty-eighth Conference of the International Law Association (1978), 404.

<sup>125</sup> *Ibid*, at 405.

<sup>126</sup> Schwarzenberger and Brown, *A Manual of International Law* (6th edn., 1976), 84. (Hereinafter, Schwarzenberger and Brown, manual).

<sup>127</sup> *Ibid*, at 86.

Schwarzenberger, having considered it as a hypothesis and attributing *lex lata* where it was verifiable, found that other principles would operate more convincingly and with firmer authority in law.<sup>128</sup> It was however noted, that the considerations in his analysis applied only to the ‘unorganised society’,<sup>129</sup> and the ‘organised society’ came under a separate regime where the principle may find significance in the ‘lawyer’s technical language’.<sup>130</sup> Therefore the significance of Schwarzenberger’s arguments does not deny the existence of the rule in international law, as this wide *caveat* excluded the significance of international judicial determinations. Brownlie limited the use of the prohibition by identifying its elements as existing within other principles of international law, thereby concluding that on its own the principle did not exist in positive international law.<sup>131</sup> Schwarzenberger argued similarly that the rule of *jus aequum*<sup>132</sup> would apply in violations of provisions of treaties or customary rules that evolved from treaties, instead of the prohibition, because the former is well established in customary international law.<sup>133</sup> He also argued that the principle could not exist as a general principle recognised by civilised states,<sup>134</sup> because no support is found in either English, Italian, or Roman law.<sup>135</sup> However, Brownlie is able to point to several domestic legal regimes that do recognise this principle.<sup>136</sup>

The concept of *droit abuse* does exist in most legal systems, as Ago and Brownlie suggest, however its scope and application does differ between states. A principle recognised by civilised states may or may not exist, depending upon the definition and scope given to the principle and its particular application, which in this case is contentious.

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<sup>128</sup> Schwarzenberger, *International Law and Order* (1971), at 85. (Hereinafter, Schwarzenberger, law and order).

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, at 109.

<sup>131</sup> Brownlie, state responsibility, at 52.

<sup>132</sup> A rule that rights are relative and must be exercised reasonably and in good faith.

<sup>133</sup> Schwarzenberger, law and order, at 86.

<sup>134</sup> Article 38(1)(c) Statute of the International Court of Justice.

<sup>135</sup> Schwarzenberger, law and order, at 86, notes 10, 11 and 12.

<sup>136</sup> For example, Article 1912 of the Mexican Civil Code states, ‘[w]hen damage is caused to another by the exercise of a right, there is an obligation to make it good if it is proved that the right was exercised only in order to cause the damage, without any advantage to the person entitled to the right.’ Cited in Brownlie, state responsibility, at 51; see also, Ago, Third Report, [1971] ii Yrbk I.L.C. 221-2, para. 67-9.

Its consistent application as a cause of action depends on individual states acting within their jurisdictions.<sup>137</sup> The prohibition of the abuse of rights does exist as a principle of international law, regardless of language,<sup>138</sup> but its applicability as a cause of action is doubtful because of this inconsistent application.<sup>139</sup> Although gaining ‘currency’, it seems to lack precise form in character, extent and consequences.<sup>140</sup> However this does not mean that the principle cannot act as a guide in adjudication, even if it cannot be applied as an independent cause of action. The basis of this principle has been claimed to rely on the interdependence of rights and obligations, and the relativity of exercising a right with respect to other obligations in international law, whether treaty or custom.<sup>141</sup> The principle might necessarily be present in determining the compliance of the rule of *jus aequum*, particularly since the condition of good faith is considered fundamental to any conduct of inter-state affairs or the exercise of rights.<sup>142</sup> Therefore, if a precondition of good faith must be present, and if as was claimed, that the international courts already treat the whole body of international law as *jus aequum*, interpreting and applying rules on that basis,<sup>143</sup> then the operation of a principle prohibiting the abuse of rights already exists as a guide in adjudication.

The most cogent claim for the existence of the prohibition is that it fills the gaps in international law,<sup>144</sup> to satisfy a need for the principle in areas not specifically covered by

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<sup>137</sup> Friedmann, *supra*, at 288. For example, in the former Soviet Union, the rights of individuals were subordinate to those of the community, it would not be an abuse of right if the community exercised a particular right to the detriment of an individual’s right. On the other hand, in some Muslim jurisdictions the individual’s property rights are almost absolute and the community cannot limit its exercise even if it seems the exercise is abusive; see Friedmann, *supra*, at 289, note 33.

<sup>138</sup> Gutteridge, ‘Abuse of Rights’ (1933) 5 Cambridge L.J. 22; and Lauterpacht, H., *The Development of International Law by the International Court* (1958), 162.

<sup>139</sup> As Judge Read (dissenting) claimed, ‘[p]ractically speaking, it is, ... impossible for an international tribunal to examine a dispute between two sovereign States on the basis of either good or bad faith or of abuse of law.’ *Case of Certain Norwegian Loans* (France v. Norway) (Preliminary Objections) [1957] I.C.J. Reps 9, 94 (dissenting opinion of Judge Read); and Schwarzenberger, law and order, at 84.

<sup>140</sup> Fitzmaurice, Gerald, ‘The Law and Procedure of the International Court of Justice, 1951-54: General Principles, and Sources of Law’ (1953) 30 Brit. Yrbk. Int’l. L. 1, 53-54.

<sup>141</sup> Cheng, *supra*, at 131.

<sup>142</sup> In *Megalidis Case* (1928) 8 T.A.M. 386, 395, it was claimed to be ‘the foundation of all laws and all conventions.’

<sup>143</sup> Schwarzenberger and Brown, manual, at 24.

<sup>144</sup> Garcia-Amador, Fifth Report of the ILC, *supra*, at 58-60.

conventions or customary international law.<sup>145</sup> However, often the difficulty lies in the identification of whether there was a violation of the principle, which might then lead to a cause of action or a violation of an international obligation *stricto sensu*.<sup>146</sup>

Schwarzenberger claimed that where there is an invasion of the rights of other subjects of international law, it is not an abuse of rights, but an international tort.<sup>147</sup> For example, the unlawful expulsion of aliens itself creates a cause of action, where the unlawfulness is represented by the desire to expropriate the alien's property or because of some other discriminatory or unreasonable purpose. Thus the abuse of rights does not serve as the basis of illegality. When a treaty or principle under customary international law is violated, international responsibility is attracted and a minimum reaction to that responsibility has to be disassociation from the wrongful act.<sup>148</sup> 'To attempt to derive rights from a contravention of international law amounts to perseverance in the illegal act and constitutes in itself an international tort.'<sup>149</sup>

Therefore, to seek to rely on the prohibition of an abuse of rights as a cause of action is like the use of a double-edged sword. On the one hand, it makes wrong what would otherwise be legitimate; whilst on the other hand, to persist in calling the action that commits a wrong as a right, will in itself be a wrong. In other words, the failure to disassociate from that act goes against the concept and obligation of reparations to *status quo ante*. This proposition was supported by the ILC, which found no need to examine the doctrine as a distinct concept, because 'if there were situations in international law in which the exercise of a right was subject to limits, that was because there was a rule which imposed the obligation not to exceed those limits. In other words, the abusive exercise of a right then constituted failure to fulfil an obligation.'<sup>150</sup> Or as Cheng articulated, '[t]he existence of the obligation explains the illegality of the abusive exercise of the right.'<sup>151</sup>

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<sup>145</sup> *Ibid*, at 60.

<sup>146</sup> *Ibid*.

<sup>147</sup> Schwarzenberger, *law and order*, at 89.

<sup>148</sup> *Ibid*, at 91.

<sup>149</sup> *Ibid*.

<sup>150</sup> Ago, Summary Records of the 25th Session, [1973] i Yrbk. I.L.C. 19; UN Doc. A/CN.4/Ser. A (1973).

<sup>151</sup> Cheng, *supra*, at 131, note 28.

Thus the nature of the abusive exercise of a right depends upon the initial obligation of the state. Therefore, to cause human suffering by denationalising citizens, coercing their transboundary movements or relocating without compensation would be a violation of some primary obligation not to do so.<sup>152</sup> In fact, de Arechaga clearly dismissed the existence and applicability of the principle, as it could not act as an exception to the general requirement that an unlawful action is a prerequisite for international responsibility.<sup>153</sup>

The attraction of certain writers to favour the inclusion of the prohibition of the abuse of rights to plug the gaps in international law thus seem initially enticing.<sup>154</sup> Yet even if it were not able to found a cause of action *per se*, one positive response to their arguments would be to use the prohibition as a means to determine the intention behind state action. For example, in the exercise of the right to expel, the act of expulsion could be for the intention of expropriation of property or even for genocide, thus '[i]n such cases the exercise of the power cannot remain untainted by the ulterior and illegal purpose.'<sup>155</sup> In application as judicial guidelines, the abuse of rights or bad faith cannot not be presumed in every case,<sup>156</sup> but determining an abuse of rights can contribute to the identification of unlawful conduct.

'The question is one of substance involving the existence or non-existence of a 'primary' rule of international law - the rule whose effect is apparently to limit exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise... If it was recognised that existing international law should accept such a limitation and prohibition, the abusive exercise of a right

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<sup>152</sup> See further on the wrongfulness element in Chapter 4.

<sup>153</sup> de Arechaga, 'International Responsibility', in Sorensen (ed), *Manual of Public International Law* (1968), 540 (hereinafter, Sorensen (ed), manual). On the other hand, see Akehurst, M., 'Jurisdiction in International Law' (1972-73) 46 *Brit. Yrbk. Int'l. L.* 145, 188-9 (hereinafter, Akehurst, jurisdiction), who identified a situation where a state will violate international law where the content of its legislation is contrary to international law, thus giving rise to genuine cases of abuse of rights as causes of action. A state is entitled to legislate on any matter it chooses, however, an abuse occurs where the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating state (at 189). Note the example of the 1920 proposed legislation to encourage seamen to defect from foreign ships to US vessels, see Briggs, *The Law of Nations* (2nd edn., 1952), 353; and Akehurst, jurisdiction, at 189.

<sup>154</sup> See generally, Kiss, *Abus de droit en droit international* (These, Paris, 1952), 139-41; Politis, 'La theorie de l'abus des droit' (1925) 6 *Recueil des Cours* 5, 107.

<sup>155</sup> Goodwin-Gill, 'The Limits of the Power of Expulsion in Public International Law' (1974-5) 47 *Brit. Yrbk. Int'l. L.* 55, 79.

<sup>156</sup> *Certain German Interests in the Upper Silesia Case* (Merits) [1926] P.C.I.J. Ser. A, No. 7, at 30 and 37-8.

by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others... If the existence of an internationally wrongful act was recognised in such circumstances, the constituent element would still be represented by the violation of an obligation and not by the exercise of a right.’<sup>157</sup>

In a sense, the principle is not useful as a cause of action, but is helpful in focusing attention on the intentions and motives of states.<sup>158</sup>

Besides identifying intentions and motives, the abuse of rights could also act as a standard to evaluate the exercise of certain rights and duties. For example, domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas*, which prevents a state from exercising its rights and ‘saddling’ other states with their unwanted population.<sup>159</sup> Thus abusing the right of expulsion would be a violation of a primary obligation, and further, it would be an abuse of rights to avoid the obligation to receive back unlawfully expelled nationals by removing the nationality of the expelled population.<sup>160</sup> The denationalising of individuals might be a sovereign right of a state, however to exercise this right so as to avoid an obligation to receive back its own nationals would be an abuse of rights.<sup>161</sup> In this respect, a state that creates conditions unsuitable for the return of expelled populations, like the settlement of other populations of people, would also be acting in abuse of its rights,<sup>162</sup> where the use of territory is seen as an exercise of a sovereign rights. In these situations, the unlawfulness is founded on the exercise of a right for an unlawful or inappropriate intention, thereby making the exercise of the right unlawful. The wrongfulness of the act is in the unlawful expulsion of nationals and the violation of an obligation to accept them back. The principle prohibiting the abuse of rights simply allows a standard to be drawn against the lawful or unlawful exercise of a sovereign right.

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<sup>157</sup> Ago, [1970] ii Yrbk. I.L.C. 177, 193; UN Doc. A/CN.4/233.

<sup>158</sup> Goodwin-Gill, ‘The Limits of the Power of Expulsion in Public International Law’ (1974-5) 47 Brit. Yrbk. Int’l. L. 55, 82.

<sup>159</sup> Jennings, ‘Some International Law Aspects of the Refugee Question’ (1939) 20 Brit. Yrbk. Int’l. L. 98, 112.

<sup>160</sup> See further section 4.5.1, ‘Mass Expulsion and the Removal of Nationality’.

<sup>161</sup> Jennings, *supra*, at 112.

<sup>162</sup> *Ibid.*

The principle prohibiting the abuse of rights can also be used to evidence bad faith, improper purpose or discrimination. It has thus been claimed that a state acts in bad faith where it abuses its rights. For example in the *Tacnei-Arica Question*,<sup>163</sup> the Tribunal found that Chile acted in bad faith in conscripting young Peruvians into the armed forces with the aim of forcing them to leave the land in question.<sup>164</sup> The action was an abuse of right because it was an exercise of a right - administrative jurisdiction of the land - in bad faith, to encourage the movement of Peruvians out of the land. Thus the Tribunal examined the stated intent (*ex facie* bad faith) and the effect of the decision (implied bad faith). The principle can also by *ex facie*, or by implication, evidence an improper purpose<sup>165</sup> or discrimination.<sup>166</sup> Thus for example, deportation for an ulterior purpose, beyond the professed authorised purpose would make it unlawful.<sup>167</sup> Although the standard of proof for the latter will require exceptional circumstances that show the harm to be inexplicable on any other factor.<sup>168</sup>

It would seem most acceptable, in view of the arguments above, to claim that the principle prohibiting the abuse of rights does exist as a general principle of international law. Although it may not in itself found a cause of action,<sup>169</sup> it may be applicable as a standard to assess the validity of state action. Like the use of equity, it could be ‘a yardstick, a way of measuring and interpreting legal rights and obligations.’<sup>170</sup> This doctrine must exist ‘in the background in any system of administration of justice in which courts are not purely mechanical agencies’,<sup>171</sup> although its application ‘must be wielded with studied

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<sup>163</sup> *Tacnei-Arica Question* (1925) 2 R.I.A.A. 921

<sup>164</sup> Taylor, *supra*, at 335-6.

<sup>165</sup> *Ibid*, at 327.

<sup>166</sup> *Ibid*, at 340.

<sup>167</sup> *R v. Governor of Brixton Prison, ex parte Soblen* [1962] 3 All E.R. 641, 661, *per* Lord Denning MR.

<sup>168</sup> *Church of Scientology v. UK* (Req. No. 3798/68) (1969) Yrbk. E. Comm. H. Rights 306, 322; and Taylor, at 340.

<sup>169</sup> Although it was argued as a separate heading in the final submission of Belgium, *Barcelona Traction Case* (Second Phase) [1970] I.C.J. Repts. 4, 17; however, the Court did not deal with the abuse of rights *per se*.

<sup>170</sup> Friedmann, *supra*, at 289.

<sup>171</sup> Lauterpacht, *The Development of International Law by the International Court* (1958), 165.

restraint.’<sup>172</sup> The principle concerning the prohibition on the abuse of rights can therefore be used to discern whether there is an intention to cause forced migration.

### 3.6.2 COERCION

The element of coercion must exist in order for movement to be forced migration.<sup>173</sup> This section will deal with the question of what acts amount to coercion, whether there is a distinction between direct and indirect coercion, and why a distinction might be maintained? The concept of direct and indirect coercion may refer to two situations. The ILA defined ‘direct’ coercion to mean the use or threat of force to compel departure in violation of basic human rights, whilst ‘indirect’ coercion referred to ‘the deliberate creation or perpetuation of conditions that so violate basic human rights as to leave people with little choice but to flee their homelands.’<sup>174</sup> This distinction does not seem to further an understanding of the nature of causes of forced migration or distinguish them from other movements. There seems to be no real difference in outcome, whether a government applies the ‘direct’ threat of force to compel departure, or the ‘indirect’ starvation of the population by removing the means of subsistence. They are both in fact, acts of coercion calculated and intended to produce the same effect.

There is perhaps some merit in considering the use or threat of force applied against a group as direct coercion, whilst identifying other push factors like poverty, famine or natural disasters as indirect coercion based on omission of the state authorities to alleviate the suffering or detrimental economic situation. On the other hand, whether the authorities act to cause, or omit to act and thereby cause, they still cause, possibly in violation of obligations not to cause. What might separate the two situations is whether an intention to cause exists. Where the threat or use of force is applied, the intention might be more obvious, whilst in the omission situation, the intention is less obvious, although a claim that the authorities were negligent or reckless in omitting to act might suffice for an implied

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<sup>172</sup> *Ibid*, at 164.

<sup>173</sup> Coles, 1992 report, at 13, who suggested that this was in line with the Experts Report, to distinguish refugees within their scope of research and those outside.

<sup>174</sup> Lee, L.T., ‘Report of the International Committee on the Legal Status of Refugees’, Cairo Conference of the ILA (1990), Commentary to Draft Declaration of Principles of International Law on Compensation to Refugees, Principle 1.

intention to cause. It would thus seem that to distinguish direct or indirect coercion by the type of activity is superfluous to the understanding of causes. Perhaps the narrower confines of research for both the ILA and Experts Report might explain the eventual use of the direct/indirect concept.<sup>175</sup> Both dealt primarily only with states of origin responsibility and the attribution of blame to armed conflicts, whilst introducing indirect responsibility where complicity existed either in states assisting in the threat or use of force, or states assisting in the causing of indirect coercion.

The use of the same terms in this thesis will adopt a broader perspective. Consistent with the aim of investigating international responsibility for causes of forced migration, this research will seek not only to discuss the responsibility of states of origin, but also other states and organisations that contribute towards the causes.<sup>176</sup> It is proposed that direct coercion will be acts of coercion applied directly to the victims, which includes both ILA situations, including either an invading foreign state or a state of origin massively violating basic human rights. Thus any activity that is applied directly to the victims, whether it be cutting water supplies, preventing employment, or sending armed troops to round-up for expulsion, are direct acts from an authority against the victims.

Indirect coercion would refer to actions that are applied via a subsidiary means to coerce the victims. For example, an organisation that funds a development project, which forcibly relocates an indigenous population. In a sense, the organisation does not directly apply the coercion, although the state organs may. but it applies indirect coercion because it finances a project that causes forced migration. Thus the coercion is applied indirectly through the organs of the state of origin. Similarly, a state applies indirect coercion by supporting a regime that consistently violates the human rights of their citizens.<sup>177</sup> This alternative use of the terms specifically identifies the application of coercion, and recognises that several actors may be involved in causing forced migration. It also acts to distinguish levels of responsibility between participators in creating forced migrants. Not all acts that contribute towards the causing of forced migrants bear the same degree of

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<sup>175</sup> The Experts Report also maintained the distinction between direct and indirect coercion, although they never specifically identified what would amount to an indirect coercion, see Experts Report, para. 5.

<sup>176</sup> See section 4.5.3, 'Supply of Arms or Aid'.

<sup>177</sup> See section 4.5.3, 'Supply of Arms or Aid' and Chapter 5.

blameworthiness. Some actions would deserve more serious consequences than others. However, making distinctions on these premises, allow for a clearer conception of the nature of causes.

Any acts applied to dictate the will of persons to move - whether economic or armed force - is inherently coercive in nature, as they aim for the same result. However, not all acts of coercion would be unlawful. Some acts of coercion are conducted for the interests of the persons involved. This is not to suggest that all claims for the greater good necessarily legitimise acts of coercion, but a balance has to be maintained and each situation analysed from its own unique circumstances. It is advocated that western concepts of civil and political freedoms may not necessarily override all other considerations.<sup>178</sup> For example, forcible relocation may sometimes be necessary because tribal superstition causes some groups of people to refuse to move voluntarily, yet if properly planned, with provision of good accommodation, employment, compensation and other basic necessities, this might suggest that the initial coercion was not unlawful. Thus coercion has to be viewed in light of the intention and consequences.

Fundamental tension may exist where a developing state seeks to provide economic growth for its people, but has to limit the exercise of political and civil rights whilst doing so. In such a situation, it may be argued, economic development outweighs the necessity of enjoying full civil and political rights. States that pursue this policy have to show *bona fide* intentions to provide for all their citizens without discrimination. They must provide for reasonable forms of redress, compensation and a clearly better standard of living. Thus, the element of coercion cannot be discussed on its own, but is dependant upon other elements. This is in line with the functional perspective, for the regime of international responsibility requires that an international wrongful act be committed. Where there is a situation of dam building or some other lawful development project - i.e., acts permitted as an exercise of territorial sovereignty - then whether the coercive action would lead to a cause of action has to be viewed in the light of the resulting consequences. For example, where there is a failure to compensate or the causing of death and injury. It should be emphasised that coercive actions, which are inherently unlawful under international law, can never be

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<sup>178</sup> See section 4.9, 'Advocating Against the Use of Human Rights Provisions'.

condoned, even if the resulting consequences were beneficial to a majority of persons. Thus, extra-judicial killings to encourage resettlement in vastly improved housing estates with the finest facilities, would not excuse nor defend the unlawful killing. It is not acceptable for an authority within a state to exercise discrimination against minority groups, even if the majority benefits accordingly. It is advocated that coercive actions should be reviewed within their particular facts, without a hierarchical preference for either civil and political rights, or economic, social and cultural rights.<sup>179</sup>

Apart from direct instances of coercion, indirect causes of forced migration are often hidden amidst other combined and complex direct causes. Attention is often given to the direct root causes of displacement, whilst ignoring indirect causes.<sup>180</sup> The causes of armed conflicts also have indirect contributors - the arms dealers, the arms manufacturers, and the governments who support the conflict from the relative comfort of their own peaceful countries.<sup>181</sup> There are those who trade with governments accused of creating forced migrants, thereby providing them with international legitimacy.<sup>182</sup> A Swiss inter-ministerial strategy group on refugees concluded that foreign support for repressive regimes contributed to mass displacement, whether that support permitted human rights violation to continue or the continuance of war and internal conflicts.<sup>183</sup>

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<sup>179</sup> See section 4.9, 'Advocating Against the Use of Human Rights Provisions'.

<sup>180</sup> For example, most Asian refugees who left Uganda during the reign of Idi Amin were expelled or their lives were made so difficult for them, they had to leave. Yet there were also indirect contributors, for example those who supported Idi Amin, who provided the means from which he was able to commit such brutal acts.

<sup>181</sup> This was suggested in the programme *Network First*, where complicity with the 1975 Indonesian invasion of East Timor was attributed to several third states. It was alleged that the invasion was acknowledged and approved by H. Kissinger then Secretary of State for the US, the UK government, and planned and approved by G. Whitlam then premier of Australia, see ITV's *Network First*, 22 February 1994, a film by David Munro and John Pilger.

<sup>182</sup> See generally, Brockett, C.D., 'The Right to Food and United States Policy in Guatemala' (1984) 6 Hum. Rts. Q. 366, who argues that support for regimes that perpetuate the hunger problem is inherently wrong, but all too evident from the policies of the US, which continues to support such regimes.

<sup>183</sup> Report of the inter-ministerial group, *Possible Swiss Strategy for a Refugee and Asylum Policy in the 1990's* (1989), 13; cited in Gilbert, *supra*, at 417.

The element of coercion may thus take varied forms, whether it is direct or indirect, whether it is the denial or violation of whatever human or basic rights. In some instances, coercion has to be seen in relation to intentions and detrimental effects.

### 3.6.3 DETRIMENTAL CONSEQUENCES

The third element occurring in forced migration is a detrimental consequence - a harm or negative effect consequent on the intention to cause flight, combined with the application of coercive action. Where the 'victims' end up in a position significantly better than before, then there would be no cause for complaint, unless the coercive action itself amounts to an international wrongful act. Once again, this proposition does not suggest that a non-detrimental consequence would excuse or defend an inherently unlawful act or intention. However, to amount to forced migration, the element of detrimental consequence has to be present. On the other hand, a detrimental consequence without a prior unlawful act may not attract international responsibility, unless the detriment itself violates international law.<sup>184</sup>

Various parties may suffer detrimental effects that are consequences of the intention and coercion. International responsibility may result from the failure of states to observe basic human rights, apart from what they owe to individuals. The issues therefore need examination from the perspective of violations against the international community as well.<sup>185</sup> In many instances, the advent of injury will be significant, however not a

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<sup>184</sup> For example, a state may act entirely lawfully, yet cause damage to another state's interest, especially if 'interest' receives a broad interpretation, like the use of section 301 of the US Trade Act which allows unilateral retaliatory action in response to perceived unfair trade barriers against US exports, but is generally used as a threat against trading partners, see generally, Oman, R., 'Intellectual Property after the Uruguay Round' (1994) 42 *Journal of the Copyright Society of the U.S.A.* 18, 35. My gratitude to Charmaine Wee for explaining the use of the 'super 301'. The ILC in fact has considered the separate issue of international liability for injurious consequence arising out of acts not prohibited by international law, see Barboza, Fifth Report of the Special Rapporteur, UN Doc. A/CN.4/423 (1989). For consideration of lawful acts as a separate regime, see Simma, 'Self-Contained Regimes' (1985) 16 *Neth. Yrbk. Int'l. L.* 111.

<sup>185</sup> Nanda, 'International Law and the Refugee Challenge: Mass Expulsion and the Internationally Displaced People' (1992) 28 *Willamette L. Rev.* 791, 800, although directed specifically at refugees, does affirm the potential of obligations owed *erga omnes*; and see section 5.3, 'Obligations Owed *Erga Omnes* as a Basis for Action'.

prerequisite for responsibility. The concept of damage would seem not to have a 'material or patrimonial character.'<sup>186</sup> In fact,

'[e]very breach of an engagement vis-à-vis another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State. As Anzilotti stated in his first work on the topic, international responsibility derives its *raison d'être* purely from the violation of a right of another State and every violation of a right is a damage.'<sup>187</sup>

The issue of the 'injured' party will be discussed in Chapter 5, together with the legal and jurisdictional standing to commence an action in international law, but suffice to note here that a detrimental consequence is an element occurring in forced migration, an element that includes a mere violation of a right.

### 3.7 NATURE OF THE CAUSES OF FORCED MIGRATION

The three elements that underlie forced migration are, therefore, the intention to cause flight, internally or externally, whether a cause of 'ethnic cleansing', urban development, exploitation of natural resources, civil war or other armed conflicts; the element of coercion, which may be massive violations of human rights, denial of the means of subsistence, perpetuation of armed conflicts, or in many instances, a combination of these factors, whether it is applied directly or indirectly; and the detrimental circumstances that the 'victims' and other parties find themselves in. These circumstances may be refugee camp conditions, the dependence upon aid and the goodwill of countries of refuge, or other generally unfavourable conditions. These elements combine to identify the nature of the causes of forced migration.

Knowledge and identification of the nature of causes of forced migration should not overlook the nature of forced migration itself. Whatever the considerations that contribute towards root causes, whatever the elements may be, at the heart of forced migration are human beings, placed in circumstances beyond their control, violated and oppressed beyond their tolerance, abused to the extent they have no choice but to uproot and move. Whether

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<sup>186</sup> de Arechaga, *supra*, at 534.

<sup>187</sup> Ago, 'Second Report on State Responsibility' [1970] ii Yrbk. I.L.C. 177, 195, with reference to Anzilotti, *Teoria Generale Della Responsibilita Della Stato Nel Diretto Internazionale* (1902).

it be movements beyond state borders or internally, an intricate part of the nature of forced migration is the intense suffering of human beings. The elements of forced migration are important in identifying the unlawfulness of the creation of forced migration.<sup>188</sup> It distinguishes the situation where a state acts *bona fide* in the interest of the all the people, and it sets apart the instance where populations consent to be moved.<sup>189</sup>

## PART II - SOLUTIONS

### 3.8 GLOBAL SOLUTIONS

Having identified the dynamics, considerations, elements and nature of causes of forced migration, attention will now be given to the desired solutions. UNHCR has identified twin elements as challenges for protection in the 1990s,<sup>190</sup> the protection of those fleeing, and establishing an environment where people do not have to seek protection outside their countries. Thus affirming that,

‘[s]afeguarding human rights is a domestic responsibility of sovereign states, and one of the primary objectives of the United Nations. It is a goal in its own right, and a necessary condition for the attainment of international peace and security. For both these reasons, it is here that the solution to the refugee problem must begin.’<sup>191</sup>

In accordance with these elements, the investigation into solutions will be divided into measures when forced migration occurs and preventative measures.<sup>192</sup>

It is generally accepted that third state resettlement and local integration therein is no longer a realistic option.<sup>193</sup> The majority of displaced persons do eventually return home.

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<sup>188</sup> See further Chapter 5.

<sup>189</sup> See for example, the Inter-American Commission on Human Rights decision on the legality of displacement of the Miskito Indians in Nicaragua, Doc. 10, Rev. 3, 29 November 1983, 21; cited by Beyani, ‘State Responsibility for the Prevention and Resolution of Forced Population Displacement in International Law’ (1995) *Int’l. J. Refugee L. - Special Edition* 130, 135; see also, section 5.11, ‘Population Transfer as a Last Resort’, which identifies the primary requirement for lawful population transfers as voluntariness.

<sup>190</sup> UNHCR, *state of the world’s refugees*, at 141.

<sup>191</sup> *Ibid*, although clearly applicable to forced migration generally.

<sup>192</sup> Also suggested by Gilbert, *supra*.

<sup>193</sup> UNHCR, *state of the world’s refugees*, at 3.

Therefore, more emphasis should be given to causes before flight occurs and the addressing of conditions within the state of origin after flight has occurred. Action on behalf of forced migrants should focus on preventing the conditions that compel them to flee, and only failing that, the restoration of conditions within a state sufficient for it to carry out its responsibilities to its citizens.<sup>194</sup> Both preventative and reactive responses are needed in a comprehensive programme and they should operate simultaneously, complimenting one another. The primary obligation in either response lies with the causing states and the state of origin. A state is under a duty to assist in the solution of a problem it has created or helped create,<sup>195</sup> and states of origin ‘... *must accept the responsibility for the burdens they inflict upon their neighbours, the international community, and above all, their own people.*’<sup>196</sup> At the very least, there is a duty to alleviate the burden placed on states of refuge.<sup>197</sup> It is also therefore the concern of the international community to apply concerted efforts utilising all mechanisms - economic, legal and political - to eradicate root causes.<sup>198</sup>

### 3.8.1 MEASURES WHEN FORCED MIGRATION OCCURS

The fact that forced migration occurs *ipso facto* suggests that serious difficulties persist within the state of origin. Whether the movement is transboundary or internal, ultimately, a peaceful settlement within the state has to be reached, the considerations that contributed to the cause has to be addressed, and a sense of confidence and security needs to be created.<sup>199</sup> Kouchner emphasised,

‘[t]he ideal which is all too often forgotten, is not to put refugees in camps in a neighbouring country - an approach which the international community has resigned itself as the lesser evil. No, the ideal is for refugees to return home

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<sup>194</sup> *Ibid*, at 141.

<sup>195</sup> Jennings, *supra*, at 113.

<sup>196</sup> Moussalli, Michel, ‘UNHCR and New Challenges’, in Lee (ed), Office of the US Co-ordinator for Refugee Affairs, *The Second Annual Refugee Day* (30 October 1991), 64-5, commenting on refugees. (Italics added)

<sup>197</sup> Report of the Committee on International Assistance to Refugees, presented to the Council of the League of Nations, 20 June 1936, League Documents, C.2, M.2, XII, 1936.

<sup>198</sup> Moussalli, *supra*, at 65, whose primary concern was the eradication of human rights violations.

<sup>199</sup> Deng, (1995) 14 (1&2) *Refugee Survey Quarterly*, at 270, para. 258-9.

protected, and eventually for the situations that cause them to leave to be prevented. Prevention rather than cure - the old adage is still true.<sup>200</sup>

Solutions when flows occur have to be both reactive and responsive at the same time. An essential goal is to find durable solutions and to encourage voluntary repatriation,<sup>201</sup> whether refugees or internally displaced, who are also human beings in distress, deserving of international assistance.<sup>202</sup>

### 3.8.1.1 Voluntary Repatriation and Integration

Voluntary repatriation and reintegration are the most important solutions in transboundary forced migration,<sup>203</sup> whilst for the internally displaced, return to their homes or integration within new communities are the desired solutions. Where it is impossible to return to specific homes, the relocation programmes must nevertheless follow the same procedures as in repatriation, and this regime and conditions would be similarly applicable to those internally displaced.

Perhaps one of the earliest statements from the UN concerning repatriation of refugees was in 1946. It was declared that refugees shall not be compelled to return if, '... in complete freedom and after receiving full knowledge of the facts, including adequate information from the Government of their countries of origin, expressed valid objections to returning to their countries of origin ...'<sup>204</sup> This established the concept that repatriations must be an informed and voluntary decision. Many GA resolutions have since authorised UNHCR involvement in rehabilitation, resettlement and reintegration programmes.<sup>205</sup> In

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<sup>200</sup> Kouchner, Bernard, 'The Right of Humanitarian Intervention', in Lee (ed), Office of the US Coordinator for Refugee Affairs, *The Second Annual Refugee Day* (30 October 1991), 35, founder and president of *Medecins sans Frontieres* advocates for the use of concerted humanitarian assistance to conduct appropriate operations, like GA Res. 45/100 (1990), which endorsed a multi-lateral response whenever people are in distress.

<sup>201</sup> Martin, S.F., *Refugee Women* (1991), 64. (Hereinafter, Martin, refugee women).

<sup>202</sup> Moussalli, *supra*, at 66; and Aga Khan, 'Looking into the 1990s: Afghanistan and other Refugee Crisis' (1990) *Int'l. J. Refugee L. - Special Edition* 14, 23, who places emphasis on solving the problem of internally displaced persons.

<sup>203</sup> See for example, the UN solution to the 10 million refugees fleeing East Pakistan, GA Res. 2790 (XXVI), 6 December 1971.

<sup>204</sup> GA Res. 8(I), 12 February 1946, which also stipulated two exceptions, which were war criminals and certain Germans outside Germany.

<sup>205</sup> See Goodwin-Gill, *the refugee*, at 220, notes 17 and 18.

practice, the UNHCR Executive Committee has declared the promotion of and obligations towards voluntary repatriation as a 'primary responsibility of States.'<sup>206</sup> Linking the internal situation of the country of origin,<sup>207</sup> with the consequences of return.<sup>208</sup> However, unless convinced that refugees can return safely, UNHCR does not promote return.<sup>209</sup>

Is there a desire for forced migrants to return to their homes and if there is, what affects their decision? Martin concluded that refugee women particularly would voluntarily repatriate for a number of reasons, (not least) to see their parents 'before it is too late' or even so their children would know and see their home country, if the conditions permitted it.<sup>210</sup> The desire to go home does exist, although there is a pragmatic expression of the need for conditions within the state to be suitable for return.<sup>211</sup> The emotional pull of one's homeland, the restoration of citizenship and the end of the pain of exile<sup>212</sup> - as exile without the hope of asylum is usually that of poverty, dependency and frustration - may instigate voluntary repatriation amidst conflict resolution, even when instability and insecurity persists.<sup>213</sup>

Repatriation is not simply the organised return of civilians. The physical return is only one aspect. Conditions beyond the need for peace has also to be present. A programme for social, economic, and political change may need development and reconstruction. Homes may need rebuilding; employment and means of subsistence have to be created; mines have to be cleared; within a contemporaneous programme of political legal reconciliation. Enormous development and long-term requirements need to be fulfilled because without food, tools and seeds, refugees will head back to greener pastures, where

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<sup>206</sup> Conclusions on the International Protection of Refugees, adopted by the Executive Committee of the High Commissioner's Programme, No. 40 (XXXVI) Voluntary Repatriation, 40 UN G.A.O.R. Supp.(No.12A), at 33, UN Doc. A/40/12/Add.1 (1985), para. d.

<sup>207</sup> *Ibid*, para. k.

<sup>208</sup> *Ibid*, para. l.

<sup>209</sup> UNHCR, state of the world's refugees, 172.

<sup>210</sup> Martin, refugee women, at 65, from many interviews with refugee women.

<sup>211</sup> Kouchner, *supra*, at 35, who believes refugees would want to return home if there were no risk to life and liberty.

<sup>212</sup> UNHCR, state of the world's refugees, at 104.

<sup>213</sup> *Ibid*, at 103.

extreme deprivation and competition might ignite violence and undermine the fragile peace.<sup>214</sup> The vicious cycle of poverty and displacement needs to be broken. Success, however, depends on the creation and maintenance of stable conditions to allow reintegration of forced migrants with populations that remained. This includes the repair of basic infrastructures, providing education and income-generating activities.<sup>215</sup> Special attention is needed to tailor programmes for women and children, who make up most of those internally displaced.<sup>216</sup> Steps must be taken to enhance the dignity of women, to ensure the persecution has ended, to integrate women fully in development projects and reconstruction.<sup>217</sup>

Redevelopment projects therefore need to encompass a wide variety of considerations and satisfy a host of needs. Successful programmes need to be comprehensive and include co-operation in planning; information and the dissemination of information; proper liaison between forced migrants, governments and agencies; legal and actual protection and guarantees; and economic development - co-operation from the international community and financial organisations like the World Bank and IMF. Although the UN has an important role in implementing programmes for voluntary repatriation,<sup>218</sup> a 'Catch 22' situation may emerge with respect to funding. Donors only give once the refugees start returning, but 'it is becoming increasingly plain that the refugees will not go back without something to go back to.'<sup>219</sup> Thus the cycle will only be broken by the recognition that basic security and subsistence requirements must be fulfilled before refugees would return home.<sup>220</sup>

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<sup>214</sup> *Ibid.*, at 112.

<sup>215</sup> For example implementing Quick Impact Projects, pioneered in Central America and Cambodia, to encourage self-sufficiency, see UNHCR, state of the world's refugees, at 173.

<sup>216</sup> Deng, (1995) 14 (1&2) Refugee Survey Quarterly, at 197 and 272-3, notes that little effort is given to document abuses against them. See also section 6.3, 'Social and Economic Needs'.

<sup>217</sup> Martin, refugee women, at 74.

<sup>218</sup> Aga Khan, 'Looking into the 1990s: Afghanistan and other Refugee Crisis' (1990) Int'l. J. Refugee L. - Special Issue 14, 16.

<sup>219</sup> *Ibid.*, at 17.

<sup>220</sup> *Ibid.*

The impact of integration has sociological and psychological consequences, that does require consideration in any comprehensive programme of action. States may be 'ambivalent about the return of their citizens', have limited resources for reintegration, and those who remained during the emergencies or disasters may be antagonistic towards returnees.<sup>221</sup> Yet the people's willingness to return might reflect positively on the government and act to legitimise the authority or regime, even if it might serve the interests of those who remained that those who fled stay abroad.<sup>222</sup> Examples of successful occasions where voluntary repatriation have been conducted are numerous, although displacement re-occurs if the peace is lost.<sup>223</sup> There are an increasing number of UNHCR assisted voluntary repatriations.<sup>224</sup> UNHCR tries to facilitate aid provisions, the establishment of a legal framework to protect returnees, and the guarantee of conditions on arrival.<sup>225</sup> In Guatemala, refugees are organising voluntary repatriations, despite the continued existence of violence and violations of human rights.<sup>226</sup> In Mozambique, the peace accord between the Mozambican government and RENAMO in Rome on the 4 October 1992 opened the way for the largest organised repatriation in Africa.<sup>227</sup>

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<sup>221</sup> Martin, refugee women, at 66.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*, at 65, who noted, '[f]ollowing the declaration of independence in many former colonies or territories of other countries, such returns have been common. The most massive repatriation programme involved refugees returning to Bangladesh after its formation in December 1971: within four months, more than 10 million refugees returned to their homes.'

<sup>224</sup> UNHCR, state of the world's refugees, at 172, for example, 41,000 airlifted back to Namibia in 1989; 365,000 Cambodian from Thailand in 1992; 1.3 million Mozambican refugees from mid-1993, the largest such program in Africa to date; 1.6 million Afghan refugees from Pakistan and Iran, despite uncertain conditions in native land by mid-1993 (at 2); and 50,000 Guatemalan refugees in Mexico began returning in January 1993 (at 103).

<sup>225</sup> *Ibid.*, at 173, for example, the initiation of Quick Impact Projects have been designed in collaboration with UNDP to help returnees and their communities regain self-sufficiency.

<sup>226</sup> *Ibid.*, at 106, in 1991, government and refugees established negotiating bodies which included multi-party commissions with participants from UNHCR, refugee representative, government officials from Mexico and Guatemala, NGOs and Human Rights representatives.

<sup>227</sup> *Ibid.*, at 108. One of the primary concerns was to establish a legal framework for the repatriation. UNHCR signed an agreement with the government in March 1993, providing for the following conditions: the voluntary character of the repatriation must be strictly observed, UNHCR must be allowed to monitor the situation of returnees, and land had to be made available for cultivation and resettlement. Other agreements between UNHCR, the Mozambican government and states of asylum have also been entered into.

If voluntary repatriation is to be successful, reintegration and development projects must include special groups, like women, and be grounded on the provision of basic needs, rights and freedoms. It is inconceivable that repatriation and integration will succeed where human rights continue to be denied or violated, and where discrimination is maintained or the basic means of subsistence is non-existent. Whether transboundary or internal, the measures needed when forced migration occur are similar. To address the conditions within the causing state, to provide development programmes, to provide redress for grievances, to establish an environment of confidence and safety. The responsibility of states of origin and the international community cannot be overlooked if return and reintegration is to be successful.<sup>228</sup>

‘While the wars, repression and poor economic conditions which displaced millions of people still persist, repatriation has become reality for many and a realistic hope for others. Peace and/or democratization have become realities in a number of places, for example, Namibia, Nicaragua, Iran, Eastern Europe, and foreign troops have been withdrawn from a number of conflict areas, such as Afghanistan.’<sup>229</sup>

The possible role of international law in the stages of repatriation is unlimited. International law may establish a duty for states to receive back its own nationals or those who are ‘ressortissants’, whether or not denationalised, where the expulsion was unlawful.<sup>230</sup> International principles could justify the removal of governments and provide the means of redress for individuals.<sup>231</sup> Thus as part of a complex plan of action, the link with the use of international law cannot be under-emphasised.

### 3.8.2 PREVENTATIVE MEASURES

Preventive action requires the implementation of various complex long-term and sometimes controversial mechanisms. The problem of forced migration cannot be viewed in a vacuum, but needs to take account of wider issues within a global perspective that have

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<sup>228</sup> Moussalli, *supra*, at 65, who confirms ‘[t]his again underlines the responsibility of countries of origin and of the international community to promote satisfactory conditions for the return and the reintegration of repatriating refugees.’

<sup>229</sup> Martin, *refugee women*, at 65-66.

<sup>230</sup> John Fischer Williams, ‘Denationalization’ (1927) 8 *Brit. Yrbk. Int’l. L.* 45, 61.

<sup>231</sup> See further Chapter 5.

to be addressed if current problems are to be realistically dealt with.<sup>232</sup> The reiteration of theoretical solutions is easier than its implementation, however both legal and non-legal measures are available for individual and international application.

Constitutional safeguards and guarantees within a state, particularly within developing states, and the external supervision to ensure compliance, are potentially significant means of preventing forced migration. These safeguards may pre-empt widespread open conflicts, whilst international supervision may prevent abuse of authority, hold those in authority accountable for unlawful acts, remove support for dictatorial authorities, and increase the peaceful settlement of internal and external conflicts. Economic solutions also need concerted efforts and co-operation amongst states, inter-governmental and non-governmental organisations. Underdevelopment has to be eradicated along with the policy of unfair trade terms and the over-dependence on cash crops. Conditions of extreme poverty and insecurity have to be combated by the redistribution of wealth, not in aid and gifts, but in training, equitable trade agreements and profit sharing rather than exploitation.

It may not be possible to guard against all forms of environmental disasters, thus preventative measures are less relevant. However prevention against forced migration caused by environmental considerations is necessary. Disasters that are caused by man could be preventable, like excessive logging that lead to mud slides and desertification. Waste dumping, pollution, over-development and over-use of resources, can all be mitigated so as to prevent forced migration. Forced migration, caused for the sake of environmental management, may be preventable with a system of accountability and the acceptance of human dignity. If groups need to be relocated, if certain environmentally harmful activities need to be limited or stopped, then consultation and education could be instituted with proper means of compensation, employment and accommodation. Resettlement and relocation need not amount to forced migration. The implementation of technology that mitigates the consequences of environmental disasters could also prevent forced migration. The implications of man-assisted disasters could be reduced and the provision of assistance during such disasters could greatly prevent forced migration.

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<sup>232</sup> Moussalli, *supra*, at 64.



The observance of human rights must be the most significant means of preventing forced migration. In practice, the application of civil domestic redress for violations of human rights or the general enforcement of rights under international law would exhibit an acknowledgement that those rights are seriously recognised. Further, the application of domestic procedures, such as the US Alien Tort Statutes,<sup>233</sup> ought to remove the political question for a legal determination, once those statutory hurdles are crossed.<sup>234</sup> As Panjabi noted,

‘... if the concept of government with the consent of the governed becomes universally accepted and some day implemented, and if this political philosophy is accompanied by a healthy measure of tolerance - tolerance based on the shared memories of mutual suffering under dictatorship - there may well be hope for a positive solution to many of the ethnic tensions that currently plague this planet.’<sup>235</sup>

Perhaps a unified global perspective that puts human beings before other institutions is needed. Tyrants believe their people exist to provide them with ‘positions’, whilst good governors realise their ‘positions’ exist to provide their people with freedoms and rights. The supervision of the international community should be to ensure that the people do receive such rights and freedoms.

### 3.8.3 NON-LEGAL SOLUTIONS

There are a wide range of non-legal solutions to the causes of forced migration. There are measures that filter out unfair trade restrictions or improve policies connected with environmental and human concerns, but most significant are the means to encourage human rights observance. For example, low level non-physical interference involved in monitoring human rights abuses, such as human rights reporting. Educating the public against the perception that refugees are ill-educated, delinquent, needy people may prevent racist and xenophobic tendencies.<sup>236</sup> More efficient regulation of the arms trade and more

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<sup>233</sup> See further Chapter 5.

<sup>234</sup> Steinhardt, R.G., ‘Fulfilling the Promise of *Filartiga*: Litigating the Human Rights Claims Against the Estate of Ferdinand Marcos’ (1995) 20 *Yale J. Int’l. L.* 65, 86.

<sup>235</sup> Panjabi, *supra*, at 7-8.

<sup>236</sup> UNHCR, *state of the world’s refugees*, at 60-1; which provides examples of refugees who have made outstanding impacts are: Marlene Dietrich, Albert Einstein, Sigmund and Anna Freud, Rudolf Nureyev. Willy Brandt, Chancellor of West Germany was for a time a refugee, Elie Wiesel a deportee

effective channelling of financial resources will contribute significantly to addressing causes of forced migration.

More interventionist measures might also be advocated. For example, inciting public outrage by publicising civilian massacres, starvation and mass graves - to provide the public with the ammunition to influence decision-making in western governments. In the extreme, actions amounting to humanitarian intervention without consent may be advocated.<sup>237</sup> In a situation like Liberia, where there are a few factions fighting, indiscriminately killing civilians and 'groups at risk',<sup>238</sup> then intervention for extensive rebuilding, human rights monitoring, re-establishing a legitimate constitutional government as the foundation for the society,<sup>239</sup> or peace-making action under the Secretary-General's Agenda for Peace may be advocated.<sup>240</sup>

Another solution is international recognition of the need for a cohesive preventative policy and adherence to the Experts Report, by implementing the provisions in human rights instruments, and strengthening the right to return.<sup>241</sup> Individual petitions and country reports may have positive contributions, Being semi-legal in nature, they combine negotiations and mediation methods. Yet to implement individual petition has its pros and cons.<sup>242</sup> Governments and other international organisations fear that implementing human rights provisions might jeopardise other areas of concern in health care, labour

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to Auschwitz, Dalai Lama, Tibet's exiled spiritual leader, Rigoberta Menchu, a Guatemalan Mayan Indian, sought asylum in Mexico, all recipients of the Nobel Peace Prize.

- <sup>237</sup> For example, the CSCE Moscow Meeting established a more intrusive role for regional stability, Moscow Final Act, CSCE/CHDM.49/Rev.1; and see Gilbert, *supra*, at 428.
- <sup>238</sup> George, K., United States Policy and Liberia: Observations and Recommendations, Written Testimony presented to Senate Foreign Relations Committee Subcommittee on African Affairs (Washington, D.C.: Friends of Liberia, 9 June 1993), 2-3.
- <sup>239</sup> 'Liberia' (1994) 13 (2&3) Refugee Survey Quarterly, at 74.
- <sup>240</sup> UN Doc. A/47/277, S/24111, 17 June 1992.
- <sup>241</sup> Horst-Wolfram Kerll, 'New Dimensions of the Global Refugee Problem and the Need for a Comprehensive Human Rights and Development Oriented Refugee Policy' (1990) Int'l. J. Refugee L. - Special Edition 237, 240-43.
- <sup>242</sup> For example, it is difficult to secure the support of states, although the European Convention system has many positive results, the ICCPR system does not seem to be expanding, although country reporting under the ICCPR seems more receptive to governmental co-operation. It would also be difficult to persuade people to act where they have family remaining in the country of origin; see also Gilbert, *supra*, at 419, note 36.

organisation, or environmental programmes. This highlights the different agendas and the difficulty of combining the wide web of complexities that surround the issues of transboundary and internally displaced persons. Even mention of human rights could and is too often viewed with suspicion and hostility.<sup>243</sup>

The intervention of political issues would present a formidable hurdle to any implementation of non-legal solutions. Ingram noted,

‘[h]uman rights issues are extraordinarily complex, arouse great emotions and generate much muddled thinking... We must remember that the United Nations is not supranational. It must in practice act in ways which are acceptable to the sovereign States which constitute it... Neither the Secretary-General of the United Nations, nor any agency of the system, is able to take action which is contrary to the consensus about the limits of what are appropriate interventions by United Nations secretariats...’<sup>244</sup>

Sovereignty may thus apply to prevent the application of human rights standards that may not have the necessary consensus. Yet the recognition that all men are equal, requiring the same basic and fundamental needs, is the best foundation to build a cohesive society that promotes wider values and binds different groups of people, because human rights have the capacity to diminish ethnic, religious or social differences. There are, however, practical difficulties with the reporting of human right abuses, particularly the standards and practicalities of proof,<sup>245</sup> and the provision of information. Without information, humanitarian tragedies go unnoticed and will remain untreated. Information and publicity draws attention to the policies of state authorities,<sup>246</sup> but without reliable information, such suffering is concealed. Information and the dissemination of information is also useful in informing forced migrants of the situation in their state of origin, and in other camps.<sup>247</sup> The reduction in misinformation about ‘golden opportunities’ may also reduce the trafficking in

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<sup>243</sup> Beyer, Gregg A., ‘Monitoring Root Causes of Refugee Flows and Early Warning: The Need for Substance’ (1990) *Int’l. J. Refugee L. - Special Edition* 71, 74; and see section 4.9, ‘Advocating Against the Use of Human Rights Provisions’.

<sup>244</sup> Ingram, James, ‘Respondent’s Comments’ (1989) *2 J. Refugee Studies* 355.

<sup>245</sup> See generally Beyer, *supra*, at 74-77, for examples.

<sup>246</sup> For example the Bosnian detainees, see UNHCR, *state of the world’s refugees*, at 53.

<sup>247</sup> For example, the use of the mass information system in Vietnam was a huge success, and Radio Tirana, Voice of America and BBC World helped to reduce the number of people from Albania seeking asylum in Italy; see UNHCR, *state of the world’s refugees*, at 64.

human misery. It may also make people aware of the dangers of piracy, kidnapping and human smuggling.

Persuasion with the use of financial incentives may be another non-legal solution, to influence 'offending' governments to cease abuses.<sup>248</sup> The linking of aid and development assistance to human rights record is already practised by several states including the US. The problem with this option is the claim of neo-colonialism, that the system is abused and is oppressive, and that western ideas of human rights do not compliment the human rights necessary for developing states.<sup>249</sup> On the other hand, '[a]id is the strongest card that the international community has and it should be used now.'<sup>250</sup> The value of such economic action is still doubtful, as it will ultimately be the people who will suffer.<sup>251</sup> Perhaps the corrupt leaders may find less funds to line their own pockets, but how would a freeze on aid lead to a change in the situation? Perhaps it will show that the international community does not support ruthless dictators, or perhaps the government might loose the support from the majority of the people and their decline from power will commence. The use of economic mechanisms is not limited to inter-state relations, but also between state and other organisations. Economic measures like aid, which are given to countries of origin (to address the pull-push factors), should contain provisions for supervision by international organisations to ensure proper use.<sup>252</sup> Similarly, debt forgiveness relations should also provide for elements of supervision and conditions that encourage the promotion of human rights and basic needs. In Africa, a comprehensive solution that combined economic, social and political issues has to be implemented.<sup>253</sup> If Africa is to participate as a partner in the international arena led by Africans, then rehabilitation, reconstruction and economic

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<sup>248</sup> Beyer, *supra*, at 73.

<sup>249</sup> See further section 4.9, 'Advocating Against Human Rights Provisions'.

<sup>250</sup> Kenneth Matiba, 'This brave woman who stood up to a cruel African regime', *The Mail on Sunday*, 6 August 1995, 28, authored by the Kenyan opposition leader, who called for all donor countries to follow Britain's example and announce an immediate freeze on aid to Kenya until democracy is introduced. Commenting on Baroness Chalker's announcement on a freeze of aid. A similar freeze was instituted in 1991 which led to a general election.

<sup>251</sup> See section 5.5.2, 'Sanctions'.

<sup>252</sup> Kerll, *supra*, at 244-47.

<sup>253</sup> Nana-Sinkam, S.C., 'From Relief and Humanitarian Assistance to Socio-Economic Sustainability: Rehabilitation, Reconstruction and Development with Transformation as the Ultimate Solution' (1995) *Int'l. J. Refugee L.* 187.

development has to be established to provide a transformation in the economic, social and political structures.<sup>254</sup>

### 3.8.4 LEGAL SOLUTIONS

The desirability of eradicating the root causes of forced migration may be facilitated by the regime of international responsibility, an issue that has received comment by authors,<sup>255</sup> and international organisations.<sup>256</sup> In fact, the UNHCR has confirmed that a major concern was '*developing a stronger concept of State responsibility for those problems; [and] burden sharing through development assistance to countries of origin and first asylum*'.<sup>257</sup> States have also moved towards identifying international responsibility as a desirable means of ending transboundary movements.<sup>258</sup> For example, Sweden has identified the need for direct action in eradicating causes by placing emphasis on the circumstances leading to forced migration and linking the eradication of causes with developmental aid and trade policies.<sup>259</sup> In the past, US policies encouraged Cubans to seek asylum in the US, but more recently, this policy has been withdrawn and measures have

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<sup>254</sup> *Ibid*, at 194.

<sup>255</sup> For example, Lee, 'Toward a World without Refugees: The United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees' (1986) 57 *Brit. Yrbk. Int'l. L.* 317; Goodwin-Gill, 'Refugees and Human Rights: Challenges for the 1990s' (1990) *Int'l. J. Refugee L. - Special Edition* 29; Plender, R., 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 *Int'l. J. Refugee L.* 345; Beyani, C., 'State Responsibility for the Prevention and Resolution of Forced Population Displacement in International Law' (1995) *Int'l. J. Refugee L. - Special Edition* 130; and Tomuschat, 'State Responsibility and the Country of Origin', in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1996), 59; although see Gilbert, G., 'Root Causes and International Law: Refugee Flows in the 1990s' (1993) 11 (2) *Neth. Q. Hum. Rts.* 413, who advocates against the use of state responsibility.

<sup>256</sup> Aga Khan, 1981 report; Coles, 1992 study; ILA Draft Declaration of Principles of International Law on Compensation to Refugees (Cairo, April 1992); Deng, Francis, *Protecting the Internally Displaced: A Challenge for the United Nations* (A Report by the Special Representative of the Secretary-General on Internally Displaced Persons to the UN Commission on Human Rights 1993); and UNHCR, state of the world's refugees.

<sup>257</sup> The Working Group on Solutions and Protection, Report of the United Nations High Commissioner for Refugees, UN G.A.O.R., - Sess., Supp.(No.12), 11 UN Doc. A/46/12 (1991) (emphasis added).

<sup>258</sup> The various reports were initiated by states, for example, the Experts Report was for the GA; whilst the Aga Khan, 1981 report was for the ECOSOC, Commission on Human Rights; and Deng was appointed as the Representative of the Secretary-General; also, the EU has commissioned the Institute of Public Policy and Research to investigate, 'Human Rights, Refugees and the Restoration of Stability: The Role of the EU' (Seminars, London, March 1996).

<sup>259</sup> Swedish Ministry of Labour, Summary of Government Bill on Active Refugee and Immigration Policy, May 1991, prop.1990/91:195, p.1; cited by Gilbert, *supra*, at 414.

been implemented to stem the flow of Cubans and others entering the US.<sup>260</sup> It is clear that merely treating the symptoms is no longer sufficient.<sup>261</sup>

The question is can a regime of international responsibility provide a significant contribution to a comprehensive plan of action? The concept of international responsibility as a solution has been widely ignored or dismissed on allegedly pragmatic, even cynical, considerations. Gilbert found that although possibly ‘untenable’, ‘[s]tate responsibility is important in that it imposes obligations on the source state, but the nature of those obligations is just as important to the desired final result.’<sup>262</sup> The possibility of legal action against those who cause forced migration is available through a variety of international instruments,<sup>263</sup> although without clear enforcement procedures, responsibility cannot be preferred over other non-legal measures. On the other hand, the variety of enforcement mechanisms in international law have not been fully developed or utilised,<sup>264</sup> primarily because of the Cold War. Insisting therefore on legal responsibility against those that cause forced migration is consistent with the functional perspective, encouraged by greater co-operation between UN organs and the end of the Cold War. A legal order holding causing states responsible ‘can prevent and resolve refugee crisis to a degree impossible under a legal order...’, aimed at imposing responsibility on receiving states.<sup>265</sup>

The emphasis on international responsibility (developed in Part III), as a significant contributor to a comprehensive solution, underlies this thesis because it affirms the overall identification of wrongfulness in causing human suffering by allocating blame. It also underscores both legal and non-legal solutions, by establishing a basis from which

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<sup>260</sup> See generally, *Guardian Education*, 6 September 1994, 11, on Cuba, and the LIBERTAD Act, which seeks to remove the Castro regime and install a democratic regime; and note the sanctions and interventionist activities in Haiti to restore Aristide to power; see generally, SC Res. 905, 933, 940, and 944 (1994).

<sup>261</sup> Gilbert, *supra*, at 413.

<sup>262</sup> *Ibid*, at 435.

<sup>263</sup> Either for causing forced migration, for violating principles of human rights or other principles of international law, see Chapter 4.

<sup>264</sup> See generally, Lee, L.T., ‘The Right to Compensation: Refugees and Countries of Asylum’ (1986) 80 *Am. J. Int’l. L.* 532

<sup>265</sup> Garvey, Jack I., ‘The New Asylum Seekers: Addressing Their Origins’, in Martin (ed), *New asylum seekers*, at 191, who note that solving root causes has practical and political difficulties.

obligations may be imposed. The types of action that may be imposed consequent on the imposition of obligations may not necessarily be legal action *per se*, but will have a legal nature and character. For example, the obligation to receive back unlawfully expelled nationals may be litigated through arbitration or provide the foundation for negotiation and mediation, to co-operate with international agencies to receive those nationals back. Essentially, any action founded on international responsibility would have a degree of cogency for the attainment of law and order. It would also encourage confidence in the international legal order.

### 3.9 REVIEWING THE SOLUTIONS

Guidelines may be proposed in the application of both legal and non-legal solutions. Firstly, co-operation traits should be encouraged,<sup>266</sup> secondly, ‘... assistance should always be secondary to solution[s]’, to discourage refugee dependency which often occurs at the expense of durable solutions; thirdly, aim to introduce institutionalised apparatus that involve the state of origin,<sup>267</sup> fourthly, to convert substantive obligations for harm into substantive procedures for compensation, which may have a deterrent effect as well.<sup>268</sup> Positive diplomatic mechanisms, such as promissory notes, undertakings, debt forgiveness or any other measure which may influence and instigate good governance may also be advocated,<sup>269</sup> as well as, ‘preventive diplomacy’.<sup>270</sup> Although these solutions are generalised, ‘[e]ach refugee crisis, of course, is *sui generis* and requires its own tailor-made

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<sup>266</sup> Such as early warning, orderly departure and return; for example, the 1979 Memorandum of Understanding on the Orderly Departure of Persons from Vietnam between UNHCR and the Government of Vietnam, UN Doc. A/C.3/34/7 (1979).

<sup>267</sup> For example, to administer early warning measures, to manage and aid relations between organisations, to stimulate political processes that secure co-operation and orchestrate *quid pro quo* assistance like voluntary repatriation.

<sup>268</sup> Garvey, in Martin (ed), new asylum seekers, at 189-90.

<sup>269</sup> For example using the UN Secretary-General’s Office for Research and the Collection of Information (ORCI)

<sup>270</sup> Pioneered by Dag Hammarskjod, UN Experts Report.

solution.<sup>271</sup> A broad comprehensive approach that remembers the individual victim is vital.<sup>272</sup>

The solutions highlight a few common denominators: the complexity of issues; the need for the protection of human rights; the amalgamation of economic, social and trade mechanisms, with environmental issues, political consideration and policy-making; and the need to develop the principles of international responsibility, not merely in identifying violations, but in addressing enforcement and persuading compliance. A legal order is required to distribute justice, to redress grievances and to provide a system of accountability within the governance of states. International responsibility could act to prevent flows from occurring by ensuring accountability and the redress of grievances. It could also act as a solution when flows occur by implementation of the same measures, accountability and redress of grievances. Thus the legal solution can be both reactive and preventative. Like a three-legged stool - the will to develop the state of origin, the direct participation of the citizens within that state in co-operation with international efforts, and the promotion and enforcement of human rights - the failure of one will unbalance the stability of the system.<sup>273</sup> The international community has to enforce a minimum standard against other states,<sup>274</sup> whether through international, regional arrangements or domestic arrangements.<sup>275</sup>

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<sup>271</sup> Aga Khan, 'Looking into the 1990s: Afghanistan and other Refugee Crisis' (1990) Int'l. J. Refugee L. - Special Edition 14, 23, who also pointed out that the root causes are almost always similar: war, persecution, environmental degradation, foreign invasion, ethnic tension and 'above all, poverty.'

<sup>272</sup> Feller, Erika, 'UNHCR and the International Protection of Refugees - Current Problems and Future Prospects' (1990) Int'l. J. Refugee L. - Special Edition 335, 346, who noted, '[r]ein vigorated and energetic global co-operation is required to find solutions to refugee problems within the framework of a new and broadly based approach that integrates refugee, asylum, migration, development assistance and foreign policy considerations, while not losing sight of the various groups of individuals involved or their basic rights.'

<sup>273</sup> Nobel, *supra*, at 83, who postulated this analogy.

<sup>274</sup> Garvey, 'Towards a Reformulation of International Refugee Law' (1985) 26 Harv. J. Int'l. L. 483.

<sup>275</sup> For example in the US, under the Alien Tort Statutes, applied in *Filartiga v. Pena-Irala* 630 F.2d 876 (1980); and under the ECHR, in *Short v. The Netherlands* (1990) 29 I.L.M. 1378, 1381-2; citing decision (App. No. 6950/75, 1975), the Advocate-General Strikwerda of the Dutch Supreme Court speaking and quoting from the jurisprudence of the Commission claimed, '[i]t is clear from the language,.. and the object of this Article [1], and from the purpose of the Convention [ECHR] as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.' See further below, Chapter 5.

## PART III - INTERNATIONAL RESPONSIBILITY: A SIGNIFICANT SOLUTION

### 3.10 NATURE OF RESPONSIBILITY

Membership in the international community presupposes that states have accepted the existence of certain rules, the observance of which is mutually applied and the violations of which result in international responsibility.<sup>276</sup> Hall from a moral perspective concluded that,

‘[t]he ultimate foundation of international law is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature. In virtue of this assumption... it is considered that their moral nature imposes upon them the duties of good faith, of concession of redress for wrongs, of regard for the personal dignity of their fellows, and to a certain extent of sociability’.<sup>277</sup>

Thus international responsibility results from an act violating an obligation or omission to fulfil an obligation,<sup>278</sup> or the failure to eliminate the consequences of an unlawful act.<sup>279</sup>

Although it is convenient to keep the classic title ‘state responsibility’, a more accurate term would be ‘international responsibility’, as this reflects the responsibility of individuals, states and other organisations.<sup>280</sup> International responsibility is the concept that establishes an obligation to make good the violation of other obligations under international law.<sup>281</sup> This principle by which states owe a duty to make good a violation of an obligation is, in contemporary international law, hardly a matter for dispute. It is claimed to be as old

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<sup>276</sup> Eagleton, Clyde, *The Responsibility of States in International Law* (1928, reprinted 1970), 5. (Hereinafter, Eagleton, responsibility).

<sup>277</sup> Hall, *International Law* (8th edn., 1924), 50.

<sup>278</sup> Grotius, *De Jure Belli et Pacis* (Whewell trans., 1883), Book II, chapter XXI, who claims that the foundation for responsibility of states is fault of its own, and fault for the acts of others where fault of its own is established; cited by Eagleton, responsibility, at 18; and Tunkin, G.I., *Theory of International Law* (Butler trans., 1974) (hereinafter, Tunkin, theory), 382, who rephrased this to base responsibility from an unlawful action of a state or the unlawful failure to act, for example in failing to take legislative measures in fulfilment of a treaty obligation.

<sup>279</sup> de Visscher, C., ‘*Le deni de justice en droit international*’ (1935) 52 *Recueil des Cours* 421, who added that ‘[i]nternational responsibility is a basic idea which amounts to the duty of a state to eliminate the consequences of an unlawful act...’; and Tunkin, theory, at 388.

<sup>280</sup> Jennings and Watts (ed), *Oppenheim’s International Law* (9th edn., 1992), 500. (Hereinafter, Jennings and Watts (ed)).

<sup>281</sup> Eagleton, responsibility, at 22

as the concept of morality and is fundamentally necessary to mankind.<sup>282</sup> International judicial decisions support the principle of reparations for the breach of an obligation under international law, irrespective of conventions.<sup>283</sup> An international wrongful act is committed when conduct consisting of an act or omission is attributable to an actor in international law, and that conduct constitutes a breach of an international obligation owed by that actor.<sup>284</sup>

The nature of state responsibility is that '[e]very internationally wrongful act of a State entails the international responsibility of that State.'<sup>285</sup> This principle has been claimed to be inaccurate because not every incident of 'illegal' or 'invalid' act will necessarily amount to a situation concerning state responsibility.<sup>286</sup> If not all duties would give rise to state responsibility, then the distinction between duties have to be identified and investigated.<sup>287</sup> On the other hand, it might be argued that any, if not all, wrongful action would lead to state responsibility even if the consequences of responsibility were not claimed. For example, State A who violates an agreement with State B, is under the confines of state responsibility even if State B takes no action to pursue the claim. The existence and threat of the claim would exist, until waived or estopped from pursuit. It does not detach from the original position, that international wrongful acts do entail international responsibility, even if those acts remain unclaimed legally.

The nature of state responsibility as postulated by the ILC has also been criticised because it proposes that all the different kinds of breaches of all the different kinds of

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<sup>282</sup> *Ibid*, at 16.

<sup>283</sup> *The Chorzow Factory (Claim for Indemnity) Case (Merits) (Germany v. Poland) [1928] P.C.I.J. Ser. A, No. 13, 5; The Chorzow Factory (Indemnity) Case (Jurisdiction) (Germany v. Poland) [1927] P.C.I.J. Ser. A, No. 8 (Judgement of 26 July 1927), at 21; and Dickson Car Wheel Co. case (1931), 4 R.I.A.A. 669, at 678, which found that, '[u]nder international law apart from any convention, in order that a state may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exists a violation of a duty imposed by an international juridical standard.'*

<sup>284</sup> Derived from the ILC determination of an international wrongful act committed by states, [1973] ii Yrbk. I.L.C. 179.

<sup>285</sup> ILC Draft Articles on State Responsibility, [1980] Yrbk. I.L.C. 30, Article 1.

<sup>286</sup> Brownlie, state responsibility, at 29-30, who identified two categories: firstly, where state responsibility would be applicable, but the injured state chooses to reserve its rights and merely asserts a claim to the invalidity of the act; and secondly, certain claims that do not in themselves generate state responsibility *in limine*, for example mere assertions to title without pursuing further action.

<sup>287</sup> Brownlie, state responsibility, at 30.

obligations result in one consequence - 'responsibility'.<sup>288</sup> This does not in practice seriously contradict the general nature of responsibility. It remains true even under the ILC Draft Articles that liability or responsibility arises not merely because of the intervening concept of responsibility but because of the initial act of international wrongful conduct. In fact it is claimed that Article 1 reflects a principle that received widest support in state practice and judicial decision, as it is deeply rooted in the doctrine of international law.<sup>289</sup> Dupuy reiterated that '[t]he origin of the responsibility [arises] in the commission of a wrongful act by a state, in particular, an act or omission by the state violating its international obligation vis-à-vis another state.'<sup>290</sup>

A final critique of the nature of state responsibility as put forward by the ILC is that it notionalises the concept of responsibility, thus leaving much room to argue the cases of potential liability.<sup>291</sup> This would be true if the general conditions of responsibility were the

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<sup>288</sup> Allott, P., 'State Responsibility and the Unmaking of International Law' (1988) 29 Harv. Int'l. L.J. 1, 11; and who noted at 12, '[t]he wages of sin are death, not responsibility for sin. In the terms of legal analysis, wrongdoing gives rise to a liability in the offender not a consequence of some intervening concept of responsibility. It is a direct consequence flowing from the nature of the wrong (the content of the rights of the offended party and the duties of the offender) and from the nature of the actual wrongful act in the given case (in particular, the content of the specific rights and duties which have been affected by the breach in question). The remedies available are a function of integrating the nature of the liability in the given case with the nature of the particular wrongful act.'

<sup>289</sup> [1973] ii Yrbk. I.L.C. 173. Although it may be argued that the Draft Articles are weakened by the fact that they have not been adopted as a convention, there is merit to the use of the Articles as a guide for inter-state relations and 'legislative' policy, see Brownlie, state responsibility, at 20-21, who likens it to Codes of Practice; and Ago, [1970] ii Yrbk. I.L.C. 179, para. 11, who claimed;

'Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed 'primary', as opposed to the other rules - precisely those covering the field of responsibility - which may be termed 'secondary', inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require very extensive commentaries. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely. But the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter. On the contrary, on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted. It should come as no surprise, therefore, that the present report contains very long passages dealing with a whole series of problems, followed by a few short articles.'

<sup>290</sup> Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?' (1989) 11 (1) Mich. J. Int'l. L. 105. (Hereinafter, Dupuy, international law).

<sup>291</sup> Allott, *supra*, at 14.

ongoing battle between fault and objective responsibility, where the substance of responsibility were in effect only that which the ILC Draft Articles postulated. In reality, the application of the principles of state responsibility act only as general principles insofar as the nature of wrongful acts. The legal substance of each wrongful act, the meat on the bones, are provided from the construction of particular primary obligations. Thus it is vital to investigate the specific obligations and the consequences that arise from the violation of these obligations.<sup>292</sup> This does not provide the answer to situations where the primary source obligation remains silent on whether an objective or fault based criterion is to be applied. However, these incidences are slight and emphasis should be placed on the application of accountability for specific contexts, powers and duties, which require specific consideration.<sup>293</sup>

### 3.11 BASIS OF INTERNATIONAL RESPONSIBILITY

On the theoretical plane, the question of the basis of responsibility is relegated to whether it arises as a result of the 'objective' or 'risk' theory, or the 'subjective' or 'fault' theory. Yet it should be emphasised that generally where international responsibility is claimed, the primary source of obligation, for example in a treaty provision, would define the context of imputable elements. However, not all primary provisions would specifically outline when responsibility might attach, thus the necessity for the consideration of the two theories. The objective theory rests on a claim based on results alone.<sup>294</sup> Where a damage, injury or violation of a right occurs, responsibility would attach regardless of fault. The fault theory rests on the proving of either negligence (*culpa*) or wrongful intention (*dolus*), before responsibility can be attached. Intention and negligence are also used as standards of attribution in determining causation. Thus the application of the fault concept is necessary where defences are made, where certain indirect acts of a state cause damage, or where acts or omissions cause damage.

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<sup>292</sup> *Ibid*, at 12.

<sup>293</sup> *Ibid*, at 13.

<sup>294</sup> Brownlie, state responsibility, at 38.

As long as a causal connection may be established, the defendant may only exculpate himself through a defence, like an act of a third party.<sup>295</sup> Objective responsibility includes absolute and strict responsibility.<sup>296</sup> Practice of international tribunals supports the validity of this doctrine as a general principle.<sup>297</sup> This principle does reflect a rule of international law that the absence of fault is no defence.<sup>298</sup> In fact, from a practical perspective, 'to require fault as an additional general condition of international responsibility considerably restricts the chances of a state being held responsible for the breach of an international obligation.'<sup>299</sup> This does not stand as a general disagreement with the concept of fault, but recognises that wrongful intent or negligence is difficult to prove, especially against those acting on behalf of the state. On the other hand, it is admitted that the concept of culpable negligence or fault, if specifically provided for, would be applicable.<sup>300</sup> Although the objective responsibility may be the preferred basis of responsibility, it may not be an automatic tool of application, as fault does play a role in attributability. The ILC in considering the application of responsibility claimed,

'[t]he very essence of wrongfulness, as a source of responsibility, is constituted... by the contrast between the State's actual conduct and the conduct required of it under international law. In other words, it is conduct attributed to the State under international law and representing a breach on its part of an international obligation that the law of nations attaches the emergence of the new legal situations unfavourable to the State in question which are grounds under the common denominator of international responsibility.'<sup>301</sup>

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<sup>295</sup> See Judge Azevedo, [1949] I.C.J. Repts. 85-6.

<sup>296</sup> Absolute responsibility occurs where a defendant state is responsible without exception on the basis of an injury resulting from a particular conduct; and strict responsibility occurs where a defendant state may invoke very strictly limited defences to excuse responsibility, see Jennings and Watts (ed), at 509, note 3.

<sup>297</sup> See Brownlie, state responsibility, at 39, note 22, who cites awards under the General Claims Commission set-up under the 1923 Convention between Mexico and US; it has also been adopted as a basis for responsibility by many treaties, particularly those dealing with dangerous activities, for example the Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960); and the Convention for the Regulation of Antarctic Mineral Resource Activities (1988), Article 8, *reprinted in* (1988) 27 I.L.M. 859. See further, Jennings and Watts (ed), at 510, note 9; and de Arechaga, *supra*, at 539.

<sup>298</sup> Special Rapporteur Ago, Third Report, [1971] ii Yrbk I.L.C. 199, 219-24, para. 61-75.

<sup>299</sup> de Arechaga, *supra*, at 535.

<sup>300</sup> *Ibid.*

<sup>301</sup> Ago, Fifth Report on State Responsibility, [1976] ii Yrbk. I.L.C. 3, 4; UN Doc. A/CN.4/291, Add.1 and 2 (1976).

The role of fault has been acclaimed as the psychological element of the state with respect to the breach,<sup>302</sup> and a basic requirement of responsibility.<sup>303</sup> In fact, the role of fault is claimed to extend further than mere psychology, but a prerequisite for responsibility - that a state would not be responsible except for the presence of *dolus* (malicious intent) or *culpa* (culpable negligence).<sup>304</sup> The role of fault did not however apply across the entire framework of international law, but seems to have been limited to acts or omission of state organs, the acts of private individuals or rebels, and insurrections. In the *Corfu Channel Case*, the Court required a degree of deliberate 'eye-shutting', an element of fault, in order to establish a basis for responsibility.<sup>305</sup> Lauterpacht argued that the Court's inquiry into actual or constructive knowledge of the mine laying, may be interpreted as clear authority for the requirement of fault.<sup>306</sup> This concept finds support from the dissenting judges, Krylov and Ecer.<sup>307</sup> This would mean that injury did not presuppose responsibility without the element of fault, because fault is a prerequisite of wrongfulness. On the other hand, de Arechaga argues that the case dealt with neither 'risk' nor 'fault', but whether a 'pre-existing obligation' had been violated.<sup>308</sup> As to the discussion about the knowledge of the minefield, he concluded that it does not apply the 'fault' theory, but merely rejects the 'risk'

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<sup>302</sup> *Force Majeure* and 'Fortuitous Events' as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine, UN Doc. A/CN.4/315, in [1978] ii Yrbk. I.L.C. 61, 194-5.

<sup>303</sup> As advocated by several commentators, including: Oppenheim, *International Law* (vol. 1, 8th edn. Lauterpacht, H. (ed).), 343; Eagleton, responsibility, at 209-210; and Ago, (1939, II) 68 *Recueil des Cours* 476-498.

<sup>304</sup> [1978] ii Yrbk. I.L.C. 61, 145, note 742. In *Janes Case* (1925), 4 R.I.A.A. at 86ff, the tribunal found it a necessary condition that the state must have failed in its obligation of due diligence in either preventing injury or in punishing the offender; also, [1975] ii Yrbk. I.L.C. 98, para. 26; in the *Home Frontier and Foreign Missionary Society Case* (1920), 6 R.I.A.A. 42, 44, the tribunal found that, '[i]t is a well-established principle of international law that no Government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of negligence in suppressing insurrection.' The Mexican-US Claims Commission defined responsibility as, 'whether what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international law.' See, *The Mechem Case* (1929), 4 R.I.A.A. 440, 443; and the *Neer Case* (1926), 4 R.I.A.A. 60, 61.

<sup>305</sup> *Corfu Channel Case* (UK v. Albania) [1949] I.C.J. Repts. 4.

<sup>306</sup> Oppenheim, L., *International Law* (Lauterpacht, H. ed., 1955), 343.

<sup>307</sup> *Corfu Channel Case*, *supra*, Krylov, at 72; and Ecer, at 128, who claimed, '[a]n act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence.'

<sup>308</sup> de Arechaga, *supra*, at 537.

or absolute responsibility theory. The determination of knowledge was in fact required in order for the Court to find that a pre-existing obligation had been violated.<sup>309</sup> The logic seems simple. It presumes that an obligation exists to warn of dangers within the territory. However, if the state has no knowledge of the dangers, then there can be no obligation to warn. So only if there was knowledge of the dangers could there be an obligation to warn.

On the one hand, it would seem that *culpa* has to be satisfied before responsibility would be attached. On the other hand, there are limits to the application of this requirement. For example, de Visscher placed it in the context of obligations of states to protect foreign interests from the acts of private individuals,<sup>310</sup> whilst de Arechaga limited its application only to breaches by omission.<sup>311</sup> However where the issue is one of due diligence, then the lack of due diligence would be the content of the violation of an obligation. In total, therefore, responsibility does not attach merely because of malice or negligence, but it includes general defects or failings in procedural aspects of administration, for example the lack of due diligence, or even the ‘insufficiency’ of governmental legal powers.<sup>312</sup> It seems the role of fault does not have universal application in every case,<sup>313</sup> but it does have a role and application. The application clearly exists where it is specifically provided for by agreements,<sup>314</sup> and from the formulation of each obligation.<sup>315</sup> As Brownlie claimed, ‘[t]oday one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights

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<sup>309</sup> *Ibid.*

<sup>310</sup> de Visscher, *La Responsabilite Des Etats* (1924) 2 *Bibliotheca Visseriana* 86.

<sup>311</sup> de Arechaga, *supra*, at 535; and Strupp, ‘*Les Regles generales du droit de la paix*’ (1934) 47 *Recueil des Cours* 263, 564; and Sorensen, ‘*Principes du droit international public*’ (1960) 101 *Recueil des Cours* 1, 228-9.

<sup>312</sup> de Arechaga, *supra*, at 536-7; citing the *Alabama Claims* (1872), Lapradelle et Politis, *Recueil des Arbitrages*, vol. iii, 891.

<sup>313</sup> *Differend Concernant l'interpretation de l'Article 79* (Decision No. 196 du 7 Decembre 1955) (Italy v. France), 13 R.I.A.A. 422, 431-33.

<sup>314</sup> For example, Article 3 of the Convention on International Liability for Damage Caused by Space Objects (1971), provides that liability attaches ‘only if damage is due to fault or the fault of persons for whom it is responsible.’

<sup>315</sup> Brownlie, *state responsibility*, at 40, who considers this to be the approach taken by the Special Rapporteur and the Commission itself.

and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts...<sup>316</sup> Thus the content of each particular duty will depend on the formulation of individual obligations.

It is claimed that the doctrine of fault is a part of international law as it applies accountability to the real addressees of international duties, the agents of states.<sup>317</sup> Brownlie on the other hand disagrees with the general opinions that favour the significance of the fault doctrine.<sup>318</sup> He maintains a distinction between absolute liability - where no mode of exculpation is permitted - and strict liability - the application of which merely shifts the burden of proof.<sup>319</sup> Thus to Brownlie, the concept of objective responsibility does permit considerations of knowledge, control, justification and defences, and the application of which merely shifts the burden of proof. This is not to claim that there is no role for fault, but that it is not a general condition for liability.<sup>320</sup> In fact, Judge Azevedo pointed out that the relations of objective responsibility and the *culpa* principle are very close.<sup>321</sup> This does not answer the question, '[i]s an international delinquency committed by the mere fact of the legitimate interests of one state having been injured within the territory or by the organs of another? Or is it an essential condition for the existence of such responsibility that malicious intent or culpable negligence should be proved?'<sup>322</sup>

Objective responsibility is therefore argued to be the overriding basis for responsibility because it does not deny that *culpa* may be the condition for international responsibility in certain cases. It is also argued on a practical basis because many obstacles lie in proving fault. For example, it is not always possible to rely on the *prima facie* situation existing at the time as evidence and negligence or a dereliction of duty is not

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<sup>316</sup> Brownlie, *Principles of Public International Law* (4th edn., 1990, reprinted, 1993), 433. (Hereinafter, Brownlie, principles).

<sup>317</sup> Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 137.

<sup>318</sup> Brownlie, state responsibility, at 41-44.

<sup>319</sup> Brownlie, state responsibility, at 44, citing Blackburn J. in *Rylands v. Fletcher* (1866) L.R. 1 Ex. 265, 279-280.

<sup>320</sup> Brownlie, state responsibility, at 45.

<sup>321</sup> *Corfu Channel Case* [1949] I.C.J. Reps. 85; see also Garcia-Amador, [1960] ii Yrbk I.L.C. 63. But note Dupuy, international law, at 110 and 127, who pointed out that the elimination of the mental element of *culpa* as the origin of state responsibility is embedded in classical state responsibility.

<sup>322</sup> Lauterpacht, H., *Private Law Sources and Analogies of International Law* (1927), 135.

simple to prove. Thus, to have *culpa* as a *sine qua non* in all cases is simply not compatible with the notion of international justice. Anzilotti advocated that, '*La conclusion a laquelle il semble qu'on puisse arriver est donc que, en regle, en droit international l'animus de l'individual-organe n'est pas la cause ou la condition de la responsabilite, celle-ci nait du seul fait de la violation d'un devoir international de l'Etat.*'<sup>323</sup> He in fact intended to dismiss and replace *culpa*; '*Nous pensons, quant a nous, que la theorie de la faute doit etre ici mise absolument hors de cause.*'<sup>324</sup> Other commentators have echoed similar concerns,<sup>325</sup> and Starke believed that there simply is no 'general floating requirement of malice or culpable negligence as a condition of responsibility.'<sup>326</sup> Particularly '[i]f the original rule or provision of the Convention does not envisage malice or culpable negligence, it is difficult to see how this can be invoked as a condition of the imputation and responsibility.'<sup>327</sup> A set of international arbitration awards would seem to support this view. For example, it was found in the *Owners of The Jessie, The Thomas F. Bayard and The Pescawha Case*,

'[i]t is unquestionable that the United States naval authorities acted *bona fide*, but though their *bona fides* might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgement, and any Government is responsible to other Governments for error in judgement of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.'<sup>328</sup>

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<sup>323</sup> Anzilotti, *Cours de Droit International* (Gidel. G., trans., 1929), 501; see also, *Teoria Generale della Responsabilita dello stato nel Diritto Internazionale* (1902). 'The conclusion that it seems we may draw is that, generally, in international law, the animus of the individual organ is not the reason for the condition of responsibility, the latter results from the very fact of violation of an international duty of state'. My gratitude to David Engler for this translation.

<sup>324</sup> Anzilotti, '*La Responsabilité des Etats à Raison des Dommages Soufferts par des Etrangers*' (1906) 13 R.G.D.I.P. 5, 287. 'We believe that the theory of fault as a cause is absolutely not relevant here.' Also translated by David Engler.

<sup>325</sup> For example, Borchard, E., 'Theoretical Aspects of the International Responsibility of States' (1929) *Zeitschrift fur Auslanderrecht* 223, 226, who commented that '[t]he failure to perform a duty should suffice without a further attempt to prove a vague and uncertain fault.' de Arechaga, *supra*, at 535, who specifically rejects the need for inquiry into fault when '[t]he concept of fault as the violation of a pre-existing obligation is, ..., superfluous, because it reiterates the objective element of the internationally wrongful act.'

<sup>326</sup> Starke, 'Imputability in International Delinquencies' (1938) 19 Brit. Yrbk. Int'l. L. 104, 114-5.

<sup>327</sup> *Ibid*, at 114.

<sup>328</sup> (1921), 6 R.I.A.A. 57, 59.

It might be tempting to see unqualified responsibility as the overriding basis for the acts of state organs, officials and armed forces, however their concern is really more an issue of attribution than responsibility.<sup>329</sup> It might be argued that an anchor for objective responsibility may be found in the application of the principle prohibiting the abuse of rights, yet the status of the principle as a cause of action is uncertain.<sup>330</sup> The largest obstacle in claiming objective responsibility as a principle in customary law, in all cases of international responsibility, is that not all violations of international law are internationally wrongful acts.<sup>331</sup> There are circumstances that will preclude wrongfulness or excuse wrongfulness although they have violated international law.<sup>332</sup> Further, the suggestion that the application of the objective regime, in ultra-hazardous activities, is supported in general international law has been conclusively rejected by Handl, who cites the aftermath of the Chernobyl accident to illustrate the point.<sup>333</sup>

Although the evidence seems to suggest a preference for the objective regime,<sup>334</sup> it does not mean that the fault regime is completely excluded. Jennings and Watts claimed that '[t]here is probably no single basis of international responsibility, applicable in all circumstances, but rather several, the nature of which depends on the particular obligation in question.'<sup>335</sup> If the primary obligation were clear as to the basis of responsibility, then the formulation would not be difficult. However, customary international law is notoriously imprecise. Imposing an objective regime would be unreasonable where fault would allow issues of exception and qualifications to be considered. On the other hand, there is little argument to justify the place of fault where customary law or treaty provisions are clear and precise. What is necessary is the conclusion that the basis of responsibility is the breach

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<sup>329</sup> Jennings and Watts (ed), at 511, note 15.

<sup>330</sup> See section 3.6.1.1, 'Prohibition of the Abuse of Rights' and section 4.4.5, 'Abuse of Right or the Unreasonable Exercise of a Power'.

<sup>331</sup> Jennings and Watts (ed), at 511.

<sup>332</sup> Article 29-34, ILC Draft Articles, which include acts of legitimate countermeasures, self-defence, necessity, distress and force majeure.

<sup>333</sup> Handl, 'Liability as an Obligation Established by a Primary Rule of International Law' (1985) 16 *Neth. Yrbk. Int'l. L.* 49, 58-61; and Dupuy, *international law*, at 114. On Chernobyl, see Blix, 'The Post-Chernobyl Outlook for Nuclear Power' (Autumn 1986) *International Atomic Energy Agency Bull.* 9.

<sup>334</sup> Harris, D.J., *Cases and Materials on International Law* (4th edn., 1991), 467.

<sup>335</sup> Jennings and Watts (ed), at 509.

of a duty imposed under an obligation in international law, and that an internationally wrongful act is the act contrary to international law.<sup>336</sup> However, the removal of *culpa* does not answer all situations and cannot be applied universally.<sup>337</sup>

### 3.12 STATE RESPONSIBILITY FOR OTHER ENTITIES

International law does impose responsibility on the state for the acts of other entities, like state organs, individuals and groups of individuals. The issue of imputability may arise where organs of state are concerned, although this concept has been dismissed on two grounds. Firstly, on the basis that the issue of responsibility is the violation of a duty or elements of the duty;<sup>338</sup> and secondly, it creates a distinction between authorised and unauthorised acts, necessitating consideration of vicarious liability,<sup>339</sup> a concept that is uncertain in international law.<sup>340</sup> In practical terms, all acts of states are the acts of officials or institutions of the state. 'Since the actions of a state in practice are expressed in the actions of its agencies, the international legal responsibility of a state arises out of the actions of its agencies (state administration, legislative and judicial).'<sup>341</sup> There is little contention that international responsibility is attracted where an act or omission of the organs of a state involve a breach of international obligations.<sup>342</sup> The same proposition would also be true where the entity involved is not part of the formal structure of the state, but is granted some governmental authority and even if it operated in another territory.<sup>343</sup>

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<sup>336</sup> Anzilotti, '*La Responsabilité des Etats à Raison des Dommages Soufferts par des Etrangers*' (1906) 13 R.G.D.I.P. 5, 14.

<sup>337</sup> Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' (1992) 3 Eur. J. Int'l. L. 139, 142.

<sup>338</sup> Brownlie, principles, at 435, who considers the concept of imputability to be a 'superfluous notion', because, 'the major issue in a given situation is whether there has been a breach of duty'.

<sup>339</sup> *Ibid*, at 435.

<sup>340</sup> Jennings and Watts (ed), at 501, note 13, who claim, '[a]lthough the terminology is convenient for drawing attention to a useful distinction, it must be noted that a state's responsibility for the act of a private person is not vicarious responsibility *stricto sensu*. The state is in international law not legally responsible for the act itself, but for its own failure to comply with obligations incumbent upon it in relation to the acts of the private person: those acts are the occasion for the state's responsibility for its own wrongful acts, not the basis of its responsibility.'

<sup>341</sup> Tunkin, theory, at 382.

<sup>342</sup> Jennings and Watts (ed), at 540.

<sup>343</sup> *Ibid*, at 540, note 1.

The authorised acts of administrative officials and members of the armed forces are capable of attracting international responsibility. Acts that are ‘ostensible exercise of their official function’, even if without authority, in excess of their competence or through mistake or ill-judged, will also attract international responsibility.<sup>344</sup> The acts of members of the armed forces committed in the line of duty, or in the presence of and under the orders of a superior official, are *prima facie* attributable to the state.<sup>345</sup> Even if *ultra vires* were claimed, it is generally accepted that the so-called *ultra vires* acts of state organs will not create immunity from legal consequences where the acts complained were committed within their apparent authority or general scope of authority.<sup>346</sup> Further, a state that fails to punish,<sup>347</sup> or take due diligence to avoid injury,<sup>348</sup> may be held responsible.<sup>349</sup> These acts may also not be excused merely because they were permitted or required by domestic law.<sup>350</sup> There is little contention that where an administrative or executive organ of state fails in fulfilling its obligations, international responsibility would attach to the state.<sup>351</sup>

The question of whether responsibility attaches, because of the direct action of the official or from the omission to take measures to deal with the consequences, will depend upon the circumstances of the acts and the particular obligations alleged to have been violated.<sup>352</sup> It is also clear that entities not forming part of the formal structures of the state

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<sup>344</sup> Jennings and Watts (ed), at 545; also Article 20, ILC Draft Articles, ‘acted in that capacity’ [1975] ii Yrbk. I.L.C. 61 and 70, para. 28.

<sup>345</sup> Jennings and Watts (ed), at 546, note 5. The distinction between higher and lower officials has been rejected, see *Way Case* (1928), 4 R.I.A.A. 391; Hague Codification Conference, Article 7 and 8; and de Arechaga, *supra*, at 547.

<sup>346</sup> Brownlie, principles, at 450; and de Arechaga, *supra*, at 548.

<sup>347</sup> *Zafiro Case* (1925), 6 R.I.A.A. 160.

<sup>348</sup> *Tinoco Arbitration Case* (1923), 1 R.I.A.A. 375, 394.

<sup>349</sup> A contrary opinion is argued by Meron, ‘International Responsibility of State for Unauthorised Acts’ (1957) 33 Brit. Yrbk. Int’l. L. 85, 113.

<sup>350</sup> Part 1, Article 4, ILC Draft Articles in [1973] ii Yrbk. I.L.C. 184-8; and Article 46, Vienna Convention on the Law of Treaties (1969).

<sup>351</sup> The principle was stated by Commissioner Nielsen in *Massey Claim* (1927), 4 R.I.A.A. 155, 159, who opined, ‘I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of [state officials], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.’

<sup>352</sup> Brownlie, principles, at 448. For example, in the *Rainbow Warrior Incident* (1985), Ruling of the Secretary-General, 6 July 1986, (1987) 26 I.L.M. 1346, the UN Secretary-General mediated a large financial settlement from France for the violation of New Zealand sovereignty by French agents; and in

may also attract state responsibility for their actions where there exists the element of 'effective control'.<sup>353</sup> In fact, the burden of proving that an entity was not acting under government authority lay with the Respondent.<sup>354</sup> The acts of an individual, acting in a public position, might attract responsibility as a private individual.<sup>355</sup> Individual responsibility may also attach to certain acts specifically provided by international law, like in the case of the crime of genocide or war crimes.<sup>356</sup> The acts of a head of state might therefore attract international responsibility, as well as personal responsibility, depending on the obligation violated. This would be the same for diplomatic envoys operating in another state. However members of parliament would only attract the responsibility of the state for their collective public acts, whilst their private affairs remained separate, as would members of government and members of the judiciary.<sup>357</sup>

States are generally not responsible for the acts of private individuals, unless there is an element of complicity.<sup>358</sup> The same would apply to mob violence,<sup>359</sup> or insurrections<sup>360</sup> unless there is some bad faith.<sup>361</sup> A state does have to apply a degree of vigilance because it may be responsible for the acts or omissions of its own authorities in seeking, as far as possible, to guard against the consequences of mob violence.<sup>362</sup> Thus the non-responsibility

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the *Nicaragua Case (Merits)* [1986] I.C.J. Reps. 14, 146-9, the Court held the US responsible for the hostile activities carried out against Nicaragua by agents for the US.

<sup>353</sup> *Nicaragua Case* [1986] I.C.J. Reps. 14, 64-5, para. 115; also Boyle, 'Determining U.S. Responsibility for Contra Operations under International Law' (1986) 81 Am. J. Int'l. L. 86.

<sup>354</sup> *Yeager v. Iran* (1987) Iran-U.S. C.T.R. 92, para. 43-45.

<sup>355</sup> For example note the case of *Filartiga v. Pena-Irala* 630 F.2d 876 (1980), reprinted in, (1980) 19 I.L.M. 966, where the US Second Circuit Court of Appeals found an individual responsible for his acts in a public position, in a private suit.

<sup>356</sup> See further below Chapter 4 and 5.

<sup>357</sup> See generally, Jennings and Watts (ed), at 542-4.

<sup>358</sup> See further section 5.4.1, 'Compelling a State to Investigate and Prosecute Human Rights Violations'.

<sup>359</sup> Jennings and Watts (ed), at 550.

<sup>360</sup> *Ibid*, at 552.

<sup>361</sup> *Home Frontier and Foreign Missionary Society Case* (1920), 6 R.I.A.A. 42, 44; also *Youmans* (1926), 4 R.I.A.A. 110; and *Mead Case* (1930), 4 R.I.A.A. 653, where there was an obvious failure to arrest the perpetrators.

<sup>362</sup> *Per sole Arbitrator Huber in Spanish Zones of Morocco Claim* (1925), 2 R.I.A.A. 615, 642.

provisions are subject to a requirement to exercise due diligence,<sup>363</sup> and not to be 'manifestly negligent'.<sup>364</sup>

Responsibility may also attach to the state for the legislative acts that are incompatible with international law or from the non-enactment of legislation that is required under international law.<sup>365</sup> Controversy exists with both these situations, as failing to enact legislation does not imply that the provisions are not being applied, unless the enactment is itself the obligation. On the other hand, enacting legislation but failing to apply the provisions is probably the greater evil.<sup>366</sup> Enacting legislation incompatible with international law also creates controversy. For example as to when an action might arise - would it arise when applied,<sup>367</sup> or is the very existence wrongful.<sup>368</sup> *Dicta* in the World Court supports both contentions, leading to the conclusion that the mere existence of legislation incompatible with international law was sufficient to establish a legal interest in pursuing a claim.<sup>369</sup> Ultimately, it would seem to depend on the specific obligation that is alleged to have been violated and whether the obligation is of 'conduct' or 'result'.<sup>370</sup> Where a state is required not to act in a specific manner and does so, it violates an obligation of conduct.<sup>371</sup> A breach of an obligation of result might occur where a state is required to achieve a particular result, for example the elimination of discrimination, but takes no steps to comply. The 'result' expected is the elimination of discrimination, which

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<sup>363</sup> *Diplomatic and Consular Staff in Tehran Case* [1980] I.C.J. Reps. 3, 29-30.

<sup>364</sup> Garcia-Amador, on Article 12(1), [1957] ii Yrbk. I.L.C. 121-3.

<sup>365</sup> League of Nations Conference for the Codification of International Law, *Acts*, vol. IV, Third Commission, 32-49.

<sup>366</sup> de Arechaga, *supra*, at 545.

<sup>367</sup> For example, when the US legislated exempting their vessels from the Panama toll, the UK government accepted that no claim existed till the legislation was applied: Hackworth, *Digest*, vol. 6, at 59; and it was found by the Panama-US General Claims Commission that it was the expropriation of alien's property and not merely the legislation that created an international claim: *Mariposa Development Company Case* (1933), 6 R.I.A.A. 338, 341.

<sup>368</sup> For example in *Phosphates in Morocco Case* (Preliminary Objections) [1938] P.C.I.J. Ser. A/B, No. 74, at 25, the court found that the unlawfulness resulted from the legislation itself.

<sup>369</sup> Schwarzenberger, *International Law as Applied by Courts and Tribunals* (3rd edn., 1957), 614.

<sup>370</sup> See Draft Articles 20 to 22, and commentaries; [1977] ii Yrbk. I.L.C. 11-30, which deal with obligations of 'result' and 'conduct'.

<sup>371</sup> For example, where a positive duty exists to refrain from torture and torture is carried out by state officials, this is conduct violating an international obligation.

may be fulfilled through domestic legislation or the dismemberment of the structures of apartheid. No individual conduct might give rise to responsibility, but the failure to achieve the result or a blatant disregard for the obligations to take necessary steps might suffice.<sup>372</sup>

### 3.13 INTERNATIONAL PERSONALITY

Any entity with international personality is capable of committing an international wrongful act.<sup>373</sup> Belligerents are subjects of international law with limited international personality.<sup>374</sup> Responsibility would only apply where the rebels have been successful,<sup>375</sup> and it is proven that the acts complained of were attributable to the revolutionaries who are now the government.<sup>376</sup> International organisations may also have international personality to function as a legal entity,<sup>377</sup> although the possibility of international organisations being held responsible is a far more difficult issue and the law in this area remains unclear.<sup>378</sup> The problem is perhaps most significant where UN troops commit tortious acts.<sup>379</sup> Troops in

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<sup>372</sup> See further section 5.4.1, 'Compelling a State to Investigate and Prosecute Human Rights Violations'.

<sup>373</sup> Jennings and Watts (ed), at 504.

<sup>374</sup> Mugerwa, *supra*, at 286, who identified belligerency to exist where: there is an armed conflict within a state and the rebels occupy a substantial portion of territory; they conduct hostilities according to the rules of war; are organised with a responsible authority; and circumstances make it necessary for a state to define its attitude to the conflict with respect to the rebels.

<sup>375</sup> *Bolivar Railway Co. Case* (1903), 9 R.I.A.A. 445, the Umpire found that a nation was responsible for the acts of a successful revolution from the time the revolution began; note however in the *Sambaggio Case* (Italy v. Venezuela) (1903), 10 R.I.A.A. 499, where the revolution was unsuccessful, the Umpire found that no government was responsible for a revolution designed to remove it from power; also Article 15, ILC Draft Articles - [1975] ii Yrbk. I.L.C. 99-106.

<sup>376</sup> *Short v. Iran* (1987) Iran-U.S. C.T.R. 76, para. 33-35.

<sup>377</sup> The ICJ has found on at least two occasions that international organisations have implied powers to function as an international legal entity; *Reparations for Injuries Suffered in the Service of the United Nations Case* [1949] I.C.J. Reps. 174, where sufficient international personality was given for the UN to bring an international claim; and secondly, in the *Effects of Awards of Compensation made by the United Nations Administration Tribunal* [1954] I.C.J. Reps. 56-7, which dealt with the competence of a tribunal to do justice between international organisation and members of its staff.

<sup>378</sup> Brownlie, principles, at 688. However, the UN Administrative Tribunal and the Administrative Tribunal of the ILO are designed to permit the application of individual petitions concerning contractual matters of employment between the employee and specialised agencies, thus providing a forum for the responsibility of international organisations, although only on contractual issues.

<sup>379</sup> An example of atrocities committed by UN personnel, was the torture and murder of Shidane Arone a sixteen year old Somali in 1993, see Cockburn, 'Living in Sin', in *The Guardian*, *UN Blues*, 21; and UN investigations uncover evidence that the responsibility for the Harbel massacre might rest with ECOMOG (Economic Community of West African States Cease-Fire Monitoring Group), or at least their allies, see 'Liberia' (1994) 13 (2&3) Refugee Survey Quarterly, 48 and 70-72.

peacekeeping missions, although operating under the general banner of the UN, may nevertheless receive and operate on the commands of their respective governments.<sup>380</sup>

Although not all cases are admitted, generally the UN has accepted responsibility for the tortious actions of its agents.<sup>381</sup> Whether this would apply as a matter of principle of all specialised agencies remains unclear.<sup>382</sup>

One critical element of the Draft Articles is its emphasis on the responsibility of states, excluding the idea that wrongdoing is in fact done by morally responsible human beings.<sup>383</sup> It is often claimed that only states and international organisations may be subjects of international law capable of international responsibility.<sup>384</sup> Yet individuals may be responsible for international crimes.<sup>385</sup> Allott argues that the subjects of international law are the 'peoples of the world'.<sup>386</sup>

'The wrongful act of a state is the wrongful act of one set of human beings in relation to another set of human beings. Thus the effect of interposing responsibility between a wrongful act and liability for its consequences is more than conceptual or structural. Its substantive consequence is that those human beings who implement the law's rights and duties are able to perceive themselves, on the one hand, as entitled to implement the state's rights and duties and, on the

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<sup>380</sup> See generally, McCoubrey, H., 'International Law and National Contingents in UN Forces' (1994) XII (3) *International Relations* 39, who believes that responsibility lies primarily with the state of the nationality of the force.

<sup>381</sup> (1965) Yrbk. U.N. 138; *M v. Organization des Nations Unies et Etat Belge* 45 I.L.R. 446.

<sup>382</sup> Brownlie, principles, at 688.

<sup>383</sup> Allott, *supra*, at 13-14.

<sup>384</sup> Tunkin, theory, at 382.

<sup>385</sup> For example, under Article 6 of the Nuremberg Charter, there 'shall be individual responsibility' for 'crimes against peace', 'war crimes', and 'crimes against humanity', Charter annexed to the Agreement of 8 August 1945 for the punishment of major war criminals, see (1945) 39 Am. J. Int'l. L. - Supp. 259; in fact, the Tribunal claimed, that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' In Transcript of Proceedings (1947) 41 Am. J. Int'l. L. 220; unanimously affirmed by GA Res. 95(I), 11 December 1946, affirming the principles recognised in the Charter of the tribunal; and the ILC Draft Code of Offences against the Peace and Security of Mankind, [1954] ii Yrbk. I.L.C. 151-2; reviewed and renamed in 1982 as Draft Code of Crimes against Peace and Security of Mankind, Report of the ILC Forty-Second Session, 1990, para. 158. Under the Code, various acts are attributed as criminal conduct, which included acts or threats of aggression (Article 2(1) and (2)); fomenting civil strife or terrorist activities (Article 2(5) and (6)); annexation of territory (Article 2(8)); destruction of ethnic, national, racial or religious groups (Article 2(10)); inhuman acts against civilians on social, political, racial, religious or cultural grounds (Article 2(11)); and conspiring, attempting, inciting or participation in commission of the above mentioned acts (Article 2(13)).

<sup>386</sup> Allott, *supra*, at 1.

other hand, as bringing about responsibility in the state if they implement them unlawfully. In such circumstances, it is not surprising that states behave badly. The moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails.<sup>387</sup>

The imposition of responsibility must depend on the specific considerations of the acts themselves, whether committed by states or individuals.<sup>388</sup> An international criminal court with universal jurisdiction has been proposed,<sup>389</sup> a statute has been drafted by the ILA,<sup>390</sup> and considered by the ILC.<sup>391</sup> However until one is set-up, enforcement is dependent on specific international tribunals<sup>392</sup> or national courts.<sup>393</sup> Several other international conventions also provide for individual responsibility,<sup>394</sup> however their application is problematic without an international criminal court.<sup>395</sup> It may nevertheless be concluded that individuals are subjects of international law and in certain instances, may be held responsible for their actions, both on the international and domestic spheres, both criminally and under civil suits.<sup>396</sup> There are difficulties with holding heads of states responsible, although there is historical precedence.<sup>397</sup> The recent UN efforts in Haiti,<sup>398</sup>

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<sup>387</sup> *Ibid*, at 14.

<sup>388</sup> *Ibid*, at 15-16.

<sup>389</sup> See generally, Jennings and Watts (ed), at 507, note 27.

<sup>390</sup> ILA, Report of the Sixty-first Conference (1984), 4-6, 257-67.

<sup>391</sup> Report of the ILC, Forty-Second Session, 1990, para. 93-157; note also the report of the working group, (1993) 87 Am. J. Int'l. L. 140.

<sup>392</sup> For example the International Tribunals for the former Yugoslavia and Rwanda.

<sup>393</sup> See generally the *Eichmann Case* (1961), (1962) 56 Am. J. Int'l. L. 805.

<sup>394</sup> The Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article 4 provides for individual responsibility, whilst Article 6 provides for enforcement in domestic tribunals; and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), Article 3 provides for international criminal responsibility for individuals.

<sup>395</sup> Brownlie, principles, at 563.

<sup>396</sup> For civil suits, see further below section 5.7, 'Empowering the Individual to Enforce International Norms', the Alien Tort Statutes; and *Filartiga v. Pena-Irala* (1980) 630 F.2d 876.

<sup>397</sup> The Peace Treaty of Versailles following the First World War, Article 227, indictment of Emperor Wilhem.

<sup>398</sup> See SC Res. 905 (1994).

against Aidid,<sup>399</sup> and in ostracising Karadzic,<sup>400</sup> suggests that individual leaders and governments are not immune from interventionist action by the UN.<sup>401</sup>

### 3.14 DEFENCES AND THE EXHAUSTION OF LOCAL REMEDIES

The concept of defences or 'justifications'<sup>402</sup> lack consistency in terminology and application.<sup>403</sup> What seems to exist is a series of principles that act as standards, raised according to the circumstances of a given situation by a state to excuse actions that would otherwise incur international responsibility. The defences are: countermeasures,<sup>404</sup> self-defence,<sup>405</sup> and other circumstances precluding wrongfulness - which includes consent, *force majeure*, fortuitous event, distress and a state of necessity.<sup>406</sup> It should be noted that whereas a claim of self-defence and countermeasure might operate to excuse the responsibility of a state completely, the operation of the other defences might not prejudice the claim for compensation. Further, they may only have limited application as

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<sup>399</sup> See generally, the basis for the arrest of Aidid under SC Res. 733, 751 and 794 (1992); and Serrill, M., 'Death of a Warlord: Will the killing of Mohamed Farrah Aidid pave the way for peace in war-ravaged Somalia?', *Time*, 12 August 1996, 17.

<sup>400</sup> See generally, *Kadic v. Karadzic*, (civ. 94-9069 US Court of Appeal for the Second Circuit, 13 October 1995), *reprinted in*, (1995) 34 I.L.M. 1592.

<sup>401</sup> In fact, it seems possible to hold an entire state to account over the acts of alleged terrorists, as was applied to Libya for refusing to take action in response to the requests of the US, France and the UK, which led to the application of sanctions under SC Res. 731 and 748. See further section 5.5, 'Coercive Action and Action to Remove a Government'. Although with respect to a civil suit, immunity or the act of state doctrine might apply to bar litigation.

<sup>402</sup> As proposed by Brownlie, principles, at 463.

<sup>403</sup> Malanczuk, P., 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility', in Spinedi and Simma (eds), *United Nations Codification of State Responsibility* (1987), 198; and Brownlie, principles, at 463.

<sup>404</sup> For example reprisals as a means of self-help are permitted under international law, defined and affirmed in the *Nahlilaa Case* (1928), 2 R.I.A.A. 1011, but the use of economic countermeasures must remain within the rules prescribed by international law and be in response to an initial wrongful act of another state: *Air Services Agreement Case* (1978), 18 R.I.A.A. 416, at para. 81; as well as be proportionate in relation to the necessity of the action and the damage inflicted by the initial wrong, see Malanczuk, *supra*, at 214-5. See further below section 5.5, 'Coercive Action and Action to Remove a Government'.

<sup>405</sup> Set out in the *Caroline Case*, *per* Mr Webster, 19 B.F.S.P. 1137-38; 30 B.F.S.P. 195-6, as 'instant, overwhelming, leaving no choice of means, and no moment for deliberation.' See also Harris, *supra*, at 848; and under Article 51 of the UNC where an armed attack occurs.

<sup>406</sup> See also ILC Draft Articles on State Responsibility, Articles 29-34.

circumstances that preclude wrongfulness, where they operate on a temporary basis, limited by time and circumstance.<sup>407</sup>

A rule exists in international law that before a claim for an injury can be actionable in an international tribunal, the claimant has to have exhausted the avenues within the state that is alleged to have caused the injury.<sup>408</sup> This rule would not apply to situations where an immediate injury is caused by a direct breach of international law upon a state, or where the state is not complaining of an injury done to its nationals.<sup>409</sup> It would probably also not apply where the damage done does not violate internal law, but violates international law.<sup>410</sup> The rule is generally included by specific provisions that establish competence for tribunals, commissions or courts to hear complaints concerning human rights abuses. It is therefore a general requirement that before a claim is made against a state, all local remedies have to be exhausted. It is also true that this is a preliminary objection that has to be raised by the respondent state.

The function of the rule is to allow a state an opportunity to redress, in its own courts, any wrongs it might have done.<sup>411</sup> The rule is also necessary 'to establish beyond doubt that the wrongful act or denial of justice complained of is the deliberate act of the State, and that it is willing to leave the wrong unrighted.'<sup>412</sup> The application of this rule shows the significant difference between two regimes of state responsibility. The use of diplomatic interposition for the protection of nationals abroad, which is the first source of state responsibility - injury to aliens; and the second source of state responsibility, which is the protection of non-nationals - the international protection of human rights.<sup>413</sup> These two distinct regimes nevertheless contain a common condition - the exhaustion of local

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<sup>407</sup> Malanczuk, *supra*, at 201.

<sup>408</sup> Sohn, L.B., 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am. U. L. Rev. 1, 4, who claims it is incorporated in the law of human rights.

<sup>409</sup> de Arechaga, *supra*, at 582; see also Jennings and Watts (ed), at 523.

<sup>410</sup> Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 Brit. Yrbk. Int'l. L. 452, 454.

<sup>411</sup> *Interhandel Case* [1959] I.C.J. Reps. 6, 27, 83 and 88.

<sup>412</sup> Fawcett, *supra*, at 452.

<sup>413</sup> Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), 48.

remedies. For the application of diplomatic protection, the rule is there to avoid unnecessary interference from another state. Thus the alien who has suffered an injury has to seek and exhaust local remedies before the home state can bring a claim on his/her behalf.<sup>414</sup> Under the regime of human rights protection, an opportunity must be given to a state to right the wrongs done against its own nationals, before other enforcement measures are activated.

With respect to the first regime, an issue of contention is whether the state was seeking to establish its own direct rights, or whether it was adopting the cause of its national. The *Interhandel Case* found that the Swiss claim was of the kind that attracted the exhaustion of local remedies, as the state was adopting the cause of its national.<sup>415</sup> Various authors have considered this position with respect to the responsibility for injuries to aliens,<sup>416</sup> although the concern of this thesis lies mainly with whether it would apply to the international protection of human rights. The requirement of exhaustion of local remedies to the situation of non-nationals is usually provided for in treaties that accord international human rights protection.<sup>417</sup> Generally, the rule is asserted and the availability of remedies proven by the defendant government,<sup>418</sup> whilst it is for the applicant to show that such remedies were exhausted or ineffective.<sup>419</sup> Accordingly, the burden of persuasion

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<sup>414</sup> *Ibid*, at 50.

<sup>415</sup> *Interhandel Case* [1959] I.C.J. Reps. 6 28-9; and the *Elettronica Sicula Case* [1989] I.C.J. Reps. 42-3, shows the difficulty in establishing a direct breach of international obligation, as distinct to a dispute that arises from an injury suffered by a national in another state.

<sup>416</sup> See generally, Freeman, *The International Responsibility of States for Denial of Justice* (1938), 403-55; Dawson, 'International Law and the Procedural Rights of Aliens before National Tribunals' (1968) 17 Int'l. & Comp. L.Q. 404-27; Jennings, 'General Course on Principles of International Law' (1967) 121 (ii) Recueil des Cours 327, 480-6; and Adler, 'The Exhaustion of Local Remedies Rule after the International Court of Justice Decision in *ELSI*' (1990) 39 Int'l. & Comp. L.Q. 641-53.

<sup>417</sup> For example, Article 26, ECHR (1950); *De Jong, Baljet and Van de Brink v. The Netherlands* (1986) 8 Eur. Hum. Rts. R. 20, where the applicants were conscripts, although the Court found that the Government was estopped from arguing that there was no exhaustion of local remedies; see also *Tomasi v. France* (1993) 15 Eur. Hum. Rts. R. 1, 48-9; Article 46(1)(a), Inter-American Convention on Human Rights (1969); see *Exceptions in the American Convention* (Advisory Opinion of 10 August 1990 - OC - 11/90, requested by the Inter-American Commission on Human Rights) (1991) Hum. Rts. L.J. 20-3, para. 41; Article 11(3) and 14(7)(a), CEAFRD; and Article 41(1)(c), ICCPR.

<sup>418</sup> For example, Article 46(1)(a), ACHR.

<sup>419</sup> Article 46(2), ACHR. For example, the issue of the non-exhaustion of local remedies was raised by Honduras in the *Valasquez Rodriguez Case*, where the Court found such local remedies to be ineffective, *Valasquez Rodriguez Case* (Judgement) Inter-American Court of Human Rights, (1989) 28 I.L.M. 291, 304-309, para. 50-81.

is upon the applicant, although it is for the respondent to raise and prove the issue of non-exhaustion, by showing the existence of such remedies, and the standard of proof is high.<sup>420</sup>

It is possible for the rule not to apply in certain other situations, for example where the parties specifically agree to it, where it is waived or by estoppel.<sup>421</sup> Also, where the time delay in bringing a claim before a local tribunal has been excessive,<sup>422</sup> which might then amount to a denial of justice.<sup>423</sup> It is sufficient to establish here that the requirement of the exhaustion of local remedies would apply where specifically provided, but the allegation of governments would not operate automatically to dismiss a claim, but would depend on the proof that such remedies did in reality exist.<sup>424</sup>

### 3.15 CONCLUSION

It seems clear, that '[w]hether political or economic in nature, exodus could be prevented or circumscribed only if conditions were to be drastically different at the point of departure.'<sup>425</sup> A comprehensive system of preventative as well as corrective measures should have a perspective that permits the use of all tools, legal or otherwise, to contribute to the solution. Clearly, a comprehensive response needs to take account of the individuality of the situation, but also apply all the practical tools at their disposal, such as effecting a cease-fire, negotiating international monitoring and disarmament, cessation and prosecution of human rights violations, development of structures for longer term mediation, economic development, rehabilitation and reconciliation at every stage.<sup>426</sup>

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<sup>420</sup> Robertson, 'Exhaustion of Local Remedies in International Human Rights Litigation - the burden of proof reconsidered' (1990) 39 Int'l. & Comp. L.Q. 191, 193 and 196.

<sup>421</sup> See Jennings and Watts (ed), 526, note 15, 16 and 17.

<sup>422</sup> *Teti v. Uruguay* (1982), 70 I.L.R. 287, 294.

<sup>423</sup> For example, the denial of justice may include the refusal of a judicial authority to exercise its functions and wrongful delay in giving judgement. See further below section 5.4.1, 'Compelling a State to Investigate and Prosecute Human Rights Violations'.

<sup>424</sup> For example, under the US Torture Victim Protection Act of 1991, section 2(b) permits the court to waive the requirement where the local remedy was not 'adequate and available'; and under section 703 of the Restatement (Third) of the Foreign Relations Law of the United States (1987), a plaintiff need not even attempt the local remedy where it is apparent that it would be futile to pursue (hereinafter, Third Restatement).

<sup>425</sup> Aga Khan, 1981 report, para. 34.

<sup>426</sup> UNHCR, state of the world's refugees, at 28. Some examples of UN assisted programmes for long term solutions include the Central American plan, CIREFCA, the 1989 International Conference on

Forced migrants are a community unto themselves, identified and circumscribed by their flight - both transboundary and internally - loss of normality, property and homestead.<sup>427</sup> Where the initial flight occurs, a policy of coercion will inevitably exist, whether caused by fighting, expulsion, urban development or ethnic tension. The solutions during flight are generally governed by politics, such as Cold War propaganda, extreme nationalism or simply the lack of political will to find a solution. Yet at each stage of the process, between the normal situation to resettlement or repatriation, a legal solution could have been attempted, if the political will existed to pursue it.<sup>428</sup>

Although state sovereignty still remains an effective impediment to averting refugee flows,<sup>429</sup> legal mechanisms applying existing international norms supersede the veil of state sovereignty. Aga Khan concluded that, '[d]ealing with root causes requires international co-operation, with *specific responsibilities* assigned to states, the UN and other organizations.'<sup>430</sup> As a general proposition, the attribution of responsibility on a state depends upon the act or omission of the state's organs, whether it be the legislative organs, military, government or administrative officials. To this extent, the acts of private individuals, mob violence or insurrections would be attributable on the basis that a state organ acted, or omitted to act, in violation of an international obligation. The main purpose in establishing standards of conduct from which a state may be held responsible, is that a connection may be maintained between the entity of the state and the harm done. For the purposes of this thesis, the harm done is generally the causing of forced migration, whether because the causing violates international provisions or the causing is *per se* an international wrongful act. Can the element of wrongfulness be isolated? Would it be possible for an individual to bring an action against another individual or state in a domestic court for violations of international law? It is possible that apart from states, international

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Refugees in Central America; the Comprehensive Plan of Action for Vietnam; and the UN Transitional Authority in Cambodia (UNTAC).

<sup>427</sup> Goodwin-Gill, in Rystad (ed), *the uprooted*, at 20, identifies the refugee in similar terms.

<sup>428</sup> See Appendices, A2

<sup>429</sup> Hathaway, J.C., 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harv. Int'l. L.J.* 129, 144-51; and generally, Jack I. Garvey, 'Toward a Reformulation of International Refugee Law' (1985) 26 *Harv. Int'l. L.J.* 483.

<sup>430</sup> Aga Khan, 'Looking into the 1990s: Afghanistan and other Refugee Crisis' (1990) *Int'l. J. Refugee L.* - Special Edition 14, 27 (emphasis added).

organisations and individuals may also be held accountable for violations in international law. These are some of the issues that need clarification before legal solutions may be applied.

## CHAPTER 4

### FORCED MIGRATION AND INTERNATIONAL RESPONSIBILITY

#### 4.1 INTRODUCTION

The challenge to link forced migration and international responsibility was articulated by Goodwin-Gill when he concluded that, '[I]legal theory nevertheless remains incomplete, in view of the lack of any clearly correlative rights 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.'<sup>1</sup> Several issues have therefore been identified for investigation; what are the substantive rights and obligations, what correlative implications exist between those competent to exercise protection and the legal consequences following breach of obligation. When we address the question of international legal protection against forced migration, we also need to consider issues concerning entitlements under law, mechanisms to vindicate claims and means for the redress of grievances.<sup>2</sup>

This chapter seeks to investigate and address the link between the causing of forced migration and international responsibility. By the term responsibility, we mean legal responsibility, although the actions that may result in a finding of legal responsibility may not necessarily be a legal action *per se*. For example, the basis of a legal claim could be used as leverage in persuading conciliation or mediation and it might even encourage one party to submit to the advice of another. Establishing a legal foundation acts as an opportune starting point for the analysis of *locus standi* and jurisdiction to implement solutions, and the various enforcement mechanisms.<sup>3</sup> The objections to using the regime of responsibility and that of human rights provisions will also be investigated below.

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<sup>1</sup> Goodwin-Gill, *The Refugee in International Law* (1985), 227. This remains true for the internally displaced as well.

<sup>2</sup> Helton, Arthur C., 'What is Refugee Protection?' (1990) *Int'l. J. Refugee L.* - Special Edition 119.

<sup>3</sup> See below Chapter 6, note also Appendices, A6.

Goodwin-Gill lamented that the ‘precise formulation’ of underlying rights and duties incorporated into a regime of responsibility remained elusive.<sup>4</sup> Thus, it is hoped that the discussions below will add to the development of an understanding of rights and duties pertaining to forced migration. It may be argued that defining the rights of forced migrants may be detrimental if it is insufficiently precise and comprehensive, and would therefore prejudice the existing human rights position.<sup>5</sup> On the other hand, Deng notes that if ‘[c]onceived as part of a dynamic process of decision making, law becomes not an end but a means to be moulded as need requires, both as an educational prescription and a sanction.’<sup>6</sup> Therefore it is hoped that the clarification of legal obligations towards forced migrants would act as code of conduct for governments. Proposing such a regime of legal accountability might also contribute to public awareness and international opinion.

In the last two decades the influence of the ‘positivist’ approach to law has declined such that, ‘... the law has been liberated from the stultifying effects of those elements of the past which only served to act as shackles, impeding the law from responding in a just and practical way to new human and social needs.’<sup>7</sup> Thus concluding that refugee issues and human rights law should not be separated and each should draw from the other, or rather, that refugee protection and solutions should take from human rights law. The speciality of the legal provisions arises not from the source of individual provisions, but from the identified subjects and the application of those provisions for their benefit. The protection of refugees does not rely merely on the 1951 Convention and 1967 Protocol, but on a variety of other international instruments. Similarly, the protection of the internally displaced does not merely rely on the human rights conventions, but also on international criminal law provisions and international humanitarian law. Therefore the provisions relating to forced migration will draw from a similarly wide source.

One might ask, ‘[i]s a government responsible under international law if large numbers of persons resident in that country wish to leave it?’<sup>8</sup> The answer to this question

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<sup>4</sup> Goodwin-Gill, *the refugee*, at 226.

<sup>5</sup> Deng, *protecting the dispossessed*, at 9.

<sup>6</sup> *Ibid*, at 10.

<sup>7</sup> Coles, *bulletin*, at 65.

<sup>8</sup> Johnson, D.H.N., ‘Refugees, Departees and Illegal Migrants’ (1980) 9 *Sydney L. Rev.* 11, 15.

raises several issues that highlight the complexities of forced migration. A government would only be responsible where it has in fact violated certain elements of international law, but what are these elements that make the activity unlawful? If in fact the government was merely assisting *bona fides* the migratory aspirations of its inhabitants, something which the persons chose voluntarily, then they could arguably be assisting in the right of freedom of movement.<sup>9</sup> Thus identifying the causes of forced migration with unlawfulness and the causes of action is significant as a precondition to international responsibility. For international responsibility to be attached to a given action, a primary obligation or some fundamental right has to be established. If the obligation or right is then violated, the party who is 'injured' may bring an action or claim.

There has been some international concern between issues of forced migration and international responsibility, reflecting both refugee and internally displaced perspectives.<sup>10</sup> The Australian initiative concerning temporary refuge, submitted to the UN Secretary-General, clearly identified three positions concerning refugees: Firstly, the primordial responsibility for refugees rested with the state of origin; secondly, the international community had to help in voluntary repatriation where possible; and thirdly, the conditions within the state of origin had to provide for the basic rights of exiles to facilitate their voluntary return.<sup>11</sup> Similarly, in 1980, the German government requested an agenda for study, which led to the Experts Report in 1986.<sup>12</sup> The report clearly established the causes of refugees and recommended measures that should be taken to avert future flows of refugees. It did not, however, expressly apply the concept of responsibility, but called instead for international co-operation to observe international obligations.<sup>13</sup> More specifically, the report called on international institutions and states to make full use of their

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<sup>9</sup> UDHR, Article 13; see commentary by Grahl-Madsen, A., 'Article 13', in Asbjorn Eide and others (eds), *The Universal Declaration of Human Rights: A Commentary* (1992), 203-214.

<sup>10</sup> See generally, Lee, L.T., 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis?' (1996) 9 *J. Refugee Studies* 27; and International Conference on Central American Refugees (Guatemala City, 1989), *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America* (CIREFCA).

<sup>11</sup> UN Doc. A/36/582, 23 October 1981, 4ff.

<sup>12</sup> UN Doc. A/41/324, 13 May 1986.

<sup>13</sup> *Ibid.*, para. 66.

competence to prevent future flows.<sup>14</sup> Thus the emphasis, although more on political co-operation, had a foundation based on enforcing the obligations under the Charter and other international instruments. More recently, the Conclusions of the Executive Committee of the UNHCR, assisted by the report of the Expert Round Table of the International Institute of Humanitarian Law at San Remo,<sup>15</sup> identified that state responsibility was inextricably linked to an overall solution for voluntary repatriation. Therefore, the solution of voluntary repatriation necessarily engaged the responsibility of the state of origin.<sup>16</sup> The Asian-African Legal Consultative Committee also studied the concerns of state responsibility and refugees.<sup>17</sup> With respect to those who are internally displaced, Deng has clearly linked international responsibility with the causes of internal displacement.

#### 4.2 IDENTIFYING UNLAWFULNESS AS CAUSES OF ACTION

The causes of forced migration have already been considered above.<sup>18</sup> In order for a legal action to arise, unlawfulness in international law has to be identified and linked with the causes of action. Two approaches will be suggested in determining the unlawfulness of causing forced migration. The first approach considers that the causing of forced migrants is an international wrongful act because, the activities that create forced migrants are unlawful and/or the resulting effect and consequence of forced migrants are unlawful.<sup>19</sup> This proposition would require a brief discussion of the existing provisions in international law that may be applied to forced migration, an exercise that has already been conducted by several studies.<sup>20</sup> As for the internally displaced, provisions in international law do exist to establish unlawfulness under: the UNC, the four Geneva Conventions, the two International

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<sup>14</sup> *Ibid*, para. 67-68.

<sup>15</sup> (1985) Yrbk. Int'l. Institute of Humanitarian Law 244ff.

<sup>16</sup> UNHCR Executive Committee Conclusion No. 40 (XXXV), endorsed by GA Res. 40/118.

<sup>17</sup> Report on the Status and Treatment of Refugees: The Applicability of the Doctrine of State Responsibility, UN Doc. E/CN.4/Sub.2/1992/37.

<sup>18</sup> See above Chapter 3.

<sup>19</sup> Tomuschat, C., 'State Responsibility and the Country of Origin', in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1996), 59, 60, noting that an international wrongful act under the ILC Draft Articles on State Responsibility requires the breach of an international obligation (Article 3(b)), act or omission, attributable to the state (Article 3(a)).

<sup>20</sup> For example the Experts Report, para. 63, concluded that causing refugees was an international wrongful act that incurred state responsibility and was in the domain of international concern.

Covenants, the UDHR, the CEAFRD, the Friendly Relations Resolution, as well as other regional instruments.<sup>21</sup> The Programme of Action for Human Rights, agreed under the World Conference on Human Rights,<sup>22</sup> has already proposed measures for strengthening existing instruments for the protection of human rights.

The second proposition to identify unlawfulness will suggest that the causing of forced migration is in itself an international wrongful act and independently capable of founding a cause of action - this proposition will need to be proven as a principle of international law, taking the substantive elements as intention, coercion and detrimental effects.<sup>23</sup> Thus the causing of forced migration will have to be recognised as a law under the law-building stages and a principle under customary international law. In either instance and in general terms, responsibility is only owed where firstly, there is an act or omission that violates an obligation established by a rule of international law in force between the state responsible for acts or omission and the 'injured' party; secondly, the unlawful act must be imputable to a legal person; thirdly, loss or damage must have resulted from the unlawful act.<sup>24</sup>

International responsibility is not a branch of international law that stands on its own. It is a concept that should link all areas of conventional, customary and general principles of law for the benefit of a given subject matter. Thus the study of international responsibility should open up all the general principles of law and focus upon the causing of forced migration.<sup>25</sup> The application of either of these provisions might provide the basis of legal action against those who cause forced migration and establish a foundation for international responsibility and the consequential availability of remedies. In any event, the identification of unlawfulness is consistent with the functional perspective because it

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<sup>21</sup> Plender, 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 Int'l. J. Refugee L. 345, 353; and see generally, Deng, protecting the dispossessed.

<sup>22</sup> Vienna, 14-25 June 1993.

<sup>23</sup> As discussed in section 3.6, 'Elements Occurring in the Causes of Forced Migration'. A cause of action is defined as having legally recognised rights that were violated, thus providing a claim for judicial relief, see D'Amato, A., 'Judge Bork's Concept of the Law of Nations is Seriously Mistaken' (1985) 79 Am. J. Int'l. L. 92, 95.

<sup>24</sup> Johnson, *supra*, at 16; also note, Jimenez de Arechaga, 'International Responsibility', in Sorensen (ed), manual, at 534, although the absence of loss or damage may not prejudice the claim itself.

<sup>25</sup> See also Coles, 1992 study, 8-9.

identifies movements with unlawful causes and imposes obligations thereto, whilst taking account of issues such as protection, amelioration and prevention - part of a comprehensive plan of action.<sup>26</sup> There are however several loop holes in the application of international law provisions. For example, firstly, a state may suspend the application of humanitarian and human rights provisions because of an alleged state of emergency, such as in the situation of the Tamils in Sri Lanka and the Armenians in Turkey; secondly, where states have not ratified the humanitarian law or human rights provisions; and thirdly a situation where an organisation such as an NGO causes displacement.<sup>27</sup>

Wrongfulness may be claimed from the fact that rights and remedies need to be asserted, for '[a] *priori*, individuals and groups ought to be free to enjoy human rights in the territory with which they are connected by the internationally relevant social fact of attachment. The right to seek asylum and the benefits due to refugees, including non-refoulement and a certain standard of treatment, may therefore be seen as consequence of the breakdown of the norm.'<sup>28</sup> This same analysis would apply to those who are involuntarily displaced internally. Individuals or groups are effectively connected to the state by this 'social fact of attachment' which is determined by international law. Once so deemed, the state has to observe their human rights and protect this social attachment. The fact of the need for protection by an outside source is evidence of the breakdown of this relationship. Unlawfulness is not proved by the breakdown itself, but from the violation of the provisions recognised in international law, such as the protection of human rights. The provisions which have been violated will therefore need further investigation, especially if controversy on their application exists. It may be a legitimate conclusion that whilst human rights provisions do impose a general standard, their universal application and enforcement remain obscure. Yet they do provide a general position to allege *a priori*, unlawfulness.

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<sup>26</sup> See Appendices, A2.

<sup>27</sup> Deng, (1995) 14 (1&2) Refugee Survey Quarterly, at 226, who noted these loop holes concerning the internally displaced, although they are also relevant to transboundary movements. It should, however be noted that suspending certain humanitarian or human rights provisions may not be possible under certain treaty provisions - for example, Article 15(2), ECHR, which provides a no derogation clause - such clauses apply mainly to the right to life.

<sup>28</sup> Goodwin-Gill, the refugee, 229.

If unlawfulness and the causes of action may be established, these issues are clearly legal in character and beyond mere 'political' or 'purely humanitarian' questions, but are fundamental issues of law and order.<sup>29</sup> Thus politically difficult remedies, such as the removal of governments, should be determined under legal conditions and not political expedience. A political observer noted that the international community wanted to maintain the law without using force, but what resulted was a situation of force without law.<sup>30</sup> The sad truth of this statement is visible in situations where armed UN peace-keepers are kidnapped or used as human shields because of the uncertainty of their mandate. A clear foundation for legal action must thus be available for the international community to respond to causes of forced migration, even before considering the use of enforcement measures, whether economic sanctions or the use of force.

### 4.3 CAUSES OF ACTION

Brownlie provides for a number of headings of causes of action in law.<sup>31</sup> Not all of the headings are applicable to causing forced migration, and only the pertinent ones will be identified. As a general proposition, a cause of action is not the same as the 'subject matter of dispute'.<sup>32</sup> For example, the subject matter of a dispute may be provisions in a treaty, whilst the cause of action will be international responsibility for breach of treaty provisions. The distinguishing line may not always be clear, although, the causes of action inherent in causing forced migration will have forced migrants as the subjects, whilst the violations of specific international law provisions as the cause of action. For example, where alleging the causing of forced migration as an international wrongful act, the subject matter of the dispute are forced migrants, but the cause of action is the violation of a rule in international law, whether under a treaty provision or customary international law. Fundamental causes of action have to satisfy four conditions.<sup>33</sup> firstly, the category must not refer only to a subject matter of the dispute; secondly, the category must not merely refer to the legal issue

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<sup>29</sup> Coles, 1992 study, at 159.

<sup>30</sup> *Ibid*, at 86, the observer commenting on the situation in the former Yugoslavia, was cited by Coles.

<sup>31</sup> Brownlie, state responsibility, at 53-85.

<sup>32</sup> *Ibid*, at 84.

<sup>33</sup> *Ibid*, at 85.

of a given case; thirdly, the category should reflect accepted practices; and fourthly, the category should belong to a list of ‘ultimate and irreducible legal categories’ upon which legal claims may be founded.<sup>34</sup>

A cause of action provides the pinnacle from which unlawfulness may be alleged and provides a heading from which the violations of substantive provisions may be asserted. It therefore acts as the starting point from which a legal claim may commence. Brownlie suggested the following causes of action which include:

‘(a) State responsibility arising from breach of treaty obligation. (b) State responsibility arising otherwise (from a breach of a duty set by general international law). ... (e) Violation of the sovereignty of a State by specified acts. ... (g) The unreasonable exercise of a power causing loss or damage (abuse of rights). ... (i) Breach of the international standard concerning the treatment of aliens (sometimes called ‘denial of justice’). (j) Breach of human rights standards: in particular, the forms of unlawful discrimination. (k) Unlawful confiscation or expropriation of (public or private) property. ...’<sup>35</sup>

A list of applicable headings may thus be identified from the foundation provided by Brownlie, tempered and refined specifically to the causes of forced migration. Some overlap will occur, and depending on the particular provision violated, two or more causes of action may be alleged. The preference of choice will depend on several other factors, for example, a violation of a human rights provision may be alleged as a violation of convention or customary international law. Thus the choice of heading will depend on whether the ‘injured party’ is a party to the relevant convention, or is alleging a violation of obligation owed *erga omnes*.

A comprehensive discussion of all the provisions available under each heading of cause of action is not sought at this point, instead, samples of provisions linked to the cause of action will be identified and the application as a legal provision assessed on that basis. It is hoped therefore that the identification of the primary obligation will provide a foundation for legal or extra-legal action, on the basis that it supports a number of causes of action, whether they are causes of action inherent in the causing of forced migration, or whether

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

the causing of forced migration is considered an internationally wrongful act sufficient to found a cause of action in itself.

#### 4.4 CAUSES OF ACTION INHERENT IN CAUSING FORCED MIGRATION

This section will identify the causes of action and link them with provisions in international law that concern the causing of forced migration. This section aims further, to suggest the application of various provisions that provide primary obligations under each cause of action heading. A comprehensive approach that discusses all the applicable provisions within a cause of action heading might distract from the significance of the suggested system, which is to identify the heading and attach substantive provisions under it. Thus only those headings with specific application to forced migration will be suggested and a selection of clearly applicable provisions attached. This would also permit the system to develop where new provisions in international law evolve to supersede previous provisions. Although a detailed discussion of individual provisions will not be rehearsed herewith, the importance of determining the application of individual provisions should not be undermined, as the determination of responsibility rests primarily with the initial obligation itself.

Every incident of forced migration, whether transboundary or internal, has a precise or a combination of precise causes. For example, causing forced migration might violate the provisions prohibiting arbitrary arrest, detention and exile,<sup>36</sup> the freedom of movement and of residence within the borders of each state;<sup>37</sup> the right to leave and return,<sup>38</sup> and the right to nationality,<sup>39</sup> or the right not to have one's nationality removed on the grounds of race, ethnic, religious or political grounds.<sup>40</sup> The individual or combined causes may either in themselves or because of their consequence, violate international law. The international law provisions they violate, can be categorised under a cause of action heading. It is not possible to deal with every single cause here, but it is possible to identify the starting point

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<sup>36</sup> Article 9, UDHR; Article 3(1), ECHR, on arbitrary expulsion.

<sup>37</sup> Article 13(1), UDHR; Article 12, ICCPR.

<sup>38</sup> Article 13(2), UDHR; Article 12(4), ICCPR.

<sup>39</sup> Article 15(1), UDHR.

<sup>40</sup> 1961 Convention on the Reduction of Statelessness, Article 9.

for any action concerning forced migration issues. Thus, once a specific cause or causes are identified, it then has to be linked to a violation of an international legal provision, and that provision may then be categorised under a cause of action heading. This section thus represents the second stage, which is the linking of the provision with the heading.<sup>41</sup>

#### **4.4.1 Breach of Treaty Obligations**

International responsibility may attach when an obligation in a treaty is breached. Responsibility depends on whether the violator is a party to the treaty, bound by the treaty and bound by the specific provisions relied upon in the treaty. A number of questions need to be answered before an action may be initiated, where alleging a violation of a treaty provision. Who are the parties to the provision; is the provision that is violated binding upon the violator state; who is in a position to bring an action against the violator; in which forum would an action be best instituted; what remedies would be available under the provisions of the treaty if any; and further, are there any reservations to the treaty; does the treaty specify the method of dispute settlement; and does the treaty provide for any suspension of application or defence terms? As only an 'injured' party may bring proceedings and the type of proceedings being determined thereof, it is important to note the interaction between the specific cause or violation, and the individual provision. For example, where the allegation is the suppression of the freedom of movement, then several provisions may be cited under the heading of violation of treaty provisions, namely Article 12 of the ICCPR, and Article 5(d)(i) and (ii) of the CEAFRD.

Regional agreements may also provide primary obligations from which to plead this cause of action. For example, the ECHR, Protocol No. 4, Article 3(1), prohibits the expulsion of nationals, individually or collectively; and Article 3(2) prohibits deprivation of the right of a national to return to their state of nationality. Derogation however, is permitted under Article 15 of the Convention itself. The Inter-American Commission on Human Rights has claimed that domestic law which permit the expulsion of nationals or the prohibition of their return for alleged superior interests of the state violates Article 22 of

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<sup>41</sup> See Appendices, A6.

the ACHR (Pact of San Jose) and Article 12 of the ICCPR.<sup>42</sup> Thus in the freedom of movement situation, both the regional arrangement and the international covenant could be a basis for a cause of action under this heading.<sup>43</sup>

Other instruments that may have application as primary obligations under this heading, include the ICESCR, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and various regional agreements, including the OAS, Inter-American Convention on the Forced Disappearance of Persons.<sup>44</sup>

#### 4.4.2 Breach of Obligations Under Customary International Law

Article 38(1)(b) of the SICJ provides for ‘international custom, as evidence of a general practice accepted as law’, as an applicable source of international law. To rely on this heading, the primary obligation has to be a norm under customary international law. A rule may become customary international law where there has been uniform state practice and *opinio juris et necessitatis*.<sup>45</sup> State practice should be constant and general, without specific duration,<sup>46</sup> it should generally be uniform, although not necessarily completely uniform in practice,<sup>47</sup> and should be relatively extensive. *Opinio juris* distinguishes legal obligation from, political or moral obligations, and is necessary to establish that a particular rule is held to be binding in law by the majority of states.<sup>48</sup> The specific cause of forced migration must therefore first be established as a rule of customary international law.<sup>49</sup>

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<sup>42</sup> Sieghart, Paul, *The International Law of Human Rights* (1983), 184-85. (Hereinafter, Sieghart, international law).

<sup>43</sup> Barring the intervention of a recognised reservation or other defences and exceptions. For example the ACHPR also provides for a right to leave and return under Article 12(2), and the freedom of movement under Article 12(1), but are subject to the exceptions of national security, law and order, public health or morality.

<sup>44</sup> *Reprinted in* (1994) 33 I.L.M. 1529; 12 states have so far signed the Convention, at 1618.

<sup>45</sup> See generally, *North Sea Continental Shelf* [1969] I.C.J. Rep. 4.

<sup>46</sup> Brownlie, principles, at 5.

<sup>47</sup> *Fisheries Case* [1951] I.C.J. Rep. 116, 131.

<sup>48</sup> Although customary law may be general, or local, where it needs to be accepted by the states involved in that locality.

<sup>49</sup> See generally, Brownlie, principles, at 14-15.

Among other sources, a declaration may become customary international law and be binding. The UN Office of Legal Affairs confirmed this in a 1962 memorandum, specifically identifying that a declaration such as the UDHR will be binding, where there is strong expectation that states would abide by it and state practice that they will abide by it.<sup>50</sup> A similar contention is evident from the *amicus brief* submitted by the government of the US in the *Filartiga case*. They unequivocally stated that,

‘General principles of law recognized by civilized nations also establish that there are certain fundamental human rights to which all individuals are entitled, regardless of nationality. Although specific practices differ widely among nations, all nations with organized legal systems recognize constraints on the power of the state to invade their citizens’ human rights. In the period 1948-1973, the constitutions or other important laws of over 75 states either expressly referred to or clearly borrowed from the Universal Declaration of Human Rights. In the same period, the Declaration was referred to in at least 16 cases in domestic courts of various nations.’<sup>51</sup>

Although the rights as declared under the UDHR are often violated, there is little doubt that all governments recognise their validity and acknowledge their existence in international law.<sup>52</sup> Buergenthal notes that states are effectively reaffirming the normative quality of human rights provisions, particularly in the UDHR, and are undertaking to abide by those norms, thus proclaiming their existence as customary international law.<sup>53</sup> The provisions are also often pleaded in international adjudication.<sup>54</sup>

States may confirm the binding nature of customary norms by membership in declaratory instruments, although the instrument is not in itself binding. For example the Helsinki Final Act, which had thirty-five parties, members of both NATO and the Warsaw

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<sup>50</sup> 34 UN ESCOR Supp.(No.18) at 15, UN Doc. E/CN.4/L.604 (1962).

<sup>51</sup> Memorandum of the United States *Amicus Curiae*, at 10-11, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir, 1980), reprinted in (1980) 19 I.L.M. 585.

<sup>52</sup> Goldman, R.K. and Martin, S.M., ‘International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Laws’ 5(3) Hum. Rts. Q. 302, 306-7.

<sup>53</sup> Buergenthal, T., ‘International Human Rights Law and the Helsinki Final Act: Conclusions’, in Buergenthal (ed), *Human Rights, International Law and the Helsinki Accord* (1977), 8.

<sup>54</sup> For example, they were pleaded in the *Corfu Channel Case* (Merits) [1949] I.C.J. Reps. 4, at 9-11 by the UK, and at 11-12 by Albania; and by Liechtenstein in the *Nottebohm Case* (Second Phase) [1955] I.C.J. Reps. 4, 6-7.

Pact.<sup>55</sup> Although the Act itself was declared as a non-binding instrument, it is good evidence of the intention of the participating states and consequently, of customary law. In fact, by invoking and incorporating pre-existing international norms and affirming their intention to adhere to those norms, these states inevitably strengthened the argument that these norms are customary international law.<sup>56</sup> Principle 7 of the Final Act sets out the human rights provisions, which are *inter alia*, to respect human rights and fundamental freedoms; to confirm such rights to individuals that they know of them and can act upon them; to conform to the UNC and UDHR; and to fulfil their obligations under the International Covenants.<sup>57</sup> Interesting to note that civil, political, cultural, economic, social and other rights are pledged.

It is argued that human rights provisions with status under customary law include, the right to life, self-determination, non-discrimination, and the prohibition of genocide.<sup>58</sup> Each of these headings have to be determined separately, because the exact nature of each provision is controversial. For example the right to life is not absolute in all parts of the world, and should perhaps be rephrased as, the right not to lose one's life arbitrarily. On the other hand, the independence of the judiciary in some regimes is still doubtful and the execution of persons may be arbitrary despite the cover of 'legitimacy'. As for self-determination, controversy still ensues as to whether it remains merely for colonial territories or for separation within states, and whether there is such a principle as economic self-determination. Controversy remains even with respect to non-discrimination provisions, for example, discrimination between nationals and non-nationals is permissible and a government holds prerogative in determining nationality. Thus discrimination is somewhat legitimised through a determination of nationality or the lack of nationality.

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<sup>55</sup> Final Act of the Conference on Security and Co-operation in Europe, 1 August 1975, *reprinted in*, (1975) 14 I.L.M. 1292; see generally, Buergenthal, T. (ed), *Human Rights, International Law and the Helsinki Accord* (1977).

<sup>56</sup> Buergenthal, T., 'International Human Rights Law and the Helsinki Final Act: Conclusions', in Buergenthal (ed), *Human Rights, International Law and the Helsinki Accord* (1977), 6.

<sup>57</sup> Helsinki Final Act in (1975) 14 I.L.M. 1292, 1313.

<sup>58</sup> Beyani, C., 'State Responsibility for the Prevention and Resolution of Forced Population Displacement in International Law' (1995) *Int'l. J. Refugee L. - Special Edition* 130, 134.

Genocide is, however, an example where the provisions of the convention have been adopted as customary international law. According to the *Reservations Case*,<sup>59</sup> the principles in the Convention apply irrespective of the Convention itself and is binding because it is recognised by all civilised nations.<sup>60</sup> In the example used above on the freedom of movement, the international agreements may be cited as evidence of status as an existing norm of customary international law and also the specific extent of the freedom of movement itself. Along with the international conventions, two further sources may be cited; the Strasbourg Declaration, which provides for the right to leave and return to one's residence,<sup>61</sup> and the Sub-Commission reports on the prohibition of forced relocation.<sup>62</sup> Further evidence of the right to freedom of movement and clarification of its provisions may be taken from academic references.<sup>63</sup> For example, Sieghart identified six categories of the freedom of movement: freedom to choose a residence within a state; freedom to move within the borders of a state; freedom to leave and enter a state; freedom from expulsion; and freedom from exile.<sup>64</sup> International consensus does seem to at least confirm that the right to return is widely recognised as a customary norm, for a denial of the right would amount to exile.<sup>65</sup> The Bangkok Principles of 1966, established by the Asian-African Legal Consultative Committee in Bangkok, provides in Article IV that refugees have a right to return to their country of nationality and for a duty of the state of origin to receive their nationals.<sup>66</sup>

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<sup>59</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] I.C.J. Rep. 15.

<sup>60</sup> Rodley, N.S., 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 Int'l. & Comp. L.Q. 321, 322.

<sup>61</sup> Hannum, H., 'The Strasbourg Declaration on the Right to Leave and Return' (1987) 81 Am. J. Int'l. L. 432, 434-438.

<sup>62</sup> UN Doc. E/CN.4/Sub.2/1993/17 and Corr. 1; and UN Doc. E/CN.4/Sub.2/1994/18 and Corr. 1.

<sup>63</sup> See generally, Sieghart, international law, at 174-187; and Goodwin-Gill, *International Law and the Movement of Persons between States* (1978).

<sup>64</sup> Sieghart, international law, at 178-9.

<sup>65</sup> Ingles, Jose D., Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country* (UN, 1963), 14.

<sup>66</sup> See, UNHCR Collection of International Instruments concerning Refugees, 1979, 201-206.

#### 4.4.3 Acts Committed Contrary to International Law that Cause Loss and Damage

This cause of action may be pleaded where loss and damage can be shown, and that loss or damage being the consequence of some general illegal action.<sup>67</sup> This heading would apply simply where damage was caused by an illegal act, and the combination of damage and illegality may be sufficient to found a cause of action. Two examples where this was pleaded are the *Anglo-Iranian Oil Co. Case*, where the UK asked the Court to declare the acts of the Imperial Government of Iran contrary to international law and therefore attaching state responsibility,<sup>68</sup> and in the *Case Concerning the Aerial Incident of July 27th 1955* (Preliminary Objections), where Israel pleaded that Bulgaria was internationally responsible for the loss of life, property and general damages.<sup>69</sup> In the latter case, no breaches of particular obligations were expressly pleaded.

Causing forced migration, whether transboundary or internal, would inevitably cause some loss or damage, whether to property or injury of persons. Detrimental consequence is an element of forced migration and this detrimental consequence has to be due to the coercive application of the intention to move. Thus proving the elements of forced migration may in themselves be sufficient to plead this cause of action.<sup>70</sup> Two main issues that emanate from this proposition have to be considered: firstly, the act of causing forced migration has to be recognised as unlawful; and secondly, the question of who would be legally entitled to bring a claim. Where the loss was suffered by a victim state, then clearly that state would have the standing, but if it were the forced migrants, then several difficulties would arise. Firstly, if another state were to bring a claim, they would have to show cause for being an 'injured state'. Secondly, nationality would be a factor for states to bring an action on behalf of individuals, unless an international crime is alleged.<sup>71</sup> Thirdly, since the real complainants are individuals, they would have to bring an action

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<sup>67</sup> Brownlie, state responsibility, at 63.

<sup>68</sup> [1952] I.C.J. Reps. 93, 95-6.

<sup>69</sup> [1955] I.C.J. Pleadings, at 525-531.

<sup>70</sup> See section 3.6.3, 'Detrimental Consequences'.

<sup>71</sup> See section 5.2, 'Locus Standi', and section 5.3, 'Obligations Owed *Erga Omnes* as a Basis for Action'.

according to accepted means, namely those specifically provided for under international provisions,<sup>72</sup> and those specifically provided under domestic provisions.<sup>73</sup>

#### 4.4.4 Violation of the Sovereignty of a State

Both the territorial and political sovereignty of a state may be violated by the influx of forced migrants. The validity of this heading as a cause of action is unquestionable and has been applied in case law, as well as in the pleadings of states. The *Corfu Channel Case* (Merits) clearly emphasised the significance of territorial and political sovereignty.<sup>74</sup> Although the merits of the *Nuclear Tests Case* were not specifically dealt with, the Court found it unnecessary to express any view of the legal substance of Australia's assertion as to the violation of sovereignty in receiving nuclear fall-out.<sup>75</sup>

The concept of decisional sovereignty may also be violated and this argument was raised by Australia in the *Nuclear Tests Case*. Australia claimed;

‘[t]he deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent... (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources’.<sup>76</sup>

The Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock, expressed the view that this argument was a part of the merits of the case.<sup>77</sup> This argument will be useful if it was sought to address the position of a state who has had an influx of forced migrants, but who have not suffered real damage. In fact, the state may have received positive reactions, *albeit* in a temporary manner, for example in aid or other funds. Alternatively, the resettled forced migrants may have made significant contributions towards the community, for example in the provision of labour or other

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<sup>72</sup> For example, individual complaints mechanisms under the ECHR.

<sup>73</sup> For example, alien tort statute provisions, see section 5.7, ‘Empowering the Individual to Enforce International Norms’.

<sup>74</sup> [1949] I.C.J. Reps. 4, 26-35.

<sup>75</sup> [1974] I.C.J. Reps. 253, 312, 369-70 (Joint Dissenting Opinion); and I.C.J. Pleadings, vol. 1, 14, para. 49.

<sup>76</sup> I.C.J. Pleadings, vol. 1, 14, para. 49; also 335-6, para. 451-5.

<sup>77</sup> [1974] I.C.J. Reps. 369, para. 117; and Brownlie, state responsibility, at 69.

intangible assets.<sup>78</sup> Therefore, even if political or territorial sovereignty is not violated, decisional sovereignty may have been violated.

#### 4.4.5 Abuse of Right or the Unreasonable Exercise of a Power

The violation of the principle of *sic utere tuo ut alienum non laedas* was a potential area of responsibility was suggested by Goodwin-Gill.<sup>79</sup> This cause of action may be pleaded where there has been arbitrary and discriminatory acts of a state in pursuing what would otherwise be legal activities,<sup>80</sup> i.e., the use of sovereign powers for an improper purpose. The application of the prohibition of the abuse of rights has already been discussed in previous chapters.<sup>81</sup> It was pleaded in Belgium's final submission in the *Barcelona Traction Case (Second Phase)*.<sup>82</sup> Further, in a document prepared for *Establishing the Historical Precedents and Legal Grounds for International Action by the League of Nations on behalf of the Jews and Non-Aryans in Germany*,<sup>83</sup> three examples were given for the abuse of rights as a precedent for international action on behalf of the nationals of the expelling state - the expulsion of Jews from Romania after 1878, the policies of the Tsarist regime in Russia in the late nineteenth century, and the refusal of the Turkish government to accept expelled Armenians.<sup>84</sup> In each of these three cases, the grounds for action was the abuse of rights and the measures were taken on behalf of the nationals of the state accused.

The benefits of having a cause of action accusing a state of unreasonable behaviour or an abuse of right, permits the international community a legal forum to investigate the exercise of sovereign powers. The intention to commit oppressive and unacceptable acts are easily masked behind the use of unfettered sovereign power. A credible regime of international accountability and transparency in international relations, all consistent with

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<sup>78</sup> Note generally, Johnson, *supra*, who argues that receiving states cannot prove a harm caused by an influx.

<sup>79</sup> Goodwin-Gill, *the refugee*, at 228.

<sup>80</sup> See also Jennings, *supra*.

<sup>81</sup> See section 3.6.1, 'Intention' and section 3.6.1.1, 'Prohibition of the Abuse of Rights'.

<sup>82</sup> [1970] I.C.J. Reps. 4, 7. Unfortunately the Court did not deal with the merits of the case.

<sup>83</sup> Coles, 1992 study, Annex.

<sup>84</sup> *Ibid*, at 25.

the concept of popular sovereignty demands that this cause of action be a legitimate plea in legal actions. In fact, it is argued that the prohibition is the 'alter ego' of two accepted principles of international law,<sup>85</sup> namely, the principle against discrimination and the principle that although privilege might apply to harm intentionally caused, such privilege will not attach without good reason. Thus a state cannot exercise a power in violation of other principles of international law, and where it exercises a power that causes a harm, then it has to have good reason, presumably also in good faith.

The applications of this cause of action to forced migration are immense, particularly where certain state activities require accountability. Ingles reported with respect to situations where states deny the right to leave or return, that discrimination is difficult to establish because, conduct 'appears to be the result of a generally-applied policy, explained on the basis of national security, public order, public health or morals, or protection of the rights and freedoms of others.'<sup>86</sup> A violation of the prohibition may thus be pleaded where the nationality of certain groups formerly living within the state has been removed, where a state has relocated a certain population without compensation or the provision of other necessities, or where the constitutional rights of a certain group has been removed in martial law situations. This cause of action would encourage accountability for the exercise of any sovereign power.

#### **4.4.6 Violation of the Principle Prohibiting Discrimination: Racial Discrimination**

This heading could draw from the various provisions prohibiting discrimination, and overlap with other causes of action. It may be based upon all the provisions concerning non-discrimination, particularly racial discrimination, comprising existing treaty provisions, customary norms, international tribunal pronouncements, and the writings of eminent scholars.<sup>87</sup> Although racial discrimination is of primary concern here, other forms of discrimination may also be relevant, for example, discrimination based on gender,

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<sup>85</sup> Brownlie, state responsibility, at 70.

<sup>86</sup> Ingles, *supra*, at 18.

<sup>87</sup> In effect a combination of all the provisions of Article 38, SICJ; for a discussion on international provisions, see generally, Schachter, O., 'How Effective are Measures Against Racial Discrimination?' (1971) 1 Hum. Rts. J. 293.

principally under the Convention on the Elimination of All Forms of Discrimination against Women, 1980.

Goodwin-Gill suggested that the violation of the minimum standards of treatment of nationals, owed to the international community was a potential area of responsibility.<sup>88</sup> A more specific element to this general proposition is that states have a general obligation not to discriminate unlawfully against their nationals.<sup>89</sup> What amounts to discrimination and particularly racial discrimination is of concern.<sup>90</sup> The Sub-Commission in approving a memorandum issued by the UN Secretary-General on the meaning of discrimination, stated *inter alia* that discrimination was, 'any act or conduct which denies to certain individuals equality of treatment with other individuals because they belong to certain social groups.'<sup>91</sup> McKean believed that 'the term 'discrimination' is not synonymous with 'differential treatment' or 'distinction'. Rather, in the sense used in the studies, 'discrimination' means some sort of distinction made against a person according to his classification into a particular group or category rather than by taking into account his *individual* merits or capacities.'<sup>92</sup> To discriminate is therefore, to make an arbitrary distinction based on a perceived group characterisation and in a sense, to remove from the individual his/her individuality.

Consistent with this idea of stressing individuality, the definition of 'racial discrimination' does not define the nature of 'race' nor racial distinctions, but classified it as, 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect...' adverse to the individual.<sup>93</sup> The

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<sup>88</sup> Goodwin-Gill, the refugee, at 228.

<sup>89</sup> The issue of *bona fides* 'positive discrimination' or 'reverse discrimination' measures will be excluded from these discussion, but see; Schachter, 'How Effective are Measures Against Racial Discrimination?' (1971) 1 Hum. Rts. J. 293, 303.

<sup>90</sup> See Ingles, *supra*, at 14-17.

<sup>91</sup> The Sub-Commission, UN Doc. E/CN.4/Sub.2/40.

<sup>92</sup> McKean, W.A., 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 Brit. Yrbk. Int'l. L. 177, 180. (emphasis added)

<sup>93</sup> Article 1, The Convention on the Elimination of All Forms of Racial Discrimination, adopted by GA Res. 1904 (XVIII) in 1963 and GA Res. 2106 (XX) in 1965 respectively, entered into force on 4 January 1969; see generally, Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (1970).

definition thus places the emphasis not on the category itself, but on the ‘effect or purpose’ of the actions that amounts to racial discrimination. As Meron found, the Committee has established a ‘common law’<sup>94</sup> based on equality rather than a strict definition of racial discrimination.<sup>95</sup> It is then arguable that racial discrimination or discrimination of any kind violates the individuality of a person and consequently, the human dignity of a person. Thus, racial discrimination would violate various international provisions and a general stand against discrimination, apart from specific provisions.<sup>96</sup> These general provisions relate to the respect for human dignity.<sup>97</sup> Respect for dignity clearly prohibits treatment that demeans or humiliates, including ‘attacks on personal beliefs and ways of life but also attacks on the groups and communities with which individuals are affiliated.’<sup>98</sup> In fact, it would include psychological aggression which results from a lack of respect against those groups, or worse, reducing or destroying the ‘self-respect that is so important to the integrity of every human.’<sup>99</sup> Even ‘[t]eaching that particular races, ethnic groups or religions hold ‘ridiculous’ or dangerous views, or otherwise belittle cherished beliefs’, and the ‘[d]issemination of negative stereotypes of groups (ethnic, religious, social) and implications that members of such groups are inferior.’<sup>100</sup>

The binding nature of the sources establishing the prohibition of discrimination have been confirmed by previous international determinations and conferences,<sup>101</sup> as well as in

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<sup>94</sup> Committee on the Elimination of Racial Discrimination; 8 UN G.A.O.R. Supp.(No.18) para 168, 192, 280, UN Doc. A/38/18 (1983).

<sup>95</sup> Meron, T, *Human Rights Law-Making in the United Nations* (1986), 17.

<sup>96</sup> The provisions against discrimination appear in several international instruments, but the policy against discrimination underlies all these provisions and forms the basis for an attitude against any practice of discrimination.

<sup>97</sup> For example, the UNC, Preamble, see Appendices, A1; and Article 1(3); the UDHR, Preamble and Article 1 and 2; ICCPR, Preamble and Article 10(1); ICESCR, Preamble; the Helsinki Accord, Principle VII; and the American Convention on Human Rights, Art 5(2); and even domestic documents, such as the German Federal Constitution, Article 1. See Schachter, O., ‘Human Dignity as a Normative Concept’ (1983) 77 Am. J. Int’l. L. 848, 852.

<sup>98</sup> *Ibid*, at 850.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*, at 852.

<sup>101</sup> For example, the Proclamation of Tehran in 1968 stated that, ‘[t]he primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and dignity.’ See UN Doc. A/CONF.32/41.

judicial determinations.<sup>102</sup> Anti-discrimination provisions are also set out amongst other instruments which include, those sponsored by the Specialised Agencies,<sup>103</sup> in particular, the Declaration and Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1963 and 1965 respectively,<sup>104</sup> the ICCPR Article 2(1); the ICESCR Article 2(2); the ILO Convention concerning Discrimination in respect of Employment and Occupation (No. 111), adopted 25 June 1958;<sup>105</sup> the UNESCO Convention against Discrimination in Education;<sup>106</sup> and the numerous anti-apartheid provisions, such as the Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

Asserting this cause of action has an added advantage in the wider ambit of dealing with ethnic and nationality claims, as it diverts emphasis away from the seeking of self-determination and the fragmentation of a state.<sup>107</sup> An action brought against discriminatory practices would address the fundamental concern of respect for human dignity, individuality and equality amongst all persons, which may be preferable over separate statehood aspirations. There is some merit in the argument that full sovereign autonomy as a state is not possible, save in a decolonialisation process, thus necessitating the need for greater emphasis on human rights and equality regimes within each state. Dissatisfaction and discontentment might be greatly reduced if justice and equality were prevalent within each state.

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<sup>102</sup> For example, Rodley noted from his analysis of the *Barcelona Traction case*, that the obligations owed to the international community was '... derive[d] from, *inter alia*, the principles and rules concerning the rights of the human person.' See Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 Int'l. & Comp. L.Q. 321, 323; *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) (Second Phase)* [1970] I.C.J. Rep. 3, para. 33 and 34. And in the *Namibia case* [1971] I.C.J. Rep. 16, 57, it was affirmed that discrimination based on race, colour or descent, national or ethnic origins constitutes a denial of fundamental human rights and 'is a flagrant violation of the purposes and principles of the Charter.'

<sup>103</sup> For example, the UNESCO Convention against Discrimination in Education (1960).

<sup>104</sup> See generally, Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (1970).

<sup>105</sup> (1960) 362 U.N.T.S. 31.

<sup>106</sup> In force, 22 May 1962.

<sup>107</sup> Note however, that Part II of CEAFRD delegates supervision and enforcement of provisions of the Convention to the Committee.

#### 4.4.7 Violation of Obligations Leading to Criminal Responsibility

International criminal responsibility is a specialist subject with its own merits,<sup>108</sup> but is applicable here, mainly because of two advantages. Firstly, an assertion of an international crime connotes a very serious wrongful act under the ILC Draft Articles on State Responsibility,<sup>109</sup> apart from specialised provisions on the international criminal code.<sup>110</sup> If a particular action were an international crime, then there would be significant implication as to *locus standi*, accountability for states and accountability for individuals. Secondly, the development of an international criminal code with enforcement measures and substantive rules continues and international interest in prosecuting international criminals is evident from the establishment of the two special tribunals, on the former Yugoslavia<sup>111</sup> and Rwanda<sup>112</sup>. Therefore a comprehensive plan of action in addressing the issues of forced migration might include the prosecution of international criminals, whose crimes result in forced migration. The issues concerning the international criminal law are however diverse and controversial, thus they cannot adequately be discussed here. This section will instead attempt to highlight some of the issues that international criminal responsibility would raise and the implications of a cause of action under this heading.

International criminal responsibility is accepted by many authors and claimed as a logical evolution of the classical unified regime of state responsibility.<sup>113</sup> A shift from the recovery of compensation, which is concerned with an obligation upon a state, to an application of sanctions or penalties, which is the emphasis of the rights of the injured or other interested states.<sup>114</sup> A distinction exists between delicts and crime, and the latter includes crimes against the peace, war crimes and crimes against humanity.<sup>115</sup> Lauterpacht

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<sup>108</sup> See generally, Brownlie, *International Law and the Use of Force by States* (1963), 150-66; and Tunkin, theory, at 396-404.

<sup>109</sup> [1976] ii Yrbk. I.L.C. 116-7, para. 651.

<sup>110</sup> See generally, Harris, *supra*, at 462ff.

<sup>111</sup> (1993) 32 I.L.M. 1163.

<sup>112</sup> (1994) 33 I.L.M. 1601.

<sup>113</sup> Dupuy, international law, at 119.

<sup>114</sup> *Ibid*, at 107.

<sup>115</sup> Tunkin, theory, at 421; and Pella, *La guerre-crime et les criminels de guerre* (Geneva, *Revue de droit international de sciences diplomatiques et politiques* (1946), who drafted a 'Plan for an International

in supporting an international criminal regime claimed, '[t]he comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of that term.'<sup>116</sup> In fact, the meaning acknowledged by civilised states included the ruthless, contempt of human life, and war.<sup>117</sup>

There are however, many objectors who claim positive international law does not support a general international criminal regime,<sup>118</sup> and that there is insufficient definition of the scope and form of criminal responsibility.<sup>119</sup> Other objectors claim that it is a mistake to attribute criminal responsibility upon states. Phillimore claimed;

'To speak of inflicting punishment upon a State is to mistake both the principles of criminal jurisprudence and the nature of the legal personality of a corporation. Criminal law is concerned with a natural person; a being of thought, feeling, and will. A legal person is not, strictly speaking, a being of these attributes, though, through the mediums of representation and of government, the will of certain individuals is considered as the will of the corporation; but only for certain purposes. There must be individual will to found the jurisdiction of criminal law. Will by representation cannot found that jurisdiction.'<sup>120</sup>

Similarly, Drost claimed that the state 'cannot act or do anything at all. It cannot defend its crimes for exactly the very same reason that it cannot commit crime.'<sup>121</sup> In defence, Pella

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Criminal Code'; and Pella, *La guerre-crime et les criminels de guerre*, 148-150, who identified crimes as *inter alia*, '(1) War crimes, through the following activities; (a) declaration of war; (b) armed intrusion into the territory of another state; (c) armed attack on territory, vessel or aircraft of another state; (d) sea blockade; (e) support of armed bands within the territory of another state, or failure to deprive the armed band within the state's territory of support, assistance or protection; (2) Production, sale or use of prohibited means of waging war and other violations of the customs of war;... (4) Extermination, enslavement, or persecution in time of peace or war of a specific group of population for reasons of race, politics, or religion.'

<sup>116</sup> Lauterpacht, H (ed), *Oppenheim's International Law* (8th edn., vol. I, 1955), 339.

<sup>117</sup> *Ibid*, at 355.

<sup>118</sup> Anzilotti, *Teoria generale della responsabilita stato nel diritto internazionale* (1902), 96-97; and Dumas, J., *De la responsabilite des Etats* (Paris, Recueil Sirey, 1930), xi; as cited by Tunkin, theory, at 400.

<sup>119</sup> Bourquin, M., '*Crimes et delits contre la surete des Etats etrangers*' (1927) XVI Recueil des Cours 124; cited by Tunkin, theory, at 401.

<sup>120</sup> Phillimore, R., *Commentaries Upon International Law* (3rd edn., vol. I, 1879), 5.

<sup>121</sup> Drost, P.N., *The Crime of State* (1959, vol. 1), 293, quoting from the remarks of Justice Jackson at the Nuremberg Trial.

claimed, 'a state has its own will and, consequently, is capable of committing crimes.'<sup>122</sup> Recent developments in the law have to some extent addressed this argument, for example, in English law, companies can now be successfully prosecuted for criminal acts,<sup>123</sup> which brings English law into line with French and German law on the liability of criminal actions of companies and directors.<sup>124</sup>

Ultimately, some authors, such as Brownlie still consider international criminal responsibility unsuitable for the present system of international law.<sup>125</sup> Yet the ILC commented that certain principles are 'deeply rooted in the conscience of mankind' that are considered by states to be international crimes, the legal consequences of which must be more severe.<sup>126</sup> The ILC defined an international crime as 'serious breaches on a widespread scale of an international obligation of essential importance for safeguarding the human being... slavery, genocide and apartheid'.<sup>127</sup> Article 19 received a favourable reaction from developing and East European states,<sup>128</sup> but was given more cautious treatment from Western states.<sup>129</sup> Garcia-Amador was actually in favour of the concept of criminal responsibility of states,<sup>130</sup> however most of the members of the Commission felt

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<sup>122</sup> Pella, V.V., '*La repression des crimes contre la personnalite de l'etat*' (1930) XXXIII Recueil des Cours 821-2; cited by Tunkin, theory, at 397.

<sup>123</sup> Re Peter Kite, managing director of OLL Ltd. who was charged for the manslaughter of four schoolchildren who died in a canoeing disaster, was jailed for three years and the company fined 60,000 pounds, see Jenkins and Gibb, 'Canoe centre chief and company are found guilty', *The Times*, 9 December 1994, 1.

<sup>124</sup> For example in German law under the *Strafgesetzbuch* (German Criminal Code of 15 May 1871 as amended 1 September 1969), BGB I.1 1445; and *Aktiengesetz* (Public Company Act); in French law under the Law No. 66-537 of 24 July 1966, on commercial companies; see generally, Mayon, French and Ryan, *Mayon French and Ryan on Company Law* (12th edn., 1996).

<sup>125</sup> Brownlie, state responsibility, at 32-33, who doubted its acceptability by governments, found no evidence in positive law, and cast suspicion on its utility as a practical tool. Further criticisms see, Green, L.C., 'New Trends in International Criminal Law' (1981) 11 *Israel Yrbk. Hum. Rts.* 9, 24-40.

<sup>126</sup> [1976] ii *Yrbk I.L.C.* 109, 119.

<sup>127</sup> ILC Draft Articles on State Responsibility, Article 19(3)(c).

<sup>128</sup> See G.A.O.R., 31st Sess., 1976, A/C.6/SR 29, at 6 (India); and G.A.O.R., 31st Sess., 1976, A/C.6/SR 26, at 7-8.

<sup>129</sup> See G.A.O.R., 31st Sess., 1976, A/C.6/SR26, at 4 (France); and G.A.O.R., 31st Sess., 1976, A/C.6/SR 18, para. 35 (UK).

<sup>130</sup> Garcia-Amador, [1956] ii *Yrbk. I.L.C.* 183.

that it was unknown to contemporary international law and thus was denied a detailed proposal.<sup>131</sup>

The application of war crimes tribunals, particularly those of the Second World War, have been argued to cast doubt on the entire proposition of criminal liability. For example, the structure of the Nuremberg Tribunal was based on victor against vanquished. Its application seems to be based less on justice and more on political expedience. War crimes were not prosecuted against the victors, but against the losing side.<sup>132</sup> In fact, historians suggest that the bombing of Nagasaki and Hiroshima by the US was unnecessary for the war, but conducted for the assumption of US control after Japan's total surrender.<sup>133</sup> The damage done by the bomb was extensive, a combined effect of some 100,000 to 120,000 deaths, with an equal number of injured.<sup>134</sup> Yet in all these cases, no action was taken, showing the inadequacy of *ad hoc* tribunals.<sup>135</sup> In this light and influenced by the decision of the ICJ in the *Barcelona Traction Case*,<sup>136</sup> particularly the application of obligations *erga omnes*,<sup>137</sup> the ILC stated in the Commentary to Article 19, that such obligations would attract the legal interest of all member states, and accordingly, responsibility would be owed to the international community.<sup>138</sup> This has added advantage with respect to the issues of *locus standi*, whereas for international responsibility a state will have to show that it is an 'injured state', when a recognised international criminal provision is violated, all states would be *prima facie* 'injured states'. An international criminal code that includes elements of the causing of forced migration could have significant advantages. For example, it would act as a deterrence; it would influence

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<sup>131</sup> *Ibid*, at 239-241.

<sup>132</sup> See generally, Williams, Kenneth A., 'The Iraq-Kuwait Crisis: An Analysis of the Unresolved Issue of War Crimes Liability' (1992) 18 (2) *Brook. J. Int'l. L.* 385 (hereinafter, Williams, war crimes), who considers the issue of prosecuting President Bush for war crimes; and at 406, who considers the Allied bombing of Dresden between the 13 and 15 of February 1945 which killed an estimated 25,000 civilians and destroyed many homes and public buildings, as unnecessary and a war crime.

<sup>133</sup> Blackett, P.M.S., *Fear, War, and the Bomb* (1949), 132-43; and Williams, war crimes, at 409-10.

<sup>134</sup> Blackett, *supra*, at 40-42.

<sup>135</sup> Williams, war crimes, at 410, who thus advocates for a permanent war crimes tribunal

<sup>136</sup> *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) [1970] I.C.J. Repts. 3.

<sup>137</sup> *Ibid*, para. 33-34.

<sup>138</sup> [1976] ii *Yrbk I.L.C.* 99

conduct by identifying the most serious activities that the international community can condemn; it would be forward looking as well as consolidate existing norms; it would serve as an indicator for the limits of proportionate response, because it would recognise the severity of action deemed crimes; it would establish a judicial process that does not depend on specific consent of states; and it would, where applicable, target the individuals responsible for the crimes.

On the other hand, two observations dampen unrealistic ambitions, the ‘unavoidable requirement’ of having to apprehend the criminal, and the necessity of greater social solidarity - where ‘the rich become less rich and the poor become less poor’ - would first have to exist.<sup>139</sup> Further, under an international criminal regime, the individual may become ‘scapegoats’ to state and political interests. Lippman concluded that the Eichmann trial placed the interests of states, particularly the state of Israel, before the interest of the individual and international law was used as a tool to legitimise that self-interest.<sup>140</sup> Allott pointed out that sacrificing individuals without affecting state conduct was insufficient and a deficiency in the state responsibility regime.<sup>141</sup> The application of criminal responsibility is complex and the hypothetical situations proposed by Lippman highlights this fact, particularly in an international environment where state interests override the interests of the individual.<sup>142</sup>

A clear, unambiguous international criminal regime needs further development, whether it be based on domestic prosecution of international crimes founded on domestic conditions,<sup>143</sup> or on international tribunals prosecuting on the basis of an international criminal code.<sup>144</sup> It suffices to note here that alleging a violation of a recognised international crime will provide for, at the very least, international responsibility and the

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<sup>139</sup> Coles, 1992 study, at 157.

<sup>140</sup> Lippman, M., ‘The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law’ (1982) 5 *Hou. J. Int’l. L.* 1, 33-34.

<sup>141</sup> See section 3.13, ‘International Personality’ and section 5.7.1, ‘Status of Individuals Espousing Claims Based on International Norms’.

<sup>142</sup> Lippman, *supra*, at 33, note 173; see Appendices, A4.

<sup>143</sup> For example, in the *Eichmann case*, the prosecution in Israel was based on Israeli legislation.

<sup>144</sup> For example, the two post-Second World War tribunals and the two current International Criminal Tribunals, of the Former-Yugoslavia and Rwanda.

application of remedies proportionate to the international wrongful act. It will also, to an extent, recognise that the wrongful acts are severe enough to be termed international crimes, even if the criminal response remains unclear.

#### **4.4.8 Violation of Provisions Under International Humanitarian Law**

As with the international criminal law regime, the provisions under international humanitarian law seeks to protect groups at risk in armed conflicts, by imposing a regime of accountability on individuals, groups or states. Some authors combine the four Geneva Conventions and the two 1977 Protocols, with the Charter of the Nuremberg Tribunal, as the basis for war crimes and crimes against the peace.<sup>145</sup> Like the international criminal law, international humanitarian law is a wide, specialised subject of international law, a detailed analysis of which is not possible here.<sup>146</sup> What this section does seek to highlight is the possibility of attracting international responsibility when a provision under international humanitarian law is violated, and the pleading of this heading as a cause of action when forced migration is caused in violation of such provisions.

The majority of forced migrants are created as a consequence of armed conflicts. Some of these persons flee from the fighting and the total disruption to their daily lives and livelihood, while others may be forced to move by combatants.<sup>147</sup> In fact, uprooting a population may be a goal in itself. In a few cases, the population uprooted by conflict include refugee populations from another state.<sup>148</sup> Thus in some situations, a rather complex set of events are simultaneously occurring, mixing internally displaced persons with refugees from other states. Causing forced migration whether in an internal or international armed conflict, might violate provisions under international humanitarian law.

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<sup>145</sup> Williams, war crimes, at 386-93.

<sup>146</sup> See generally, De Lupis, *The Law of War* (1987); Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1980); and McCoubrey, *International Humanitarian Law* (1990).

<sup>147</sup> For example it is noted that, '[f]orced displacement is commonly used as a military strategy. By depopulating a rural area, one party to a conflict may hope to deny its opponents a major source of support and recruitment.' See UNHCR, state of the world's refugees, at 67.

<sup>148</sup> For example, after the Mengistu regime in Ethiopia collapsed in 1991, Sudanese refugees living in western Ethiopian camps were attacked, forcing 380,000 people to spill back to the conflict in Sudan; see UNHCR, state of the world's refugees, at 68.

The origins of international humanitarian law goes back to 1864, when the first International Committee of the Red Cross, Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, was adopted. Since then, there have been four 1949 Geneva Conventions and two Additional Protocols.<sup>149</sup> By June 1993, 181 states had signed the Geneva Conventions, making it the largest conventions to date. International humanitarian law provisions seek generally to harmonise the behaviour of parties in an armed conflict. As a general proposition, the Geneva Conventions do not, except for a few provisions of limited scope, deal with the protection of civilians from the effects of hostilities. However a major contribution of the Geneva Conventions, is the implicit necessity of distinguishing civilians from combatants, and to direct hostilities only against combatants and military objectives.<sup>150</sup>

Convention IV does attempt to provide specific protection to civilians. Article 53 prohibits the wanton destruction of property; and Article 32 prohibits murder, torture, corporal punishment, mutilations and other acts of brutality. Most significantly, Article 49 prohibits, amongst other things, the deportation and forcible transfers of individuals and populations of individuals, regardless of their motives, unless imperative military reasons demand the evacuation. However, proper accommodation, hygiene, health, safety, nutrition and family unity have to be guaranteed. Similarly, Article 85(4) of Protocol I and Article 17 of Protocol II prohibit the displacement of civilian populations unless for their security or for imperative military reasons, and they must be given satisfactory conditions of shelter, hygiene, health, safety and nutrition. Article 147 makes violation of the prohibition of

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<sup>149</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I); Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II); Relative to the Treatment of Prisoners of War (Convention III), and Relative to the Protection of Civilian Persons in Time of War (Convention IV); all of 12 August 1949; and Protocols Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); both of 8 June 1977.

<sup>150</sup> This author does recognise the difficulties implicit in making such distinctions and the possibility that military objectives may affect civilians and their property. The civilian is defined in Protocol I, Article 50 and civilian property is defined in Article 52. Articles 49, 51 and 52 prohibit attacks, whether in defence or as offensive, against civilian populations and their property. Article 54 prohibits starving a population or destroying indispensable objects for the survival of the population, for example water installations, unless for imperative military necessity.

forcible transfers or deportations a grave breach of Convention IV.<sup>151</sup> ‘Grave breaches’, defined under the Conventions, also include torture, inhuman treatment, wilful killing, wilfully causing great suffering or serious bodily injury, extensive destruction not justified by military necessity or carried out wantonly and unlawfully.<sup>152</sup>

The resort to armed force for the settlement of disputes has itself been outlawed under the UNC,<sup>153</sup> The Friendly Relations Resolution (1970),<sup>154</sup> and the Resolution on the Definition of Aggression.<sup>155</sup> Despite the outlawing of war, some rules had to be applicable ‘if there had to be a war’, ‘for to abandon all rules would be to withdraw protection from the helpless and condone the infliction of needless suffering.’<sup>156</sup> This does not suggest that the application of international humanitarian law is simple, nor does it suggest it is effective, but it does work to prevent violators from being ‘beyond the pale’.<sup>157</sup> Singh pointed out that,

‘[i]t is fortunate that those magnificent organizations [the Red Cross and Red Crescent] were created in time to alleviate so much of the sufferings of war that this century has known. But there are disquieting signs. New efforts will have to be made to ensure that international standards can be enforced even within situations of international illegality.’<sup>158</sup>

In effect, what would be required is that states either provided mechanisms for the prosecution of those within their jurisdiction who have violated provisions under international criminal law and international humanitarian law, or set up a temporary or permanent war crimes tribunal. Similar with the regime of international criminal law, the violation of provisions under international humanitarian law provides for an allegation of wrongfulness, even if not specifically tantamount to an international crime. It further

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<sup>151</sup> Annotated copy of the four Conventions and Protocols may be obtained from the world wide web at ‘<http://www.icrc.ch/>’.

<sup>152</sup> Sunga, Lyal S., *Individual Responsibility in International Law for Serious Human Rights Violations* (1992), 52.

<sup>153</sup> Article 1 and 2.

<sup>154</sup> Principle 1, GA Res. 2625 (XXV), 24 October 1970.

<sup>155</sup> Article 5(2), GA Res. 3314 (XXIX), 14 December 1974.

<sup>156</sup> Singh, N., ‘The UN and the Development of International Law’, in Roberts and Kingsbury (eds), *United Nations, Divided World: The UN’s Roles in International Relations* (2nd edn., 1993), 389.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

provides jurisdiction for domestic courts, as well as in international tribunals, because of the perceived gravity of such violations.

As Meron pointed out, armed conflicts occur in exceptional circumstances, of conflicting justifications for conduct, and of spontaneous, reactive decision-making conditions, where third party access is limited and the collection of evidence virtually non-existence.<sup>159</sup> Thus humanitarian conventions receive ‘lesser prospects for actual compliance than other multilateral treaties, even though they enjoy stronger moral support.’<sup>160</sup> It should be noted that certain provisions under the conventions and protocols are considered customary law.<sup>161</sup> In the premises, the rules under the regime of international humanitarian law could provide a cause of action against the causes of forced migration, and even if not an international crime, would, similar to the international criminal law provisions, be evidence of an international wrongful act attracting international responsibility.

#### **4.5 SUBSTANTIVE ELEMENTS OF WRONGFULNESS AFFECTING FORCED MIGRATION**

Certain types of state action, which are not in themselves wrong, may give rise to legal claims because they become substantive elements of wrongfulness. These activities may thus found a cause of action under several headings, for example the abuse of right or a breach of an obligation under customary international law. Three types of state action, that are of particular interest because of their affects on forced migration, are mass expulsion and the removal of nationality, the failure to exercise due diligence, and the supply of arms or aid. These substantive elements may assist in the assessment of state action and therefore warrant analysis and investigation.

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<sup>159</sup> Meron, T, *Human Rights and Humanitarian Norms as Customary Law* (1989), 44. (Hereinafter, Meron, human rights).

<sup>160</sup> *Ibid.*

<sup>161</sup> See the discussion *ibid*, at 41-78.

#### 4.5.1 MASS EXPULSION AND THE REMOVAL OF NATIONALITY

Several questions should be raised when considering the issues of mass expulsion and the removal of nationality by states. Does a state possess a sovereign right to expel its own nationals and if so, what conditions may be applied to the exercise of this right? Does a state have a sovereign right to remove the nationality of persons formerly possessed of nationality and are there conditions prevalent upon the removal of nationality? Are states obliged to receive back their nationals? Can a state remove nationality as part of a policy of expulsion? What legal principles might apply? This section seeks to address the situation where expulsion has taken place and the expelling state either removes the nationality before expulsion or after expulsion, with the intention of evading international responsibility. Because nationality is the traditional link between a state and its population, to what extent are states able to manipulate the maintenance or removal of nationality to evade responsibility or accountability of their treatment of a population?<sup>162</sup>

##### 4.5.1.1 Mass Expulsion

Under emerging norms of international law, a state that practices mass expulsions of its nationals, violates both international human rights law and its obligations regarding friendly relations between states.<sup>163</sup> This is a norm recognised and developed in the context of state responsibility,<sup>164</sup> proposed by international organisations and confirmed by publicists.<sup>165</sup> International instruments do provide further evidence of the establishment of a rule in international law. Article 9 of the UDHR prohibits arbitrary exile and Article 13(2)

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<sup>162</sup> For example in very general terms, if the state maintains nationality and causes internal displacement, then their actions could be argued as an internal matter; whilst if a state removes nationality, then they may discharge any obligations to provide and protect the population, who become aliens within the territory.

<sup>163</sup> Nanda, Ved P., 'International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced People' (1992) 28 *Willamette L. Rev.* 791, 797; note also Lee, L.T., 'Report of the Committee: International Committee on the Legal Status of Refugees', International Law Association, Seoul, 1986; and Declaration on the Principles of International Law on Mass Expulsion (1986).

<sup>164</sup> Report of the ILC on the Work of Its 42nd Session, 45 UN G.A.O.R. Supp. (No. 10) at 179-224, UN Doc. A/45/10 (1990).

<sup>165</sup> The International Committee of the Red Cross has proposed that the prohibition of deportation is 'embodied in international law', in Uhler, O. and Coursier, H. (eds), *ICRC Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 279; cited by Meron, human rights, at 48.

establishes a right to leave and return. Article 12 of the ICCPR also establishes a right to leave and prohibits arbitrary denial of the right to return, although mass expulsion would almost inevitably violate several other provisions of the ICCPR, for example, before expulsion, an arrest or rounding up is necessary, which may violate Articles 9 and 10.

The regional human rights instruments also contain various provisions that amount to a prohibition of mass expulsion. Article 3 of the Fourth Protocol 1963, of the 1950 ECHR, prohibits the expulsion of nationals from the state of nationality and the right of nationals to enter the territory of nationality, whilst Article 4 prohibits the collective expulsion of aliens.<sup>166</sup> Under the 1969 ACHR, ‘no one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it’, and the collective expulsion of aliens is also prohibited.<sup>167</sup> And Article 12 of the ACHPR articulates the widest accord of rights for national and non-nationals to reside within the territory and to permit expulsions only ‘in accordance with the law’, thus providing general rights to the freedom of movement.

The act of mass expulsion is therefore prohibited by several international instruments, and is also a rule of customary international law, because the consequence of expulsion places a burden on another state, even if that other state benefits in some tangible or intangible form. That burden is at its most basic a compulsion to accept a population on its territory without consent, thus violating its sovereign right, decisional, political, and territorial. President Harrison in 1891 proclaimed in his Congressional address that, ‘[t]he banishment, whether by decree or by no 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.’<sup>168</sup> A decree expelling populations from a state is thus of international concern and will be wrongful, because of its implications on other states who

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<sup>166</sup> 4 November 1950, 213 U.N.T.S. 222, Article 15 of the Convention provides for derogation in specific circumstances.

<sup>167</sup> Article 22(5) and (9), OAS Official Rec., OEA/ser.K/XVI/1.1, Document 65, Rev.1, Corr.1 of 7 January 1990; *reprinted in* 9 I.L.M. 108; see also Article VIII, 1948 American Declaration of the Rights and Duties of Man, OAS Res. XXX (1948), OAS Official Records. OEA/Ser.L/V/1.4 Rev. (1965).

<sup>168</sup> (1891) Foreign Relations xiii; and John Fischer Williams, ‘Denationalisation’ (1927) 8 Brit. Yrbk. Int’l. L. 45, 61, who confirmed that banishment from one state means, compulsion on another state to receive the banished.

have to receive these populations.<sup>169</sup> The Annex to McDonald's letter of resignation identified that a state has the right to expel, but not where it caused a burden upon another state. However, according a right to states for a behaviour that is inherently wrong has been criticised.<sup>170</sup> Wrongfulness may thus be established because of several factors inherent in mass expulsion, namely where it violates human rights or causes human suffering, and where it violates the non-discrimination provisions or any other primary obligation in international law. The application of wrongfulness according to this proposition, rests not simply with the possibility that it casts a burden upon another state or that it violates sovereignty, but also because it clearly violates a mixture of basic human rights and other provisions of international law,<sup>171</sup> thus enunciating clearly the seriousness of such conduct.<sup>172</sup>

In sum therefore, international law does recognise a general power vested in states to expel, but the exercise of that power is subject to limitations,<sup>173</sup> which are: its obligations towards other states;<sup>174</sup> the obligations of human rights standards particularly that under the CEAFRD Article 1;<sup>175</sup> the obligations under the two 1966 International Covenants,<sup>176</sup> and the obligation prohibiting the abuse of rights.<sup>177</sup> The only acceptable justification for

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<sup>169</sup> See Coles, 1992 study, 27-29; and previous discussion section 4.4.4, 'Violation of the Sovereignty of a State'.

<sup>170</sup> *Ibid*, at 41.

<sup>171</sup> For example, under the Nuremberg Principles, deportation was declared a war crime and a crime against humanity, see ILC Draft Code of Offences against the Peace and Security of Mankind, Principle VI(b) and Principle VI(c) respectively; note also, Article 6(c), London Charter annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279; *reprinted in*, (1945) 39 Am. J. Int'l. L. 257; and UN GA Res. 95(I), 11 December 1946 on the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, UN Doc. A/64/Add.1 (1946).

<sup>172</sup> See section 4.4.8, 'Violations of Provisions under International Humanitarian Law'.

<sup>173</sup> See generally, Goodwin-Gill, 'The Limits of the Power of Expulsion in Public International Law' (1974-75) 47 Brit. Yrbk. Int'l. L. 55-156.

<sup>174</sup> *Ibid*, at 62-64.

<sup>175</sup> *Ibid*, at 64-65.

<sup>176</sup> *Ibid*, at 65-68.

<sup>177</sup> *Ibid*, at 79-86.

expulsion is *ordre public* and in any event, any expulsion must comply with the requirement of good faith.<sup>178</sup>

#### 4.5.1.2 The Duty to Receive Back Own Nationals

Where the expulsion is wrongful in international law, the state will have a duty in the first instance, to receive back its own nationals, in fact, there is a general assurance that a state would receive back its own nationals.<sup>179</sup> The European Court of Justice stated in 1974, that ‘a national, however undesirable and potentially harmful his entry may be, cannot be refused admission into his own State. A State has a duty under international law to receive back its own nationals.’<sup>180</sup> In fact, Coles suggests from reviewing the incidents of mass expulsion that no right exists for a state to expel their nationals *en masse*, and if they do, they have an obligation to accept them back.<sup>181</sup> In essence, a state has a duty to receive back its own nationals if they choose to return. And it does seem clear, that those who flee internal armed conflicts generally do not wish to ‘disestablish [their] ties of nationality or allegiance to [their] country on a temporary or permanent basis’, but to seek temporary refuge till their government was in a position to accord them protection.<sup>182</sup>

#### 4.5.1.3 The Removal of Nationality

A state cannot escape a general obligation to receive back its own nationals, whatever the ostensible reasons for the initial expulsions may be. The same may not be true for a state that is expelling an alien population.<sup>183</sup> A state may argue that national security or *ordre public* necessitates the deportation of the alien population. Once this population is

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<sup>178</sup> *Ibid*, at 96-122, who discusses in detail the requirement of good faith and the justification of *ordre public*.

<sup>179</sup> Oda, ‘The Individual in International Law’, in Sorensen (ed), manual, at 472; Grahl-Madsen, ‘Protection of Refugees by Their Country of Origin’ (1986) 11 Yale J. Int’l. L. 362, 376; and Weis, P., *Nationality and Statelessness in International Law* (1956), 35-60.

<sup>180</sup> *Van Duyn v. Home Office* [1974] 1 E.C.R. 1337.

<sup>181</sup> Coles, 1992 study, at 30-32 and Attachment A, 26-43.

<sup>182</sup> Perluss and Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Va. J. Int’l. L. 551, 596; and section 3.8.1.1. ‘Voluntary Repatriation and Integration’.

<sup>183</sup> Goodwin-Gill, *International Law and the Movement of Persons between States* (1978), 202, strongly asserted that the prior removal of citizenship does not justify the subsequent application of expulsion.

out of their territory, the same reasons may be used to prohibit their return, and the removal of nationality severs the links between the state and the population. Can a state thus remove the nationality of its population before expulsion takes place, or remove the nationality after expulsion has taken place? Could a state gain strategic advantage in removing the nationality of the expelled persons?

A state does have the power to remove nationality from its citizens because it is the state who decides who are its nationals,<sup>184</sup> but not for an arbitrary purpose or for the purpose of evading their obligations under international law.<sup>185</sup> The wrongfulness in the removal of nationality may result from several instances. Firstly, because it imposes a burden on another state.<sup>186</sup> Secondly, because it may create statelessness. Denationalising in large scale on racial, religious or political grounds, although questionable in its compatibility with international law, acts nevertheless to cause the loss of nationality for the denationalised population.<sup>187</sup> Deprivation of nationality should not be arbitrary,<sup>188</sup> yet it is not actionable before the European Commission on Human Rights.<sup>189</sup> In fact, the 1961 Convention on the Reduction of Statelessness only imposes restrictions where the removal of nationality would result in statelessness.<sup>190</sup> Thus the removal of nationality would be wrongful under this provision only where it causes statelessness. There is little contention that international law seeks to reduce the occurrence of statelessness.<sup>191</sup> For example, where a piece of territory is transferred from one state to another, nationality is usually

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<sup>184</sup> *Nationality Decrees Issued in Tunis and Morocco* (UK v. France) (Advisory Opinion) [1923] P.C.I.J. Ser. B, No. 4, at 24; and Article 1, Convention on Conflict of Nationality Laws (1930), 179 L.N.T.S. 89.

<sup>185</sup> Goodwin-Gill, *International Law and the Movement of Persons between States* (1978), 7-8 and 202-203; and Johnson, *supra*, at 17.

<sup>186</sup> As John Fischer Williams, 'Denationalisation' (1927) 8 Brit. Yrbk. Int'l. L. 45, 61, noted, '... a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory.'

<sup>187</sup> Jennings and Watts (ed), at 879, note 15.

<sup>188</sup> UDHR, Article 15(2); and Article 20(3), ACHR.

<sup>189</sup> *X v. German Federal Republic* (Re Application No. 288/57) (1957) 24 I.L.R. 346.

<sup>190</sup> See Articles 7, 8 and 9.

<sup>191</sup> Oda, in Sorensen (ed), manual, at 477.

determined by treaty, although in the absence of a treaty, the nationality of the successor state is usually adopted.<sup>192</sup>

The third instance of wrongfulness emanates from a violation of the prohibition of the abuse of rights. The exercise a right in order to evade international responsibility, may amount to an abuse of right. The Annex to the resignation of McDonald established the unlawfulness of denationalisation on a violation of the principle prohibiting the abuse of rights rather than on a more obvious complete disregard for human rights.<sup>193</sup> Whether or not the abuse of rights would provide for a cause of action, it would nevertheless permit international scrutiny of the legitimacy of the exercise of the right of denationalisation. The Advisory Opinion in the *Nationality decrees Issued in Tunis and Morocco*,<sup>194</sup> clearly states that the exercise of a sovereign right, which in this case was the removal of nationality, was subjected to two limitations - treaty commitments<sup>195</sup> and the developments of international relations.<sup>196</sup> Thus in summary, the right to remove nationality depends on the rules of international law and is therefore, not an issue solely within the domestic jurisdiction of a state as it affects the territory or interests of other states.<sup>197</sup> And the fourth foundation for wrongfulness is based on the violation of basic human rights. For example, Article 15 of the UDHR which provides for a right to nationality and prohibits the arbitrary removal of nationality would be violated. In effect, the removal of nationality may take place within a policy of discrimination, thus also possibly violating the non-discrimination principles.

Most provisions concerning the expulsion of persons, whether aliens or nationals,<sup>198</sup> recognise the power to expel in accordance with the law.<sup>199</sup> The importance of assessing state claims of legitimacy when exercising their sovereign right to expel can be seen from

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<sup>192</sup> *Ibid*, at 479.

<sup>193</sup> Coles, 1992 study, at 42-3.

<sup>194</sup> (UK v. France) (Advisory Opinion) [1923] P.C.I.J. Series B, No. 4, 6.

<sup>195</sup> See also *Polish Nationality Decrees* [1923] P.C.I.J. Ser. B, No.7, 10.

<sup>196</sup> ( UK v. France) (Advisory Opinion) [1923] P.C.I.J. Series B, No. 4, 24.

<sup>197</sup> *Ibid*.

<sup>198</sup> Article 22 of the ACHR, which prohibits collective expulsion of aliens, Article 3 and 4, Fourth Protocol, ECHR.

<sup>199</sup> See for example, Article 12, ACHPR; and Article 13, ICCPR.

the Armenian case. The Armenians in the Ottoman empire were deported according to legal criteria, of alleged national security and temporary military law.<sup>200</sup> Yet Dadrian emphasised, in analysis, that the real reason for the deportations were known to all observers, namely for the expropriation of Armenian property and their eventual annihilation.<sup>201</sup> It should however be noted, that most states do have explicit grounds on which to deprive nationality and would in most circumstances fulfil the 'according to law' requirements.<sup>202</sup> Thus the necessity to look behind the overt justifications cannot be overemphasised.

It could be argued that a right to remove nationality exists with a right to expel.<sup>203</sup> Although it may also be claimed, '[t]he right of States to withdraw their nationality from individuals is, on the whole, not limited by international law. Deprivation of nationality, even mass denationalisation, is not prohibited by international law, with the possible exception of the prohibition of discriminatory denationalisation.'<sup>204</sup> On the other hand, Jennings wrote that mass expulsion and denationalisation could be construed as an abuse of rights, whilst actions that violated fundamental human rights, or created statelessness, must clearly reflect unlawfulness.<sup>205</sup> In any event, insofar as conventional law is concerned, the collective expulsion of aliens is prohibited under the three regional instruments - the Fourth Protocol of the ECHR, the ACHPR and the ACHR. Thus, under these provisions, member states will gain no benefit from removing nationality before expulsion.

It may be said that despite the controversy surrounding the issues concerning mass expulsion and the removal of nationality, the significance of the acts do not lie with whether a state has the inherent right, but whether international responsibility is attached because of the occurrence of mass movement from its territory and how that responsibility may be enforced.<sup>206</sup> Whether or not sovereign rights exist, it is clear that there are limits to the

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<sup>200</sup> Dadrian, *supra*, at 270-73; and at 273, noted the then German under-secretary in 1916 as observing that the deportations were conducted with the 'appearance of legality'.

<sup>201</sup> *Ibid*, generally.

<sup>202</sup> Jennings and Watts (ed), at 878.

<sup>203</sup> See Garvey, in Martin (ed), *New asylum seekers*, at 188; for example the Potsdam Protocol and Potsdam Agreement, 2 August 1945.

<sup>204</sup> Weis, P., *Nationality and Statelessness in International Law* (2nd edn., 1979), 242.

<sup>205</sup> Jennings, *supra*.

<sup>206</sup> Garvey, in Martin (ed), *New asylum seekers*, at 188.

exercise of those rights. The effects of such acts are of concern to the international community and they cannot be applied in violation of the prohibition of the abuse of right or in violation of primary obligations under international law.

#### 4.5.2 FAILURE TO EXERCISE DUE DILIGENCE

In defence to an allegation of causing forced migration, a state or organisation may claim that it did not apply direct or indirect coercion in causing forced migration. Thus it will not be responsible because the acts of coercion were applied, directly or indirectly, by other parties. International law however, does recognise that international responsibility attaches to acts *or omissions*.<sup>207</sup> Thus an entity may be held responsible for a failure to act, more specifically, a failure to act with due diligence. Responsibility for the failure to take due diligence has been developed more from the regime of responsibilities for injury to alien, but it does provide support that a failure to protect, or an omission to exercise protective powers, will render the reticent state responsible.<sup>208</sup>

The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens<sup>209</sup> and the League of Nations document concerning the Responsibility of States for Damage Caused in Their Territory to the Persons or Property of Foreigners (1929),<sup>210</sup> both provide that responsibility is owed not because of the acts of individuals, but upon a failure of a state to take due diligence in protecting or apprehending the wrongdoer. In the *Alabama*, the tribunal held that due diligence had to be exercised by a neutral state to prevent the territory from being used in matters concerning a war, and as such, 'the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed' in failing to prevent the departure of the *Alabama*.<sup>211</sup>

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<sup>207</sup> *Corfu Channel Case* [1949] I.C.J. Rep. 4, 23, omitting to warn; Ago, Second Report, [1970] ii Yrbk. I.L.C. 177, 188; and Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1989/90) 13 Fordham Int'l. L.J. 1, 16-20.

<sup>208</sup> Ago, Second Report [1970] ii Yrbk. I.L.C. 177, 188.

<sup>209</sup> Article 13(2).

<sup>210</sup> Article V(a).

<sup>211</sup> *Alabama Claims Arbitration*, 1 Moore, Int'l. Arb. 653, 656.

In the *Iranian Hostages Case*, the Court found that Iran's failure 'to take appropriate steps' to protect the Embassy was a clear violation of its obligations in international law.<sup>212</sup> In the case of *Velasquez Rodriguez v. Honduras*, the Inter-American Court held, '[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'<sup>213</sup> Whilst in the domestic application of international law, the US courts have held a state responsible for 'turning a blind eye'.<sup>214</sup>

A state may therefore be held responsible where an international wrongful act has been done by another source, and the state has failed to act with due diligence either in failing to protect, in turning a blind eye, or facilitating the wrongful conduct.

#### 4.5.3 SUPPLY OF ARMS OR AID

Can a state be held responsible for the conduct of another state; can it be implicated through acts or omissions, by aiding or assisting another state in violating international law?<sup>215</sup> The causing of forced migration may relate to at least three identifiable situations where wrongfulness may be attributed to conduct of the provider of arms or aid. Firstly, the arms or aid could be used to perpetuate an armed conflict, whether international or non-international, that causes forced migration; secondly, the provision of arms or aid could be used for the suppression of individuals or groups of individuals and the violation of their human rights, which may lead to forced migration; and thirdly, the provision of aid (without arms) for projects that cause forced migration, although that was not the specific intention of the provider. Could international responsibility in either of these situations attach to the provider, who would thus be the indirect cause of the movement? Can the intention element be satisfied? Would any international legal principles be identifiable to facilitate the

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<sup>212</sup> *U.S. Diplomatic and Consular Staff in Tehran Case* [1980] I.C.J. Rep. 3, 30, para. 61 and 32, para. 67.

<sup>213</sup> Inter-American Court of Human Rights, 29 July 1988, Series C, No.4, at 154.

<sup>214</sup> See generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir, 1980).

<sup>215</sup> See, Smith, *State Responsibility and the Marine Environment* (1988), 11-12.

application of international responsibility? The investigation of the relationship between wrongful conduct and the supply of arms or aid requires comprehensive analysis, thus this section will aim to consider the legitimacy of the supply of arms or aid specifically within the context of causing of forced migration. In the process, wrongfulness may be identified as a substantive element of forced migration.

Perpetuating an armed conflict would possibly violate provisions under the UNC.<sup>216</sup> If the assistance in arms or aid is conducted in violation of any SC sanctions under Chapter VII, then international responsibility is almost certain to attach. The undesirability of armed conflicts, whether international or internal in character, is indisputable. Yet as Dieng notes, the ease at which arms are available contributes significantly to heightened and continued conflict and unrest.<sup>217</sup> Added to this, it has been claimed that more than ninety percent of the world's refugees are driven by armed conflict of one sort, yet only ten percent of the arms used are manufactured in the third world.<sup>218</sup> Thus the influence or contribution of third states to the furtherance of armed conflicts, by the provision and supply of arms, cannot be doubted. It may be proposed that the supply of weapons of mass destruction should attract international responsibility, '[a]s the proliferation of weapons of mass destruction *implies* an increased *risk* of such an outcome, it correlates with a need to widen the sphere of the responsibility of governments in the conduct of international relations.'<sup>219</sup> Although the provision of arms may be effected through individuals or companies, the complicity of state authorities is usually present or state authorities actually facilitate the supply of arms.<sup>220</sup>

The provision of arms in certain circumstances would amount to an international wrongful act. The ICJ in the *Nicaragua Case (Merits)*,<sup>221</sup> found that the provision of

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<sup>216</sup> Particularly Article 1(1), 2(4) and Article 2 generally.

<sup>217</sup> Dieng, *supra*, at 127.

<sup>218</sup> Nobel, *supra*, at 82.

<sup>219</sup> Rubenstein, 'State Responsibility for Failure to Control the Export of Weapons of Mass Destruction' (1993) 23 (2) Cal. W. Int'l. L.J. 319, 321.

<sup>220</sup> Note generally, *op. cit.*, Dispatches, Channel Four; and note Rubenstein, *supra*, at 322-27, who claims the smuggling of certain types of weapons, perhaps bomb-grade uranium, is permitted by state officials of the possessor state.

<sup>221</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* [1986] I.C.J. Reps. 14.

weapons, logistical support or other support to rebels may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of another state.<sup>222</sup> The provision of arms does not in itself amount to an armed attack,<sup>223</sup> however, the Court found that the assistance, logistical support and supply of weapons to the *contras* 'constitutes a clear breach of the principle of non-intervention.'<sup>224</sup> The case does provide support for the proposition that the provision of assistance may amount to an indirect use of force, depending on the type of assistance. Financial assistance although not amounting to unlawful use of force, could violate the principle of non-intervention, and the provision of arms, for the purpose of continued armed struggle, not in the decolonisation process would amount to unlawful intervention.<sup>225</sup> Therefore, the supply of arms in situations that perpetuate armed conflicts that are not justified under international law would attract international responsibility.<sup>226</sup> In fact, a state, although without sufficient control, may nevertheless be aware that the provision of arms or aid is used to violate international law.<sup>227</sup> Much does depend on the construction of the particular obligation,<sup>228</sup> and whether it is obligations of 'conduct' or 'result'.

The implication of responsibility in the second situation depends primarily on the notion of intention.<sup>229</sup> If it were clear that the provision of arms or aid were given with the

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<sup>222</sup> *Ibid*, at para. 195.

<sup>223</sup> *Ibid*, para. 230.

<sup>224</sup> *Ibid*, para. 241 and 242.

<sup>225</sup> Non-intervention as a principle of international law is provided under the Declaration of Inadmissibility of Intervention in the domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131 (XX), 21 December 1965, para. 2; and the Friendly Relations Resolution, para. 1.

<sup>226</sup> Legal justifications include legitimate concerns of self-determination, collective use of force, or as a proportionate response to a previous international wrongful act.

<sup>227</sup> In the *Nicaragua Case* [1986] I.C.J. Rep. 4, 129-30, para. 254-256, the court found international responsibility on the basis that the US published a Manual that encouraged the *contras* to violate humanitarian law and were therefore aware that such violations were occurring.

<sup>228</sup> Rubenstein, *supra*, at 355. For example, in Rubenstein's thesis, the unlawfulness stems from the obligation not to proliferate non-conventional weapons, thus the failure to control would be a violation of this non-proliferation obligation, at 332-42.

<sup>229</sup> Ago, Seventh Report on State Responsibility, [1978] ii Yrbk. I.L.C. 31, 99, the precondition of attaching responsibility is that the specific intent be established, at 104; UN Doc. A/CN.4/307 and Add. 1 and 2. Although note Smith, *supra*, at 12, who claims the ILC's proposition on intention does not take into consideration lesser degrees of intent.

knowledge that they would be used for the violation of human rights that lead to forced migration, then international responsibility would attach.<sup>230</sup> The relevant knowledge could be implied, particularly if there is deliberate eye-shutting, or if the provider was grossly negligent in ascertaining the use of such funds or arms.<sup>231</sup> Another possible scenario is where a state provides the tools for torture, for example the export of electro-shock equipment.<sup>232</sup> The primary focus of such arms or aid provisions would be its control within the domestic jurisdiction of the provider entity. Cohen starts from the proposition that the international law of human rights imposes obligations on states in the exercise of their domestic sovereignty.<sup>233</sup> Under the sum total of all the human rights provisions, Cohen proposes a corresponding duty on states 'not to support another [government] engaged in serious violations of internationally recognized human rights.'<sup>234</sup> In the US,<sup>235</sup> this duty was codified under the then, Foreign Assistance Act of 1961, Section 502B, which prohibits the provision of aid or assistance to governments that repress their people.<sup>236</sup>

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<sup>230</sup> Note, Article 27, ILC Draft Articles on State Responsibility, which provides that where aid or assistance is provided for the commission of an internationally wrongful act, responsibility would attach even if the act of assistance or aid when taken alone, constitutes no violation of international law.

<sup>231</sup> For example, the US Government has been criticised for supporting a Guatemala Government that is known for its massive violations of human rights, see Brockett, 'The Right to Food and United States Policy in Guatemala' (1984) 6 Hum. Rts. Q. 366.

<sup>232</sup> *Op. cit.*, Dispatches, Channel Four, broadcast at 9pm, 11 January 1995; copy of transcript with author. The programme suggests gross negligence on the part of the government in permitting sales despite embargoes or failing to determine if the equipment would be used for internal suppression, and deliberate eye-shutting by government departments.

<sup>233</sup> Cohen, S.B., 'Conditioning U.S. Security Assistance on Human Rights Practices' (1982) 76 Am. J. Int'l L. 246.

<sup>234</sup> *Ibid.*

<sup>235</sup> AFP reporting on a release by the US Arms Control and Disarmament Agency, claims the US is the top arms exporter, with the UK the second largest in the world, 'US continues to top list of world arms peddlers', *The Straits Times*, 5 July 1996. This suggests that the supply and sale of arms is dominated by developed states, particularly the UK and US.

<sup>236</sup> 22 U.S.C. Section 2304 (Supp. 111, 1979); subsection (a)(2) prohibits military aid or sale of arms to regimes that engage in a 'consistent pattern of gross violations of internationally recognized human rights.' But subsection (c)(1)(c) provides a national interest proviso. However, although the provision was adopted by Congress to specifically direct the Executive on a policy to respect human rights, it was limited by several difficulties. Firstly, the need for information in order to enforce the provisions; secondly, the proviso, which allows deviation on national security; and thirdly, the actual language of the provision which is worded in favour of discretion and flexibility, 'should' rather than 'shall'. See further, Cohen, *supra*, at 250.

The provisions make it clear that a state has obligations that corresponds with the duty not to violate human rights, which is the obligation not to assist in the violation of human rights. Although the actual practical effect is limited, it does provide a sound basis for a duty not to cause indirectly, forced migration. Cohen suggests that the upholding of provisions such as the Foreign Assistance Act has some advantages: it may deter violations of human rights; regimes who fear losing their aid may refrain from violating human rights; and the legitimacy of a government may be questioned, if a provider state disassociates the violating state by withdrawing aid.<sup>237</sup> Rubenstein also argued that responsibility should be attached to states that fail to control the export of weapons of mass destruction, including the agents of toxins and technology.<sup>238</sup> In the UK, the courts have found through judicial review, that the funding of projects that are detrimental to the populations receiving the funds may be unlawful, where it violates domestic provisions.<sup>239</sup> In *R v. Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*, the Economists and the Accounting Officers of the relevant government departments analysis of the project clearly emphasised its possible detrimental effect on the Malaysian population and the bad economic prospects,<sup>240</sup> leading the Court to find that the decision taken by the Foreign Secretary to fund the project in 1991 as unlawful and not for the developmental purpose pursuant to Section 1 of the 1980 Act.<sup>241</sup>

On the international plane, responsibility would attach to a state where it has violated a primary obligation. For example, where the intention to facilitate the wrongdoing of another state can be proven, or the provision of arms or aid themselves constitute

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<sup>237</sup> Cohen, *supra*, at 279.

<sup>238</sup> Rubenstein, P., 'State Responsibility for Failing to Control the Export of Weapons of Mass Destruction' (1993) 23 Cal. W. Int'l. L.J. 319.

<sup>239</sup> In *R v. Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd* [1995] 1 All E.R. 611, the provision of foreign aid and the lawfulness of the scheme to provide aid was successfully challenged. The World Development Movement challenged the Foreign Secretary's decision to provide aid for the Pergau project on the basis that it violated Section 1 of the Overseas Development and Co-operation Act of 1980, which states in section 1(1), '[t]he Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.'

<sup>240</sup> [1995] 1 All E.R. 611, 616.

<sup>241</sup> *Ibid*, at 627d.

an international wrong.<sup>242</sup> However, the situation is different where the provision of arms or aid are used by a receiver state to violate human rights. In essence, a state would be responsible if a primary obligation or conduct of result is violated in providing arms or aid.<sup>243</sup> In this instance, an analogy with Shue's attendant duties could be applied to impose an obligation not to provide arms or aid that would cause indirect forced migration.<sup>244</sup> This duty is inherent, at least, in international relations, because, '[t]hough some nations enjoy greater autonomy, no country is free to act as it pleases, particularly when its behaviour affects the asserted interests of other nations.'<sup>245</sup> Thus a positive duty of forbearance could apply to implicate entities that provide arms or aid that contribute or facilitate the violation of human rights or other international wrongful acts. Or an obligation of result could be violated,<sup>246</sup> although wrongfulness would depend on whether a particular obligation or result is violated during the provision of arms or aid.<sup>247</sup> It is argued in this context that military expenditure increases foreign debt, obscures other areas of needed development, decreases trade and promotes the rise of military leadership rather than civilian leaders.<sup>248</sup>

The third situation concerning aid without arms, is somewhat similar to the second situation, except the imposition of responsibility for the provision of aid in itself for the purpose of innocent motives may be difficult. Shelton advocated for an analogous requirement of the Civil Law obligation to assist another in distress where it would pose no threat or injury.<sup>249</sup> In this sense, a state might be responsible for the violations of another state by omission.<sup>250</sup> Where a state could have assisted another state in formulating policy

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<sup>242</sup> Article 27 of the ILC Draft Articles would then apply.

<sup>243</sup> For example, an obligation of conduct could be an obligation not to act or do certain specified things.

<sup>244</sup> Shue, H., *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980), 35-44, who suggested that there exists a duty of *forbearance*, which is a duty not to deprive persons of basic rights or to perpetuate a wrong.

<sup>245</sup> Bard, R.L., 'The Right to Food' (1985) 70 Iowa L. Rev. 1279, 1283.

<sup>246</sup> For example, an obligation not to cause human suffering, or forced migration itself.

<sup>247</sup> The author is also aware of the difficulty in proving the knowledge of the use of arms or aid. However note that the export of arms, apart from permeating armed conflicts that violate human rights and create floods of refugees, also perverts the process of development itself; see Nobel, *supra*, at 82-3.

<sup>248</sup> *Ibid*, at 83.

<sup>249</sup> Shelton, 'The Duty to Assist Famine Victims' (1985) 70 Iowa L. Rev. 1309, in fact, a person would be liable if he/she failed to assist where it would pose no threat or injury.

<sup>250</sup> Smith, *supra*, at 12.

that might prevent human rights abuses, then even if the act of aiding the state was legitimate and would not lead to the question of responsibility, failing to supervise the implementation of the funds might open the issue of responsibility by omission. Domestic mechanisms may facilitate the supervision of aid, for example the Foreign Assistance Act of the US or in judicial review situations such as in the UK. It is conceivable that responsibility may be sought not only from states, but from development-based organisations, for example the World Bank. At present there are few mechanisms for the supervision of the provision of aid, yet World Bank funded projects do have a real potential of causing forced migration.<sup>251</sup> There would seem to be an obvious lack of a much needed system of supervision and accountability on the international plane,<sup>252</sup> although the World Bank has commissioned an Investigation Panel to receive complaints concerning their projects.<sup>253</sup> There are many difficulties implicit with the search for mechanisms that may impose responsibility on non-state entities for the provision of aid, particularly for development projects, and this represents another area where more resources should be committed to.<sup>254</sup>

#### **4.6 RECOGNISING CAUSING FORCED MIGRATION AS AN INTERNATIONAL WRONGFUL ACT**

This section seeks to identify the causing of forced migration as the subject matter of an international wrongful act. When forced migrants are caused, certain principles of international law may be violated, and certain causes of action may be alleged. If specific causes of forced migration are unlawful, would it be possible to claim that causing forced migration is itself an international wrongful act? Would the elements that have been identified combine to establish unlawfulness and consequently be itself a subject matter for a cause of action? In order for an affirmative answer to be concluded, causing forced

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<sup>251</sup> Hutchins, T., 'Using the International Court of Justice to Check Human Rights Abuses in World Bank Projects' (1991-92) 23 Colum. Hum. Rts. L. Rev. 487, 488-495, who provides an account of the Kedung Ombo project in Indonesia which caused forced relocation, through intimidation and mental abuse under the colour of state authority, and with inadequate compensation. See also section 3.5.2, 'Economic Considerations'.

<sup>252</sup> *Ibid*, at 522.

<sup>253</sup> Although armed only with powers of recommendation.

<sup>254</sup> See for example, Downing, Theodore E., 'Findings and Recommendations of the First International Conference on Development-Induced Displacement and Impoverishment', 3 to 7 January 1995, Refugee Studies Programme, Oxford, UK.

migration must be a recognised norm of international law. Thus it has either to be established by a source of international law under the SICJ, or be authorised through the processes of law creation.<sup>255</sup> Sohn identified four ‘law-building stages’: firstly, an assertion of particular concern by a world organ (assertion of concern); secondly, a declaration in a universal instrument (declaration); thirdly, followed by an elaboration in an international document (elaboration); and finally, by application and reaffirmation in international law (affirmation and application).<sup>256</sup> In order for the causing of forced migration to be *per se* an international wrongful act, it has to be either specifically provided for in convention form, agreed, recognised and applied by states, or it has to be a norm of customary international law. Sohn’s ‘law-building stages’ emphasises the overall mechanisms for the emergence of a norm in international law.

Therefore, whether transboundary or internal displacement, the causing of forced migration based on the elements alluded to in previous chapters have to satisfy the criteria suggested by Sohn’s four stages: assertion of concern, declaration, elaboration, and affirmation and application. This section intends to identify and analyse whether the causing of forced migration has the status of a norm of international law.

#### 4.6.1 ASSERTION OF CONCERN

The historical accounts of international concern for those who are forced to cross international boundaries have been well documented by several authors.<sup>257</sup> Since the establishment of UNHCR, the trend has been to extend the mandate of UNHCR beyond the constraints of the 1951 Convention and 1967 Protocol, to those who move under conditions of armed conflicts, famine or other coercive causes that do not amount to ‘a well-founded fear’ of ‘persecution’.<sup>258</sup> More recently, the root causes of transboundary

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<sup>255</sup> For example as suggested by Alston’s discussion on the creation and recognition aspects of new human rights, through procedural requirements and analysis of usefulness, Alston, P., ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 Am. J. Int’l. L. 607-621.

<sup>256</sup> Sohn, L.B., ‘The New International Law: Protection of the Rights of Individuals Rather Than States’ (1982) 32 Am. U. L. Rev. 1, 11; who discussed the status of individuals holding rights in international law.

<sup>257</sup> See Goodwin-Gill, the refugee; and Grahl-Madsen, A., *The Status of Refugees in International Law* (1966).

<sup>258</sup> See above section 2.2 and 2.3.

movements have been given emphasis, culminating in a specific report investigating responsibility from the perspective of states of origin.<sup>259</sup> There have therefore been clear international expressions of concern for transboundary movements.

The issues concerning internally displaced persons have been less specific, primarily because they deal with the treatment of nationals within a state. Although the influence of absolute state sovereignty may be receding, the political will to intervene for the benefit of the nationals within their own state is still inconsistent. However, UN and other international organisations have recently focused much attention on internally displaced persons and their plight. The first explicit reference by the GA of internally displaced persons and the linking of activities of the Office of the UNHCR was in 1992.<sup>260</sup> Since then, the Commission on Human Rights has called for greater co-operation between the UNHCR, the International Organisation for Migration, the Department of Humanitarian Affairs and other organisations, with the Representative of the Secretary-General on Internally Displaced Persons.<sup>261</sup> Most significant, among these developments, is the recognition by the UNHCR that any means to assist the internally displaced had to incorporate their protection, with a search for durable solutions.<sup>262</sup>

A further assertion of international concern for forced migrants, both internal and transboundary can be seen from the mandate given to the ILA Committee on Internally Displaced Persons which states,

‘To study and report on selected legal issues relating to internally displaced persons, in particular, legal issues relating to the protection of internally displaced persons under international human rights and humanitarian law, and possible links

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<sup>259</sup> See above section 2.3, ‘The Perspective under Customary International Law’ and section 2.4.4, ‘Recapitulating the Functional Approach’.

<sup>260</sup> GA Res. 47/105 (1992), and suggested by Plender, R., ‘The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced’ (1994) 6 Int’l. J. Refugee L. 345, 349; the reference to internally displaced persons by the UN is noted in the 1988 Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (Oslo), in CIREFCA (1989), SC Res. 688 (1991) concerning Iraqi civilians, and in GA Res. 2958 (XXVII) (1992) commending UNHCR work with the internally displaced in Sudan; Plender, in Gowlland-Debbas (ed), at 121-123.

<sup>261</sup> Resolution 1994/68, 9 March 1994; see also, UN Doc. E/CN.4/1991/L.34 (1991), Resolution on Internally Displaced Persons.

<sup>262</sup> *UNHCR’s Role in Protecting and Assisting Internally Displaced People*, November 1993, at 11; and Plender, ‘The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced’ (1994) 6 Int’l. J. Refugee L. 345, 350.

with the international law applicable to refugees and externally displaced persons.<sup>263</sup>

Both transboundary and internally displaced persons have therefore received the attention of international concern. The wrongfulness of both types of forced migrants have also been referred to. Thus this law-building stage would seem to be satisfied.

#### 4.6.2 DECLARATION

In order to satisfy the second law-building stage, unlawfulness has to have been declared or listed within a universally accepted document, for example a resolution by the UNHCR Executive Committee, a GA resolution, international conventions or by other organs of international bodies.

There are numerous declarations concerning transboundary forced migration. Perhaps the best example is GA Resolution 194 (III) of 11 December 1948, concerning the Palestinian refugees, which has been recited annually since that year. The situation with the internally displaced, however, is less forthcoming. Perhaps the main reason why a declaration, identifying the unlawfulness of forced migration within the borders of a state, does not exist is because states wish to maintain the state sovereignty principle and fear any such statements would erode this fundamental pillar. It is however clear that seeking durable solutions for forced migration involves addressing the causes of displacement and this may mean guaranteeing human rights, securing peace in conflict situations through force, intervening directly in a despotic state regime, and all the problems and difficulties consequent to such activities.<sup>264</sup> Deng notes that there are as yet no specific provisions that are directly applicable to the internally displaced,<sup>265</sup> nor norms that make the creation of

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<sup>263</sup> ILA, Executive Council, 21 November 1992; Lee, Report of the Committee on Internally Displaced Person; prepared for the Working Group in Helsinki, 1996 (unpublished); and note, Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis?' (1996) 9 (1) J. Refugee Studies 27

<sup>264</sup> Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993), 3.

<sup>265</sup> It should be noted that several principles of international law, conventions and customary law may be relevant to situations where internal displacement occurs, or in the actual causing of internal displacement; see for example, Lee, Report of the Committee on Internally Displaced; prepared for the Working Group in Helsinki, 1996 (unpublished), Annex; 'List of International Instruments on Human Rights and Humanitarian Law of Particular Relevance to the Protection of, and Assistance to, Internally Displaced Persons'.

internally displaced persons unlawful.<sup>266</sup> Deng does on the other hand emphasise that principles for the protection of human rights have to be clearly defined with respect to its application for the internally displaced and concludes that a declaration and perhaps, a convention, is in fact needed.<sup>267</sup> In fact, the Refugee Policy Group has proposed, and continues to work for a draft declaration and convention for the internally displaced,<sup>268</sup> and the ILA continues to work for a Draft Declaration of Principles of International Law on Internally Displaced Person.<sup>269</sup>

The most cogent declaration of unlawfulness of the treatment of civilians and the creation of internal displacement was when the SC condemned 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region'.<sup>270</sup> Lee suggests that this distinctive resolution has led to other SC resolutions extending protection to the internally displaced explicitly and by implication.<sup>271</sup> Thus the creation of 'safe havens' in Iraq for the Kurds,<sup>272</sup> the condemnation of forced population transfers of Armenians in Turkey,<sup>273</sup> and the Jews in Germany,<sup>274</sup> and international condemnation of 'bantustans' in South Africa most notably Transkei,<sup>275</sup> are examples of declarations of the recognition of the unlawfulness of specific causes of internal forced migration.

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<sup>266</sup> Deng, *protecting the dispossessed*, at 9.

<sup>267</sup> *Ibid*, at 10.

<sup>268</sup> Refugee Policy Group, *Strengthening International Protection for Internally Displaced Persons*, December 1993; Plender, 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 *Int'l. J. Refugee L.* 345, 352.

<sup>269</sup> Lee, Report of the Committee on Internally Displaced; prepared for the Working Group in Helsinki, 1996 (unpublished).

<sup>270</sup> SC Res. 688, 5 April 1991, para. 1; *reprinted* (1991) 30 *I.L.M.* 858.

<sup>271</sup> Lee, *internally displaced person*, at 38; SC Res. 752 (1992), 836 (1993), and 859 (1993), dealing with Bosnia and Herzegovina; and Res. 912, 918, 924, and 965 (1994), dealing with Rwanda.

<sup>272</sup> 'Sanctuary for the Kurds', *The Economist*, 20 April 1991, at 12.

<sup>273</sup> See generally, Dadrian, *supra*.

<sup>274</sup> See Coles, 1992 study, annex A.

<sup>275</sup> GA Res. 31/6, 26 October 1976, on the So-called Independent Transkei and other Bantustans, where the GA 'strongly condemned' the creation of bantustans, rejected the independence of Transkei and called for a prohibition on dealings with bantustans.

More recently, a detailed resolution against forced displacement was adopted by the Sub-Commission, on the Right to Freedom of Movement in 1994.<sup>276</sup> The Resolution reaffirms the right of everyone to liberty of movement and freedom to choose their residence within the territory of their country, '[a]ffirms the right of persons to remain in peace in their own homes, on their own lands and in their own countries' and '[u]rges Governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and "ethnic cleansing" in violation of international legal standards'.<sup>277</sup> Further, the Commission on Human Rights has recommended that all governments provide remedies consistent with the wishes and needs of persons subjected to forced evictions, following mutually satisfactory negotiations.<sup>278</sup>

In the premise, both transboundary and internally displaced persons have received declarations concerning their unlawfulness. Although the more recent declarations on the internally displaced have been applied from case specific situations rather than on general propositions of unlawfulness. On the whole this aspect of the second law-building stage is satisfied.

#### **4.6.3 ELABORATION**

The elaboration of the unlawfulness of causing forced migration (transboundary and internal) has not previously been collated within a specific document, treaty, resolution or research report. There are many reasons for this, perhaps most significantly because transboundary and internal displacement are currently kept separate and distinct subjects, although there is a move towards a removal of the dichotomy between refugees and those internally displaced.<sup>279</sup> Because there are no documents specifically elaborating the elements and aspects of unlawfulness of causing forced migration, this stage may not be satisfied, although there is on-going work in a possible legal synthesis between refugees and

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<sup>276</sup> Resolution 1994/24, UN Doc. E/CN.4/Sub.2/1994/56, at 67. See Appendices, A3.

<sup>277</sup> See Appendices, A3.

<sup>278</sup> Human Rights Commission Resolution 1993/77, para. 4; and Theo van Boven, 'Final Report of the Special Rapporteur', Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993, at para. 21.

<sup>279</sup> See generally, Lee, internally displaced persons.

those internally displaced.<sup>280</sup> On the other hand, specific and general acts that cause forced migration, for example violating human rights provisions, committing genocide, or discrimination, have been elaborated in international documents. A combination of many documents would thus form a comprehensive elaboration of the elements of forced migration. Moreover, as mentioned above, there have been specific declarations of the unlawfulness of causing internal displacement and a corresponding elaboration of the specific unlawfulness.<sup>281</sup>

The unlawfulness of coerced transboundary movements has been identified and elaborated by several international projects, namely Special Rapporteur Aga Khan in 1981,<sup>282</sup> the ILA, Declaration of the Principles of International Law on Mass Expulsion,<sup>283</sup> Declaration of Principles of International Law on Compensation to Refugees,<sup>284</sup> and the 1992 study conducted by Coles for UNHCR.<sup>285</sup> These projects outline the basic regime of international responsibility for causing transboundary movements, by connecting the violation of human rights to mass exodus, by underlining the violation of several obligations in international law when coercion is applied to cause transboundary movements, and under Coles, the violation of the right of freedom of movement by the state of origin.

The elaboration of internal displacement as unlawful has not been as comprehensive, yet internal displacement amounting to forced migration does violate international provisions concerning human rights. Even at the time of the League of Nations, the protection of nationals was a significant concern, evidenced by the minorities protection regime which was there to safeguard the rights of linguistic, racial and religious groups who were nationals or citizens within a state.<sup>286</sup> Thus, causing internal displacement amounting to forced migration might also violate several international provisions. However,

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<sup>280</sup> *Ibid.*

<sup>281</sup> See above SC Res. 688 and Sub-Commission Res. 1994/24, Appendices, A3.

<sup>282</sup> See Aga Khan, 1981 report.

<sup>283</sup> *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986).

<sup>284</sup> See ILA. Sixty-Fourth conference report.

<sup>285</sup> See Coles, 1992 study.

<sup>286</sup> League of Nations, *Protection of Linguistic, Racial and Religious Minorities by the League of Nations*, Geneva, 1927; which states all nationals 'shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion'.

these provisions have been elaborated according to their own subject matter and not as causing forced migration *per se*.<sup>287</sup> Although the ICRC provisions on civilians extend protection without distinguishing transboundary or internal movements.<sup>288</sup> Recent international concern for the internally displaced may, however, provide the elaboration necessary to satisfy this criterion of the law-building stage. The report of the Representative of the Secretary-General, Deng, does identify areas where international responsibility would apply in the causing of internal displacement, but also suggested that the specific provisions need further development, possibly through a declaration or convention.<sup>289</sup> He suggested that existing human rights and humanitarian law provisions could be applied to the internally displaced, although they may not be explicitly applicable.<sup>290</sup> Further, the ILA, Committee on Internally Displaced Persons and the Refugee Policy Group continue to work on investigating and preparing their respective draft documents on the legal norms applicable to the internally displaced.<sup>291</sup>

It is therefore conceivable that within the near future, the elaboration of the unlawfulness of causing internal displacement will receive widespread international recognition, although examples of unlawful acts that cause forced migration have already been elaborated. For example, according to the Agreement in London, ‘crimes against humanity’ included murder, extermination, enslavement, starvation, deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious, or political grounds.<sup>292</sup> Clearly the forcible removal of a population (whether or not across borders), coercive relocation or deportation are crimes against humanity because they would include the commission of one or more of these prohibited

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<sup>287</sup> For example, causing internal displacement amounting to forced migration might violate provisions under the UDHR, Article 12, concerning arbitrary interference with privacy, family and home; and Article 17, concerning the right to own property and not have it arbitrarily taken away.

<sup>288</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) and Additional Protocols (1977).

<sup>289</sup> See generally, Deng, (1995) 14 (1&2) *Refugee Survey Quarterly*, 192.

<sup>290</sup> *Ibid*, at 234, para. 135.

<sup>291</sup> Refugee Policy Group, *Strengthening International Protection for Internally Displaced Persons*, December 1993; and Lee, Report of the Committee on Internally Displaced Person; prepared for the Working Group in Helsinki, 1996 (unpublished)

<sup>292</sup> (1952) *Yearbook on Human Rights for 1950*, 163; cited by Lippman, *supra*, at 13, note 76.

acts. The term ‘ethnic cleansing’ also clearly identifies forced migration as unlawful, based on the means in which it is procured and defined as a close kin to genocide.<sup>293</sup> An example of domestic elaboration of unlawful displacement may be found under Article One of the Nazis and Nazi Collaborators (Punishment) Act, 1950 (Israel), which states the ‘crime against Jewish people’ include, *inter alia*, placing Jews in living conditions calculated to bring about their physical destruction and forcibly transferring Jewish children to another national or religious group, both or either with the intention of destroying the Jewish people in whole or in part.<sup>294</sup>

In the premise, the causing of forced migration has received elaboration, both as transboundary and internal displacement. The elaboration concerning transboundary movements have been more comprehensive, although there is a clear identification of the unlawfulness of internal displacement related specifically to the unlawful causes themselves. The development of international norms concerning the internally displaced continues under Deng, the ILA and the Refugee Policy Group. As a specific subject matter relating to unlawfulness, the causing of forced migration *per se* may not have received specific elaboration, however, it does seem clear that forced migration based on the combined transboundary and internal displacement regime might attract a consideration of unlawfulness based on the elaboration of the respective situations. In any event, it is an emerging contention that there is no dichotomy between transboundary and internally displaced persons.<sup>295</sup>

#### 4.6.4 AFFIRMATION AND APPLICATION

In this fourth stage of law-building, the unlawfulness of both transboundary and internal displacement need to have been applied and affirmed by states as state practice. To a large extent, the causing of transboundary movements have been declared unlawful by

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<sup>293</sup> Deng, protecting the dispossessed, at 31, describes it as ‘[t]he means used by an ethnic group in control of a given territory to force another ethnic group from the territory’, using a variety of means that include, ‘threats, harassment and intimidation, rape, torture, extra-judicial execution, and shooting or using explosives against homes and places of business, destroying places of worship and cultural importance, and forcibly relocating populations’; note at 34-35, Deng describes Serbian intimidation to force Muslim and non-Serbs to leave, including the use of rape.

<sup>294</sup> (1952) Yearbook on Human Rights for 1950, 163; cited by Lippman, *supra*, at 13, note 76.

<sup>295</sup> See above section 2.4.1.1, ‘The Internally Displaced’.

those states who have been the recipients of persons leaving their states of origin. For example, states have referred to mass exodus as waves of bombers or bullets,<sup>296</sup> and in 1971, India claimed self-defence from the massive influx of persons from Pakistan.<sup>297</sup> There can be little doubt that refugees can and often are, a direct cause of international tension.<sup>298</sup> The discussions above, concerning the status on the prohibition of mass expulsion, as well as the reaction of states and commentators, clearly shows the application and affirmation of the general unlawfulness of causing transboundary forced migration.

The application and affirmation of internal displacement amounting to forced migration has also been applied, but only in the context of violations of human rights and the activation of humanitarian intervention. As a specific application of intervention on behalf of internal forced migrants, there have been weak instances of affirmation and application. For example, the situation of 'bantustans' in South Africa, the Kurds in Northern Iraq, and concerns over the movement of indigenous populations for the purpose of urban developments, the building of roads or deforestation.<sup>299</sup> The issues concerning displacement for development continues to be controversial and acts as an effective hurdle against any allegation of unlawfulness.<sup>300</sup> The concerns in South Africa may possibly be limited to the anti-apartheid movement, whilst the intervention in Northern Iraq has been claimed to be an exclusive product of the Gulf War.<sup>301</sup> There have been on the other hand other instances where the SC has specifically accorded protection to those internally displaced, for example in situations in Bosnia and Herzegovina, Rwanda, and Somalia.<sup>302</sup>

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<sup>296</sup> See above section 2.3, 'The Perspective under Customary Law'.

<sup>297</sup> On 21 November 1971, there were 10 million refugees in India, thus self-defence was claimed as this affected its social system and economy, 26 UN S.C.O.R., 1606th mtg., 4 December 1971, para. 158-163.

<sup>298</sup> For example, Beyer noted that the long standing ethnic and economic tension in Northern Somalia was ignited by the influx of Ogadeni refugees from Ethiopia, Beyer, G.A., 'Human Rights Monitoring and the Failure of Early Warning: A Practitioner's View' (1990) 2 Int'l. J. Refugee L.56.

<sup>299</sup> For example see, 'Malaysia: Logging on', *The Economist*, 8-14 April 1995, at 76.

<sup>300</sup> See section 3.5.2, 'Economic Considerations'; and ICIHI, *supra*, at 82-3.

<sup>301</sup> See generally, Reisman, W.M., 'Some Lessons from Iraq: International Law and Democratic Politics' (1991) 16 Yale J. Int'l. L. 203; Weston, B.H., 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 Am. J. Int'l. L. 516; and Nanda, V.P., 'Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti - Revisiting the Validity of Humanitarian Intervention Under International Law - Part I' (1992) 20 Denv. J. Int'l. L. & Pol'y. 305.

<sup>302</sup> On Bosnia and Herzegovina and Rwanda, see section 4.6.2, 'Declaration'; and for Somalia see, SC Res. 775 and 794 (1992); for the 'affected population'.

And the decisions and recommendations of the World Bank Investigation Panel do suggest that unfettered use of discretionary powers to relocate populations may now be conditioned by the suffering it causes individuals or groups.<sup>303</sup>

If the causing of forced migration were itself unlawful, and the unlawfulness identified by the elements of intention, coercion, and detrimental effects, then arguments concerning the right to development and sovereignty over natural resources would be less applicable. The right to deal with natural resources and the right to develop would not be an issue because, the emphasis would be on the treatment of the population. A state would maintain its right to exercise power over all its natural resources and determine the best way to develop its economic structures, but it must not violate the obligation not to cause forced migration, specifically internal forced migration. It would satisfy this obligation by ensuring that it was not coercive and that if it effected relocation programmes, that they were conducted without detriment to the relocated population. However, these are propositions *de lege ferenda* as existing international law only recognises specific violations of human rights provisions rather than a general subject matter of causing forced migration.

The affirmation and application of the unlawfulness of causing mass exodus across international borders can be established. However, the same cannot be maintained for internal displacement amounting to forced migration. The allegation of unlawfulness for the violations of human rights of nationals in a state, even to the extent of armed intervention, has been acclaimed a right of all states, but internal displacement is not a significant factor of the application of this alleged right.<sup>304</sup>

#### 4.7 THE WRONGFULNESS IN CAUSING FORCED MIGRATION EXPLORED

It would seem that forced migration is arguably within a position close to satisfying the four law-building stages, although in reality the stages merely represent a gauge of

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<sup>303</sup> See section 3.12, 'State Responsibility for other Entities' and section 5.7.2, 'Action by Individuals in the International Sphere'.

<sup>304</sup> For a discussion on humanitarian intervention see, Franck, Thomas M., *Nation Against Nation: What Happened to the UN & What the U.S. Can Do about it* (1985); Lillich, Richard B. (ed), *Humanitarian Intervention and the United Nations* (1973); Teson, Fernando R., *Humanitarian Intervention: An Inquiry Into Law And Morality* (1988); and Adelman, H., 'Humanitarian Intervention: The Case of the Kurds' (1992) 4 Int'l. J. Refugee L. 4.

when a principle becomes customary international law. What would ultimately be required in order for it to be customary international law, is that states recognise that causing forced migration is unlawful and apply it as a matter of law. Such that a violation of international law occurs when the elements of forced migration - the intention, the coercion and the detrimental consequences - are proven. The shift is therefore from wrongfulness in specific acts of causing forced migration, which is not in anyway denied, to an emphasis on the causing of forced migration founding an allegation of unlawfulness *per se*. In a sense, it is a move towards recognising, the importance of the subject-victims and their situation over the causes themselves, and that it is the subjects who will determine the subject matter of an action. However, identifying the subjects needs ultimately to return to the functional perspective, which is cause related and determined by the applicable elements, population movement, need for protection and the causing factors. It would therefore seem that both means of action are dependent on the causes of forced migration, and both emphasise the wrongfulness of the causes of forced migration. The only conceptual distinction is that one relies on the use of general international law, whilst the other depends upon recognising the causing of forced migration as a specific subject matter attributing unlawfulness in international law.

The distinction between causes of action applicable to elements of causing forced migration and causing forced migration itself being an international wrongful act, is that the former identifies particular specific acts of wrongfulness and assesses its application under a recognised cause of action heading. Thus it accommodates all types of situations according to causes and identifiable acts of wrongfulness. The latter contention emphasises general unlawfulness based upon the finding of forced migration. Thus, the primary elements - intention, coercion and detrimental effects - combine to prove unlawfulness where there has been an occurrence of population movement, whether transboundary or internal. The unlawfulness therefore comes not from the identifiable acts violating international law, but specifically because there has been a determination of forced migration.

Whether or not the causing of forced migration is *per se* an international wrongful act depends on the angle from which one analyses the proposition. If state are perceived as bound only to that which they specifically commit to, then the principle remains *lex ferenda*. On the other hand, if the determinations of UN organs, the establishment of

unlawfulness borrowed from a wide source of international instruments and provision under customary international law, and the affirmation of some state practice could bind states generally, then it is *lex lata*. This author does not take either extreme view, but suggests the proposition as a clearly emerging norm *de lege ferenda*, that has not attained the full authority of being a recognised international norm. The existence of much international concern over those internally displaced, the work being conducted under the auspices of the GA, the Sub-Commission, and the ILA, suggests that a clear pronouncement of unlawfulness for internal displacement amounting to forced migration is near.

The determination of the status of a principle of international law does generally hold two radical views. Firstly, the view that states are only bound by that which they specifically commit to, which is then, *lex ferenda*; and secondly, the view that states may be bound by declarations in international instruments that are applied and enforced within a variety of methods, including domestic practices and political declarations of their status.<sup>305</sup> Which ever view one might take, there are established obligations that the causing of forced migration would clearly violate.

#### 4.8 ADVOCATING AGAINST INTERNATIONAL RESPONSIBILITY

There are several objections to the use of a regime of international responsibility as an effective solution or prevention against forced migration and these objections do not rest on the claim of a lack of legal substance. There are two main propositions against the use of international responsibility. Firstly, the requirement that an international wrongful act has to occur and the consequence of that act may not provide legal standing to bring an action. Secondly, the necessity for a coercive regime of enforcement is objected to, either because one does not exist or if it does exist, it is not the most effective or desirable tool. In sum,

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<sup>305</sup> See generally, Lauterpacht, 'Codification and Development of International Law' (1955) 49 Am. J. Int'l. L. 16; Weil, 'Towards Relative Normativity in International Law' (1983) 77 Am. J. Int'l. L. 413; Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60 Am. J. Int'l. L. 782; Akehurst, 'The Hierarchy of the Sources of International Law' (1974-75) 47 Brit. Yrbk. Int'l. L. 273; Virally, M., 'The Sources of International Law', in Sorensen (ed), manual, at 116; Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 Cal. W. Int'l. L.J. 445; Schachter, O., 'Towards a Theory of International Obligations' (1968) 8 Va. J. Int'l. L. 300; and Chinkin, C.M., 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 Int'l. & Comp. L.Q. 850.

any claim to the utility of the regime of international responsibility would be discarded as impracticable and intangible.

It is argued that in some instances of refugee out-flows, no injury has been caused to the receiving state, on the contrary, states that receive refugees have benefited culturally and economically.<sup>306</sup> Thus if the receiving state has not sustained an injury, then the wrongfulness must be in their treatment of their own nationals. In fact, Johnson argues that causing a condition within a state that encourages migration may not be an international wrongful act,<sup>307</sup> nor is it automatically wrongful to assist the nationals who seek to leave the state.<sup>308</sup> Thus the preponderance of a requirement that some wrong be committed is inconvenient in providing a solution or better understanding of the circumstances of forced migration in this proposition. The existence of wrongfulness in causing a refugee flow cannot seriously be denied as a violation of the sovereignty of another state, and neither can the causing of forced migration be denied wrongfulness on the basis of the ill-treatment of the nationals in a state.

Yet who can bring an action? Johnson argued that *locus standi* does not exist for a legal action against a state that violates the rights of its own nationals.<sup>309</sup> Citing the *Barcelona Traction case*,<sup>310</sup> which stated, ‘on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has to be sought.’<sup>311</sup> This suggests that the claims for human rights rests with treaty mechanisms, creating a bilateral relationship within a multilateral structure. Along these arguments, creating harsh conditions that persuade nationals to depart is not a ‘wrong under international law for which a legal remedy is

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<sup>306</sup> Johnson, *supra*, at 16, who claims that the unlawful act must have resulted in loss or damage, as a precondition for responsibility. This understanding of the law of responsibility has since been clarified and loss or damage as a precondition is not required. It is however, interesting to note Johnson’s understanding of the contributions of refugees or migrants to the long-term well-being of the state.

<sup>307</sup> Generally, Johnson, *supra*, at 18-20.

<sup>308</sup> *Ibid*, at 53-55.

<sup>309</sup> *Ibid*, at 18.

<sup>310</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited* [1970] I.C.J. Reps. 3.

<sup>311</sup> *Ibid*, at 47.

available to any other country which claims to be hurt thereby.<sup>312</sup> On the other hand, the obligations owed *erga omnes* under customary international law are not governed by treaty, but by general international law principles. It is difficult to envisage why a principle under custom has to comply with treaty provision, unless those provisions are also principles of customary international law.<sup>313</sup>

Even if it were successfully argued that interested states would hold legal standing to bring an action, the position would still not be satisfactory. It is difficult to abide by a regime that allows a state or the state authorities to act in ways detrimental to persons (nationals or non-nationals), yet not be responsible in a personal manner to those same persons. Where a wrong is committed, the wrongdoer should be responsible to the victim, not to some interested third party, nor should it be the norm that only that designated third party be permitted to carry the *locus standi*. It is further not an ideal position where those acts occur, wrongfulness is based on the violation of primary obligations that are owed to states. For example, where violations of human rights occur within the territory of another state, the wrongfulness is founded not on the pain and suffering of the victims, but on the violation of obligations owed *erga omnes*, i.e., to the international community. This is conceptually unacceptable to a wider understanding of the inherent dignity and worth of a human person. This is not to propose that causing a refugee flow would not violate the sovereignty of another state,<sup>314</sup> but suggests that equating refugees with noxious substances is not acceptable.

These arguments are perhaps directed more at the shortcomings of the international system, rather than the regime of international responsibility, although they are interconnected. In a sense, international law does not recognise the individual as a subject except where specifically provided, for example in the cases before the Iran-US Claims Tribunal. Individuals can also bring actions in domestic courts on the basis of international legal norms, for example as an alien tort claim in the US. States can also legislate to provide a remedy for individuals to bring actions in domestic courts where the state

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<sup>312</sup> Johnson, *supra*, at 20.

<sup>313</sup> Discussed further below section 5.3, 'Obligations Owed *Erga Omnes* as a Basis for Action'.

<sup>314</sup> See section 4.4.4, 'Violations of the Sovereignty of a State'.

authorities of another state violate their basic rights. For example, the US Cuban Liberty and Democratic Solidarity Act of 1996 empowers individuals to bring action against other individuals or corporations for trading in goods or property unlawfully expropriated by the Cuban authorities.<sup>315</sup> As a blue-print for possible action, any interested state can legislate to empower individuals to bring legal actions against those who facilitate or trade with other states that ill-treat their own nationals.

The second proposition against international responsibility is partially addressed by the LIBERTAD Act, which provides a form of enforcement mechanism against violations of human rights. International mechanisms do exist for the enforcement of international law and these will be discussed further below. A more intrinsic argument against the use of a regime of international responsibility is based on the coercive nature of legal action. Feliciano argues that allocating blame may 'as a pragmatic matter, impede the search for solutions whether temporary or durable.'<sup>316</sup> This determination rests on the assumption that states would co-operate where there is less political pressure and more diplomatic assistance and good offices, yet the International Criminal Tribunals of the Former Yugoslavia and Rwanda sit amidst the continued turmoil and are possibly, seen as a contributing part of the overall solution.<sup>317</sup> In any event, allocating blame provides social and psychological elements that contribute to the 'healing' process of a state in turmoil. It also arguably provides for a basis for the recognition of wrongdoing, reconciliation, and the strengthening of the rule of law. The causes of action as identified above do not act merely to bring judicial proceedings in every circumstance. The provision of a legal claim provides the basic foundation for negotiation, conciliation, mediation, as well as a judicial claim for remedies. International responsibility identifies the root problem based upon legal accountability and at the very least, it is standard setting as part of a comprehensive approach.<sup>318</sup>

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<sup>315</sup> 104th Congress, HR 927. See Appendices, A5.

<sup>316</sup> Feliciano, *supra*, at 118, who concentrates on the possible legal duty to grant refuge.

<sup>317</sup> Note, Mirko Klarin, 'Implementing the Hague', *War Report*, No. 39, February/March 1996, 3, argues the tribunal may be a hindrance to peace.

<sup>318</sup> Petrasek, *supra*, at 290.

#### 4.9 ADVOCATING AGAINST THE USE OF HUMAN RIGHTS PROVISIONS

There are several arguments against the use of human rights as the basis from which to found a claim against a state that causes forced migration. Two main objections are that firstly, it presupposes that there is acceptance of the concept of universal human rights, or that the application of fundamental rights begins with the guarantee of unfettered civil and political rights.<sup>319</sup> Secondly, the use of human rights provisions enflames sensitive political issues and causes resentment rather than foster co-operation. Adherence is thus rejected simply on the basis that it creates a situation of post-colonial dominance, the North versus the South, developed versus developing. Thus alleging violations of human rights becomes detrimental to the search for credible and lasting solutions.<sup>320</sup>

Garvey concluded from his analysis of the Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees that the root causes/human rights approach was not desirable.<sup>321</sup> He claimed it irritates the political interests within that state, and condemnation of human rights violations produces recrimination and insistence that sovereignty has been violated. Secondly, root causes themselves are no mystery, but specific, provable instances capable of identification and isolation are a separate issue and are complicated when states of origin hold all the data and possess a system of justice to try itself. Thirdly, addressing root causes inevitably always falls back on the broader endeavour to pursue international peace and security, which is a complex issue that may require radical political changes. Fourthly, he claims, as everyone connected with UNHCR knows, practical administration of refugee relief must avoid political acumen, especially on human rights issues, and '[i]t is long overdue that the legal

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<sup>319</sup> For example the debates at the recent World Economic Forum in Davos, Switzerland, see Fernandez, 'Sound of civilisations clashing as East meets West at Davos', *The Straits Times Weekly Edition* (Singapore), 11 February 1995, 14.

<sup>320</sup> See also, Cerna, C.M., 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 Hum. Rts. Q. 740, who summarised the disagreements with the application of the UDHR and universality of human rights as; the need to redefine the content of human rights; the previous definition being part of 'ideological patrimony of Western civilisation'; as an interference in internal affairs when the definition is imposed by third states; it hampers trade and weakens competition; and because socio-cultural differences justifies differing standards.

<sup>321</sup> Garvey, Jack I., 'The New Asylum Seekers: Addressing Their Origins', in Martin (ed), *New asylum seekers*, at 186-87.

regime reflect this same pragmatism.<sup>322</sup> On the other hand, it has been reiterated by so many, such as Aga Khan and UNHCR, that the refugee problem is essentially a human rights problem, especially in modern terms.<sup>323</sup> Improved conditions of human rights is an essential aspect of the solution of the refugee problem.

Goodwin-Gill suggested that states had potential responsibility under the *Corfu Channel case* and *Trail Smelter Arbitration*, alleging transboundary harm.<sup>324</sup> This approach was also adopted by Garvey who proposed using these principles of international responsibility, instead of human rights.<sup>325</sup> The obligation not to cause transboundary harm, reflected in treaties,<sup>326</sup> in international declarations,<sup>327</sup> and in international arbitration.<sup>328</sup> On the other hand, treating human beings as a transboundary nuisance or harmful toxic equivalent is not consistent with the upholding of human dignity.<sup>329</sup> To consider refugees as somehow harmful to a state is degenerating and ignores the fact that refugees are human beings, no different from any other person, with the capacity to contribute as much as anyone else to the community.<sup>330</sup> Harm, if a criterion for the basis of responsibility, should be harm to the subjects, those who are forced migrants, those who suffer immeasurably - the victims. To pursue such arguments about harm to the receiving state merely propagates xenophobic tendencies and ignores the human perspective completely.

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<sup>322</sup> *Ibid*, at 187.

<sup>323</sup> UNHCR, state of the world's refugees, at 7-8.

<sup>324</sup> Goodwin-Gill, the refugee, at 228.

<sup>325</sup> See generally Garvey, in Martin (ed), new asylum seekers.

<sup>326</sup> For example, Treaty Governing Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, 27 January 1967, 610 U.N.T.S. 205.

<sup>327</sup> For example the Stockholm Declaration, Report of the UN Conference on the Human Environment, Principle 21, UN Doc. A/CONF.48/14/Rev.2 and Corr.1 (1972).

<sup>328</sup> For example, *Corfu Channel case*, *op. cit.*; and *Trail Smelter Arbitration* (US v. Canada) (1941), 3 R.I.A.A. 1905, at 1938 and 1965.

<sup>329</sup> Akhavan and Bergsmo, 'The Application of the Doctrine of State Responsibility to Refugee Creating States' (1989) 58 *Nordic J. Int'l. L.* 243, 244-46, who suggests that the influx of refugees be equated with harm on receiving states akin to toxic fumes; also Coles, 1992 study, at 148; and Goodwin-Gill, the refugee, at 228.

<sup>330</sup> Tomuschat, in Gowlland-Debbas (ed), at 79, who notes that 'it is rather embarrassing to compare refugees with toxic fumes', and if the arrival of persons is not in itself an injury to the state, but a liability in expenditure to care of them, at 74.

The debate surrounding the non-universality of human rights belongs in an environment of discussion that this discourse cannot truly dissect nor do justice to.<sup>331</sup> However, it should be noted that the non-universality claims include the proposition that the hierarchy of civil and political rights over economic, social and cultural rights is flawed, and that each state takes the application of human rights based upon the circumstances within that state, taking account of the economic, social and cultural conditions relevant to that state. The importance of economic, social and cultural rights are already recognised in several international instruments - the UDHR, the ICESCR, the UNESCO Declaration of Principles of International Cultural Co-operation (1966),<sup>332</sup> the ILO Convention on Indigenous and Tribal Peoples in Independent Countries,<sup>333</sup> and the Universal Declaration on the Rights of Indigenous Peoples.<sup>334</sup>

In effect, greater emphasis on economic, social and cultural rights is advocated to combat the fragmentation of states.<sup>335</sup> In some situations where self-determination and autonomy is claimed, the authorities have failed to accommodate social, cultural or economic rights of the population, especially if they are a minority group. For example, the Tamil population of Sri Lanka initially sought peaceful means of gaining recognition and a federal arrangement, and it was not till 1977 that they sought a separate state.<sup>336</sup> The fragmentation of states for such claims may not always be the best solution. The fragmentation of the former Yugoslavia and the ensuing conflict provides an obvious example where such territorial claims can lead to a messy, bloody conflict. Perhaps if

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<sup>331</sup> See, Meron, human rights, at 79-106; and also, McDougal, M.S., Lasswell, H., and Chen, L., *Human Rights and World Public Order* (1980); Sohn, L.B., 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 *Am. U.L. Rev.* 1; Weil, 'Towards Relative Normativity in International Law' (1983) 77 *Am. J. Int'l. L.* 413; Alston, P., 'The UN's Human Rights Record: From San Francisco to Vienna and Beyond' (1994) 16 *Hum. Rts. Q.* 375; and Cerna, C.M., 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 *Hum. Rts. Q.* 740.

<sup>332</sup> Reprinted, UN, *Human Rights: A Compilation of International Instruments*, UN Doc. ST/HR/1/Rev.3, (1988), 409.

<sup>333</sup> ILO Convention No. 169, adopted 27 June 1989, in force 5 September 1991, reprinted in (1989) 28 *I.L.M.* 1382.

<sup>334</sup> UN Doc. E/CN.4/Sub.2/1989/33.

<sup>335</sup> Anaya, S. James, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' (1990) 75 *Iowa L. Rev.* 837.

<sup>336</sup> Hyndman, *supra*, at 284.

economic, social and cultural rights were given equal priority with civil and political rights, the nationality-cum-self-determination claims might be prevented. For example, in the Armenian situation, had the Armenians been given the constitutional rights they were guaranteed, they would not have sought full autonomy from Turkish Ottoman, and possibly the genocide might not have occurred.

In a recent statement, Mr K. Y. Lee, former Prime Minister of Singapore recounted what he considered as the ideals within a good society, where everyone had enough food, shelter, a good education and a good future, a society that provided a minimum standard of basic needs - hope, food, home, health, and education.<sup>337</sup> The World Health Organisation (WHO) reported that one-fifth of the world's population live in extreme poverty, and a third of the world's children are undernourished.<sup>338</sup> The WHO report clearly outlines that a disproportionate flow of resources continues from poor to rich countries, because of debt repayments, the demand for raw materials in exchange for processed goods. and general economic inequities that favour developed countries.<sup>339</sup> Extreme poverty is a 'push' factor that forces people to move. Poverty of this nature is a consequence of the growing gap between rich and poor. A gap enlarged by the exploitation of plutocracy, the dominance of corruption and the establishment of unfair economic conditions. Thus the economic, social and cultural conditions within a state are vital ingredient to be taken into consideration when imposing obligations to implement human rights.

D'Amato claimed that Hegel's philosophy supported the promotion of human rights of all persons within the unique context of the nations they inhabited.<sup>340</sup> In the same vein, the Tehran International Conference on Human Rights declared that,

'[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent on sound and effective national and international policies of economics and development.'<sup>341</sup>

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<sup>337</sup> *Straits Times Weekly Edition*, 6 May 1995, 2.

<sup>338</sup> Mihill, C., 'Fifth of world's people live in poverty', *The Guardian*, 2 May 1995, 3.

<sup>339</sup> Mihill, C., 'Public enemy number one', *The Guardian*, 2 May 1995, 2 and 3.

<sup>340</sup> D'Amato, relation of the individual, at 12.

<sup>341</sup> Proclamation of Teheran, 23 UN G.A.O.R. Supp. No. 41 at 1, UN Doc. A/Conf.32/41 (1968), para. 13.

Both the Tehran Conference and D'Amato's proposition are reminiscent of the claim of those who advocate for more emphasis to be given to the economic, social and cultural conditions within each state. A GA resolution in 1977 also recognised that 'human rights questions should be examined globally, taking into account both the overall context of the various societies in which they present themselves, as well as the need for the promotion of the full dignity of the human person and the development and well-being of the society.'<sup>342</sup> In fact, UNHCR has emphasised in their assessment of a comprehensive response to the refugee crisis that industrialised states need to move beyond the traditional prominence of political and civil rights and also recognise economic and social rights, as well as the aspirations of citizens in the developing world.<sup>343</sup>

The concept that denies universality emphasises that human rights have to be developed according to cultural and economic concerns within individual states.<sup>344</sup> This does not necessarily mean that civil and political rights are ignored or disregarded, but the traditional emphasis on, for example, the right to freedom of speech, does not attain the unfettered sanctity that it does in the West. One justification for promoting the concept of respect for cultural, economic and social conditions within the state, is the claimed social decline in the US. Statistics are often quoted and recently, it has been alleged that the problem in the West was an excess of democracy, an overdose of freedom.<sup>345</sup> On the other hand, this may be used as an argument to further political aims through the suppression of political freedoms. For example, the building of the Bakun dam in Sarawak ignored in its plans the rights or future of the indigenous nomadic tribes, by felling trees amounting to 69,000 hectares (larger than the area of the island of Singapore).<sup>346</sup> In response to criticism, Prime Minister Mahathir argued that the industrialisation of the West also sacrificed people

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<sup>342</sup> GA Res. 32/130, 32 UN G.A.O.R. Supp. No. 45, at 150-51, UN Doc. A/32/45 (1977).

<sup>343</sup> UNHCR, *The State of the World's Refugees* (1993), 141.

<sup>344</sup> Wong, K.S., 'The Real World of Human Rights' (Statement by the Minister for Foreign Affairs, Republic of Singapore, at the World Conference on Human Rights, Vienna, 16 June 1993), Singapore Press Release No. 20/J UN, 09-1/93/06/16, *reprinted in*, [1993] *S'pore. Journal of Legal Studies*, at 608, '[d]evelopment and good government require a balance between the rights of the individual and those of the community to which every individual must belong, and though which individuals must realise their rights.'

<sup>345</sup> 'Asian values: The scourge of the West', *The Economist*, 22-28 April 1995, at 76.

<sup>346</sup> 'Malaysia: Logging on', *The Economist*, 8-14 April 1995, at 76.

and forests, thus they cannot now prevent the development of other states in a like manner.<sup>347</sup>

A balance needs somehow to be drawn, which permits the welfare and promotion of the basic rights of the individual to be maintained within a framework that encourages the development of the state.<sup>348</sup> D'Amato strongly believed that the right of individuals should be prioritised over the rights of states. He claimed, '... that what counts are the rights of human beings and the primacy of the individual human personality. If there were no nations in the world, ... [couples] would naturally have the right to live together in the place of their choosing. We may superimpose national borders on the world, but I don't [sic] see how that changes their basic right.'<sup>349</sup> He further suggested that those who believe the rights of human beings should be subordinate to abstractions, like the state, have been manipulated by the 'legal superstructures'.<sup>350</sup> Perhaps an overriding concern should be the accountability of state authorities in their decision-making and policy-implementing process.

The basic problem in the arguments for or against human rights rests with the governments of a particular state. It is not a profound concept that the authorities within a state that controls without accountability can do anything it wishes with impunity. The argument that developmental rights necessarily overrules political and civil rights has been both the basis for, and the protagonist to, the alleviation of suffering. In many African states, the people are told to dismiss their political and civil rights for nation-building and unity requirements. 'Development, they are told, requires obedience to the party and government in power'.<sup>351</sup> Yet it is claimed, 'the primary cause of forced population movements is bad, undemocratic government.'<sup>352</sup>

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<sup>347</sup> *Ibid.*

<sup>348</sup> For example, Cerna, *supra*, at 745-746, noted that objectors to universality did agree that certain core rights were non-derogable, like, torture and arbitrary killings, but private rights referring to religion, culture, status of women, rights to marry and divorce, and rights associated with the promotion of Western democracy.

<sup>349</sup> D'Amato, relation of the individual, at 5, in discussing the case of a Russian husband trying to leave Russia to be united with his American wife in the US.

<sup>350</sup> *Ibid.*

<sup>351</sup> Makau Wa Mutua, 'The Interaction between Human Rights, Democracy and Governance and the Displacement of Populations' (1995) *Int'l. J. Refugee L. - Special Edition* 37, 43.

<sup>352</sup> *Ibid.*, at 43.

Nobel summed up succinctly the description of human rights as based upon the worst of human experiences and inspired by ‘... a strong desire to avoid a repetition.’<sup>353</sup> Thus the UDHR is a reflection of those who had experienced the discrimination, persecution, genocide, mass killings of the Second World War and the principles are based upon those shared human experiences.<sup>354</sup> ‘If the human rights are thus felt to be close and important to all of us, it may be easier for us to understand the situation of refugees [and forced migrants generally] whose rights have been denied, threatened or violated.’<sup>355</sup> Thus whether the application of a universal set of rules is acceptable or not, the underlying premise should be that human rights reflects experiences of deliberately inflicted suffering and hardship that should not be repeated. In application, it is the acts that cause these ‘worst experience’ that have to be targeted and not merely the consensual acceptance of a rigid set of rules. A regime of legal responsibility could act to link the causes of suffering with accountability, where the regime of responsibility could provide the *locus standi* to bring the desired remedy, enforced against the causing entity. In effect, it is recognised that the challenge towards universality of human rights must incorporate the concept of cultural, linguistic and traditional diversity in the promotion and protection of human rights, and an understanding that conflicts and tensions between rights do exist.<sup>356</sup> It may even be advocated that human rights should be promoted from a regional perspective, as regions may share several links - geography, culture, history, religion, language - that would have more influence on each other.<sup>357</sup>

Higgins believed, ‘... profoundly, in the universality of the human spirit’ emphasising,

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<sup>353</sup> Nobel, P., ‘Blurred vision in the rich world and violations of human rights - a critical assessment of the human rights and refugee linkage’ 91/1, *Bulletin of Human Rights*, 74, 75.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*

<sup>356</sup> Alston, P., ‘The UN’s Human Rights Record: From San Francisco to Vienna and Beyond’ (1994) 16 *Hum. Rts. Q.* 375, 383; and Wong, ‘The Real World of Human Rights’ (Statement by the Minister for Foreign Affairs, Republic of Singapore, at the World Conference on Human Rights, Vienna, 16 June 1993), Singapore Press Release No. 20/J UN, 09-1/93/06/16, *reprinted in*, [1993] S’pore. *Journal of Legal Studies*, at 605, who claimed, ‘[u]niversal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity.’

<sup>357</sup> Cerna, *supra*, at 752, and at 750, provides examples where values are regionally identified.

‘[i]ndividuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.’<sup>358</sup>

#### 4.10 CONCLUSION

There are other types of actions that may be pursued, although not elaborated here, for example claims made by organs of the UN on the basis of international responsibility. The Secretary-General is authorised to bring an international claim against the government of a state, members or non-members of the UN, for reparations for injuries suffered by agents of the UN.<sup>359</sup> The SC may also assert claims in response to a violation of international law.<sup>360</sup>

The application of international responsibility will not be the major solution in each and every situation. It will not assist where there is a situation of complete anarchy, where there is no *de facto* governing authority, such as in Somalia where the situation was fractional fighting. It will also not be an instant response, which means it could not immediately alleviate the situation. However, it will have other advantages. For example, it could lay the foundation for the just application of sanctions, the provision of guarantees or

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<sup>358</sup> Higgins, R., *Problems and Process: International Law and How we Use It* (1994), 97, and elaborated at 97-110. (Hereinafter, Higgins, problems and process).

<sup>359</sup> GA Res. 365(IV), 1 December 1949. For example, in the *Reparations Case* [1949] I.C.J. Reps. 174, 184, the Court clarified, that ‘[i]n claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.’

<sup>360</sup> For example, in response to the abduction of Adolf Eichmann from Argentina, the SC passed Res. S/4349, 23 June 1960 which requested the Government of Israel to make appropriate reparations, see (1960) Yrbk. U.N. 196-8; in response to the attack on Beirut airport, SC Res. S/262, 31 December 1968, considered that the Lebanon was entitled to appropriate redress and the resolution was passed by a unanimous vote after hearing evidence from representatives of Lebanon, Israel and the Chief of Staff of the UN Truce Supervision Organisation., see Falk, ‘The Beirut Raid and the International Law of Retaliation’ (1969) 63 Am. J. Int’l. L. 415; and Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 Am. J. Int’l. L. 1; and in response to the attack on the nuclear reactor near Baghdad, SC Res. S/487, 19 June 1981 considered that Iraq was entitled to appropriate redress for the destruction it suffered was also passed unanimously, see (1981) 20 I.L.M. 963-97.

financial consideration, for the encouragement of confidence in the international legal system and for positive support to the UN as a whole. In situations like Rwanda, legal mechanisms might have been appropriate to stop and redress the massive human rights violations and acts of genocide had it been applied at an earlier stage.

Ultimately, the success of a regime of international responsibility lies in the political will to implement the legal tools. The identification of wrongfulness in causing forced migration is evident from the primary obligations, the violation of which founds a cause of action. The next stage is to investigate the potential for these obligations to be enforced, either through international or domestic measures.

## CHAPTER 5

### LEGAL INTERESTS AND ENFORCEMENT MEASURES

#### 5.1 INTRODUCTION

The identification of wrongful conduct will be of less significance if that conduct cannot be addressed through judicial or non-judicial actions. Action concerning forced migration may have to be distinguished between transboundary and internally displaced movements, although some of the actions taken on their behalf will overlap. The types of action that will be investigated under this chapter will be inter-state action, action by individuals, and action by NGOs and other international organisations. Inter-state action may exist when both transboundary and internal displacement occurs, but the type of action, the legal interest and jurisdictional competence has to be established. Individuals may also have recourse to international and domestic mechanisms where they are specifically provided for. The availability of such measures may differ between transboundary movements and internal displacement. Where the individual has been internally displaced, several options may be available, starting from internal domestic procedures for complaints, judicial or otherwise, and failing that, to procedures established by international instruments.<sup>1</sup> Where the individual is moved across international borders and is in another state, similar international measures, as well as domestic procedures of the state where he/she is present may be applicable.

This chapter will identify an inexhaustive list of possible state action, including measures that empower the individual in domestic and international spheres. Several issues need to be discussed in relation to a regime of accountability for wrongful conduct leading to forced migration, namely whether a legal interest or *locus standi* exists to address the particular wrongful conduct, whether jurisdiction is permitted in law for competence to address such conduct, and the mechanisms that might exist for the protection of that interest. It will also be proposed that apart from the accountability of the state itself,

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<sup>1</sup> This may be in the form of conventions or through the internal procedures of IGOs, see section 5.7, 'Empowering the Individual to Enforce International Norms'.

individuals or the regime consisting of individuals may be the target for action by states (collectively through the UN or unilaterally) and individuals. The types of action may be pursued through the international or domestic courts, through the Specialised Agencies' mechanisms for complaints, through self-help or retorsion methods, or simply through good offices and mediation.<sup>2</sup>

This chapter will seek to identify the possibilities that exist for states, individuals and other organisations to enforce their interests in international law from a multi-tiered perspective, mixing international and domestic processes, and combining issues of public and private international law. The emphasis is not merely on the existence of mechanisms and a legal interest to use such tools, but the contribution it could make to a comprehensive plan of action where the perceived dichotomy of differing disciplines may be broken down, and the use of domestic provisions that empower the individuals to espouse a claim based on the violation of international law.

Essentially the type of action must correspond with methods prescribed by the enabling instrument or under customary law. For example, in the case of parties to the ECHR, unless the optional clause of accepting individual complaint is recognised through specific declaration, the only recourse is via the inter-state complaint procedures or through the reporting mechanisms.<sup>3</sup> On the other hand, where a provision in a treaty has successfully become a norm of international customary law, then the remedies available consequent to a violation of the provision would permit the use of recognised remedies under general international law, for example legitimate acts of retorsion.<sup>4</sup> Similarly, action that is pursued in domestic courts would depend on the domestic provisions, even where the action is based on the violation of international law providing individuals redress of grievances.<sup>5</sup>

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<sup>2</sup> See for example, Murty, B.S., 'Settlement of Disputes', in Sorensen (ed), manual, 674, at 678-683.

<sup>3</sup> See section 5.3, 'Obligations Owed *Erga Omnes* as a Basis for Action'.

<sup>4</sup> Skubiszewski, K., 'Use of Force by States, Collective Security, Law of War and Neutrality', in Sorensen (ed), manual, at 753, who claimed that an essential element of retortion is that the acts of both the offending and retaliating states remain within the bounds of law.

<sup>5</sup> For example under the ATS, it is the commission of a tort in domestic law, caused in violation of international law, that provides a private cause of action in federal courts. Thus the violation of international law forms the catalyst for domestic procedures in this situation. See further below section 5.6 and 5.7.

The type of action that may be brought also depends on the relationship that exists between the parties, whether provided for by treaty or general international law. If it were a bilateral relationship, then the remedies available are consequent to that relationship, which includes unilateral non-forcible measures to encourage dispute settlement. If the relationship was multilateral in nature, or an integral relationship,<sup>6</sup> then this would entail other considerations. For example, if it were a violation of a bilateral provision in a multilateral instrument, the consequences would be as in a bilateral relationship, in that there would only be one 'injured state', whilst all other parties to the instrument merely had a 'legal interest'.<sup>7</sup> On the other hand, violating an obligation owed *erga omnes*, makes all other states 'injured states',<sup>8</sup> but the types of action available would be determined under the 'solidarity' theory,<sup>9</sup> rather than the *uti singuli* theory.<sup>10</sup> Therefore, where a state alleges a violation of an obligation owed *erga omnes*, the type of action should be limited to one that results from a collective process.

Where general international law and conventions prescribes different sets of measures, then the type of relationship, bilateral or integral, would identify the measures that can be legitimately taken. The Court in the *Nicaragua case* seems to be authority for this proposition when it ruled that the protection of human rights between two Member States should conform to the mechanisms provided for under the relevant conventions.<sup>11</sup> Where the primary obligations are those set out in conventions, then compliance with the agreed measures are necessary when alleging a specific violation of those provisions. However, where the assertion is the violation of a provision which does not directly affect the claimant state, then the relationship is integral and would depend on whether the

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<sup>6</sup> Sachariew, K., 'State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and Its Legal Status' (1988) 35 Neth. Int'l. L. Rev. 273.

<sup>7</sup> *Ibid.*

<sup>8</sup> Particularly on the violation of human rights and fundamental freedoms, the interests are not allocated to any one single state, Draft Articles on State Responsibility, Article 5(2)(e) [1985] ii Yrbk. I.L.C. 24-25 and 27; Meron, human rights, at 191; and Theo van Boven, final report, *supra*, at para. 43.

<sup>9</sup> Sachariew, *supra*, at 283, where because of the nature of the integral relationship, collective action or action resulting from a collective agreement should be observed.

<sup>10</sup> *Ibid.*, at 283, where because of the bilateral nature of the relationship, any state can take individual action.

<sup>11</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US) (Merits) (*Nicaragua case*) [1986] I.C.J. Reps. 134, at para. 267.

convention provides for such a situation. On the other hand, not all states are party to the human rights conventions, thus obligations and measures of protection will be found from customary international law principles. These measures would in turn have to comply with the limits imposed under international custom, such as the peaceful settlement of disputes.

Where the concern is with the protection of forced migrants or the provision of a remedy for them, then the relationship between the state that causes and those that seek to protect or provide measures take (arguably) an exceptional position. Instead of a dispute settlement type arrangement between the states, it may take the form of enforcement of international obligations.<sup>12</sup> This may mean that the intervening state relies on a wider concept of the 'injured' state, and would have to establish legal and jurisdictional competence to act on behalf of the victim-individuals. The applicability of available solutions therefore depend on several factors: the nature of the violation and the cause of action; the legal and jurisdictional competence to act; the relationship between the violator and the state asserting competence; and whether the type of response is specifically or generally prescribed.

## 5.2 *LOCUS STANDI*

Whether acting on behalf of non-nationals or asserting a violation of an obligation owed to itself, a state has first to establish that it has *locus standi* or legal competence to act on the issue. This legal interest has to be asserted in relation to the entity alleged to have committed a wrongful act. This is distinct from the issue of jurisdictional competence.<sup>13</sup>

This section will suggest that states have a legal interest where forced migration is caused because the acts that cause forced migration violate norms owed specifically to the injured state, or owed generally to the international community.<sup>14</sup> In determining whether a legal interest exists, it is first necessary to decide to whom the duty is owed, by evaluating

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<sup>12</sup> Shelton, D.L., 'Judicial Review of State Action by International Courts' (1989) 12 *Fordham Int'l. L.J.* 361, 397.

<sup>13</sup> Jurisdictional competence concerns the administrative, legislative or judicial competence to deal with that wrongful act, see Brownlie, *principles*, at 298.

<sup>14</sup> See generally above Chapter 4 on causes of action and the identification of wrongfulness.

the content of the primary obligation alleged to have been breached.<sup>15</sup> This breach has a consequent correlation to the impairment of the subjective rights within a legal relationship.<sup>16</sup> Thus it is necessary to relate the obligation and the type of breach with the substantive rights, in order to test the legal relationship. The legal relationship would in turn determine whether there is legal standing to take action, the type of action, and the enforcement mechanisms. The legal relationship, the substantive rights, the type of action, and the remedies sought are inter-related, although separate issues of the legal process, and they combine to identify if a case for international responsibility exists as between the appropriate parties, whether an action may be brought, and in which forum it should be held.

When forced migration is caused, the wrongfulness emanates either from the violation of specific and varied obligations that proved causes of action,<sup>17</sup> or where the causing of forced migration may be considered in itself to be an unlawful act.<sup>18</sup> When such unlawful acts occur, they are effectively denying the application of the rule of law, and they deny an interest protected by the law.<sup>19</sup> In other words, '[a] wrongful act is the equivalent, so to speak, of a failure to recognize both the law and an individual right.'<sup>20</sup> This is confirmed by Anzilotti who claimed, '*Le dommage se trouve compris implicitement dans le caractere antijuridique de l'acte. La violation de la regle est effectivement toujours un derangement de l'interet qu'elle protege, et, par voie de consequence, aussi du droit subjectif de la personne a laquelle l'interet appartient.*'<sup>21</sup> These conceptions of what constitute the legal interest provides a basis for including those whom the law seeks to protect and those who seek to protect observance of the law. Thus the legal interest has the

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<sup>15</sup> Sachariew, *supra*, at 275, who claimed, '[t]he real basis for determining the responsibility regime is the primary legal relationship breached and its content.'

<sup>16</sup> Ago, 'Second Report on State Responsibility' [1970] ii Yrbk. I.L.C. 192.

<sup>17</sup> See above section 4.4, 'Causes of Action Inherent in Causing Forced Migration'.

<sup>18</sup> See above section 4.6, 'Recognising Causing Forced Migration as an International Wrongful Act'.

<sup>19</sup> Dupuy, international law, at 121.

<sup>20</sup> *Ibid.*

<sup>21</sup> Anzilotti, '*La Responsibilite Internationale des Etats, a Raison des Dommages Soufferts par des Etrangers*' 8 *Revue Generale de Droit International Public*, at 13; Dupuy, international law, at 122, translating this as, 'The damage is implicitly bound up with the the [sic.] anti-legal nature of the act. To violate the rule is indeed always a disturbance of the interest it protects, and thus, of the subjective right of the person whose interest it is.'

potential to attach to two situations: where a right has specifically been bestowed, for example, under a treaty; and from a more general perspective, for example, the interest to restore the legal order which was broken through the violation of an international obligation.<sup>22</sup> Similarly, where the interest belongs to an individual, then a wrongful act has the potential of also violating his/her interest,<sup>23</sup> as well as the interest of other states to ensure that the individual's interests are observed.

Apart from the violation of specific substantive rights in acts that cause forced migration, states may also assert a wider legal interest to act on behalf of both transboundary and internally displaced persons by asserting this wider legal interest to restore the international legal order, which sits with the often cited obligations owed *erga omnes*, which in turn provides an interest to all states where such obligations are violated.

### 5.3 OBLIGATIONS OWED *ERGA OMNES* AS A BASIS FOR ACTION

The issues concerning the protection and assertion of the rights of forced migrants are placed within several unique contexts. Primarily, they need protection against their state of origin,<sup>24</sup> and this protection they seek is potentially given by states who may not be directly injured nor have the narrow legal interest to assert legal competence. It is suggested in the previous section that a wider interest may exist to enforce international obligations, but what if a state that causes is not bound by such legal relationships that are consequent with membership to conventions. How would customary international law deal with this situation? The solution may perhaps be found in asserting a violation of an obligation owed *erga omnes*.

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<sup>22</sup> For example, when state A invades state B, state B has a legal interest in asserting its rights accorded under international law, violated by state A. Other states in the international community also have a legal interest, to restore the international legal order that was blatantly disregarded by state A.

<sup>23</sup> Note, Higgins, problems and process, at 50; and Lauterpacht, H., *International Law and Human Rights* (1968), at 27.

<sup>24</sup> See generally, Grahl-Madsen, A., 'Protection of Refugees By Their Country of Origin' (1986) 11 *Yale J. Int'l. L.* 362, who argues that the traditional expectation that a state protects its own nationals is fictitious when it concerns refugees and that, '[a] modern view of international refugee law must recognize that a refugee's state of origin lacks any right to 'protect' the refugee.' (at 394).

The concept of obligations owed *erga omnes* was raised as far back as 1625,<sup>25</sup> and Vattel wrote that if ‘persecution is carried out to an intolerable degree... all Nations may give help to an unfortunate people.’<sup>26</sup> The concept of obligations owed in a universal sense have been raised periodically in the context of minority protection, by governments against racial and religious persecution.<sup>27</sup> In the *South West Africa case*, the Court recognised the concept of a legal right or interest that belonged to the international community.<sup>28</sup> In fact, Judge Jessup claimed that international law recognised the concept of states having an interest even where the state or its nationals were not directly injured.<sup>29</sup> In modern terms, the violation ‘... confers a *locus standi in judicio* not merely on the State which has, or whose national has, been injured, but on all States. It is perhaps not so much an obligation *erga omnes* as an obligation of which the breach opens responsibility *erga omnes*.’<sup>30</sup> The implication of this is that without needing to show a direct injury to itself or its nationals, a state may allege a violation of an obligation that is owed to the international community.<sup>31</sup> Obligations owed *erga omnes* are distinguished into two types, those which are contained in the body of international law, the protection of which depends on the provisions in the instrument, and those which are of a quasi-universal or universal character, which allows extensive protection.<sup>32</sup> As a principle for application, such obligations have to first be distinguished by their respective constituent provisions. In the *Nicaragua case*, the Court in determining the provisions that allow human rights protection concluded that, ‘where

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<sup>25</sup> Grotius, *De jure belli et pacis* (Whewell trans., vol II), 438-40, discussing humanitarian intervention.

<sup>26</sup> Vattel, E., *The Law of Nations* (vol. II, London, 1758), 62; reprinted in, Scott, J. (ed), 3 *The Classics of International Law* (1916), 134.

<sup>27</sup> Meron, human rights, at 188-89; and for example, the CSCE has placed minority protection as a ‘legitimate international concern and consequently do not constitute an internal affair of the respective state’, see the Report of the CSCE Conference of Experts on National Minorities, Geneva, 1991 (CSCE/REM.N.20), para. II; also commented on in Roth, ‘Comments on the CSCE meeting of experts on national minorities and its concluding Document’ (1991) 12 Hum. Rts. L. J. 330, 331.

<sup>28</sup> *South West Africa Cases* (Preliminary Objections) (Ethiopia v. South Africa; Liberia v. South Africa) [1962] I.C.J. Reps. 319, 343; although the Court refused to accept jurisdiction in the Second Phase.

<sup>29</sup> Separate Opinion of Judge Jessup, [1962] I.C.J. Reps. at 430.

<sup>30</sup> Thirlway, H., ‘The Law and Procedure of the International Court of Justice 1960-1989’ (1989) 60 Brit. Yrbk. Int’l. L. 1, 92, developed only since 1970.

<sup>31</sup> *Ibid*, at 94.

<sup>32</sup> *Barcelona Traction case* [1970] I.C.J. Reps. 14, 47, para. 91; it should be noted that the issues concerning obligations owed *erga omnes* are *obiter*, and are thus persuasive, although it should be noted that each Court is not obliged to follow the precedent of previous Courts although they are highly persuasive.

human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.’<sup>33</sup>

There are several difficulties with this proposition. Firstly, the judgement could be interpreted to suggest that it is in fact in the interest of states to enter the international covenants with the minimal acceptance of reporting procedures, such that they may then violate the rights of their nationals and owe merely an explanation in reporting according to the provisions in the convention. This seems to have been the attitude with the Iraq government, who as a member of the ICCPR has submitted various reports to the Committee,<sup>34</sup> yet also conducted systematic violations of human rights.<sup>35</sup> Secondly, this proposition might mean that entering into a multilateral treaty regime supersedes the regime of customary international law, whether of a quasi-universal or universal character. Thirdly, it ignores the multilateral, or bilateral relationship of a multilateral structure, that permits a suitable response according to principles of international law and according to the interests of justice.

According to Thirlway, the *Nicaragua case* judgement can be interpreted to establish two principles: firstly, that only quasi-universal or universal situations attract obligation *erga omnes*, and secondly, that the interest of all states may legitimately be espoused, except where a convention provides specific mechanisms for supervision or enforcement.<sup>36</sup> This interpretation cannot explain the principle established by the *Barcelona Traction case*, which says that some obligations are owed to the international community because of ‘their very nature’ and ‘[i]n view of the importance of the rights involved...’.<sup>37</sup>

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<sup>33</sup> *Nicaragua case* [1986] I.C.J. Reps. 134, para. 267; the Court identified the mechanisms under the OAS Convention (Pact of San Jose) and its contemporary application. Thus for example, any action concerning the provisions of the CEAFRD may have to be overseen by the Committee on the Elimination of Racial Discrimination, as Part II of the CEAFRD delegates supervision and enforcement of the provisions to the Committee.

<sup>34</sup> See generally, Meron, T., *Human Rights Law-Making in the United Nations* (1986).

<sup>35</sup> Adelman, H., ‘Humanitarian Intervention: The Case of the Kurds’ (1992) 4 Int’l. J. Refugee L. 4, 7, concerning the use of chemical weapons reported in the *New York Times*, 26 April 1991.

<sup>36</sup> Thirlway, *supra*, at 101.

<sup>37</sup> *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) (Second Phase) (*Barcelona Traction case*) {1970} I.C.J. Reps. 3, at para. 33.

The Court seems to suggest that these rights are so important that all states have an interest in their protection.<sup>38</sup> It would seem superfluous to propose a wider legal interest, for states to deal with these areas, if it was intended to limit it merely to the application of convention provisions that not all states are parties to. For example, the Genocide Convention requires domestic application or a (non-existent) international tribunal.<sup>39</sup> Rodley suggested that the Court in the *Nicaragua case* emphasised that Nicaragua could not violate human rights with impunity, even if specific commitment to the OAS was not evident.<sup>40</sup> However, the application of convention provisions did not negate customary international law obligations, even if the thrust of the Court's judgement was in promoting international peace and security, by unequivocally prohibiting unilateral armed intervention.<sup>41</sup> Thus an interpretation of the judgement in the *Nicaragua case* is that the Court was so determined to prohibit the unilateral use of force and the protection of peace and security, that it emphasised the peaceful regime established under the human rights conventions.

Perhaps another interpretation would be that the application of protection mechanisms apply in two separate arenas, under customary international law principles and under convention provisions. Most of the very important rights suggested as imposing obligations owed *erga omnes* are rights under customary international law, even if they are also partly or fully considered within a convention frame. Thus, certain rights could easily exist simultaneously as rights under custom and under conventions. The issue that this raises is whether they can co-exist and which regime would oversee the other? An analogy (although somewhat tenuous) may perhaps be drawn with the situation of common law rights existing together with statutory rights.<sup>42</sup> The issue of which rights supersede, or which protection mechanism to apply, depends by and large on the circumstances and the

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<sup>38</sup> *Barcelona Traction case, supra*, at para. 34, the court suggested an inexhaustive list that included, protection from slavery, acts of aggression, genocide, racial discrimination, amongst other basic human rights.

<sup>39</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article V and VI.

<sup>40</sup> *Nicaragua case, supra*, at para. 267.

<sup>41</sup> Rodley, N.S., 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 Int'l. & Comp. L.Q. 321, 328 and 332.

<sup>42</sup> My gratitude to Ben Pontin, Ph.D candidate, Faculty of Law, University of Southampton, for guidance on the issues of common law and statutory rights held by Local Authorities from his research, although any errors that are made remain with me.

discretion of the right-holder.<sup>43</sup> Unless the statute specifically overrides the common law provisions, the choice of mechanism remains within the discretion of the right-holder.<sup>44</sup> Similarly, where rights of action exist both under custom and convention, the right-holder should be given the choice of action, particularly where it would be undesirable to limit the protection mechanisms except to the clear prohibition of the unilateral use of force.<sup>45</sup> The nature and importance of the rights involved, the unavailability or ineffectiveness of the convention mechanisms, the fact that principles of customary international law exist with convention provisions, and the interpretations of both the ICJ cases to the existence of obligations owed *erga omnes*, suggests that such obligations apply to widen the *locus standi* to bring certain legal actions, irrespective of convention provisions.

The actual basis for action to protect basic human rights is nevertheless still controversial. However, as Meron notes, the status of obligations owed *erga omnes* is a consequence and not a cause.<sup>46</sup> Although the prioritisation of rights and the distinction made with basic rights will continue to fuel debate, the courts clearly emphasised that such obligations must be firmly established in international law, whether as a general principle, international custom or incorporated in an international instrument.<sup>47</sup> Meron is of the opinion that the *Barcelona Traction case* provides authority for the contention that all states have an interest in the protection of human rights, regardless of whether they or their nationals are directly injured, and the consequence is that representations may be made

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<sup>43</sup> For example, in a judicial review case concerning the decision of a Local Authority to select a common law remedy of nuisance over the statutory duty under Town Planning legislation in English law, the Court held that the Local Authority was entitled to make the choice based upon a variety of pragmatic considerations, including administrative expediency. In *R v. Exeter City Council, ex parte J.L. Thomas and Co. Ltd. and another* [1990] 3 W.L.R. 100 (QBD); the Local Authority had two choices, either to pay compensation for the relocation of the industrial tenants under Town Planning legislation or to provide planning permission to residential tenants who could then apply under the law of nuisance for a higher standard of health and safety and force the relocation of the industrial tenants.

<sup>44</sup> See Merryman, J.H., *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd edn.), 20-25, on the co-existence of legal sources; 85-89 on the division of authoritative jurisdiction; and the concluding chapter which identified the conceptual difficulty with the co-existence of the code and custom.

<sup>45</sup> As in the *Nicaragua case*, *supra*.

<sup>46</sup> Meron, human rights, at 192. The cause being the violation of international norms and the consequence is responsibility *erga omnes*.

<sup>47</sup> *Ibid*, at 194.

directly to the state or to organs of the UN.<sup>48</sup> Therefore, a two step process may be identified. Firstly, a primary obligation has to exist, that obligation should be of a quasi-universal or universal character. Secondly, because of the very nature of this principle, all states then have a consequential interest in its protection. It is a combination of both steps that states then have the *locus standi* to bring a legal action (and clearly only a legal action) and not a licence for unilateral armed intervention.

The status of obligations owed *erga omnes* as providing a wider interest is confirmed by several commentators,<sup>49</sup> although the question of whether a state may present itself as an 'injured state' becomes an issue.<sup>50</sup> Sinclair was of the opinion that the 'injured state' concept could not be ignored and was critical of the suggestion that obligations *erga omnes* gave all states an equal legal interest.<sup>51</sup> This raises a few interesting issues that concern the relationship of states in differing structures. The ILC did attempt to clarify the position by defining an 'injured state' as one whose rights, whether under customary international law or multilateral treaty provision, had been violated, even if that right was established for the protection of human rights and fundamental freedoms.<sup>52</sup> This effectively opened the potential of every state to be an 'injured state'.<sup>53</sup> The type of claim that would be permissible would however, not be the same in all situations. Sachariew argued that human rights provisions were multilateral, integral structures that ran parallel to each

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<sup>48</sup> *Ibid*, at 195.

<sup>49</sup> For example, Meron, human rights, at 199, who believes that 'contemporary international law permits states, whether or not directly affected, to bring at least some actions involving human rights violations before competent international judicial or quasi-judicial organs.' Eagleton, C., *The Responsibility of State is International Law* (1928, reprinted, 1970), 224; and the Third Restatement of the US provides, with respect to customary international law of human rights, that any state may pursue remedies against violators, Section 703(2); see generally, Chen, Lung-Chu, 'Protection of Persons (Natural and Juridical)' (1989) 14 *Yale J. Int'l. L.* 542, 550-53. In fact, the Reporters went on to explain that human rights were applicable to all persons, in all jurisdictions and thus the obligations were also equally applicable to all states, and any state may therefore make a claim, although it should be noted that the customary law of human rights and the remedies depend on the violations being one of state policy, which has difficulties in terms of proof. *Ibid*, Reporters' note 3.

<sup>50</sup> Remarks of Ian Sinclair, [1983] i *Yrbk. I.L.C.* 130; and UN Doc. A/CN.4/Ser. A/1983 (1984).

<sup>51</sup> *Ibid*.

<sup>52</sup> [1985] ii *Yrbk. I.L.C.* at 25; and UN Doc. A/CN.4/Ser. A/1985/Add. 1 (Part 2) (1986).

<sup>53</sup> Sachariew, *supra*, at 273.

other.<sup>54</sup> A breach of an integral relationship makes all parties an ‘injured party’, because of the nature of the primary obligation.<sup>55</sup>

Eagleton noted a practical cause for obligations *erga omnes* that affect the entire community, for ‘[i]f the task of enforcing responsibility is left to the injured state alone, it must be obvious that the state will often be incapable of securing its rights under international law, with consequent injury to the entire community of nations.’<sup>56</sup> For the law to be applied according to the rule of law, equality should ensure that justice would prevail for both weak and strong states. Thus joint action, including action by those not directly injured, to enforce international duties might be a necessity.<sup>57</sup> He elaborated that,

‘[a] rule of absolute non-intervention would emasculate international law, and can never be admitted. Intervention should, however, be so regulated that it may never be employed except in defence of a legal right; and the vice which has brought it into disrepute, the possibility of its being misused for selfish national purposes, should be eliminated by permitting its use under the authorization of the community of nations only.’<sup>58</sup>

This concept is vital, where the notion of violations of law are not seen as disputes between parties, but as breaches of the system of international legal order itself.<sup>59</sup> In this sense, coercive measures should be applied, not as a means of last resort, after the failure of peaceful negotiations or mediation, but as an acceptable means of upholding the legal order. This proposition may in effect provide the most effective means of removing the causes of forced migration, namely the removal of a despotic regime. If the causing of forced migration could be viewed from the perspective of enforcing international law rather than the settlement of disputes between states, then the removal of the cause of such violations, may inevitably be the removal of the regime that persists in violating international law.

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<sup>54</sup> *Ibid*, at 281.

<sup>55</sup> *Ibid*, at 282.

<sup>56</sup> Eagleton, C., *The Responsibility of State in International Law* (1928, reprinted, 1970), 224.

<sup>57</sup> *Ibid*, at 224.

<sup>58</sup> *Ibid*, at 226.

<sup>59</sup> Schachter, O., ‘United Nations Law’ (1994) 88 *Am. J. Int’l. L.* 1, 10, 14; and Shelton, ‘Judicial Review of State Action by International Courts’ (1989) 12 *Fordham Int’l. L.J.* 361, 397.

### 5.3.1 Nationality an Issue in the Protection of Non-nationals

The problem of nationality may arise in the context of presenting a wider legal interest through the concept of obligations owed *erga omnes*. A state may claim that the primary means of establishing an interest to protect individuals rests on the bonds of nationality.<sup>60</sup> Nationality is the primary basis for sovereign (diplomatic) protection of individuals in international law.<sup>61</sup> The rule of nationality may however be exempted where there are special agreements, between two or more states, that diplomatic protection will be asserted by one state for the nationals of the other state.<sup>62</sup> For example, protectorates, colonies, trust territories,<sup>63</sup> and for actions reflecting 'a state's more general interest in its relations with another state, which may be prejudiced by the treatment of individuals or groups of persons irrespective of their national status.'<sup>64</sup>

Where forced migration is concerned, nationality could be an issue of much contention.<sup>65</sup> Whereas nationality, or rather, the non-existence of a nationality link between the protecting state and population is accepted because of the unique situation of transboundary forced migrants, the same may not be true for those internally displaced. Although Higgins notes,

'[t]he special body of human-rights law is strikingly different from the rest of international law, in that it stipulates that obligations are owed directly to

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<sup>60</sup> The concept of nationality or citizenship is a complex issue that depends primarily on the laws of particular states, see generally, Grahl-Madsen, A., 'Protection of Refugees by Their Country of Origin' (1986) 11 *Yale J. Int'l. L.* 362, 375-378. A state may bring an action because it is perceived to be exercising its own rights to ensure respect for international rules, see the *Mavrommatis Palestine Concessions* (Greece v. UK) (Jurisdiction) [1924] P.C.I.J. Ser. A, No. 2, at 12; the *Chorzow Factory Case* (Germany v. Poland) (Merits) [1928] P.C.I.J. Ser. A, No. 13, at 25-9; *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania) [1939] P.C.I.J. Ser. A/B, No. 76, at 17; and *Naomi Russell case* (1931), 4 R.I.A.A. 805.

<sup>61</sup> Brownlie, principles, at 399. A state may even bring an action in another state on behalf of its nationals, for example, *Greece (on behalf of Apostolidis) v. Federal Republic of Germany* (1960) 34 I.L.R. 219; although this may not be possible in every circumstance, for example, *Pfizer Inc. v. Lord et al* (1975) 14 I.L.M. 1409; where the basis of the claim is on nationality, there has to be a real and effective link with the protecting state, *Nottebohm Case* [1955] I.C.J. Rep. 4; although this criteria has been limited to situations where the individual holds more than one nationality, *Flegenheimer Claim* (1958-I) 25 I.L.R. 91, 147-50.

<sup>62</sup> Jennings and Watts (ed), at 936.

<sup>63</sup> *Ibid*, at 937.

<sup>64</sup> *Ibid*, at 939.

<sup>65</sup> See for example, above section 4.5.1, 'Mass Expulsion and the Removal of Nationality'.

individuals (and not to the national government of an individual); and it provides, increasingly, for individuals to have access to tribunals and fora for the effective guarantee of those obligations. Once it is recognized that obligations are owed to individuals (because they have rights), then there is no reason or logic why the obligation should be owed only to foreign individuals, and not to nationals. It becomes unsustainable to regard the treatment of one's own nationals as matters falling essentially within domestic jurisdiction, and thus unreviewable by the international community.<sup>66</sup>

Thus where the violation of human rights causes internal displacement, or internal displacement amounting to forced migration occurs, then the state may not logically claim it as essentially within its domestic jurisdiction. However, nationality or the lack of nationality may also be used as a means to discharge any obligations to receive the population that has been displaced transboundary.<sup>67</sup>

Four situations exist where the nationality bond may be exempted: firstly, under provisions for the protection of minorities;<sup>68</sup> secondly, where international organisations assert protection of employees in their service under the concept of functional necessity, derived from the Advisory Opinion in the *Reparations Case*;<sup>69</sup> thirdly, when states espouse a legal interest owed *erga omnes*, which include acts of aggression, the crime of genocide, slavery and racial discrimination;<sup>70</sup> and fourthly, from provisions in multilateral treaties on the protection of human rights, which might be in the form of inter-state complaints or arbitration before particular tribunals and courts. Multilateral instruments for the protection of human rights may provide a fertile basis to argue the exemption for the need of the

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<sup>66</sup> Higgins, problems and process, at 95-96.

<sup>67</sup> See section 4.5.1 'Mass Expulsion and the Removal of Nationality'.

<sup>68</sup> Jennings and Watts (ed), at 973-8, for example the minority clauses under the Leagues of Nations, at 975; also, general human rights provisions against discrimination, for example under the ECHR, Article 14, *Case Concerning aspects of the Laws on the Use of Languages in Education in Belgium* (1968) 45 I.L.R. 114, and Article 5(1)(c), Convention Against Discrimination in Education (1960); Article 27, ICCPR, Principle VII, Helsinki Final Act 1975 and Part IV of the concluding Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, (1990) 29 I.L.M. 1305, 1318-20; as well as the potential for 'self-determination' as 'a peoples', Jennings and Watts (ed), at 977.

<sup>69</sup> *Reparations for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. Rep. 174, 181, which found that protection was not dependant on nationality, but on the nature of the service in a UN organ.

<sup>70</sup> *Barcelona Traction Case* (Second Phase) [1970] I.C.J. Rep. 32; also [1976] ii Yrbk. I.L.C. 99.

nationality link. For example, under the ECHR,<sup>71</sup> under other regional and international conventions,<sup>72</sup> and even under provisions of international organisations, such as the ILO.<sup>73</sup> Nationality is therefore less of an issue for asserting the protection of non-nationals, as there are clearly applicable exceptions that apply to the causing of forced migration, once the wrongfulness has been identified.<sup>74</sup>

#### 5.4 ACTION BY AND AGAINST STATE PARTIES

There are clearly several causes of action from which a state could bring an action against another state for causing forced migration,<sup>75</sup> and there are a variety of measures that it could adopt in pursuing these claims. The two approaches (mentioned above) are either from the perspective of dispute settlement, in consequence of a violation of an obligation owed directly, or as part of a wider interest in ensuring the maintenance of the international legal order. The measures that may be initiated will be reliant on either or both of these approaches. Can a state seek to protect non-nationals, and on what basis can they assert an interest to protect non-nationals.<sup>76</sup> Does positive international law recognise a claim by states to bring an action for the protection of non-nationals? A state may legislate to provide the individual with the forum and substantive rights to litigate, where there has

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<sup>71</sup> Greece and Ireland have complained against the UK on behalf of non-nationals, Greece to the European Commission concerning the treatment of inhabitants in Cyprus, (1958-II) 25 I.L.R. 27, 168; and *Ireland v. U.K.* (1978) 58 I.L.R. 188, 291-2.

<sup>72</sup> Inter-American Convention on Human Rights (1969), Part II; and the OAU, Charter on Human and Peoples' Rights (1981), the Commission is competent to receive inter-state complaints (Article 47), and perhaps, complaints from those other than states (Article 55); and Article 41, inter-state complaints to the Committee, under the Optional Protocol, states may recognise the competence of the Committee to receive individual complaints.

<sup>73</sup> Constitution of the ILO, (as amended, 15 U.N.T.S. 35), which permits Member States to lodge complaints against the compliance of a convention by other Member States (Article 26), the first commission of enquiry was initiated in 1962 by Ghana against Portugal on the provisions of the Convention concerning the Abolition of Forced Labour 1957, 35 I.L.R. 285.

<sup>74</sup> See Chapter 4 generally on the identification of wrongfulness.

<sup>75</sup> See generally, Jennings, *supra*; Garvey, 'The New Asylum Seeker: Addressing Their Origin', in Martin (ed), *New asylum seekers*; and Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80 *Am. J. Int'l. L.* 532; and above, Chapter 4.

<sup>76</sup> In US domestic legislation, 28 U.S.C. Section 1350, the ATS applies to aliens, and the Torture Victim Protection Act of 1991, Pub. L. 102-256, March 12, 1992, 106 Stat. 73 applies to individuals, whilst the LIBERTAD Act applies to US citizens.

been a violation of certain specified international norms.<sup>77</sup> Domestic jurisdiction of international law is not a new concept, as international humanitarian law provisions already require penal sanctions to be carried out by Contracting Parties through domestic mechanisms.<sup>78</sup> There is thus precedence for the use of domestic jurisdictions to apply international law.<sup>79</sup>

States may take unilateral action or seek collective action through the UN organs.<sup>80</sup> States may use the complaints procedures that are provided in international instruments. For example, under the ICCPR, states may declare recognition of competence of the Human Rights Committee to receive communications of complaints.<sup>81</sup> Similar provisions also exist for the CEAFRD which established the Committee on the Elimination of Racial Discrimination.<sup>82</sup> States may also bring complaints to the attention of the GA<sup>83</sup> or the SC.<sup>84</sup> States could also bring an action to the ICJ,<sup>85</sup> and the judgement of the Court may be

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<sup>77</sup> Although such jurisdictional competence is available only where the state is responsible either for the harm, or the rectification of the harm, thus the state does have to show a combination of the defendant's presence (nexus), the application of available doctrines, for example transitory torts, contemporary interest of the courts to interpret international law, and the applicability of universal concern for the redress of the particular violation, whether human rights or general international law; noted by Steinhardt, *supra*, at 71. See further section 5.6, 'Jurisdiction to Establish Domestic Measures'.

<sup>78</sup> Similarly under the Genocide Convention, Article V and VI.

<sup>79</sup> The case of war crimes, highlighted by the *Eichmann case* suggests this, *Attorney-General of Israel v. Eichmann* (1961), reprinted in, (1962) 56 Am. J. Int'l. L. 805 and 36 I.L.R. 5; with respect to suits for human rights violations, see generally, Bazylar, 'Litigating the International Law of Human Rights: A 'How to' Approach' (1985) 7 Whittier L. Rev. 713; and Lillich, 'The Role of Domestic Courts in Enforcing International Human Rights Law', in Hannum, H. (ed), 228.

<sup>80</sup> Examples of as yet unused measures are, suspension of membership in the UN under Article 5, UNC; and expulsion from the Organisation under Article 6, UNC; see Schachter, 'United Nations Law' (1994) 88 Am. J. Int'l. L. 1, 11.

<sup>81</sup> ICCPR Article 41, the Committee is established under Part IV.

<sup>82</sup> Article 8; who may report to the GA the implementation of the Convention, Article 9; and who may upon the acceptance of a Member State, receive communications from individuals or groups, Article 14.

<sup>83</sup> UNC Chapter IV.

<sup>84</sup> UNC Chapter V and VI; The SC may even enforce a determination through coercive measures under Chapter VII of the UNC. An example of the use of UN mechanisms is the protest of Bangladesh to Burma concerning the influx of 150,000 Rohingya Muslims fleeing persecution by the Burmese army. Bangladesh was further looking to the ICJ, although the UN dispatched the Under-Secretary General for Humanitarian Affairs to attempt a settlement, see Gilbert, *supra*, at 434.

<sup>85</sup> Either by special agreement pursuant to Article 40 of the SICJ or by declaration of the acceptance of jurisdiction under Article 36(2) of the SICJ; See Brownlie, principles, at 721-727; Higgins, problems

enforced by the SC.<sup>86</sup> States may have recourse to courts established by regional arrangements.<sup>87</sup> For example, the Inter-American Court has held that a state is liable to account where it fails to take reasonable steps to prevent human rights violations, or it fails to use means at its disposal to investigate violations in its jurisdiction, to impose appropriate sanctions against violators and to compensate the victims.<sup>88</sup> Whilst the European Commission has found that the ECHR applies to impose obligations on High Contracting states to protect fundamental human rights of all person, nationals, non-nationals from Contracting states, and non-nationals from non-Contracting states.<sup>89</sup> States may also establish arbitration tribunals within a multilateral treaty, or by bilateral agreement.<sup>90</sup>

From a theoretical basis, Anzilotti claimed that ‘States, have neither the right nor the duty to suppress violations of international law as such, but only the right to react against those violations which are aimed directly against them...’<sup>91</sup> This meant that the injured state was not enforcing international law, but was compelling the realisation of its

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and process, at 187-191; and Gray, *Judicial Remedies in International Law* (1987), at 59-68 (hereinafter, Gray, judicial remedies).

<sup>86</sup> Article 94(2), UNC; Murty, ‘Settlement of Disputes’, in Sorensen (ed), manual, 674, at 712-713, citing the request of the UK under this section against Iran; and Schachter, O., ‘The Enforcement of International Judicial and Arbitral Decisions’ (1960) 54 Am. J. Int’l. L. 1, 21.

<sup>87</sup> See generally, Gray, *Judicial Remedies in International Law* (1987).

<sup>88</sup> *Velasquez Rodriguez case*, (1988) Annual Report of the Inter-American Court of Human Rights 35, at para. 174, even if the acts are committed by a private individual, if the state fails to seriously investigate (at 72, para. 177); Shelton, ‘Judicial Review of State Action by International Courts’ (1989) 12 Fordham Int’l. L.J. 361, 369; and note, Theo van Boven, ‘Progress Report of the Special Rapporteur’, *supra*, at para. 28-33.

<sup>89</sup> *Austria v. Italy*, Application No. 788/60, [1961] Yrbk. Eur. Convention Hum. Rts. 116, 140.

<sup>90</sup> See generally, Sohn, L.B., ‘The Role of Arbitration in Recent International Multilateral Treaties’ (1983) 23 Va. J. Int’l. L. 171; Murty, ‘Settlement of Disputes’, in Sorensen (ed), manual, at 684-697; Gray, judicial remedies, at Chapter 5; and Brownlie, principles, at 709-714. Although arbitration may be advocated as the way of the future for commercial activities, there are many difficulties with the application of tribunals as they stand. For example, in 1991, almost eight years after its establishment, the Iran-U.S. Tribunal was still completing the last of 4,000 claims. It would have been worse if 2,500 small claims were not settled as a group; see Charles Brower, ‘United Nations Considers How Iraq Should Pay Reparations’, *Financial Times*, 11 April 1991, 10, the author a judge on the Iran-U.S. Tribunal noted that a similar tribunal would not be workable. Besides the practical difficulties, there is also a danger that individuals would be left out when preference is given to financial institutions and companies or the pursuit of expedience denies justice to the individual.

<sup>91</sup> Anzilotti, *Teoria generale della responsabilita stato nel diritto internazionale* (1902), at 88.

own rights and enforcing respect thereof.<sup>92</sup> Thus the position of international responsibility only included the injured state espousing its rights against the injuring state, from whom compensation is demanded.<sup>93</sup> Therefore, the interests of other states in preserving international legal order was merely 'idealistic' and 'insufficient motive for submitting demands.'<sup>94</sup> This is however inconsistent with the theory that certain grave breaches of international norms would give all states an interest in a legal action, *re Barcelona Traction Case*.<sup>95</sup> The danger is not that collective action is frowned upon, but that states will apply it in an arbitrary manner to support unjustified collective intervention.<sup>96</sup> Hence justifying the validity of the proposition that only those suffering direct injury may have a claim in law. However, because of the changes in the international situation, the emergence of the rules against non-aggression,<sup>97</sup> the prohibition of the use of force,<sup>98</sup> and the end of the Cold War, it is suggested that international norms have also changed. A breach of the peace is therefore an issue that concerns all states and can therefore be an example of an interest that all states have the right to secure.<sup>99</sup>

In the alternative, the general rule that a state may bring an action only where there has been an injury or violation of a right has two exceptions: where an obligation *erga omnes* is owed, either through customary law or treaty provisions; and for the protection of individuals who are non-nationals under human rights provisions. These two exceptions may be argued to represent one purpose, namely to permit states to protect individuals who are not linked through the bond of nationality. They are also separate, because obligations *erga omnes* sets the position for an interest in law for all states to espouse, whilst the

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<sup>92</sup> *Ibid*, at 88-89.

<sup>93</sup> Rousseau, *Droit international public* (1953), 357; and Schwarzenberger, law and order, at 35.

<sup>94</sup> Verdross, A., *Mezhdunarodnoe pravo* (F.A. Kublitskii and R.L. Naryshkina trans., ed Tunkin, 1959), 356; as cited by Tunkin, theory, at 416; see also *Phosphates in Morocco Case* (Preliminary Objections) [1938] P.C.I.J. Ser. A/B, at 28, which also affirms this proposition.

<sup>95</sup> *Case Concerning the Barcelona Traction, Light and Power Company* (Belgium v. Spain) (Second Phase) [1970] I.C.J. Reps. 32.

<sup>96</sup> Tunkin, theory, at 416-417.

<sup>97</sup> *Nicaragua Case*, *supra*, para. 195, where the court claimed that the Definition of Aggression is customary international law.

<sup>98</sup> UNC, Article 2(4).

<sup>99</sup> Note also Tunkin, theory, at 418. Breach of the peace includes threat to the peace, which includes a potential determination from massive violations of human rights.

protection of human rights caters for the protection of individuals against their own governments. However, not all multilateral treaties provide an automatic right of action for the violation of those provisions, nor will every principle considered to be human rights represent an obligation owed *erga omnes*. The interest to espouse a claim is founded on the fact that the claimant state is an 'injured state', although not all states who are injured have recourse to the same types of action. Just because a state is bound by a rule does not automatically provide other states with a cause of action against that state.<sup>100</sup> The claimant state does have to show that a subjective right has been violated.<sup>101</sup> A state whose subjective right has been violated is thus an 'injured state'.<sup>102</sup> Thus although tangible or material object damage need not be claimed, the rights and interests alleged to be violated must clearly be vested in the claimant state.<sup>103</sup>

#### 5.4.1 Compelling a State to Investigate and Prosecute Human Rights Violations

Establishing an obligation on a state to investigate and prosecute human rights violations will encourage internal and external accountability, and might form a basis for asserting international responsibility.<sup>104</sup> Whether or not such an obligation can be found depends on two pertinent issues. Firstly, is there a positive duty on a state to investigate and prosecute occurrence of human rights violations within their territory; and secondly, who has the interest to compel the state to fulfil its duty if one exists. Roht-Arriaza claims that there are trends in general international law that provide sufficient provisions to impose an affirmative obligation on states, to investigate and prosecute grave human rights violations.<sup>105</sup> There are 'prosecute or extradite' provisions in various conventions,<sup>106</sup> and

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<sup>100</sup> Sachariew, *supra*, at 276.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, at 279.

<sup>103</sup> *South-West Africa Cases (Ethiopia and Liberia v. South Africa) (Second Phase)* [1966] I.C.J. Rep. 32-3.

<sup>104</sup> For example where there is a failure to exercise due diligence, although Jennings and Watts (ed), at 549, identified that the failure to punish the acts of private individuals was possible grounds to attract international responsibility.

<sup>105</sup> Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 Cal. L. Rev. 449, 464-67.

<sup>106</sup> For example the 1949 Geneva Conventions, *ibid.*, at 464; the European Convention on the Suppression of Terrorism (1977), *ibid.*, at 465; the International Torture Convention, *ibid.*, at 465; and note Articles 2, 3 and 4 of the CEAFRD.

the Human Rights Committee has found that an obligation exists under the ICCPR to provide the machinery for prosecution of those who violate the provisions, to protect and provide remedies for the victims.<sup>107</sup>

The Inter-American Court of Human Rights provides the leading authority that a state is responsible for a failure of this obligation.<sup>108</sup> In the *Rodriguez Case* and *Godinez Cruz Case*, Honduras was held responsible for disappearances,<sup>109</sup> even if the disappearances were not carried out by state organs, as the state's apparatus failed to act to prevent or to punish the wrongdoers.<sup>110</sup> The Court concluded that Honduras 'failed to guarantee the human rights affected by' the disappearances, because officials either sanctioned or acquiesced in the kidnappings.<sup>111</sup> The Court held that this omission violated Article 1(1) of the Convention and attracted international responsibility.<sup>112</sup> In fact, the Inter-American Court held that any violation of human rights attributable to an act or omission of a state organ constitutes an act imputable to the state under international law.<sup>113</sup> Two general obligations are therefore owed by the state under the Convention: firstly an affirmative duty to protect against violations, as well as to ensure full and free exercise; and secondly, the duty not to violate the standards of due diligence in omitting to investigate and prosecute private individuals who violate human rights provisions.<sup>114</sup>

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<sup>107</sup> *Irene Bleier Lewenhoff and Rosa Valino de Bleier v. Uruguay* (1985), UN Human Rights Commission No. 30/1978 para. 15, at 112; UN Doc. CCPR/C/OP/1; and Roht-Arriaza, *supra*, at 478.

<sup>108</sup> Roht-Arriaza, *supra*, at 478, note 153, concerning the Inter-American Commission on Human Rights; and Fawcett, J.E.S., *Application of the European Convention on Human Rights* (1987), 289, concerning the European Court of Human Rights.

<sup>109</sup> Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1989/90) 13 *Fordham Int'l. L.J.* 1, 10.

<sup>110</sup> *Rodriguez case, supra*, at 73, para. 182; note also Ago, Second Report [1970] ii *Yrbk. I.L.C.* 177, 188, 'the State is responsible for having failed to take appropriate measures to prevent or punish the individuals' act.'

<sup>111</sup> *Rodriguez case, supra*, at 66, para. 148. In this case, violations of Articles 4, 5 and 7 of the ACHR were claimed.

<sup>112</sup> Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1989/90) 13 *Fordham Int'l. L.J.* 1, 11; This may be contrasted against the European Court of Human Rights which does not recognise Article 1 of the ECHR as capable of independent violation, (at 12); *Ireland v. U.K.* (1978) Ser. A, 25 *Eur. Ct. Hum. Rts. R.* 1, 90-91, para. 239. Article 1(1) of the ACHR imposes the obligation to respect the rights and ensure full and free exercise to all persons, *reprinted in*, 9 *I.L.M.* at 675.

<sup>113</sup> *Rodriguez case, supra*, at 69, para. 164.

<sup>114</sup> Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1989/90) 13 *Fordham Int'l. L.J.* 1, 12-14 and accompanying footnotes; and *Rodriguez case, supra*, at 71, para. 172.

The ACHR provides a basis from which individuals and states could claim competence to act, and process violations of human rights against individuals. There are however, practical difficulties associated with the obligation to investigate and prosecute. Locating information and evidence is often an obstacle, as is the deliberate obstruction of any investigation by military organs that act to protect their personnel.<sup>115</sup> Another difficulty is that much depends primarily on specific provisions in the enabling convention, and the application is at present limited to those specific instances, i.e., under the ACHR. The possibility for the imposition of a general positive duty to investigate and prosecute those that cause forced migration may, however, exist in relation to the violation of those specific rights.<sup>116</sup> A further difficulty exists where a previous regime has committed the violations. Does the successor owe a duty to prosecute the violations of human rights perpetrated by the previous regime? One major hurdle in the prosecution proceedings is the desirability to encourage 'national unity',<sup>117</sup> and also the possibility that perpetrators are still in power, or in positions of influence and authority.<sup>118</sup>

Within the domestic framework, national constitutions may provide a basis from which to compel state action and to protect individuals from non-governmental actions that violate human rights. The applicability of domestic constitutional guarantees may differ between states. For example, the US constitution primarily governs governmental acts, but in the former Eastern European communist states, human rights guarantees may be invoked against private action.<sup>119</sup> It may be possible to link the responsibility of states to interference by private individuals on the basis of violating constitutional or conventional

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<sup>115</sup> See Roht-Arriaza, *supra*, at 459-461; note however the situation in the *Rodriguez case*, where presumptions and circumstantial evidence were permitted so long as they led to conclusions consistent with the facts; *reprinted in* 28 I.L.M. at 316, para. 130; Shelton, 'Judicial Review of State Action by International Court' (1989) *Fordham. Int'l. L.J.* 361, 383-84.

<sup>116</sup> For example in the *Rodriguez case*, the Court determined that the failure to investigate was a violation of Article 4 of the ACHR, the duty to ensure right to life, 28 I.L.M. at 327 and 328, para. 180-81 and 188; and the causing of forced migration may be attributable to one or more of the violation of such specific provisions.

<sup>117</sup> Dadrian, *supra*, at 291, concerning the Turkish prosecutions; and Roht-Arriaza, *supra*, at 452.

<sup>118</sup> Dadrian, *supra*, at 226-27, who notes the situation of Turkey and the failure to prosecute the actions taken against Armenians.

<sup>119</sup> Forde, M, 'Non-Governmental Interferences with Human Rights' (1985) 56 *Brit. Yrbk. Int'l. L.* 253, 253-4.

guarantees of human rights.<sup>120</sup> An example given by Forde was a situation where a term in a trust stipulated forfeiture of entitlements to the trust property, if the beneficiary married a non-Caucasian person.<sup>121</sup> In this instance, a judgement in favour of the trust would violate provisions under the CEAFRD and should render the state responsible for a failure to legislate against discriminatory behaviour. Forde identified several further examples of when a state may be implicated through litigation, where the courts uphold 'private *prima facie* human rights violations.'<sup>122</sup> Thus, where a constitution guarantees certain rights, such as non-discrimination which apply primarily to governmental action, a private individual who commits such discriminatory acts, although unassailable without legislation, may nevertheless implicate the state in litigation.<sup>123</sup>

The potential of states to be implicated, where their courts are used in litigation to enforce private acts that violate fundamental human rights, provides a means to attach international responsibility.<sup>124</sup> The consequence to the state at being implicated is that responsibility, whether on a domestic or international plane, could follow. The state would be responsible to other states where the implication amounts to a violation of an international obligation, either provided by convention or obligations owed *erga omnes*.<sup>125</sup> The state would also be potentially responsible to individuals where the guarantees were enshrined under domestic instruments, such as the constitution, and the state effectively facilitated or was implicated through the violation of private action. Thus the obligation to investigate and prosecute may be infused with this obligation not to be implicated, for a state that fails to investigate or prosecute could be implicated in litigation in a like manner. For example, either failing to investigate before deportation, or having investigated under

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<sup>120</sup> See examples given by Forde, *ibid*, at 262-263, although not all rights would be protected in this manner.

<sup>121</sup> *Ibid*, at 262; *Re Tuck's Settlement Trusts* [1978] 1 Ch. 49(CA).

<sup>122</sup> *Ibid*, at 268.

<sup>123</sup> See, *Shelley v. Kraemer*, 334 U.S. 1(1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

<sup>124</sup> Lauterpacht, H., *International Law and Human Rights* (1968), 340-1 and 154-160.

<sup>125</sup> The obligation may be one of 'result' or 'means'; see generally, Schachter, *International Law in Theory and Practice* (1991), 232-233.

INS (Immigration and Naturalization Service) hearings, nevertheless deport them to conditions that threaten their lives.<sup>126</sup>

The failure to investigate and prosecute through the judiciary may further amount to a denial of justice,<sup>127</sup> which is a ‘material injustice’ or a decision that offends ‘... the standards of justice recognised by civilised nations.’<sup>128</sup> It is claimed that ‘[o]nly a clear and notorious injustice, visible at a mere glance could furnish ground’ for international responsibility.<sup>129</sup> Although this area of law was developed specifically for injury to aliens,<sup>130</sup> it is of importance because it affects the consideration of when local remedies have been exhausted,<sup>131</sup> and its application to nationals under human rights law has been confirmed.<sup>132</sup> Grotius distinguished ‘*deni de justice*’ with ‘*defi de justice*’.<sup>133</sup> On the other hand, Anzilotti claimed;

‘the unfavourable result of a process is never, by itself, a denial of justice. It is necessary to consider as such the refusal to give access to foreigners to the

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<sup>126</sup> This would violate the Fourth Geneva Convention, where such persons are ‘protected persons’ and the deportation would put them in fear of attacks, Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, Articles 3, 4 and 27, and Additional Protocol I, Part IV, see Weiner, R., ‘The Agony and the Exodus: Deporting Salvadorans in Violation of the Fourth Geneva Convention’ (1986) 18 N.Y.U.J. Int’l. L. & Pol. 703, 712-744; and under the Torture Convention where there are substantial grounds for believing there is a danger of torture, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984), Article 3(1), ‘[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’

<sup>127</sup> Jennings and Watts (ed), at 544.

<sup>128</sup> *Ibid.* However, de Arechaga, *supra*, at 552, notes that the judgement has to be tainted with bad faith, bias, fraud or some external pressures.

<sup>129</sup> *Putnam Case* (1927), 4 R.I.A.A. 151, at 153.

<sup>130</sup> For example see in Brownlie, principles, at 529, under the chapter on injury to aliens.

<sup>131</sup> See above section 3.14, ‘Defences and the Exhaustion of Local Remedies’.

<sup>132</sup> Third Restatement, Part VII, at 144, which affirmed that, ‘[i]nternational law has long held states responsible for ‘denial of justice’ and certain other injuries to nationals of other states. Increasingly, international human rights agreements have created obligations and responsibilities for states in respect of all individuals subject to their jurisdiction, including their own nationals, and a customary international law of human rights has developed and has continued to grow.’

<sup>133</sup> *Deni* occurs ‘where judgement cannot be obtained within a reasonable time’, and *defi* occurs ‘where in a very clear case judgement has been rendered in a way manifestly contrary to law’, but where ‘in a doubtful case there is a presumption in favour of those who have been chosen by the State to render judgement’, Grotius, *De Jure Belli ac Pacis*, Book iii, Chapter 2, para. 5; and similarly, Vattel, *Law of Nations*, book ii, Chapter xviii, para. 350, claimed the ‘denial of justice’ was the refusal to permit access to ordinary tribunals, distinct from the actual judgement, unless the injustice in the decision was clear and unmistakable; see also Spiegel, ‘Origin and Development of Denial of Justice’ (1938) 32 Am. J. Int’l. L. 63.

municipal tribunals for the protection of their rights. Every time a contradiction exists between a decision regularly pronounced and international law, the responsibility incurred by the State does not arise from a denial of justice, but from some other violation of international law.’<sup>134</sup>

Thus a manifestly unjust decision would not give rise to responsibility as a denial of justice, but under the context of being a manifestly unjust decision that itself violates international law.<sup>135</sup> In this sense, the state is implicated through litigation by a manifestly unjust decision. The concept does have several inherent difficulties associated with the quality of justice in a state,<sup>136</sup> however it is clear that a failure to exercise judicial functions or unreasonable delay would amount to a denial of justice. A state would also be implicated where a domestic court assumes jurisdiction over an issue that other states claim a priority,<sup>137</sup> and the failure of judicial organs to interpret treaty provisions or apply treaty provisions, where specifically required.<sup>138</sup>

Where a state fails to prosecute the private acts of individuals, it may be implicated through *patientia*, the failure to prevent through knowledge of impending conduct, or *receptus*, the failure to punish or tacit approval of the act.<sup>139</sup> On the other hand, the key to implicating the state has been suggested to rest with state complicity, where;

‘in certain manifestations of the actual or implied complicity of the government in the act, before or after it, either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the individual, or to enable the victim to pursue his civil remedies against the offender.’<sup>140</sup>

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<sup>134</sup> Anzilotti, *Cours de Droit International* (Gidel. G., trans., vol. I, 1929), 171-173.

<sup>135</sup> de Arechaga, *supra*, at 556.

<sup>136</sup> Brownlie, *principles*, at 529-30.

<sup>137</sup> For example the Soviet Government held the Irish Government responsible for the decision of the Supreme Court of Eire in 1941 over certain Latvian and Estonian vessels for which the Soviet Government claimed ownership; as cited in Brownlie, *principles*, at 450, note 16.

<sup>138</sup> McNair, *Law of Treaties* (1961), 346.

<sup>139</sup> Cited by de Arechaga, *supra*, at 559.

<sup>140</sup> Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims* (1927), 217; also Brierly, ‘The Theory of Implied State Complicity in International Claims’ (1928) 9 *Brit. Yrbk. Int’l. L.* 42.

The theory of complicity was rejected by the Commission in the *Janes Case*,<sup>141</sup> who distinguished an international delinquency from the private delinquency of culprits, and the tacit approval of crimes from being an accomplice.<sup>142</sup> Thus the Commission in the *Janes Case* and the Inter-American Court in *Rodriguez* properly found that responsibility of the state did not result from complicity, but from the breach of ‘independent legal obligations’.<sup>143</sup> This being the failure either to prevent an unlawful act, or failing to arrest and bring to justice a known criminal.<sup>144</sup> Whether subscribing to the complicity theory or not, clearly the ratification or approval of acts, and the failure to investigate and prosecute unlawful acts of individuals will implicate the state.

The possibility of compelling states to investigate and prosecute has clear possibilities for an overall enforcement mechanism in international law.<sup>145</sup> Finding a positive obligation for states to investigate and prosecute, based on international law, provides a means of bringing to the fore violations of international law within the domestic situation. This excludes the claims of intervention from external sources and compels the state to ‘set its own house in order’. Investigating and prosecuting, even if it leads to amnesty, is nevertheless a recognition of wrongfulness, and as Adam Michnik recently remarked, ‘amnesty not amnesia’.<sup>146</sup> Further, ‘... human rights activists in each country acquire a powerful tool with which to press for improvements in their country’s human rights performance.’<sup>147</sup> National constitutions and international human rights conventions may also provide substantive provisions to impose responsibility on states, where the non-

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<sup>141</sup> (1925), 4 R.I.A.A. 82.

<sup>142</sup> *Ibid*, at 87.

<sup>143</sup> Shelton, ‘Private Violence, Public Wrongs, and the Responsibility of States’ (1989/90) 13 *Fordham Int’l. L.J.* 1, 25, *Janes Case, supra*, that obligation being the international standard of diligence in apprehending and punishing those who cause unlawful death or injury; and *Rodriguez case, supra*, at 72, para. 177.

<sup>144</sup> de Arechaga, *supra*, at 560; also Grotius, *De Jure Belli Ac Pacis Libri Tres* (Kelsey trans., vol. II, 1925), 523-29, who also identified conducts of states that could lead to international responsibility for the acts of private individuals.

<sup>145</sup> Note, Bassiouni, M. Cherif and Wise, Edward M., *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (1995), which discusses in detail the duty to prosecute or extradite in customary international law, under convention provisions and under the regime of international criminal law.

<sup>146</sup> Cited by Stan Cohen in a lecture at the University of Southampton, 3 May 1995.

<sup>147</sup> Roht-Arriaza, *supra*, at 513.

governmental action is either facilitated, assisted or conducted with the complicity of government actors, whether actions or omissions.<sup>148</sup>

If a state does have an obligation to investigate and prosecute, then this obligation may give justification for establishing civil processes within its jurisdiction to victims of human rights violations, to vindicate their grievances.<sup>149</sup> Because international law does not as a general proposition object to civil remedies against violations of human rights,<sup>150</sup> and it is a violation of international law to deny justice to aliens,<sup>151</sup> the proposition for individual action in the domestic setting has a clear foundation.

## 5.5 COERCIVE ACTION AND ACTION TO REMOVE A GOVERNMENT

In conjunction with inter-state action, states may have access to coercive measures, unilateral or collective,<sup>152</sup> in the form of armed force or sanctions.<sup>153</sup> These forms of inter-state coercive actions are usually taken extra-judicially and generally produce a variety of debates on their legality against the stated purpose.<sup>154</sup> The primary issues are, what sort of action may be used and in what circumstances may they be applied for the protection or promotion of the interests of forced migrants? When forced migration occurs, collective use of force may provide a means to directly remove the cause, either by enforcing the return of civil order within a state, or remove a despotic regime that practices gross

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<sup>148</sup> See, Theo van Boven, 'Final Report', *supra*, at para. 137(2), on the proposed general principle that imposes a duty on states to investigate violations of human rights.

<sup>149</sup> Note Borchard, *The Diplomatic Protection of Citizens Abroad, or the Law of International Claims* (1927), at 217.

<sup>150</sup> Akehurst, *jurisdiction*, at 170-72.

<sup>151</sup> Randall, 'Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute' (1985) 18 (1) *N.Y.U.J. Int'l. L. & Pol.* 1, 60-61, note 293 (hereinafter, Randall, federal jurisdiction); and D'Amato, 'The Alien Tort Statute and the Founding of the Constitution' (1988) 82 *Am. J. Int'l. L.* 62, 66; both of whom comment on the historical context of justification of the ATS as removing a potential allegation of the denial of justice to aliens.

<sup>152</sup> The distinction being action taken by a state under the authority of the UN, against an action taken without such authority.

<sup>153</sup> The term sanctions here refers to economic embargoes, as well as the removal of diplomatic and other relations, and includes the measures to enforce the sanctions, for example naval blockades as those applied in Rhodesia, Iraq, former Yugoslavia and Haiti, see Comment, 'And now Haiti: another fine mess', *The Guardian*, 18 October 1993, 19.

<sup>154</sup> For example, the debate between Reisman and Schachter, (1984) 78 *Am. J. Int'l. L.* 642-645 and 645-650.

violations of human rights. The use of sanctions may also provide a similar solution. Although it might be a slower process, it is available for unilateral application as a counter-measure. The application of such measures may specifically address the legitimacy of those in power, and could potentially be a manifestation of the collective will of the community of nations. However, because of the oppressive nature of coercive actions, their application has to be governed by legal principles, and caution must be exercised before advocating for their use.

Anzilotti claimed that, 'State responsibility, is in the nature of reparations, and not of satisfaction; consequently, the right of the injured state is limited by the requirement of compensating damage and of possible guarantees for the future, but it can not acquire the character of punishing the guilty state.'<sup>155</sup> Although in a posthumously published work, Anzilotti clarified his position by recognising that responsibility had two forms: reparations and satisfaction. Satisfaction is claimable where non-financial damage has been caused, even if the payment takes the form of money; whilst reparations arises from the consequence of inflicting financial damage, which is then expressed as either compensation or restitution.<sup>156</sup>

On the other hand, it may be argued that the consequences of a delict was a range of remedies from the payment of compensation, to recourse to armed force. Bluntschli claimed;

'In international law, the strength of the legal order also is ensured by the fact that new law emerges out of a breach of law. The illegality committed is transformed into a right of the victim to demand from the offender, in accordance with the circumstances, restoration of the previously existing situation, compensation of damage, satisfaction, retribution, or punishment. When a breach of law consists only of the failure to fulfil an obligation assumed, without injuring the prestige of the state and without breach of the peace, it can be equated to a civil breach of law, which gives the injured person the right to initiate a civil suit for the purpose of restoring the previously existing legal situation (for example, the return of property, payment of a debt, or compensation of damage). In such instances

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<sup>155</sup> Anzilotti, *Teoria generale della responsabilita dello stato nel diritto internazionale* (Florence, F. Lumachi Libraio-Editore, 1902), 96; cited by Tunkin, theory, at 386.

<sup>156</sup> Anzilotti, *Corso di diritto internazionale*, vol. I, 425-7; cited by Tunkin, theory, at 387.

international law also is satisfied only by elimination of the illegality and restoration of the right.<sup>157</sup>

It should be noted that this was stated before the use of war was excluded as a valid tool of international law, although the general principle with respect to enforcement will still be true. The substitution of the individual claim to arms with the use of UN methods, as provided for under the Charter, might represent an acceptable means of armed force to obtain a remedy for violations of international obligations. In any event, it is clear that the return to order or the restoration of rights is a significant aspect of international law.

### 5.5.1 Use of Force

The use of force under the UN has increased without the barriers posed by the Cold War.<sup>158</sup> The UN can take either direct or indirect force.<sup>159</sup> The use of force by the UN has also been applied for establishing purely humanitarian relief<sup>160</sup> The UN has also intervened with the use of force where there is internal conflict amounting to oppression against civilian populations, and social and political breakdown of the state.<sup>161</sup> There seems to be no reason why the use of force cannot be applied directly or indirectly by the UN,<sup>162</sup> although certain conditions must exist before such action can be activated. Firstly, a well defined purpose, political or humanitarian, with the clear support of member states who

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<sup>157</sup> Bluntschli, J.C., *Das moderne Volkerrecht der civilisirten Staten* (2nd edn., Nordlingen, C.H. Beck, 1872), 259; cited by Tunkin, theory, at 390; who notes (at 392) that Bluntschli was a proponent of the 'just war'.

<sup>158</sup> In about 111 Security Council resolutions concerning Chapter VII, between 1945 and 1995, only 12 were taken during the Cold War period.

<sup>159</sup> Marrack Goulding (Under Secretary-General for Political Affairs), Mountbatten-Tata Memorial lecture, 23 November 1995, University of Southampton, who identified direct force as that undertaken by a UN Force, commanded directly by the Secretary-General, and indirect force which comprises a multilateral force made up of one or more states, authorised by the UN and commanded by a lead state.

<sup>160</sup> The success or failure and the legal basis of UN action have received much comment, although the precedence and continued application of such action seems accepted, Nanda, in Gowlland-Debbas (ed), at 143. For example, SC Res. 794 (1992), to establish in Somalia 'a secure environment for humanitarian relief'; 770 (1992), concerning the provision of humanitarian assistance to Bosnia-Herzegovina in an effort to secure international peace and security; and 771 (1992), demanding access to detention camps for ICRC personnel.

<sup>161</sup> For example, SC Res. 688, *reprinted in*, (1991) 30 I.L.M. 858, for Iraqi civilians, particularly the Kurds, see Nanda, in Gowlland-Debbas (ed), at 142-3; and 'Sanctuary for the Kurds', *The Economist*, 20 April 1991, 12.

<sup>162</sup> Goulding, *supra*; and note the discussion in Higgins, problems and process, at 254-266.

signal a clear intention to provide resources; secondly, the element of proportionality must always be respected and reaffirmed;<sup>163</sup> and thirdly, the main concerns of the UN must not be forgotten, namely the pacific settlement of disputes and the respect for and protection of human rights.<sup>164</sup> Thus the collective use of force may provide a significant potential for addressing the causes of forced migration, particularly where the cause is primarily internal conflict or gross violations of human rights.

It is clear that the use of force is prohibited where it amounts to an act of armed reprisal.<sup>165</sup> Reprisals should be distinguished from acts of self-defence, although this is not always clear.<sup>166</sup> Bowett claimed in 1958 that,

‘[i]n essence the right of self-defence operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable; its function is to preserve or restore the legal *status quo*, and not to take on a remedial or repressive character in order to enforce legal rights. This, the latter function, is the function of self-help, and, in a legal system which by its degree of centralisation confines the task of law enforcement to collective organs, the positive, remedial role of self-help may well, at least to the extent that it involves the use of force, be taken from the individual States, leaving to them only the protective right of self-defence. This, it is believed, is the position which the United Nations Charter intended to achieve.’<sup>167</sup>

It would seem that the current practice on the use of force (other than in self-defence) is consistent with Bowett’s analysis in 1958.<sup>168</sup> Whether direct or indirect force, the authority

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<sup>163</sup> Although developed primarily for the use of force in self-defence, it is a principle that could be applied in any use of force situation, McCoubrey, H., ‘International Law and National Contingents in UN Forces’ (1994) XII (3) *International Relations* 39, 44-47; and Brownlie, *International Law and the Use of Force by States* (1963), 261; and *I’m Alone*, (1933 and 1935), 3 R.I.A.A. 1609, where the Commissioners found that the sinking of the vessel was an excessive and unjustifiable use of force under international law.

<sup>164</sup> Goulding, *supra*.

<sup>165</sup> Under Article 2(4), UNC, and the Friendly Relations Resolution, and reiterated by the ICJ, *Corfu Channel Case* [1949] I.C.J. Rep. I, 35; and see generally, Bowett, D., ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 Am. J. Int’l. L. 1.

<sup>166</sup> See generally, Teplitz, R.F., ‘Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?’ (1995) 28 Cornell Int’l. L.J. 569.

<sup>167</sup> Bowett, D.W., *Self-Defence in International Law* (1958), 11.

<sup>168</sup> Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 Am. J. Int’l. L. 1, 3; Brownlie, principles, at 466; and Jennings and Watts (ed), at 419, note 12; further, Teplitz, R.F., ‘Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?’ (1995) 28 Cornell Int’l. L.J. 569. However, note Higgins, problems and process, at 238-253, who raises questions concerning the issues of self-

has to emanate from the UN,<sup>169</sup> which either authorises force under the direct command of the Secretary-General or under the command of a multilateral task force.<sup>170</sup>

Rodley argues that the main thrust of the ICJ, in *Nicaragua*,<sup>171</sup> was the rejection of unilateral armed intervention for the protection of human rights and the promotion of international peace and security.<sup>172</sup> However, Rodley also claimed, '[i]f the ban on unilateral humanitarian intervention is to be politically credible, it should be accompanied by more determined inter-governmental action, not necessarily excluding coercive measures, to eliminate such practices [against human rights].'<sup>173</sup> Thus clearly advocating for UN action, yet such action is not completely without controversy. The bombing of Iraq is an example of collective action in the enforcement of international law. Yet, a UN study declared that the bombing created a 'near apocalyptic' state.<sup>174</sup> It was found that approximately 9,000 homes were destroyed and some 72,000 Iraqis made homeless, the life support system either destroyed or badly damaged, and Iraq was 'relegated to a pre-industrial age but with all the disabilities of post-industrial dependency on an intensive use of energy and technology.'<sup>175</sup> It seems, with respect to Iraq's invasion of Kuwait, many former Defence Secretaries of the US agreed that economic sanctions applied before Desert Storm would have successfully caused a withdrawal.<sup>176</sup> In fact, the estimated effect of the

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determination, humanitarian intervention, and the relationship between Article 2(4) and the promotion of human rights.

<sup>169</sup> Note however, Skubiszewski, K., 'Use of Force by States, Collective Security, Law of War and Neutrality', in Sorensen (ed), manual, 740, at 748-750, discussing domestic use of force, and at 772-775, discussing five areas of permitted use of force other than self-defence.

<sup>170</sup> Goulding, *supra*.

<sup>171</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US) (Merits) [1986] I.C.J. Rep. 14.

<sup>172</sup> Rodley, Nigel S., 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 Int'l. & Comp. L.Q. 321, 328.

<sup>173</sup> *Ibid*, at 333.

<sup>174</sup> Paul Lewis, 'UN Study call Iraq's War Damage Near-Apocalyptic', *N.Y. Times*, 22 March 1991, A1.

<sup>175</sup> *Ibid* at A9; and Barton Gellman, 'Allied Air War Struck Broadly in Iraq: Officials Acknowledge Strategy Went Beyond Purely Military Targets', *Washington Post*, 23 June 1991, A1, who noted that some targets were bombed to create post-war leverage because the repairs required foreign assistance; that many targets were identified and selected to 'amplify' the impact of sanctions on Iraqi society, both economically and psychologically; and the damage done to civilian structures was aimed at limiting Iraq's capacity to support itself as an industrial state.

<sup>176</sup> Gordon, 'Ex-Defence Secretaries Advise Patience in Gulf', *N.Y. Times*, 3 December 1990, A14.

sanctions applied to Iraq was rated twenty times greater than other successful sanctions, because it affected one hundred percent of Iraq's trade and financial relations and created a forty-eight percent loss to the G.N.P.<sup>177</sup> Might sanctions be preferred over armed force where the beneficiaries are forced migrants, who may still be internally displaced in the state?<sup>178</sup>

### 5.5.2 Sanctions

Sanctions may be applied either as a counter-measure incorporating different legal institutions - including reprisals, retorsion, institutional sanctions and even self-defence<sup>179</sup> - or as a means of enforcing a determination under Chapter VII of the UNC. In so far as economic reprisals are concerned, their application has been confirmed in international arbitration which found that, '[i]f a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".'<sup>180</sup> Riphagen claimed that a state cannot resort to reprisals 'until it has exhausted the international procedures for peaceful settlement of the dispute available to it.'<sup>181</sup> It would seem that the lawfulness, of economic reprisals, depends on it being a reaction to a prior breach of a legal duty and fulfilling the condition of proportionality.<sup>182</sup>

The use of sanctions are governed by three regimes: firstly, under Chapter VII of the UNC, as tools of the SC; secondly, as a form of self-help or retorsion, possibly to

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<sup>177</sup> Hufbauer and Elliot, 'Sanctions will Bite - and Soon', *N.Y. Times*, 14 January 1991, A17.

<sup>178</sup> Although there seems to be no practical difference between the use of force that results in the death of five thousand civilians and the starving, through economic blockade, of the same five thousand; my gratitude to Prof. C. Chinkin for pointing out this obvious proposition.

<sup>179</sup> Dupuy, international law, at 125.

<sup>180</sup> *Air Services Agreement case*, (France v. US) (1978), 18 R.I.A.A. 416, para. 81, the application subjected to proportionality (at para. 83) and the general duty not to aggravate the dispute (at para. 85). See also, *Nahlilaa Case* (1928), 2 R.I.A.A. 1011.

<sup>181</sup> Riphagen, Fifth Report of the ILC on State Responsibility, Article 10; UN Doc. A/CN.4/380 and Corr. 1 (1984), this means that it follows from an international wrongful act, Article 9(1) and (2), ILC Draft Articles; Brownlie, principles, at 466 and 538, note 99; and Tunkin, theory, at 422.

<sup>182</sup> Brownlie, principles, at 466 and 538, note 99.

secure arbitration or to protect legal interests;<sup>183</sup> and sanctions which are a right of the injured state, apart from any rights to reparation.<sup>184</sup> Sanctions may also be imposed by other organisations, for example the OAU and the EU.<sup>185</sup>

Sanctions would be applicable against a delinquent state for the violation of international law relating *inter alia* to racial discrimination and the practice of colonialism, which are principles enshrined under the UNC.<sup>186</sup> The violation of such principles under the Charter came under the jurisdiction of the UN, which could apply the spectrum of measures granted under the Charter if it determined a threat to international peace.<sup>187</sup> But more significantly, Tunkin acknowledged that individual states also had a 'right to react against this kind of violation of international law', although he does not define the types of 'pressure', or whether they would have to relate to compensation for damages.<sup>188</sup> It would therefore seem that where alleging a violation of international law in the strand of a violation of a Charter, unilateral action may be permissible, although the exact nature of the action is controversial.<sup>189</sup>

There is possible danger that, '... starting with the diversification of regimes of responsibility for different kinds of wrongful acts, a tendency may appear to confuse distinct legal institutions and give rise to uncontrolled reactions or initiatives taken in the name of defence of law and order but in reality aimed at satisfying very narrow national interests.'<sup>190</sup> Self-help counter-measures, such as economic sanctions, are not necessarily

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<sup>183</sup> *Air Services Agreement Case* (France v. US) (1978), 18 R.I.A.A. 416.

<sup>184</sup> Brownlie, state responsibility, at 34.

<sup>185</sup> White, N.D., 'Collective Sanctions: An Alternative to Military Coercion?' (1994) XII (3) *International Relations* 75, at 86-87 (OAU analysed), and at 87-88 (EU analysed).

<sup>186</sup> Tunkin, theory, at 423.

<sup>187</sup> *Ibid*, at 424; UNC, Chapter VII.

<sup>188</sup> *Ibid*; although Tunkin noted earlier that sanctions responding to international delicts related to compensation.

<sup>189</sup> An example of unilateral action within a domestic statute that applies sanctions against a state alleged to cause massive human rights violations is in the LIBERTAD Act of 1996, particularly Title II.

<sup>190</sup> Dupuy, international law, at 126. For example, it may be argued that the US, which applies economic sanctions as a foreign policy is governed by the economics of 'plutocracy', not democracy - designed to further enrich the rich in the US, Brizuelas, A.P., 'Blockade: An economic neutron bomb', PNEWS, 23 March 1995. Copy with author.

the best means to redress a situation.<sup>191</sup> At the end of the day, they may be perceived as bullying tactics, the application of economic force by one state upon another to fulfil the self-interest of the economically more powerful state. It does not matter if this practice is permitted in law, it seems nevertheless to be analogous to the acts of vigilantism in domestic law. Where a situation exists for one state to apply such pressure over another state, without the provision of natural justice concerns, then the state applying force is both judge and jury in its own concern. Allot claims, '[t]o place the concept of countermeasures at the very heart of legal responsibility, at the very heart of the character of a legal system, is thus to elevate to a position of high dignity one of society's least dignified and least sociable aspects. To do so in international law is to condemn international society to be what it is.'<sup>192</sup> As a statement of indictment, it is true the concept of counter-measures may be distasteful, but so are the instruments of war and the use of force. The use of economic sanctions may still be a preference over armed force, whilst acknowledging that it is not the ideal state-of-affairs to aspire to, but it may - in present day context - be the lesser evil.<sup>193</sup>

The initial aim of the sanctions against Iraq was to weaken its hold on Kuwait, and later it was for the purpose of securing compliance to disarm and compensate.<sup>194</sup> However, the effects of the sanctions have been to cause suffering on the Iraqi population, particularly malnutrition and diseases.<sup>195</sup> With respect to the sanctions imposed on Haiti, former US ambassador Ernest Preeg commented that the international embargo imposed on Haiti between 1991 and 1994 was 'a devastating, catastrophic error', which adversely affected the labour intensive textile and electronic assembly plants in a country of high birth rate and employment shortage.<sup>196</sup> It seems clear that sanctions do not point directly at the persons

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<sup>191</sup> See generally, Bowett, D.W., 'Economic Coercion and Reprisals by States' (1972) 13 Va. J. Int'l. L. 1.

<sup>192</sup> Allott, *supra*, at 24.

<sup>193</sup> On the issue of counter-measures, see generally, Arangio-Ruiz, G., 'Counter-Measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility: A Crucial Issue before the International Law Commission' (1994) 5 Eur. J. Int'l. L. 20; Crawford, J., 'Counter-Measures as Interim Measures' (1994) 5 Eur. J. Int'l. L. 65; and Schachter, O., 'Dispute Settlement and Countermeasures in the International Law Commission' (1994) 88 Am. J. Int'l. L. 471.

<sup>194</sup> From SC Res. 661, 6 August 1990, to Res. 666, 13 September 1990, White, *supra*, at 77.

<sup>195</sup> White, *supra*, at 77; Keesing's Record of World Events, 1991, at 38597 and 38696, and 1993, at 39391; note further, Damrosch, 'The Civilian Impact of Economic Sanctions', in Damrosch, L.F. (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993).

<sup>196</sup> Elliott and Katel, 'Completing the Haiti Handoff', *Newsweek*, 10 April 1995, 37.

responsible,<sup>197</sup> and the effects of sanctions are indiscriminate of the innocence, guilt or wrongful conduct of the individuals within the state. The moral basis of applying sanctions draws two tensions. On the one hand, no other peaceful means may exist to enforce the law, and on the other, the application/effects are too indiscriminate and are tantamount to blackmail. This provides an argument for the specific subjugation of the regime, and not the people of the state. For example, the people in Iraq do suffer much indignation under their government, yet the application of economic sanctions exacerbates that indignation, without relieving their plight. Should the measures not be directed against those who cause the suffering? Do we expect the members of the Iraqi government to really care how much their people are suffering?

The legitimacy in applying sanctions may be questioned on four grounds, namely that sanctions: violate the human rights of the people within the state;<sup>198</sup> violate the right to economic development on the whole; may only be used by those with industrialised economies, which are inevitably the richer states; and amount to a perception of bullying on an international scale.<sup>199</sup> On the other hand, White concluded that given sufficient time and effective implementation, sanctions are a good alternative to the use of armed force, except in situations of an act of aggression and ‘... may help to achieve collective security aims.’<sup>200</sup> The use of sanctions are at present based on decisions that have not the necessary safeguards of judicial decision making processes.<sup>201</sup> Natural justice, due process and other such judicial checks and balances may be totally disregarded, with dire consequences. The usefulness of sanctions should not be entirely disregarded, as there is the potential of developing a system of review of such applications.<sup>202</sup> Sanctions may also be a potential

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<sup>197</sup> White, *supra*, at 78.

<sup>198</sup> UNHCR, *state of the world's refugees*, at 140, recounting the fact that the UN sanctions imposed on Serbia and Montenegro have directly affected refugees and other vulnerable groups.

<sup>199</sup> See generally, Davidson, ‘Ten myths about sanctions’, *PNEWS*, 25 March 1995. Copy with author.

<sup>200</sup> White, *supra*, at 91.

<sup>201</sup> For example, SC Res. 1054, April 1996, imposes sanctions on Sudan for allegedly supporting terrorists.

<sup>202</sup> For example, there have been recent interest concerning the possible review of SC action, whether on the use of force or sanctions, primarily emanating from the interim decision of the ICJ in the *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (Libya v. UK), Request for the Indication of Provisional Measures, General List No. 89, and (Libya v. US), Request for the Indication of Provisional Measures, General List No. 88 (Order of 14 April), 1992; see generally, Alvarez, J.E., ‘Judging the Security Council’ (1996) 90 *Am. J. Int'l. L.* 1;

tool for enforcement action against an individual violator's assets. For example, the Carnegie Commission on the Prevention of Deadly Conflict in 1996 found that arms embargoes and the freezing of financial assets of recalcitrant elites were significant measures that could be used as an expression of the collective will of the international community. Thus, sanctions applied through judicial means, identifying the individuals who violate human rights and attaching their assets for judgement, may provide a good means of enforcing international law.<sup>203</sup>

### 5.5.3 Action to Remove a Government

The hardship suffered by Iraqi citizens is arguably the result of the regime's refusal to co-operate with the UN.<sup>204</sup> If blame rests on the regime, it becomes illogical not to be able to remove it and impose democracy, such as in Haiti and Panama. Generally applied sanctions affect the people more than the culprits. Attribution of blame and accountability should be directed at those who make decisions and those who implement state policy. Makau Wa Mutua claimed that one common factor of despotic leadership in Africa is 'the deep and inexplicable hatred and contempt for their fellow citizens.'<sup>205</sup> They consumed conspicuously the bulk of the nation's resources', including foreign aid, to arm and equip security forces to maintain their power structures.<sup>206</sup> Coles noted, the 'immorality and illegality' of mass expulsion and denationalisation in the days prior to the UN was

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Bowett, D., 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 Eur. J. Int'l. L. 89; Reisman, W.M., 'The Constitutional Crisis in the United Nations' (1993) 87 Am. J. Int'l. L. 83; Watson, G.R., 'Constitutionalism, Judicial Review, and the World Court' (1993) 34 Harv. Int'l. L.J. 1; Gowlland-Debbas, V., 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 Int'l. & Comp. L.Q. 55; Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the *Lockerbie Case*' (1994) 88 Am. J. Int'l. L. 643; Caron, D., 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 Am. J. Int'l. L. 552; and Franck, T.M., 'The 'Power of Appreciation': Who is the Ultimate Guardian of UN Legality?' (1992) 86 Am. J. Int'l. L. 519; see also, Weston, B.H., 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 Am. J. Int'l. L. 516; and Wright, Quincy, 'The Legality of Intervention Under the United Nations Charter' (1957) Am. Soc'y. Int'l. L. Proc. 85.

<sup>203</sup> Discussed further section 5.7, 'Empowering the Individual to Enforce International Norms'.

<sup>204</sup> SC Res. 706 and 712 would have generated funds from the sale of petroleum, thus refusing the offer caused the shortage of food and medical supplies.

<sup>205</sup> Makau Wa Mutua, 'The Interaction between Human Rights, Democracy and Governance and the Displacement of Population' (1995) Int'l. J. Refugee L. - Special Edition 37, 41.

<sup>206</sup> *Ibid.*

permitted, because on the political level, ‘the overriding concern [was] to appease rising and menacing powers.’<sup>207</sup> The concept of sovereignty should now reflect the reality of changing imperatives. The days of absolute power of those in control of the state are gone, and the indisputable determination of government leaders is no longer the norm. Sovereignty, as Reisman puts it, now means popular sovereignty,<sup>208</sup> and not some ‘metaphysical abstraction called the state.’<sup>209</sup>

Makau Wa Mutua wrote that the nature and blame for the under-development of Africa generally, and its economic collapse, can be attributed to the political elite, who have been assisted by foreign governments.<sup>210</sup> Although it is accepted that the origins of oppression lie with colonialism and the slave trade, the perpetuation of oppression found its base in the self-interest and greed of those in power, who strive to maintain their position at all costs.<sup>211</sup> He recognised that democracy may not be the best form of governance, but dictatorship provides clear problems and is claimed to be the single most dominant cause of hardship and displacement.<sup>212</sup> Several other commentators have observed similar trends, where hardship leading to displacement are caused. For example, where resentment and tension was created by post-colonial governments seeking ‘life presidency’,<sup>213</sup> and where history has documented that ‘certain government policies and acts lead to people finally leaving their homes and country.’<sup>214</sup> Whether addressing ultimate or proximate causes of forced migration, much ‘blame’ clearly rests on state authorities, and that most of the 25 million estimated internally displaced persons ‘live under the normal jurisdiction of

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<sup>207</sup> Coles, 1992 study, at 37.

<sup>208</sup> Reisman, W.M., ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) 84 Am. J. Int’l. L. 866, 869; and Reisman, ‘Coercion and Self-Determination: Construing Charter Article 2(4)’ (1989) 78 Am. J. Int’l. L. 642.

<sup>209</sup> Reisman, ‘Haiti and the Validity of International Action’ (1995) 89 Am. J. Int’l. L. 82, 83.

<sup>210</sup> Makau Wa Mutua, *supra*, at 38-9.

<sup>211</sup> *Ibid*, at 40-41; see also, Panjabi, R.K.L., ‘International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis’ (1991) 10 Dick. J. Int’l. L. 1, 3, who claims that democracy and human rights depends on the ruler who inherited power post-colonialisation.

<sup>212</sup> *Ibid*, at 42; and Panjabi, *supra*, at 3, who although not equating democracy with human rights, claims that ‘... a democratic system of government is the best possible guarantor of the implementation and acceptance of human rights...’.

<sup>213</sup> Dieng, *supra*, at 124-5.

<sup>214</sup> Feliciano, F.P., ‘International Humanitarian Law and Coerced Movements of Peoples Across State Boundaries’ (1985) 9 Austl. Yrbk. Int’l. L. 113, 116.

governments that are directly or indirectly a primary cause of the human rights violations they experience.<sup>215</sup>

There are several theoretical justifications that compliment the observations that some governments should be removed, although the main controversies are whether the use of force is permitted, and whether it violates the principle of non-intervention in the domestic affairs of a state. There would be good grounds for advocating the removal of a despotic government, if the people within a state are perceived as the state itself, and the government as merely an organ of the state. D'Amato suggested that, '[i]n a sense the state is the physical manifestation of the collective rights of the people who have lived in it, who are living in it, and who will be born within its territory.'<sup>216</sup> Yet, '... the state is [also] more than the sum of its parts.'<sup>217</sup> Therefore although the rights of the individual are recognisable and important, they are not supreme at all costs and must succumb to certain other rights, such as the rights of future persons born within the territory.<sup>218</sup> D'Amato does not make clear what other interests would override the individual's rights or in what circumstances, but it seems obvious that incitement to racial discrimination would override the freedom of speech. In line with this proposition is the argument that the removal of leaders is permissible where they do not represent the 'legitimate aspirations of their people', but who wish to cling to power at all cost.<sup>219</sup> D'Amato's observations emphasise that it is the people - past, present and future - that make up the state.

A further proposition may be suggested to support the contention that state organs and the state are separate entities and that the former could lose its legitimacy to govern the latter. The nationality requirement in the regime of responsibility for injury to aliens may be interposed to this end. The law concerning responsibility for injury to aliens is based on the

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<sup>215</sup> Deng, *protecting the dispossessed*, at 13.

<sup>216</sup> *Ibid*, at 8.

<sup>217</sup> *Ibid*.

<sup>218</sup> D'Amato, *relation of the individual*, at 7, who analysed Hegel's trichotomies and suggested that a state is 'translucent' because '[t]he people in the state do not constitute and cannot claim the totality of the rights in the state; this is partly because the state also incorporates rights of people who have lived in the past and people who will live in the future, and partly because the mere sum of the individuals in the state does not fully account for the way those people behave.'

<sup>219</sup> *Ibid*, at 11, arguing that Article 2(4) will not provide a blanket cover against external intervention.

violation of international law, when an alien is injured, and equating that injury to an injury of the state itself.<sup>220</sup> The injury or treatment of the alien is the basis of a claim by the state of nationality against the violating state. Conversely, where an agent of the state causes injury to a national of that same state, then the injury is also done to the state. Therefore, a regime that deliberately injures the nationals of the state loses its legitimacy to govern the state and is subject to accountability, internally and externally.<sup>221</sup> This is logical where the individuals make up the basic premise of the state, as according to Reisman, D'Amato and Sohn.<sup>222</sup>

The removal of a government is generally a complex time-consuming procedure which is usually intermingled with armed struggles or acts of terrorism.<sup>223</sup> The situations in Cambodia or Haiti did not occur overnight, but are products of much negotiation, mediation, threats, sanctions and direct UN intervention. In a situation of civil unrest, for example Algeria, intervention by the international community on behalf of the citizens could be directed against both the terrorists and the authorities, for not having a *bona fide* election.<sup>224</sup> One clear classification is that this might possibly be a civil war of a particularly erratic nature, the intervention of which would probably be unwelcome, but may be applied for the benefit of the community as a whole.

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<sup>220</sup> de Arechaga, *supra*, at 553, discussing the denial of justice as a catalyst for states to protect their nationals; Oda, in Sorensen (ed), manual, at 483-489, discussing the rights of aliens and consequent claims where expropriation occurs; Brownlie, principles, at 480-494, discussing the nationality link for international claims; and note generally, Lillich (ed), *International Law of State Responsibility for Injury to Aliens* (1982); and Garcia-Amador, Sohn and Baxter (eds), *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974).

<sup>221</sup> This proposition, based on an assumption that the citizens of the state make up the state, whilst the individuals who are the authorities are merely organs of the state, has judicial support. In *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1361 (1988), the Ninth Circuit found that Marcos was '... not the state, but the head of state, bound by the laws that applied to him.'

<sup>222</sup> Reisman, W.M., 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 Am. J. Int'l. L. 866; D'Amato, relation of the individual; and Sohn, L.B., 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am. U. L. Rev. 1.

<sup>223</sup> For example in Algeria, civil unrest is perpetuated by and the consequence of armed Islamic groups using terrorist tactics combined with a ruthless, secular government that does not shy from using armed force, and the victims are both rich and poor, young and old, muslims and non-muslims, tourist and local inhabitants. Since 1992, it is estimated that some 30,000 people have been killed. Nora Boustany, 'Slaughtered thousands are eloquent on the human cost of Algeria's unholy civil war', *The Guardian*, 7 March 1995, 11

<sup>224</sup> *Ibid*, in January of 1992, the militant Muslim party were on the verge of winning control of the legislature in Algeria, when the government cancelled the elections.

Is it permissible to use force to remove a despotic government? This issue causes much controversy. In 1984, Reisman argued that the use of force to overthrow a despotic government was permissible, because of the current weakness of the UN system and the failure of the collective security regime.<sup>225</sup> Schachter on the other hand, citing the work of McDougal and Feliciano,<sup>226</sup> who were clearly against totalitarian rule, nevertheless rejected the use of force to install democracy.<sup>227</sup> Without arguing the ‘just war’ situations, it should be noted that the very existence of the UN came about from a world war, where violence was the main tool to (arguably) maintain human dignity, and to overthrow a totalitarian (Nazi) regime. Thus in fact, to some extent, violence to maintain human dignity may be the lesser of the evil to not doing anything. Schachter forcefully argued that the use of force is not permissible because it would violate the Charter and would, in fact, be creating a new recourse to war.<sup>228</sup> He claimed, ‘[t]he world will not be made safe for democracy through new wars or invasions of the weak by the strong.’<sup>229</sup> Although the removal of recourse to unilateral armed force (except in self-defence) is clear since the League of nations,<sup>230</sup> action under the UN, direct or indirect, is permissible.<sup>231</sup>

It may be possible to take a high moralistic ground whilst judging another government and assessing their failures. Yet on a more basic assumption, where ‘any government that fails to provide the most fundamental rights for major segments of its population can be said to have forfeited sovereignty, and the international community can be said to have a duty in those instances to re-establish it.’<sup>232</sup> Examples of governments or leaders that have been removed or denied legitimacy are Karadzic from the former

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<sup>225</sup> Reisman, W.M., ‘Coercion and Self-Determination: Construing Charter Article 2(4)’ (1984) 78 Am. J. Int’l. L. 642-45.

<sup>226</sup> McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), 188 and 189; ‘Any violent expansion involves a destruction of values incompatible with the overriding conception of human dignity.’ (at 188).

<sup>227</sup> Schachter, O., ‘The Legality of Pro-Democratic Invasion’ (1984) 78 Am. J. Int’l. L. 645, 648.

<sup>228</sup> *Ibid*, at 649.

<sup>229</sup> *Ibid*, at 650.

<sup>230</sup> Sohn, L.B., ‘The New International Law: Protection of the Rights of Individuals Rather than States’ (1982) 32 Am. U. L. Rev. 1, 5.

<sup>231</sup> Note, M. Goulding, *supra*.

<sup>232</sup> Deng, protecting the dispossessed, at 140.

Yugoslavia, Noriega from Panama, the military regime in Haiti, the Smith government in Rhodesia, and the Hen Sen regime in Cambodia. In practice, states apply unilateral sanctions against the regimes they wish to remove. For example, the LIBERTAD Act has as one of its specific aims the removal of the Castro regime and for free democratic elections to be held.<sup>233</sup> The removal of a government in some circumstances may be a necessary prelude to the introduction of justice. For example, Dadrian claimed that the prosecution of mass murder in Armenian courts was the first time mass murder was designated an international crime and adjudicated under domestic penal codes.<sup>234</sup> However, the basic failure of the Turkish prosecutions was due to the fact that Turkey remained intact and was still governed by the same regime, thus it was difficult to secure prosecutions against itself.<sup>235</sup>

Although coercive action and action to remove despotic governments may seem to be one of the more effective means of removing the cause of forced migration, their application does produce oppression and violence, and they cannot be advocated by this author without some hesitation. Perhaps other non-violent means may be proposed as alternatives to coercive measures, namely a system that provided a civil remedy against such despots. Where they have caused an injury or the loss of property, then they have committed a tort, even if that tort is committed in the process of violating human rights or other norms of international law. However, caution must be exercised in the identification of blame, as it would be undesirable to absolve a state by implicating a few individual 'pawns'. The paramount issue in international law, is whether jurisdiction may be asserted to provide such domestic measures for the individual enforcement of violations of international law.

## 5.6 JURISDICTION TO ESTABLISH DOMESTIC MEASURES

Having established the legal interest to act in respect of occurrences of forced migration and having investigated the possible inter-state activities, the next issue is

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<sup>233</sup> See LIBERTAD Act, Title II generally.

<sup>234</sup> Dadrian, *supra*, at 292.

<sup>235</sup> *Ibid*, at 313.

whether jurisdictional competence exists for states to establish domestic measures from which individuals may be empowered to litigate violations of international human rights. Inter-state action may provide useful solutions in the international plane. However, establishing domestic measures may have the potential of specifically providing individuals the forum to assert the rights bestowed under international law. What can a state do to assert its legal interest and on which principle of jurisdiction can it base this assertion? It may seem incredible for a state to assert competence to legislate on activities that occurred outside its territory, between actors which may have no obvious nexus of nationality or consequence of harm, concerning violations of international law which are, arguably, laws between states. On what basis might a violation of international norms be enforced or litigated in the domestic sphere?

Essentially, the claim of jurisdiction is basically a 'state's legitimate assertion of authority to affect legal interests.'<sup>236</sup> Jurisdiction is generally based upon five principles: territoriality, where harm occurs on the claimant state; nationality, where the offender is a national or resident in the claimant state; protective, where the harm threatens the vital interest of the claimant state; passive personality, where the victim is a national of the claimant state;<sup>237</sup> and the universality principle, where the crimes or harm violate universal rules allowing all states to bring a claim.<sup>238</sup> Although the basis of jurisdiction is usually the territoriality,<sup>239</sup> the protection of forced migrants will necessitate a discussion concentrating

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<sup>236</sup> Randall, K.C., 'Universal Jurisdiction Under International Law' (1988) 66 Tex. L. Rev. 785, 786, who discusses universal criminal jurisdiction; see also, Schachter, *International Law in Theory and Practice* (1991), 240-265; Akehurst, jurisdiction, at 152-157; and generally, Bowett, 'Jurisdiction: Changing Patterns of Authority Over Activities and Resources' (1982) 53 Brit. Yrbk. Int'l. L. 1; and Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 113 Recueil des Cours 1.

<sup>237</sup> Although the status of this principle is doubtful in international law, Paust, J.J., 'Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine' (1983) 23 Va. J. Int'l. L. 191, 201-202 (hereinafter, Paust, federal jurisdiction).

<sup>238</sup> Sahovic, M., and Bishop, W.W., 'The Authority of the State: Its Range with Respect to Persons and Places', in Sorensen (ed), manual, 313, at Chapter X; and Higgins, problems and process, at 56-77.

<sup>239</sup> Territorial sovereignty forms the foundation for the territoriality principle, although acts committed by foreign nationals with consequent effects in the US has been found to provide sufficient grounds for claiming jurisdiction, see *United States v. Watchmakers of Switzerland*, 133 F. Supp. 40 (1955); 134 F. Supp. 710 (1955). However, Jennings, 'The Limits of State Jurisdiction' (1962) 32 Nordisk Tidsskrift for Int'l Relations at 225, noted that this was the practice of the US and does not reflect international law.

on the universal principle.<sup>240</sup> The assertion of jurisdictional competence may be legislative, executive or judicial, whether or not they have an extraterritorial effect.<sup>241</sup> Although the jurisdictional bases are often overlapping claims in contentious issues,<sup>242</sup> universal jurisdiction is perhaps the most effective where violations of human rights are concern, particularly where it involves transboundary or internal movements. As Tunkin noted,

‘[t]he legal consequences of violating norms of international law take many forms and may affect not only the offending state, but also the injured state, other states, and international organizations. Such consequences may, for example, depending upon the character of the breach include the duty of the offending state to compensate for the damage caused; the right of the injured state to apply enforcement measures permitted by international law against the offending state; the right of other states to render assistance to the injured state; and perhaps the duty of an international organization to undertake certain actions against the offending state.’<sup>243</sup>

Because of the consequences of such violations, jurisdiction to take measures for the protection and promotion of human rights according to international law thus needs to be founded on the basis of international principles, and possibly the combination of universal jurisdiction, national interests for the observance of international obligations, and obligations *erga omnes*. Brownlie confirmed that as a general proposition, a genuine link between the subject-matter of jurisdiction, the territorial base and a reasonable interest of the jurisdiction sought should be observed.<sup>244</sup>

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<sup>240</sup> Primarily because causing internal displacement does not generally harm another state, whilst to equate transboundary movements as a ‘harm’ to another state is avoidable, see above section 4.8, ‘Advocating Against International Responsibility’, besides, a population that moves to a state without the capacity to provide measures for their protection will still rely on a state who has not been ‘harmed’ by the influx.

<sup>241</sup> For example, the Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD Act) affects other states affairs, domestic and international, and it intermeddles with executive and judicial jurisdictions of other states, because the enforcement of the legislation requires extraterritorial effects.; Rodgers, P. and Marshall, A., ‘America likes its laws to have a long arm’, *The Independent*, 12 July 1996, 13, commenting on the LIBERTAD; and Black, I., ‘Britain confronts US over Cuba law’, *The Guardian*, 12 July 1996, 13; and Black, I., ‘Sanctions bill likely to infuriate EU’, *The Guardian*, 18 July 1996, 13.

<sup>242</sup> For example in the LIBERTAD Act, Congress justified the Act on national security grounds, as well as the consistent massive violations of human rights in Cuba, Title I, section 3.

<sup>243</sup> Tunkin, theory, at 382; also note Ago, Second Report on State Responsibility, [1972] ii Yrbk. I.L.C. 177-97.

<sup>244</sup> Brownlie, principles, at 298.

### 5.6.1 Universal Jurisdiction as a Basis

It is proposed that the doctrine of universal jurisdiction would provide the basis for state action when asserting its legal interest concerning forced migrants. Whether it legislates on international issues, or hears civil or criminal proceedings on international law issues, a state has to assert jurisdictional competence to legitimise its processes. The universality principle could possibly act to provide jurisdiction to legislate and provide measures to hear both civil and criminal cases.<sup>245</sup>

The universality principle in criminal cases was initially claimed to try pirates,<sup>246</sup> and later, for war crimes.<sup>247</sup> Multilateral treaties also specifically provided for criminal jurisdiction according to the universal principle.<sup>248</sup> Sometimes the enabling instrument was specific on the application of the universal jurisdiction, for example in some conventions, the state has to make domestic provisions for the prosecution of an offender who is a foreigner, where the offender was in the jurisdiction even if the offence was committed abroad.<sup>249</sup> Not all states recognise the universality principle for jurisdiction in criminal cases.<sup>250</sup> Thus much depends on the domestic legislation of the state claiming jurisdiction.<sup>251</sup> The universal principle was invoked in the Eichmann trial,<sup>252</sup> as the nationality and territoriality principles could not apply. Neither the victims nor the

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<sup>245</sup> For criminal jurisdiction see, Randall, K.C., 'Universal Jurisdiction Under International Law' (1988) 66 Tex. L. Rev. 785; Dinstein, 'International Criminal Law' (1975) 5 Israel Yrbk. Hum. Rts. 55, 55-68; and Green, 'International Crimes and the Legal Process' (1980) 29 Int'l. & Comp. L.Q. 567, 568-70 and 573-75.

<sup>246</sup> *Re Piracy Jure Gentium* [1934] A.C. 586, 589.

<sup>247</sup> *Attorney-General of Israel v. Eichmann (Eichmann case)* (1961-2) 36 I.L.R. 26-42, 289-304.

<sup>248</sup> For example, Article 14, International Penal Law Treaty of Montevideo, on white slavery.

<sup>249</sup> For example, Article 5, Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

<sup>250</sup> Akehurst, jurisdiction, at 164.

<sup>251</sup> The reason why some states, mainly the UK, US and France, deny the principle, is because they feel the process of justice in penal regulation from some states is inferior to their own and thus their nationals might not receive the same standards of justice as in their own territory. Yet this same argument would not be possible in a civil situations. Sunga, *supra*, at 115, therefore claims that 'the legal status of universal jurisdiction as a norm of international law is questionable.'

<sup>252</sup> Although Lippman believed this was inappropriate, Lippman, *supra*, at 31; Eichmann was forcibly abducted from Argentina and stood trial under the 1950 Nazi and Nazi Collaborators (Punishment) Law (Israel).

defendant were nationals, for the offences took place before Israel came into existence.<sup>253</sup> According to Sunga, it is the serious nature of human rights violations, and the fact that it is committed within the territory of the offending state, that justifies universal jurisdiction against the individual.<sup>254</sup> The application of universal jurisdiction by the Nuremberg Tribunal was similarly based upon the nature of the offences, and not the *locus delicti*.<sup>255</sup> Sunga suggested that the Court in the *Eichmann case* had compared the seriousness of crimes against humanity with piracy, thereby providing a justification for universal jurisdiction because crimes against humanity is even more serious.<sup>256</sup> Criminal jurisdiction, in domestic courts, is already provided for under international agreements and customary international law.<sup>257</sup> Universal jurisdiction is also provided under several other agreements for drug-trafficking,<sup>258</sup> torture,<sup>259</sup> and the prohibition of the taking of hostages.<sup>260</sup>

For civil cases, it is claimed international law does not generally object to the assertion of jurisdiction. Jurisdiction has been claims from the mere presence of the defendant, even temporary presence; on *forum patrimonii*, where the assets are; and on the basis of domicile or residence.<sup>261</sup> Akehurst claims that even the practice of alien tort claims, the jurisdiction to sue in tort for an act committed between foreigners in a foreign state, is acceptable because states have not objected on jurisdiction grounds.<sup>262</sup> Thus Akehurst concludes that apart from immunity, customary international law imposes no restrictions on

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<sup>253</sup> Sunga, *supra*, at 108-9.

<sup>254</sup> *Ibid*, at 103.

<sup>255</sup> *Ibid*, at 107.

<sup>256</sup> *Ibid*, at 110; although Sunga notes piracy is based upon *locus delicti*, whilst crimes against humanity is not.

<sup>257</sup> For example, each of the four 1949 Geneva Red Cross Conventions contains a clause that provides criminal jurisdiction irrespective of nationality, where persons have committed, alleged to have committed or ordered the commission of grave breaches, 75 U.N.T.S. 3; A grave offence may be for example, 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly', Article 49, First Geneva Convention.

<sup>258</sup> Single Convention on Narcotic Drugs 1961, Article 36(2)(iv), 520 U.N.T.S. 204; and the Convention against Illicit Traffic in Narcotic Drugs 1988, Article 4(2)(b).

<sup>259</sup> The UN Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 5(2), 24 I.L.M. 535.

<sup>260</sup> International Convention against the Taking of Hostages 1979, Article 5.

<sup>261</sup> Akehurst, jurisdiction, at 170-72.

<sup>262</sup> *Ibid*, at 176-77; and Steinhardt, *supra*, at 77, note 59.

municipal courts in civil trials.<sup>263</sup> In the case of *Filartiga*, the Second Circuit held that ‘.. for purposes of civil liability, the torturer has become - like the pirate and slave trader before him - *hostis humani generis*, an enemy of all mankind.’<sup>264</sup> Thus one interpretation of that statement is that the liability of such wrongdoers followed them wherever they might find themselves, irrespective of where the wrong was committed and whether or not there was sufficient connection with the forum state.<sup>265</sup> This concerns the doctrine of ‘transitory torts’,<sup>266</sup> the notion that a tortfeasor’s wrongful act creates an obligation that transcends international boundaries.<sup>267</sup>

The only condition is that the elements of *forum non conveniens* are satisfied,<sup>268</sup> whether the act of state doctrine applies to exclude competence, and whether sovereign immunity would be applicable.<sup>269</sup> *Re Estate of Marcos*, confirmed that the prohibition of torture was a norm of *jus cogens*,<sup>270</sup> that personal jurisdiction did have to be applied in a suit,<sup>271</sup> and that the doctrine of *forum non conveniens* did apply to the ATS.<sup>272</sup> The issue of

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<sup>263</sup> Akehurst, jurisdiction, at 177.

<sup>264</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d. Cir. 1980).

<sup>265</sup> Blum, J.M. and Steinhardt, R.G., ‘Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Pena-Irala*’ (1981) 22 Harv. Int’l. L.J. 53, 61.

<sup>266</sup> The court in *Re Estate of Marcos* confirmed that the ATS did provide a forum for ‘transitory torts’ which is described as a ‘tort action which follows the tortfeasor wherever he goes’, (1993) 32 I.L.M. at 113. The ATS may have been intended to remove the claim of a denial of justice by permitting aliens to sue for a tort committed within the jurisdiction of the US, however the plain language of the ATS seems to provide jurisdiction for torts committed outside the US, Randall, federal jurisdiction, at 60-61, note 293; and D’Amato, ‘The Alien Tort Statute and the Founding of the Constitution’ (1988) 82 Am. J. Int’l. L. 62, 66.

<sup>267</sup> Blum and Steinhardt, *supra*, at 63, who claim the exercise of jurisdiction will be proper where personal jurisdiction is obtained over the defendant, the act violates the law of the *situs* state, and policies of the forum state are consistent with the foreign laws.

<sup>268</sup> Where the tort is committed outside the jurisdiction, due process may require the element of minimum contacts between the defendant and the forum state, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), (although a domestic federal case) so as not to violate traditional notions of fair play and justice, and that it is reasonable to expect the defendant to attend suit in the forum (at 317), although mere presence in the forum is sufficient (at 316); applied in *Shatter v. Heitner*, 433 U.S. 186, 212 (1977), where mere presence in the forum state was sufficient, but fairness has to be applied for due process; also, Randall, federal jurisdiction, at 64-65; Steinhardt, *supra*, at 90-92; and further, Barrett, ‘The Doctrine of Forum Non Conveniens’ (1947) 35 Cal. L. Rev. 380.

<sup>269</sup> The difficulties with the concept of immunity and act of state doctrine where enforcement is favoured in domestic courts will be discussed further below section 5.8, ‘Hurdles Complicating the Application of Domestic Measures for Individuals’.

<sup>270</sup> Article 53, Vienna Convention of the Law of Treaties; and Section 102, Third Restatement.

*forum non conveniens* does provide some contention where the doctrine of due process is concerned.<sup>273</sup> When would there be sufficient contacts to satisfy the minimum contacts rule? In so far as US domestic law is concerned, the Supreme Court has held that the mere presence of a person within a state is sufficient to gain personal (transient) jurisdiction.<sup>274</sup>

In a sense, whether a state should pursue an action for compensation from the violating state, or allow an action by and against individuals, is debatable. It may be claimed that the state is ultimately responsible, rather than the individual who honestly believed he was doing his duty ignorant of international law.<sup>275</sup> On the other hand, holding the individual responsible attaches accountability directly to its human source. Using inter-state action requires responsibility to a state entity and may not recognise the wrong done to or by individuals. Allowing individuals to seek remedies recognises the inherent interests of the individuals who have been injured or wronged *in persona*, against the individual who has done the wrong.<sup>276</sup>

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<sup>271</sup> Example of service of process to achieve personal jurisdiction, see *Karadzic*, generally; and Lininger, T., 'Overcoming Immunity Defences to Human Rights Suits in U.S. Courts' (1994) 7 Harv. Hum. Rts. J. 177, who notes, Hector Gramajo was served at graduation ceremony at Harvard University and Sergio Arvendondo where service of process was attempted at an equestrian event, but fled, although a pre-judgement attachment was made to his prize horse; and Kane, M.K., 'Suing Foreign Sovereigns: A Procedural Compass' (1982) 34 Stan. L. Rev. 385, 396-410, discussing personal jurisdiction.

<sup>272</sup> (1993) 32 I.L.M. at 112-113; also *Karadzic*, (1995) 34 I.L.M. at 1614, noting that the courts in the former Yugoslavia were unable to entertain the claimant, but did consider the issue of *forum non conveniens*.

<sup>273</sup> Kane, *supra*, at 410-412.

<sup>274</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878); *Brilmayer, L., et. al.*, 'A General Look at General Jurisdiction' (1988) 66 Tex. L. Rev. 721, 750, note 145, where the US courts have consistently found that mere presence was sufficient; Locke, J., *The Second Treatise of Civil Government* (Cook ed. 1947), 181-182, who postulated the theory that the individual's mere presence implied a submission to the authority of the government where his physical presence is found; and Kane, *supra*, at 402-407.

<sup>275</sup> Akehurst, jurisdiction, at 243; and Steinhardt, *supra*, at 100-101, who deals with the issues of 'command' responsibility, knowingly and ought to have known.

<sup>276</sup> A proposition that states have the right to establish appropriate civil remedies is confirmed by the Third Restatement, section 404.

## 5.7 EMPOWERING THE INDIVIDUAL TO ENFORCE INTERNATIONAL NORMS

The violation of international law in causing forced migration inevitably affects the interests of individuals.<sup>277</sup> Individuals, whether as a group or not, suffer the consequence of unlawful action by states or organs of the state. These actions are perpetuated by individuals, whether directly authorised by state organs, or done as private individuals then affirmed or accepted by state authorities. Because the use of force or generally applied economic sanctions produce their own brand of suffering on the human person, empowering the individual to bring specific claims may pose a viable alternative, to such coercive inter-state actions. Theo van Boven recommended that, ‘... victims themselves or, where appropriate, the immediate family, dependants or persons acting on their behalf who seek reparations for injuries suffered as a result of human rights violations shall have access to national and international recourse procedures.’<sup>278</sup> Thus affirming that the competence of an individual to espouse a claim based on the violation of international law is a significant process in the overall system of accountability and responsibility.<sup>279</sup>

Individuals may avail themselves to a limited number of types of action.<sup>280</sup> These mechanisms have to be specifically provided for, whether international tribunals;<sup>281</sup> special arbitration tribunals, such as the Iran-US Claims Tribunal;<sup>282</sup> processes established through international and regional conventions;<sup>283</sup> actions taken before the UN Administrative

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<sup>277</sup> The concept of a class action for the violation of human rights has been established by the *Marcos* litigations, Judicial Panel on Multidistrict Litigation, under Judge Manuel Real, MDL No. 840, Order of 5 September 1990, where the court established a mass tort action based on a ‘single orchestrated and illegal policy’ that violated human rights, opening the possibility for ten thousand possible claimants, including 23 named plaintiffs; see Steinhardt, *supra*, at 66 and 92-93.

<sup>278</sup> Theo van Boven, ‘Final Report’, *supra*, at para. 136(12).

<sup>279</sup> Note also GA Res. 217A (III) (1948), Article VIII, which states that, ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’

<sup>280</sup> See Sunga, *supra*, at 141-149, who outlines the instances of individual legal capacity in international law.

<sup>281</sup> Brownlie, *principles*, at 580-594.

<sup>282</sup> See generally, Bederman, ‘Nationality of Individual Claimants before the Iran-US Claims Tribunal’ (1993) 42 *Int’l. & Comp. L.Q.* 119.

<sup>283</sup> For example, Article 14, CEAFRD; and Article 25, ECHR.

Tribunal,<sup>284</sup> or actions taken within domestic jurisdictions. For example, domestic constitutions may provide a basis for domestic action and a good starting point for actions against state authorities, because the constitutional rights emanating from the French and American revolutions reflected the sufferings fresh in their minds and a will to prevent repetitions of those sufferings.<sup>285</sup> Special provisions may also be enacted to provide subject-matter jurisdiction and cause of action against states that violate international norms, for example the alien tort provisions.<sup>286</sup>

The application of international law in domestic courts has been termed 'transnational public law litigation'.<sup>287</sup> In this section, transnational public law litigation refers to judicial proceedings within a domestic jurisdiction, governed by international law principles, public and private, concerning events that have an international flavour. The purpose of such litigation need not be for the sole basis of monetary compensation, but also the articulation of norms, the declaration and identification of wrongfulness in the violation of the norm, and the denial of a violator the comfort of a 'safe haven' away from the jurisdiction from which the violation occurred.<sup>288</sup> There are historical precedents for such a theory,<sup>289</sup> although the domestic courts have established defences against the perception of an onslaught of human rights litigation, based on the increasing number of human rights instruments.<sup>290</sup>

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<sup>284</sup> See Brownlie, principles, at 590-594; Jennings and Watts (ed), at 847, note 2; concerning the right of petition to the GA; and the *South-West Africa (Hearing of Petitioners) Case* [1956] I.C.J. Rep. 23.

<sup>285</sup> Nobel, P., 'Blurred vision in the rich world and violations of human rights - a critical assessment of the human rights and refugee linkage' 91/1, *Bulletin of Human Rights*, 74.

<sup>286</sup> Discussed further below.

<sup>287</sup> Koh, H.H., 'Transnational Public Law Litigation' (1991) 100 Yale L.J. 2347, 2348; and Jessup, P., *Transnational Law* (1956), 2, defined as, 'all law which regulates actions or events that transcend national frontiers' and includes '[b]oth public and private international law... [and] other rules which do not wholly fit into such standard categories.' See also, McLachlan, C. and Nygh, P., *Transnational Tort Litigation* (1995).

<sup>288</sup> Blum and Steinhardt, *supra*, at 113; Koh, *supra*, at 2349; and Lininger, *supra*, at 178.

<sup>289</sup> Koh, *supra*, at 2351-2358.

<sup>290</sup> See further below section 5.8, 'Hurdles Complicating the Application of Domestic Measures for Individuals', on sovereign immunity and act of state doctrine, and the doctrine of self-executing and non-self-executing treaties.

Constitutional and domestic procedures may be used to expedite the individual's rights, for example the use of *habeas corpus* or civil suit, but much depends on the specific provisions and their application.<sup>291</sup> A variety of non-judicial tools are also available, such as support from the mass media, political support in the legislature, or even the influence of domestic foreign policy to regulate the conduct of other states.<sup>292</sup> There are also various secretariats, commissions and rapporteurs whom individuals may contact both formally and informally.<sup>293</sup> At the very least, the individual has recourse to initiate a public investigation, with the support of NGOs and other international organisations.<sup>294</sup> For example, the '1503' procedure under the ECOSOC provides for non-governmental allegations of 'situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights',<sup>295</sup> and limited access to the UNESCO procedures, which permit individuals or NGOs to bring complaints within specified conditions.<sup>296</sup> In the first instance, violations of human rights have to be brought before the competent organs of the state, no matter how ridiculous this proposition may be.<sup>297</sup> It does not apply across all situations, but acts as a general proposition.<sup>298</sup>

The notion of domestic courts enforcing or applying international norms is not a novel concept. Many commentators have already rehearsed many of the arguments and

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<sup>291</sup> Hannum, H., 'Implementing Human Rights: An Overview of Strategies and Procedures', in Hannum (ed), 19, at 22.

<sup>292</sup> *Ibid*, at 23; for example the use of the 'most favoured nation clause' in the US.

<sup>293</sup> *Ibid*, at 27-29, citing as examples, the European and Inter-American commissions, the working groups and rapporteurs under the UN Commission on Human Rights, the ILO and the ECOSOC '1503' procedure.

<sup>294</sup> *Ibid*, at 30.

<sup>295</sup> ECOSOC Resolution 1503 (XLVIII) of 1970, which are discussed in closed sessions of the UN Commission on Human Rights and the Sub-Commission; Rodley, N.S., 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations', in Hannum (ed), 60, at 64-70, also the UN Commission on Human Rights thematic approach to violations of human rights, at 70-75.

<sup>296</sup> UNESCO Executive Board Decision, 104 EX/3.3, 1978, see Marks, S.P., 'The Complaints Procedure of the United Nations Educational Scientific and Cultural Organisation', in Hannum (ed), at 86-98.

<sup>297</sup> See above section 3.14, 'Defences and the Exhaustion of Local Remedies'.

<sup>298</sup> For example, a state in complete anarchy cannot obviously require that the individuals bring a complaint before the very people who have perpetrated the injury; see above section 3.14, 'Defences and the Exhaustion of Local Remedies'.

analysed the possibilities.<sup>299</sup> One suggestion is that human rights could be ‘infused’ into the domestic constitutions through the interpretation of constitutional provisions.<sup>300</sup> Thus when a court interprets the validity of statutes or when determining the legality of particular actions, they would apply the prevailing international human rights standards.<sup>301</sup> Other domestic measures may be explicitly within statutory provisions. For example, in Argentina as in other jurisdictions, a criminal proceeding may commence upon a *denuncia*, which is brought by a civilian victim.<sup>302</sup> The victim then works closely with the state authorities throughout the trial and may plead for a particular remedy.<sup>303</sup>

### 5.7.1 Status of Individuals Espousing Claims based on International Norms

Where specifically provided, individuals may have personality to be held responsible for certain obligations, and sufficient to bring a claim in accordance with international law.<sup>304</sup> Should an individual be permitted to claim against a state for the violation of his/her human rights?<sup>305</sup> Would this not be objectionable because international law governs inter-state action, thus giving states sole competence to bring such a claim? Is the ‘subject’, ‘object’ criteria a valid controversy?

Admittedly, in the past, states have been the sole subjects of international law, but writing in 1966, Krenz claimed, ‘[w]hen one views the development that has taken place,

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<sup>299</sup> See for example, Falk, ‘Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of *Banco Nacional de Cuba v. Sabbatino*’ (1961) 16 Rutgers L. Rev. 1; and Lillich, ‘The Role of Domestic Courts in Enforcing International Human Rights Law’, in Hannum, H. (ed), at 228.

<sup>300</sup> Lillich, in Hannum (ed), at 239.

<sup>301</sup> A possibility where, for example, the state incorporates the UDHR into its constitution.

<sup>302</sup> Roht-Arriaza, *supra*, at 459; See also Theo van Boven, ‘Final Report’, UN Doc. E/CN.4/Sub.2/1993/8, Part VI, *supra*, who cites the situations in the Federal Republic of Germany after the Second World War, Poland, Chile, Argentina, and Uganda after Idi Amin, where domestic measures are available specifically for the redress of grievances, particularly after a change of government.

<sup>303</sup> Mignone, Estlund and Issacharoff, ‘Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina’ (1984) 10 Yale J. Int’l. L. 118, 123.

<sup>304</sup> Brownlie, principles, at 581.

<sup>305</sup> An example of a specific provision that empowers the individual under domestic law to espouse a claim is the Torture Victim Protection Act 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified in, 28 U.S.C. section 1350 (Supp. V 1993) which provides a cause of action where official torture and extrajudicial killings are directed against an individual. These acts being committed ‘under actual or apparent authority, or color of law’, or ‘of any foreign nation’, at sub-section 2.

during the last century, in the legal thinking and in the conduct of States and the individuals of which they are composed, one can say with confidence that this tradition appears finally on its way out.<sup>306</sup> Krenz suggested that the controversy was due to the lack of consensus between positivist and natural lawyers on the meanings and content of concepts within the debate. He believed the '[l]aw is a method of regulating the conduct of those to whom it applies. Its purpose does not lie in itself, it constitutes a means towards an end: certainty and order.'<sup>307</sup> Thus a legal subject would be 'that entity which, under that system, is endowed with rights and duties.'<sup>308</sup> As Salmond claimed, '[a] juridical person is any being whom the law regards as capable of rights and duties.'<sup>309</sup>

Perhaps the main difficulty between positivist and natural law theories, and the monist and dualist schools of thought, may be summarised as the question of whether the system of international law could govern or did govern behaviour of persons who are, by nature, subjects of another system (domestic/municipal law).<sup>310</sup> One consequence of this difficulty is the claim that individuals cannot enforce their rights in international courts, as a general rule.<sup>311</sup> Krenz on the other hand modifies the question by asking, 'whether it would at all be possible for individuals to be subjects of the law of nations.'<sup>312</sup> In other words, can a natural person be the bearer of rights and duties, incumbent upon international law? If laws are fundamentally for the benefit of human beings, then issues such as 'corporate person' or 'sovereign state' are not ends in themselves, but 'convenient fictions facilitating the operation of the law in the respective fields.'<sup>313</sup> Thus the make-up of the subject would change, but its 'intrinsic identity' would not and a natural person could then be a subject where 'his activity became of a type regulated by that system.'<sup>314</sup>

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<sup>306</sup> Krenz, *supra*, at 92.

<sup>307</sup> *Ibid*, at 93.

<sup>308</sup> *Ibid*.

<sup>309</sup> Quoted by Williams, G. (ed), *Salmond on Jurisprudence* (1947), 318.

<sup>310</sup> Krenz, *supra*, at 94; also note Korowicz, 'The Problem of the International Personality of Individuals' (1956) 50 *Am. J. Int'l. L.* 534-543.

<sup>311</sup> This general rule is subject to many exceptions, although the exceptions have to be specifically provided for.

<sup>312</sup> Krenz, *supra*, at 94.

<sup>313</sup> *Ibid*, at 95.

<sup>314</sup> *Ibid*.

Krenz concluded that ‘the refugee is the subject of international law *par excellence*.’<sup>315</sup> Yet, ‘[i]n any case it remains a sad and striking anomaly that, in this day and age of international concern [in 1966] for self-determination and human welfare, there should not only be a need to protect individuals from their country of origin, but also a lack of means to enforce such protection.’<sup>316</sup> Even if an undeniable conclusion that individuals, whether exceptional or natural, were subjects of international law, they would still be denied standing to bring personal claims in the World Court and would still be severely limited in practice, without specific provisions granting them competence to espouse a claim. On the other hand, a distinction must be drawn between rights and enforcement capacity. ‘The fact that a beneficiary is incapable of taking independent steps in his own name to enforce [his rights] does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them.’<sup>317</sup> Sohn claimed that since the 1945 San Francisco Conference and the emergence of human rights provisions, the sovereign state has been deprived as the exclusive possessor of rights under international law.<sup>318</sup> A combination of both propositions would justify the potential for individuals, as subjects of international law, to bring actions that enforce their rights under international law, whether they take place in the international or domestic spheres.

The application of human rights in domestic courts has also been a well debated concept, even if its actual application has been less enthusiastic.<sup>319</sup> D’Amato emphasised

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<sup>315</sup> *Ibid*, at 115.

<sup>316</sup> *Ibid*, at 116.

<sup>317</sup> Mugerwa, ‘Subjects of International Law’, in Sorensen (ed), manual, at 266.

<sup>318</sup> Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather than States’ (1982) 32 Am. U. L. Rev. 1.

<sup>319</sup> See generally, Lillich, in Hannum (ed), 228; Strossen, N., ‘Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis’ (1990) 41 Hastings L.J. 805; Meron, human rights, at 114-135; Hoffman, P., ‘The Application of International Human Rights Law in State Courts: A View from California’ (1984) 18 Int’l. Law. 61; and Christenson, G., ‘Using Human Rights Law to Inform Due Process and Equal Protection Analyses’ (1983) 52 U. Cin. L. Rev. 3; Panel, ‘Application of Customary International Law by National Tribunals’ (1982) 76 Am. Soc’y. Int’l. L. Proc. 231, Crawford (discussing the application of general international law, customary international law and treaties in determining common law issues in Anglo-American jurisdiction and Australia, at 232-244), Dugard (identifying English and South African cases, at 245-251), and Damrosch (discussing the US domestic tribunals and the application of customary international law, at 251-255).

that '[i]f human rights means anything in international law, it means that traditional state-based jurisdictional exclusivities must give way to a more fundamental realization that the rights of people count for more than the rights of states.'<sup>320</sup> Higgins questioned the logic behind preventing the individual from espousing their claim when their interest is directly harmed.<sup>321</sup> Lauterpacht noted that individuals were clearly prescribed rights under international law, yet individuals (at that time in 1950) were incapable of asserting their rights in the international sphere.<sup>322</sup> Higgins sees international law, not as a set of rules, but '... as a particular decision-making process.'<sup>323</sup> The dichotomy between 'subjects' and 'objects' in international law may therefore be rejected, because individuals are participants within this decision-making process, as are states, international organisations, multinational corporations and NGOs.<sup>324</sup>

Would an individual be able to bring a claim against a state or other individuals for a tort committed in violation of international law? Such an action would depend primarily on the domestic provisions within the state where the action is proposed. Are there provisions within the domestic legislation or jurisprudence of domestic courts that would permit the jurisdiction of that court? If jurisdiction and legal competence are accepted, and a cause of action established, would sovereign immunity or immunity from enforcement for judgement attach to a defendant state? Could an individual's presence be *subpoenaed* or extradited? Some of these considerations were addressed by Pepper in discussing the possible claims of nationals of Kuwait and other nationals arising out of the act of aggression and invasion of Kuwait by Iraq, in either Kuwait, UK or US domestic courts.<sup>325</sup> In all three suggested jurisdictions, the courts would have been empowered to hear the claims based on domestic

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<sup>320</sup> D'Amato, A., 'Judge Bork's Concept of the Law of Nations is Seriously Mistaken' (1985) 79 Am. J. Int'l. L. 92, 93.

<sup>321</sup> Higgins, problems and process, at 52.

<sup>322</sup> Lauterpacht, H., *International Law and Human Rights* (1950), 27.

<sup>323</sup> Higgins, problems and process, at 50.

<sup>324</sup> *Ibid.*

<sup>325</sup> Pepper, 'Iraq's Crimes of State Against Individuals, and Sovereign Immunity: A Comparative Analysis and a Way Forward' (1992) 18 (2) Brook. J. Int'l. L. 313.

provisions and conflicts of law, and individuals would have had legal competence to bring actions in tort.<sup>326</sup>

It would thus seem that the individual is empowered - conceptually and practically - by specific provisions, to bring a claim on the basis of international law. It should be noted that international law may be less applicable to protect or found a claim by an individual against non-governmental action.<sup>327</sup> Although an individual would have a possible action with both individuals and states in the domestic sphere, it is likely that where an action is against a foreign sovereign state, immunity would be claimed/granted, either to the suit or to the enforcement of judgement.<sup>328</sup>

### 5.7.2 Action by Individuals in the International Sphere

There have been several proposals to empower individuals with capacity, rights of audience or rights to present information before international tribunals,<sup>329</sup> especially since UNHCR would refuse to extend their mandate in this manner. A court for individuals was envisaged by the Hague Peace Conference in 1907, to serve as a court of appeal which would hear petitions from individuals whose property was injuriously affected by judgements of national courts. Unfortunately the International Prize Court never came into force because the London Declaration of 1909 never came into force.<sup>330</sup> The Central American Court of Justice, constituted by the 1907 Cartago Accord, had jurisdiction to

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<sup>326</sup> In Kuwait under the Civil Code, *ibid* at 318-20; in the UK, by application of the Civil Jurisdiction and Judgements Act 1982, which would provide for the application of Kuwait's law of tort and consequently, standing. The 1982 Act applies the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matter, 27 September 1968, *reprinted in* (1969) 8 I.L.M. 229, revised by the Convention on Accession to the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, 9 October 1978, *reprinted in* (1979) 18 I.L.M. 8, *ibid*, at 320-1; and under section 1350 of the ATS in the US which accords standing to bring a claim based upon a tort committed in violation of international law, *ibid*, at 324-6.

<sup>327</sup> For example, in trying to sue the World Bank for facilitating the violation of human rights in aiding projects, see Hutchins, *supra*, 487; and generally, Forde, M., 'Non-Governmental Interferences with Human Rights' (1985) 56 *Brit. Yrbk. Int'l. L.* 253.

<sup>328</sup> See further section 5.8.2, and also *Al-Adsani v. Government of Kuwait and Others*, Times Law Report, 29 March 1996, *The Times*, 29 March 1996, 41 (CA).

<sup>329</sup> For example, Grassi, M., *Die Rechtstellung des Individuums im Volkerrecht* (Winterthur, 1955), 314, who suggested that the international community created an international executive for refugees and their *locus standi* before an appropriate tribunal.

<sup>330</sup> Oda, in Sorensen (ed), manual, at 511; also (1908) 2 *Am. J. Int'l. L. - Supp.* 174; and Brownlie, principles, at 583.

hear inter-state and individual claims based on the violations of treaties and other international issues, whether the governments supported the claims or not.<sup>331</sup> The mixed arbitration tribunals established under the Treaty of Versailles also provided individual citizens of the victor states with competence to bring claims against the nationals and governments of the defeated states.<sup>332</sup> The often cited Upper Silesian Arbitral Tribunal, created by the German-Polish Convention of 1922, is a further example where individuals were given full procedural capacity to bring claims against either governments.<sup>333</sup>

Various other treaties since the Second World War have also provided individuals audience before international tribunals.<sup>334</sup> For example, the Convention on the Settlement of Matters arising out of the War and Occupation, 26 May 1952.<sup>335</sup> A similar situation also existed for the Iran-U.S. Claims Tribunal.<sup>336</sup> Specialised courts have also been established under multilateral regional arrangements, for example under the European context, the Court of Justice of the European Communities,<sup>337</sup> which has jurisdiction to hear from individuals and private corporations.<sup>338</sup> More significantly, under the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Commission of Human Rights is given authority to receive and investigate individual complaints, where the government has declared the competence of the Commission.<sup>339</sup> The European Court of

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<sup>331</sup> *Ibid*, at 511; see (1908) 2 Am. J. Int'l. L. - Supp. 231, agreement between Costa Rica, Guatemala, Honduras, Nicaragua and San Salvador; and Brownlie, principles, at 584, who noted that before the Court was dissolved in 1918, it heard five cases involving individuals, four were inadmissible because internal remedies had not been exhausted and the fifth was decided against the individual.

<sup>332</sup> Article 296, 297, 304 and 305; Brownlie, principles, at 584.

<sup>333</sup> Oda, in Sorensen (ed), at 511; and Brownlie, principles, at 584-5.

<sup>334</sup> Schmidt, M.G., 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41 Int'l. & Comp. L.Q. 645, who discusses the complaints procedures under the ICCPR, CEAFRD, the Torture Convention and the Convention on the Rights of Migrant Workers and Their Families (not in force).

<sup>335</sup> (1955) 49 Am. J. Int'l. L. - Supp. 116, the Charter of the Arbitral Commission annexed to the Convention provided direct access to nationals of specified states.

<sup>336</sup> See Brownlie, principles, at 585.

<sup>337</sup> Treaty establishing the European Economic Community, 23 March 1957.

<sup>338</sup> For example under Article 173 of the Rome Treaty, and Article 146 of the Euratom Treaty.

<sup>339</sup> Article 25.

Human Rights established in 1959 only permits states and the Commission to be parties to the proceedings.<sup>340</sup>

Individuals also have standing before the administrative tribunals of international organisations. The Statute of the Administrative Tribunal of the UN, adopted by the GA, is competent to hear applications from employees of the UN Secretariat concerning contracts and terms of employment.<sup>341</sup> Under Article 11(1) of the Statute, the individual, member states, or the Secretary-General may apply to the Committee requesting an advisory opinion from the ICJ on the decision of the Tribunal,<sup>342</sup> although the individual may not be represented during the proceedings.<sup>343</sup> It is clear that Article 34(1) of the SICJ acts as an effective bar against claims by individuals as parties before the Court, and no provisions exist to enable individuals to take part in the proceedings for an Advisory Opinion of the Court.<sup>344</sup> The availability of individual petition for an advisory opinion was considered during the period of the League of Nations, although the conclusion was less than satisfactory as the League renounced its rights under Article 66 of the Statute.<sup>345</sup> The question of individuals referring an issue for an advisory opinion was again raised in the *U.N. Administrative Tribunal Case*.<sup>346</sup> The President of the Court confirmed that Article 66(2) of the Statute prevented the receipt of written or oral statements from unauthorised

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<sup>340</sup> Although, Rule 30 of the Revised Rules of Court (24 November 1982) now permits legal representation of applicants, see Brownlie, principles, at 590; and the Ninth Protocol of 1990, Article 3, amends Article 44 of the Convention to include ‘... persons, non-governmental organisations or groups of individuals [who] having submitted a petition under Article 25 shall have the right to bring a case before the Court.’

<sup>341</sup> Adopted, 24 November 1949.

<sup>342</sup> Brownlie, principles, at 591. The ICJ has considered through Advisory Opinion the mechanisms for review of the decisions of the Tribunals, *Application for Review of Judgement No. 158* [1973] I.C.J. Rep. 166; *Application for Review of Judgement No. 273* [1982] I.C.J. Rep. 325; *Application for Review of Judgement No. 333* [1987] I.C.J. Rep. 18 (Note dissenting opinion of Judge Ago, at 107-9, para. 4-7).

<sup>343</sup> However, in a case referred by UNESCO on a decision of the Administrative Tribunal of the ILO for an advisory opinion, *Judgements of the Administrative Tribunal of the I.L.O.* (Advisory Opinion) [1956] I.C.J. Rep. 77, the Court found that in this particular case, the written statements of the individual would be acceptable because UNESCO consented to its reception, and the ‘good administration of justice’ required it. at 86. However, UNESCO would not be bound by this consent in future cases. See also, Rosenne, *The Law and Practice of the International Court* (1965), 686-90 (hereinafter, Rosenne, law and practice).

<sup>344</sup> Brownlie, principles, at 581.

<sup>345</sup> Rosenne, law and practice, at 737.

<sup>346</sup> [1954] I.C.J. Rep. 47; and Rosenne, law and practice, at 737-9.

bodies and individuals. This was the finding, despite the fact that the International League for the Rights of Man was permitted to submit written statements on legal issues in the *South West Africa Case*.<sup>347</sup>

Although in many of the examples cited above, the individual had procedural capacity rather than full capacity to bring an action on the international plane. The distinction may not be entirely significant even if the denial of direct representation is seen as a problem because of the many constraints of the respective commissions.<sup>348</sup> There is a clear distinction between procedural capacity and *locus standi*. For example, in the European Court, it is not *locus standi* but procedural capacity, since only the Commission and member states have *locus standi*; whilst under the ACHR, individuals may only select their counsel to represent them before the Commission, and the Commission takes over thereafter.<sup>349</sup> On the other hand, a petitioner may have direct representation before the European Court of Human Rights.<sup>350</sup>

The remedies available within regional arrangements rest primarily with the agreed terms under the respective provisions. For example, under European mechanisms,<sup>351</sup> and more specifically under the ECHR, the European Court of Human Rights has a wide discretion in providing '... just satisfaction to the injured party'.<sup>352</sup> The Inter-American system,<sup>353</sup> on the other hand, is empowered to ensure the injured party enjoys the right or

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<sup>347</sup> [1950] I.C.J. Rep. 128, 130.

<sup>348</sup> Grossman, 'Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation' (1992) 15 *Hastings Int'l. & Comp. L. Rev.* 363, 377-78.

<sup>349</sup> ACHR, Article 6(1), only states or the Commission may bring a case to the Court; Article 57, provides for the Commission to appear in all cases before the Court; see Grossman, *supra*, at 365; although it should be noted that the victims' lawyers may be appointed as advisors to the Commission under Article 21 of the Regulations of the Inter-American Commission of Human Rights (1987).

<sup>350</sup> Revised Rules of the Court, (1982) *Yrbk. E.C.H.R.* 5, 14, Rule 30(1); Grossman, *supra*, at 377.

<sup>351</sup> See generally, Boyle, K., 'Europe: The Council of Europe, the CSCE, and the European Community', in Hannum (ed), 133; and Polakiewicz, J. and Jacob-Foltzer, V., 'The European Human Rights Convention in Domestic Law: The Impact of the Strasbourg Case-Law in States Where Direct Effect is Given to the Convention' (1991) 12 *Hum. Rts. L.J.* 65-85 and 125-142.

<sup>352</sup> Article 50, ECHR, in most situations, this is a financial pronouncement; see Tomuschat, in Gowlland-Debbas (ed), at 65-66.

<sup>353</sup> See, OAS Publication, *Basic Documents Pertaining to the Human Rights in the Inter-American System*; Shelton, D.L., 'The Inter-American Human Rights System', in Hannum (ed), at 119, the Commission has specific competence under the American Convention on Human Rights (1969) and the Inter-American Convention to Prevent and Punish Torture (1985), although the American

freedom that was violated.<sup>354</sup> This means that the primary obligation would be cessation of the wrongful conduct, although in practice, reparations amounts to compensation.<sup>355</sup> The solution for large-scale human rights violations is more complicated than merely compensation, which is ‘... a delicate problem of distributive justice’,<sup>356</sup> but must include considerations such as the provision of homes, land, employment, and other essential socio-economic and medical (mental health) needs. The *Velásquez Rodríguez case*<sup>357</sup> and the *Godínez Cruz case*<sup>358</sup> are nevertheless examples of convention mechanisms, applied by individuals against states to enforce the violation of human rights.<sup>359</sup> Finally, the African Commission on Human and Peoples’ Rights, under the ACHPR, also provides for mechanisms for individuals.<sup>360</sup>

Other organisations also provide outlets for individuals on the international plane. For example, the World Bank Inspection Panel is an internal device that provides for the investigation of complaints against the World Bank’s projects where adverse effects, actual

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Declaration of the Rights and Duties of Man (1948) is applicable to all OAS member states under the OAS Charter, amended by the 1967 Protocol of Buenos Aires and the 1985 Protocol of Cartagena de Indias.

<sup>354</sup> Article 63(1), ACHR; for example the Commission requested the Court in the *Velásquez Rodríguez case*, that the breaches of freedom and rights be remedied, and that fair compensation be paid to the injured parties, Case 7951, Inter-American Court of Human Rights 38, OEA/ser.L/III.15, doc.13 (1986); Grossman, *supra*, at 369.

<sup>355</sup> Tomuschat, in Gowlland-Debbas (ed), at 66; note in the *Velásquez Rodríguez case*, and *Godínez Cruz case*, compensation were awarded, see Grossman, *supra*, at 365 and 371; note generally, Theo van Boven, ‘Final Report of the Special Rapporteur’, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Doc. E/CN.4/Sub.2/1993/8, Part IV.

<sup>356</sup> Tomuschat, in Gowlland-Debbas (ed), at 70.

<sup>357</sup> Inter-American Court of Human Rights, OAS/ser.L/V/III.19, doc. 13 (1988), *reprinted in* (1989) 28 I.L.M. 291.

<sup>358</sup> Judgement of 20 January 1989, Inter-American Court of Human Rights, Decisions and Judgements, Ser. C, No. 5 (1989).

<sup>359</sup> See generally, Buergenthal, ‘The Inter-American System for the Protection of Human Rights’, in Meron (ed), *Human Rights in International Law* (vol. 2, 1984), at 439; Grossman, *supra*, 363; Linda Drucker, ‘Government Liability for ‘Disappearances’: A Landmark Ruling in the Inter-American Court of Human Rights’ (1989) 25 Stan. J. Int’l. L. 289; and generally, Hannum, H. (ed).

<sup>360</sup> Article 45, Flinterman, C. and Ankumah, E., ‘The African Charter on Human and Peoples’ Rights’, in Hannum (ed), at 159; rules of procedure for the Commission, *reprinted in*, (1988) 9 Hum. Rts. L.J. 333.

or threatened, result from a failure to apply policies and procedures of the World Bank.<sup>361</sup> This is as opposed to any attempts to sue the members of the World Bank or the Bank itself. However, the ‘affected party’ must be a community and not merely an individual, and the powers of the Panel are merely recommendations to the Board of Executive Directors.<sup>362</sup>

### 5.7.3 Action by Individuals in the Domestic Sphere

D’Amato emphasised, whilst rejecting the blanket use of sovereignty, that ‘[c]ourts throughout the world *can be a forum* in which people can *assert* the primacy of their human rights in all situations in which states are impeding the realization of those rights.’<sup>363</sup> He does also warn that the ATS should not be used as a political chip, but be dealt with ‘fairly and impartially’.<sup>364</sup> However, when dealing with international law issues, cases that are solely between sovereign states should be distinguished from those that have elements which affect individuals.<sup>365</sup> The application of international law within domestic courts of the US has well-established precedents in case-law,<sup>366</sup> under the Constitution,<sup>367</sup> and affirmed in the Third Restatement.<sup>368</sup> This section will focus on US legislation and case precedence because: the US does have specific legislation that provides a forum for alien tort suits; it includes international law generally as federal common law; and it is a stable

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<sup>361</sup> International Bank for Reconstruction and Development/International Development Association: Inspection Panel Operating Procedures, including Executive Directors’ Resolution and Explanatory Memorandum of the General Council, *reprinted in*, (1995) 34 I.L.M. 503.

<sup>362</sup> *Ibid*, at 511.

<sup>363</sup> D’Amato, relation of the individual, at 12.

<sup>364</sup> D’Amato, ‘The Alien Tort Statute and the Founding of the Constitution’ (1988) 82 Am. J. Int’l. L. 62, 67.

<sup>365</sup> Brilmayer, L., ‘International Law in American Courts: A Modest Proposal’ (1991) 100 Yale L.J. 2277, 2280.

<sup>366</sup> Per Justice Gray, *The Paquete Habana*, 175 U.S. 677, 700 (1900), who stated that, ‘[i]nternational law is part of [US] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.’

<sup>367</sup> ‘Supremacy Clause’, Article VI, Section 2 of the US Constitution proclaims that ‘all treaties made or which shall be made under the authority of the United States, shall be the Supreme Law of the Land...’, although only self-executing treaties becomes the Supreme Law of the Land.

<sup>368</sup> Section 111(1), clarifying that both customary international law and treaties are enforceable in domestic courts.

location that attracts a variety of foreign investors, thus providing a potentially lucrative source for the enforcement of judgements.

The Alien Tort Statute (ATS), also called the Alien Tort Claims Act, was originally a provision of the Judiciary Act of 1789.<sup>369</sup> Three types of actions are possible under the Alien Tort Statute; individuals against individuals,<sup>370</sup> individuals against governments,<sup>371</sup> and governments as plaintiffs,<sup>372</sup> although this section will concentrate primarily on the application of individuals. In the years before *Filartiga*, the statute was asserted in 21 cases in 191 years and affirmed twice.<sup>373</sup> Many commentators have written on this subject, providing historical and theoretical arguments supporting and denying subject-matter jurisdiction for federal courts to determine cases involving the violation of international law as torts.<sup>374</sup> Essentially, the ATS provides federal court jurisdiction over 'suits alleging torts

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<sup>369</sup> 28 U.S.C. section 1350 (West 1993), Ch. 20, para. 9(h), 1 Stat. 73, 77 (1798), 'district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' Note a historical account of the ATS, Cicero, 'The Alien Tort Statute of 1789 As a Remedy for Injuries to Foreign Nationals Hosted by the United States' (1991-92) 23 Colum. Hum. Rts. L. Rev. 315, 324-340.

<sup>370</sup> It would seem to be more advantageous to bring a claim against the individual, although the prospects of obtaining real compensation is remote. However, the individual's assets may be attached, and where personal jurisdiction and service is properly administered, then a wealthy defendant would provide real compensation.

<sup>371</sup> For example, *Siderman v. Republic of Argentina*, No. 82-1772-RMT (C.D. Cal. 1984); a suit by an Argentine Jew against the Republic for torture in 1976 by the military regime. The district court of Los Angeles awarded 2.6 million dollars against Argentina who did not appear. The US and other scholars later filed briefs when Argentina did appear and the district court ruled that Argentina was entitled to claim sovereign immunity. An appeal was then made to the Ninth Circuit; and *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). An action against a foreign sovereign has disadvantages in that courts may apply the act of state doctrine or grant immunity under statutory provisions, namely the Foreign Sovereigns Immunity Act (FSIA). It was found that the FSIA does trump the ATS, and the FSIA is the sole basis of jurisdiction in a suit against a foreign sovereign state, *Republic of Argentina v. Amerada Hess Shipping Corp. and others*, 488 U.S. 428, at 434 (1989).

<sup>372</sup> Koh, *supra*, at 2369-70; for example, the Government of India against Union Carbide, *Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 634 F. Supp 842 (S.D.N.Y. 1986) *aff'd in part*, 809 F.2d 195 (2d Cir. 1987); and *Republic of Philippines v. Ferdinand Marcos*, 862 F.2d 1355 (9th Cir. 1988) *cert. denied*, 490 U.S. 1035 (1989).

<sup>373</sup> See Randall, federal jurisdiction, at 4, note 15, who cites the successful cases as, *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), and *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795), also cited in (1995) 34 I.L.M. 1592, 1601.

<sup>374</sup> *Ibid*, at 11-15; with a sample of more recent and further examples: Garmisa, S.P., 'Bosnia War Atrocities Litigated in US Tort Cases' (1996) 142 *Chicago Daily Law Bulletin*, 16 February 1996, 5, col. 1; Newman, L.W. and Burrows, M., 'The Alien Tort Claims Act' (1995) 214 *New York Law Journal* 3; Rabkin, J., 'Universal Justice: The role of Federal Courts in International Civil Litigation' (1995) 95 *Colum. L. Rev.* 2120; Steinhardt, *supra*, 65; Sung Teak Kim, 'Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute' (1994) 27 *Cornell*

committed anywhere in the world against aliens in violation of the law of nations.<sup>375</sup> Action under the statute was revived in the case of *Filartiga v. Pena-Irala (Filartiga)*, where the Court of Appeals for the Second Circuit found subject-matter jurisdiction for the plaintiff to bring an action on the basis of a violation of international law.<sup>376</sup> There is a two-step process in bringing a claim: the founding of a tort in municipal law,<sup>377</sup> then a violation of the law of nations<sup>378</sup> or a treaty.<sup>379</sup> The applicable norms of the law of nations are those that exist in contemporary international law,<sup>380</sup> thus necessitating a determination on whether the norm is a rule *lex lata* and whether that rule has been violated.<sup>381</sup> Thus essentially, where a tort has been committed, the court needs only next determine if the defendant's conduct violated international law.<sup>382</sup>

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Int'l. L.J. 387; Lininger, *supra*, 177; Cicero, *supra*, 315; Maier, 'The Role of International Law in Human Rights Litigation in the United States' (1988) 82 Am. Soc'y. Int'l. L. Proc. 456; Scoble, 'Enforcing the Customary International Law of Human Rights in Federal Courts' (1986) 74 Cal. L. Rev. 127; and Falk, 'Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of *Banco Nacional de Cuba v. Sabbatino*' (1961) 16 Rutgers L. Rev. 1.

<sup>375</sup> *Per* Newman, Jon G., Chief Justice, *Kadic v. Karadzic*, (civ. 94-9069 US Court of Appeal for the Second Circuit, 13 October 1995) reprinted in, (1995) 34 I.L.M. 1592, 1596; Works, 'Filartiga v. Pena-Irala: Providing Federal Jurisdiction for Human Rights Violations through the Alien Tort Statute' (1981) 10 Denv. J. Int'l. L. & Pol'y. 355; possibility of service outside jurisdiction under the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents (1969), *in force*, 10 February 1969, 658 U.N.T.S. 164, Bazzyler, *supra*, at 729.

<sup>376</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>377</sup> Randall, federal jurisdiction, at 33-35, because in the Eighteenth Century, no concept of an international tort, although in *Adra v. Clift*, 195 F. Supp. 195, 862-863, the District Court held that the tort had to be based on a violation of the law of nations, Randall, federal jurisdiction, at 36, however, in *Filartiga*, the municipal tort argument was upheld, 630 F.2d at 786-787.

<sup>378</sup> The law of nations is a part of US law under the US Constitution, Article VI, Section 2, 'Supremacy Clause'; *The Paquete Habana*, 175 U.S. 677, 700 (1900), and under *Filartiga*, 630 F.2d at 886, 'federal common law'; see further, Randall, federal jurisdiction, at 54-55; and Henkin, 'International Law as Law in the United States' (1984) 82 Mich. L. Rev. 1555, 1559-1560.

<sup>379</sup> Randall, federal jurisdiction, at 38-39; an example of the violation of a treaty can be seen in the Attorney-General's opinion concerning a complaint by Mexico that the American Rio Grande Land and Irrigation Company had caused damage and injury as a consequence of diverting a channel, Opinion of the Attorney-General, 26 Op. Att'y. 250 (1907), Randall, federal jurisdiction, at 49-50. The Attorney-General believed that a 'public tort' had been committed in violation of a treaty between the US and Mexico, thus concluding that the ATS would provide jurisdiction, Opinion of the Attorney-General, at 252-253; and see also, *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795), (No. 1, 607).

<sup>380</sup> Randall, federal jurisdiction, at 42.

<sup>381</sup> *Ibid*, at 44.

<sup>382</sup> Steinhardt, *supra*, at 72.

As a general proposition, international law encourages the implementation of domestic remedies for violations of international law, although it does sometimes depend on whether the obligations in international law are those of ‘result’ or ‘means’.<sup>383</sup> The ATS applies to international law provisions that are self-executable obligations of result.<sup>384</sup> The complaint should allege domestic torts as the causes of action, including the violation of international law that resulted in the tort, when filing the action under the ATS.<sup>385</sup> It is claimed that the ATS provides a private cause of action.<sup>386</sup> In *Re Estate of Ferdinand E. Marcos Human Rights Litigation (Re Estate of Marcos)*, the district court found that the victim, Trajano, was tortured and his death caused by Marcos-Manotoc, in violation of fundamental human rights which constituted a tort in violation of the law of nations.<sup>387</sup> The cause of action according to the court in *Re Estate of Marcos*, did not come from the ATS itself, but from municipal tort law.<sup>388</sup> In *Kadic v. Karadzic*, the court held that jurisdiction would be established under the ATS where an alien sues for a tort,<sup>389</sup> which was committed in violation of the law of nations (including customary international law).<sup>390</sup> In *Xuncax v. Gramajo*, the court found that the ATS provides a federal cause of action as well as a forum, where the plaintiff can establish an abuse consequent on the violation of international law.<sup>391</sup> Thus the cause of action is in tort, and the ATS is activated when there is also a violation of the law of nations.

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<sup>383</sup> See generally, Schachter, *International Law in Theory and Practice* (1991), 232-233.

<sup>384</sup> Randall, ‘Further Inquiries into the Alien Tort Statute and a Recommendation’ (1986) 18 N.Y.U.J. Int’l. L. & Pol. 473, 490-491. See further below section 5.8.1, ‘The Doctrine of Self-Executing and Non-Self-Executing Norms’. If a provision requires further implementation into domestic law, then it is considered non-self-executing and would not apply to the ATS.

<sup>385</sup> Bazylar, *supra*, at 727-28.

<sup>386</sup> Randall, K.C., ‘Further Inquiries into the Alien Tort Statute and a Recommendation’ (1986) 18 N.Y.U.J. Int’l. L. & Pol. 473, 479-481, from statutory construction, and at 483-487, from congressional intent; also, Rabkin, J., ‘Universal Justice: The Role of Federal Courts in International Civil Litigation’ (1995) 95 Colum. L. Rev. 2120. Although, Lillich, in Hannum (ed), at 237, notes that *Filartiga* cannot be misread to provide sweeping assertions on all human rights violations within the UDHR; and Steinhardt, *supra*, at 77, who emphasises that the proposed norm must give rise to enforceable rights.

<sup>387</sup> *Reprinted in*, (1993) 32 I.L.M. 106, 108, damages of 4.16 million dollars were awarded according to Philippine law.

<sup>388</sup> (1993) 32 I.L.M. 106, 115.

<sup>389</sup> Blum and Steinhardt, *supra*, at 88, note 140; and Cicero, *supra*, at 385-386.

<sup>390</sup> *Reprinted in*, (1995) 34 I.L.M. 1592, 1599.

<sup>391</sup> 886 F. Supp. 162, 179 (D. Mass. 1995).

The court in *Filartiga* determined that the violation had to be a well-established norm of international law,<sup>392</sup> that such norms are evidenced by reference to jurists writing professionally, general usage and practice of states, judicial decisions recognising and enforcing the law,<sup>393</sup> and from the determination process established by the SICJ.<sup>394</sup> It would seem that the ‘law of nations’ is part of federal common law in the United States.<sup>395</sup> The court thus found that no state had the right to torture its own or another nations’ nationals. This ‘... prohibition is clear and unambiguous, and admits no distinction between treatment of aliens and citizens.’<sup>396</sup> In application, the court found that torture committed by a state official against a person held in detention violated international law, but construed the statute ‘... not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.’<sup>397</sup> The court in *Karadzic*, similarly held that the first essential ingredient was the condition of a violation of the law of nations.<sup>398</sup> It found that the modern understanding of the law of nations is not exclusively state action, but ‘... that *certain forms of conduct* violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.’<sup>399</sup> The Chief Justice was of the opinion that international law was violated not by determination of whether a claimed subject violates a provision, but whether a type of conduct violates a provision. It is the prohibited conduct, the violation of which provides the vital ingredient of unlawfulness. In the case of torture or extrajudicial killings, the conduct that is unlawful in the law of nations was the act committed under the

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<sup>392</sup> 630 F.2d at 888.

<sup>393</sup> Citing *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-161 (1920).

<sup>394</sup> Article 38, in force for the US, 24 October 1945, 59 Stat. 1055, T.S. No. 993.

<sup>395</sup> Hartman, ‘Enforcement of International Human Rights Law in State and Federal Courts’ (1985) 7 Whittier L. Rev. 741, 746; and see generally, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>396</sup> 630 F.2d at 884.

<sup>397</sup> 630 F.2d at 887; note also the Torture Victim Protection Act of 1991, Section 2 and 3.

<sup>398</sup> (1995) 34 I.L.M. at 1599.

<sup>399</sup> (1995) 34 I.L.M. at 1600, (emphasis added) and note 1600-1602.

colour or law, 'inflicted by or at the instigation of or with consent or acquiescence of a public official or other person acting in the official capacity'.<sup>400</sup>

It would seem, as one commentator suggested, '[n]ow that one can plausibly argue that federal courts have jurisdiction to for suits against violators of fundamental human rights, dictators can no longer rely on safe heaven within the borders of the United States. Those refugees who were denied judicial process within their native countries can now seek legal recourse in American courts.'<sup>401</sup> The ATS does provide a foundation for individuals who are aliens in the US, to bring an action against other states that have committed torts in violation of the law of nations.

## **5.8 HURDLES COMPLICATING THE APPLICATION OF DOMESTIC MEASURES FOR INDIVIDUALS**

There are several hurdles in the application of domestic statutory measures for the enforcement of violations of international norms. The primary difficulty lies first in having such measures specifically empowering the individual to act when a violation of international law occurs. When such measures are initiated, the difficulty in distinguishing legal from political issues, and the question of the separation of powers, then arises. Should claims against states be left entirely to inter-state activities, the domain of the Executive, or should the courts be permitted to adjudicate on what might be perceived as politically sensitive issues? In this respect, should immunity be applied with the act of state doctrine to exclude judicial competence? The courts have applied a further hurdle, by interpreting that a distinction exists between international norms that are self-executable from those that are non-self-executable.

It may even be argued that the alien tort statute is 'ill-suited' as a means of prosecuting and punishing individual offenders of international human rights law, because of several problems. The defendant could simply returned to his/her country and remain out

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<sup>400</sup> (1995) 34 I.L.M. at 1605; *Filartiga*, 630 F.2d at 885; and Article 1, Torture Convention (1985), *in force*, 26 June 1987; *Xuncax v. Gramajo*, 886 F. Supp. 734, 740, torture had to be 'official torture'; also *Re Estate of Marcos*, 978 F.2d 439, 499; note also Torture Victim Protection Act of 1991.

<sup>401</sup> Works, *supra*, at 359.

of the reach of US law, the cost of civil suit is borne by the claimant, and classifying torture as a mere tort belittles the seriousness of the offence.<sup>402</sup> On the other hand, the preference for tortious action is in line with the concept of international responsibility as opposed to criminal responsibility, and it in no way prejudices the study of international criminal responsibility, which is a specialist area of much potential.<sup>403</sup> In any event, even in domestic law, a civil action may exist with a criminal action, arising from the same incidents. Even where a criminal action fails, the civil action may still proceed.<sup>404</sup> Further, the receipt of compensation is merely one aim in the redress of grievances, as van Boven noted, compensation or retribution is not always the desired goal, and victims and their families insist on the revelation of truth as the first requirement of justice.<sup>405</sup>

### 5.8.1 The Doctrine of Self-Executing and Non-Self-Executing Norms

The application of international principles on the domestic sphere depends on the existence of self-executing treaties or norms. The distinction of self or non-self-executing norms was devised to limit the Supremacy Clause.<sup>406</sup> Self-executing treaties permitted individuals to enforce their rights in the domestic courts, and non-self-executing treaties required ratification in statutory form.<sup>407</sup> Only self-executing treaties are enforceable directly by individuals.<sup>408</sup> What amounts to a self or non-self-executing treaty is still

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<sup>402</sup> Sunga, *supra*, at 113.

<sup>403</sup> See generally, Malekian, F., *International Criminal Law: The Legal and Critical Analysis of International Crimes* (2 vols., Uppsala, 1991); Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (The Netherlands, 1987); Brownlie, *International Law and the Use of Force by States* (1963), 150-66; and Tunkin, *Theory of International Law* (Butler trans., 1974), 396-404; and Drost, P.N., *The Crime of State* (vol. 1, 1959).

<sup>404</sup> For example, in English law, in homicide cases, a prosecution for murder may be contemporaneous with a civil suit for wrongful death in tort; and in French law, a similar situation exists, where both civil and criminal action may be processed together. However, the criminal determination takes precedence, *le criminel tient le civil en e'tate*, although if the criminal action failed, the civil action may nevertheless proceed. My gratitude to Emmanuel Ngwa-Tahmundungnji, Ph.D candidate, Faculty of Law, University of Southampton, for his elucidation of the French criminal process, although any errors are mine.

<sup>405</sup> Theo van Boven, 'Final Report', UN Doc. E/CN.4/Sub.2/1993/8, *supra*, at para. 134.

<sup>406</sup> US Constitution, Article VI, Section 2, see above.

<sup>407</sup> Koh, *supra*, at 2360-2361; and generally, Lockwood, 'The United Nations Charter and United States Civil Right Litigation: 1946-1955' (1984) 69 Iowa L. Rev. 901; Paust, 'Self-Executing Treaties' (1988) 82 Am. J. Int'l. L. 760; and Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis' (1986) 26 Va. J. Int'l. L. 627.

<sup>408</sup> Lillich, in Hannum (ed), at 229; *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

controversial. However, it is clear that the US courts follow the precedent that UNC provisions are not self-executing,<sup>409</sup> although a vast array of norms are, notably those concerning torture and extra-judicial killings. This hurdle may however crop up where, for example, the right to food is alleged. In practice, the courts will interpret a treaty or norm in international law, consistent with its terms and content, to determine if a private right of action for individual enforcement is permitted.<sup>410</sup>

### 5.8.2 The Act of State Doctrine and the Application of Immunity

The modern form of the act of state doctrine was elaborated in *Banco Nacional de Cuba v. Sabbatino*,<sup>411</sup> where the competence of a tribunal to adjudicate on action of a sovereign state was denied on the theoretical justification of the separation of powers.<sup>412</sup> The act of state doctrine applies to prevent a domestic court from pronouncing on the validity of an act by a foreign state.<sup>413</sup> The main reason for applying the doctrine is to prevent foreign courts from sitting in judgement over public acts of another state.<sup>414</sup> Although it may be argued that the doctrine would not apply to violations of international law or in situations where the claim emanates from acts contrary to international law.<sup>415</sup>

Koh suggests that the act of state doctrine, concerned with the separation of powers, can be overcome by identifying and determining several elements.<sup>416</sup> Firstly, determining if a legal claim does exist, whether based on treaty or customary law; secondly, by determining the nature of the claim, is it a political claim or a justiciable matter; and thirdly, identifying the defendant(s), for sovereign immunity might apply if not waived or if

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<sup>409</sup> *Sei Fujii v. California*, 87 A.C.A. 154, 217 P. 2d 481 (1950), *aff'd*, 38 Cal. 2d 718, at 722-724, 242 P. 2d 617, at 621-622 (1952).

<sup>410</sup> Steinhardt, *supra*, at 76, note 56, who cites cases where treaties were deemed to provide a private right of action for individuals to enforce a norm of international law.

<sup>411</sup> 376 U.S. 398, 427-437 (1964); applying *Underhill v. Hernandez*, 168 U.S. 250, 252-254 (1897).

<sup>412</sup> Longo, P.A., 'Limiting the Act of State Doctrine: A Legislative Initiative' (1982) 23 Va. J. Int'l. L. 103, 113-117, who discusses the separation of powers theory.

<sup>413</sup> The doctrine does not apply to war crimes, crimes against the peace or crimes against humanity and genocide. Akehurst, jurisdiction, at 241; and see *Goering* (1946) *Annual Digest 1946*, 203, 221-2.

<sup>414</sup> Akehurst, jurisdiction, at 241.

<sup>415</sup> *Ibid*, at 243.

<sup>416</sup> Koh, *supra*, at 2383-2401.

no exception applied. The Court, in *Alfred Dunhill of London Inc. v. Republic of Cuba*, confirms this in clarifying that the doctrine applied only where ‘the conduct in question was the public act of those with authority to exercise sovereign powers and was entitled to respect in our courts.’<sup>417</sup> Thus blatant violations of human rights, recognised and established in international law, cannot be acts that are entitled to respect in domestic courts.<sup>418</sup> Hence in *Filartiga* it was essential to establish the foundation that torture was a violation of international law.<sup>419</sup> Further, the state would need to ratify the act as an exercise of sovereign power, which it is unlikely to do where it is a blatant violation of human rights. In fact, the *amicus curiae* brief submitted by the State Department confirmed that ‘a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation’s commitment to the protection of human rights.’<sup>420</sup>

Brownlie noted that the act of state doctrine is not a rule of public international law, but emphasises two important concepts: the rule that some issues are best left to the international plane; and secondly, that a ‘sensible’ relationship between national and international courts should be maintained.<sup>421</sup> This ‘relationship’, and theoretical ‘concepts’, might be justifiable on a plane consisting only of state parties. However, when individuals are involved, the intrusion into the domestic sphere is not merely desirable, it is implicitly necessary. The international plane offers no remedies to individuals who have claims against their own state, unless that state is party to the conventional mechanisms for the redress of violations of human rights. Thus domestic laws have the potential for filling that gap. As it exists, the act of state doctrine does apply to prevent domestic courts from evaluating the legality of an act by a foreign state, however it does not act to dismantle the initial perspective, which is to propose a legislative framework for the individual to bring a claim before domestic courts.

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<sup>417</sup> 425 U.S. 682, 694 (1976).

<sup>418</sup> Steinhardt, *supra*, at 83, citing the Ninth Circuit on appeal, reversing the dismissal of the Marcos litigations.

<sup>419</sup> Blum and Steinhardt, *supra*, at 74-75.

<sup>420</sup> Memorandum of the US as *Amicus Curiae*, *Filartiga*, 630 F.2d 876 (2d. Cir 1980), at 22-23.

<sup>421</sup> Brownlie, principles, at 507.

There is clear authority to suggest that violations of human rights cannot be protected by the act of state doctrine.<sup>422</sup> Koh emphasised that to deny competence to adjudicate on a claim against a sovereign state debases two fundamental principles of an independent judiciary, which is ‘to protect individuals against the power of the state and to ensure that government officials act in compliance with legal norms.’<sup>423</sup> In any event, commercial litigation does not provide a bar against questioning sovereign acts, so denial of competence simply on human rights litigation is less justifiable.<sup>424</sup> As to its application in ATS cases, the Chief Justice in *Karadzic* held that ‘... it would be a rare case in which the act of state doctrine precluded suit under section 1350.’<sup>425</sup>

The act of state doctrine prevents a court from pronouncing on the validity of an act committed by a sovereign state. This bar may mean that the court has jurisdiction to hear a claim, but will refuse to pronounce on the validity or otherwise of the act of a sovereign state.<sup>426</sup> Sovereign immunity applies to bar an otherwise legitimate claim on the basis of excluding subject-matter jurisdiction, personal jurisdiction or the inability to attach for enforcement. Under the act of state doctrine, the defendant has to prove that it would apply in their case,<sup>427</sup> whilst sovereign immunity may be alleged *prima facie* and the burden of proving an exception passes to the plaintiff.<sup>428</sup> The principle underlying the doctrine of immunity and the requirement of consent before a sovereign state may be sued in a foreign jurisdiction evolved from Chief Justice Marshall in the *Schooner Exchange v. McFaddon*, where immunity was implied because of the ‘perfect equality and absolute independence of

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<sup>422</sup> *Filartiga*, 630 F.2d at 889, note 25; Paust, federal jurisdiction, at 242-243, particularly note 211, who states at 244, that ‘[w]hen a violation of international law is at stake it would be an abdication of judicial responsibility for a federal court to refuse to enforce it. Neither the separation of powers nor the act of state doctrine require the court to refuse jurisdiction.’ (footnotes omitted); Lininger, *supra*, at 188-190; and Higgins, problems and process, at 217-218, who states that in English courts, the doctrine would not apply to violations of international human rights; see *The Rose Mary* [1944] 1 W.L.R. 246, *Oppenheimer v. Cattermole* [1976] A.C. 249, and *Frankfurter v. Exner* [1947] Ch. 629.

<sup>423</sup> Koh, *supra*, at 2363.

<sup>424</sup> *Ibid*, at 2365.

<sup>425</sup> (1995) 34 I.L.M. at 1614.

<sup>426</sup> Zander, ‘The Act of State Doctrine’ (1959) 53 Am. J. Int’l. L. 826, 831, note 30.

<sup>427</sup> Lininger, *supra*, at 189; *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1026 (6th Cir. 1990), and *Republic of Philippines v. Marcos*, 806 F.2d 344, 356 (2d Cir. 1986).

<sup>428</sup> *Ibid*, at 182; *Cargill International v. MT Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

sovereigns'.<sup>429</sup> Brownlie identifies immunity as a 'matter of the essential competence of the local courts in relation to the subject-matter.'<sup>430</sup> Thus it means that competence is withheld from the domestic courts in a claim that would otherwise be actionable.<sup>431</sup>

English courts have strictly upheld the doctrine of sovereign immunity. Diplock, LJ, claimed that,

'For the English Court to pronounce upon the validity of a law of a foreign sovereign State within its own territory, so that the validity of that law became the *res* of the *res judicata* in the suit, would be to assert jurisdiction over the internal affairs of that State. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do.'<sup>432</sup>

A foreign state would therefore be able to claim immunity where the suit was for a tort committed in a foreign jurisdiction and pursued in the UK, under Section 1 of the State Immunity Act of 1978. This is the position even where the violation is of fundamental human rights.<sup>433</sup> Thus, in the UK, at common law and under statutory provisions, a sovereign state cannot be sued at all against its will.

Brownlie distinguishes two principles on which sovereign immunity rests. Firstly, the maxim, *par in parem non habet jurisdictionem*.<sup>434</sup> Secondly, the adherence of the principle of non-intervention in the domestic affairs of another state. In effect, the denial of jurisdiction pre-empts a situation where a judgement would not be effective, nor alter the situation for the plaintiff.<sup>435</sup> Brownlie does emphasise that immunity is not absolute, because it may be waived and because, '... there is no immunity from international responsibility where this exists under general international law.'<sup>436</sup> There are two forms of

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<sup>429</sup> *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, at 137 (1812).

<sup>430</sup> Brownlie, principle, at 323, footnotes omitted.

<sup>431</sup> For a comparative review of the application of sovereign immunity see, Osakwe, C., 'A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice' (1982) 23 Va. J. Int'l. L. 13-52.

<sup>432</sup> *Buck v. Attorney-General* [1965] Ch. 745, 770-1.

<sup>433</sup> *Al-Adsani v. Government of Kuwait and Others*, Times Law Report, 29 March 1996, (CA), *The Times*, 29 March 1996, 41.

<sup>434</sup> Brownlie, principles, at 324, who noted that, 'legal persons of equal standing cannot have their disputes settled in the courts of one of them'.

<sup>435</sup> Note, *Al-Adsani v. Government of Kuwait and Others*, Times Law Report, 29 March 1996, (CA), *The Times*, 29 March 1996, 41; where this logic was applied to dismiss the claim.

<sup>436</sup> Brownlie, principles, at 326.

immunity: immunity *ratione materiae*,<sup>437</sup> and immunity *ratione persone*.<sup>438</sup> The application of immunity depends essentially on the existing domestic provisions of each state.<sup>439</sup> For example some states apply absolute immunity, whilst others apply the concept of restrictive immunity, although the dichotomy between the two is far from clear.<sup>440</sup> It is also dependant on each state to remove the grant of sovereign immunity, as the situation in the UK confirms.

Wedgwood noting the *Marcos* litigations<sup>441</sup> and Section 464 of the Third Restatement claimed, ‘a former head of state appears to have no immunity from jurisdiction to adjudicate’, but ‘[i]n the United States, the courts might grant immunity if suggested by the Executive Branch on foreign policy ground, even though it is not required by international law.’<sup>442</sup> Janney, reviewing the District Court, Second Circuit Court and the Supreme Court decisions in *Argentine Republic v. Amerada Hess Shipping*,<sup>443</sup> concluded that even in the light of *Filartiga v. Pena-Irala*, the ATS does provide alien-plaintiffs a right to bring an action in tort for violations of international law, but the FSIA limits the action where sovereigns are concerned. The practice of US courts and commentators confirm this.<sup>444</sup>

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<sup>437</sup> Which is based upon the denial of subject-matter jurisdiction.

<sup>438</sup> Which is based upon the status of the defendant as a sovereign state. See Brownlie, principles, at 330.

<sup>439</sup> See Brownlie, principles, at 326-332.

<sup>440</sup> *Ibid*, at 330.

<sup>441</sup> See also on the *Marcos* litigations, Steinhardt, *supra*, at 66, note 1.

<sup>442</sup> Wedgwood, R., ‘Immunity and Prescription’ (1989) 14 Yale J. Int’l. L. 489, 506. The former head of state would clearly not avoid liability by claiming the act of state doctrine, Steinhardt, *supra*, at 83.

<sup>443</sup> 109 S. Ct. 683 (1989), 488 U.S. 428, 434 (1989); and *Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir. 1989), *cert. denied*, 111 S. Ct 27 (1990); which established that the FSIA was the sole basis for claiming jurisdiction over foreign sovereigns.

<sup>444</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984) and *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); see also, Bazylar, *supra*, at 733-34; and Paust, federal jurisdiction, at 221-32; Randall, ‘Further Inquiries into the Alien Tort Statute and a Recommendation’ (1986) 18 N.Y.U.J. Int’l. L. & Pol. 473, 507-508; and Lininger, *supra*, at 183, citing several examples where the FSIA has thwarted ATS claims, at note 40-41; in fact, courts must consider the effects of the FSIA even if the state does not appear, *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, note 20 (1983); and generally, Janney, C., ‘Obtaining Jurisdiction Over Foreign Sovereigns: The Alien Tort Statute Meets the Foreign Sovereign Immunity Act’ (1990) 21 Harv. Int’l. L. J. 368.

Since *Filartiga*, not every ATS case has been successful.<sup>445</sup> In *Tel-Oren v. Libyan Arab Republic*,<sup>446</sup> the Court distinguished *Filartiga* on the basis that individual responsibility had to be connected to a state act before international responsibility could apply, and since the PLO was not a state, the jurisdictional requirement failed.<sup>447</sup> Sunga suggests that this is a consequence of the courts' reluctance to enforce individual responsibility for violations of international human rights through the ATS.<sup>448</sup> Whatever the underlying reasons, executive intervention does play a significant role in the judicial determination process.<sup>449</sup> Intervention has occurred in several cases,<sup>450</sup> and the court in *Doe v. Karadzic* dismissed the claim under the ATS for lack of subject-matter jurisdiction, on the basis that the government might grant head of state immunity to Karadzic if he were to be recognised as the head of a 'friendly nation'.<sup>451</sup> The Court of Appeal in reversing *Doe v. Karadzic*, held that pre-empting a case simply on the basis of what the Executive might do is not appropriate.<sup>452</sup> The Department of State did eventually declare in the *Karadzic* case, that the defendant was not immune from suit.<sup>453</sup> Intervention by the Executive is blamed on their perception that foreign affairs issues should be settled through political means, rather than a judicial determination,<sup>454</sup> which does seem to give preference to an arbitrary process over a judicial determination. This is however not a unique phenomenon, as the Executive

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<sup>445</sup> Although there have been several successes, for example, *Kadic v. Karadzic*, (civ. 94-9069 US Court of Appeal for the Second Circuit, 13 October 1995) reprinted in, (1995) 34 I.L.M. 1592; *Re Estate of Marcos*, 978 F.2d 493, 496 (9th Cir. 1992); *Siderman v. Argentina*, 965 F.2d 699, 716 (9th Cir. 1992); and *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

<sup>446</sup> 726 F.2d 774, 824 (D.C. Cir. 1984).

<sup>447</sup> Sunga, *supra*, at 112; see further disagreement with the case, D'Amato, 'Judge Bork's Concept of the Law of Nations is Seriously Mistaken' (1985) 79 Am. J. Int'l. L. 92, 94.

<sup>448</sup> *Ibid.*

<sup>449</sup> Bazyler, *supra*, at 736-738, who identified the pre-1985 cases where executive support or denial resulted in the success or failure of the plaintiff's case.

<sup>450</sup> *Republic of Philippines v. Marcos* 806 F.2d 344 (2d Cir. 1986), *cert. denied.*, 107 S. Ct. 2178 (1987); and *Siderman v. Republic of Argentina* No. 82-1772, Slip. op. (C.D. Cal. Sept. 28, 1984).

<sup>451</sup> 866 F. Supp. 734 (S.D.N.Y. 1994), it was further held that Karadzic's factions were non-state actors, thus incapable of violating international law (at 739), which is a fundamental error, as pirates who are non-state actors can violate international law; also *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

<sup>452</sup> *Karadzic*, (1995) 34 I.L.M. at 1611, although the court did identify non-justiciable political questions (at 1612).

<sup>453</sup> (1995) 34 I.L.M. at 1613.

<sup>454</sup> D'Amato, relation of the individual, at 11.

application of the Foreign Assistance Act, Section 502B is an example where the efforts of Congress to control the provisions of aid or arms, to states with poor human rights records, is simply ignored.<sup>455</sup>

The application of immunity for the violation of human rights would seem to provide a political shield for the blatant violation of international law. The Chief Justice, sitting in the Second Circuit in *Amerada Hess*, held that the FSIA did not bar the provision of subject-matter jurisdiction under the ATS. In fact, reviewing the past and present status of international law, the Chief Justice concluded that immunity would not apply to violations of international law generally.<sup>456</sup> He emphasised, '[t]he elimination of the executive branch's role in making immunity decisions certainly does not suggest an intent to provide immunity for violations of international law. Similarly, the procedural goals of the FSIA in no way require an implicit repeal of the jurisdictional grant of the Alien Tort Act.'<sup>457</sup> Thus concluding that the FSIA did not pre-empt the jurisdictional grant of the ATS.<sup>458</sup> The Supreme Court did not agree with the Chief Justice,<sup>459</sup> although there are merits to the issues addressed. The FSIA is subject to existing international agreements and international law, although the agreement has to specify an express or clear intention to waive immunity.<sup>460</sup> Although domestic statutes cannot be interpreted against international law,<sup>461</sup> a waiver is valid only from the specific intention of the sovereign state. It is suggested that to provide immunity for a state that violates human rights would be to violate Articles 55 and 56 of the UNC.<sup>462</sup> In effect, this argument may be extended to apply international responsibility against the US for violating international law through litigation,

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<sup>455</sup> See generally, Cohen, *supra*, at 247.

<sup>456</sup> (1987) 26 I.L.M. 1374, 1378-1380.

<sup>457</sup> *Ibid*, at 1382.

<sup>458</sup> *Ibid*, at 1383.

<sup>459</sup> 488 U.S. at 439-40, FSIA controls and does not provide jurisdiction in these circumstances; at 434, FSIA is the sole basis for a suit against a foreign sovereign.

<sup>460</sup> 28 U.S.C. 1604; Lininger, *supra*, at 185.

<sup>461</sup> *Paquette Habana*, 175 U.S. 677, at 700 (1900).

<sup>462</sup> Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 Am. J. Int'l. L. 337, 349-350, who interprets the Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276 (1970) [1971] I.C.J. Reps. 16, 57, para. 131, as implying that Article 55 and 56 of the UNC imposes obligations on states, and that publicists agree with this.

effectively denying their obligations under the UNC by providing a means of legitimising the violation of human rights.<sup>463</sup>

Under the ACHR, there is a positive duty on states, not only to refrain from violation of specific rights under the convention, but also under Article 1, to ‘ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.’<sup>464</sup> Thus, to grant immunity to a state to avoid liability against the victims, in the face of blatant violations of human rights, is incompatible with the obligations under Article 1, as interpreted by the Inter-American Court of Human Rights. A fair interpretation of the FSIA, that does not violate the principles and spirit of international law, is that immunity should not be granted to states that violate human rights.

In tort claims, particularly in US cases, even if a certificate of the relevant department of state does not accord immunity, the assets for enforcement might receive immunity from judgement. Execution of judgement against a foreign state depends generally on what purpose the particular assets are used for. For example, under the State Immunity Act of 1978, only commercial property is available for execution of judgement.<sup>465</sup> It is therefore necessary to show that the property is intended for use in a commercial purpose, as opposed to a military or diplomatic purpose.<sup>466</sup> As a general rule, unless the tort occurs within the forum state, it is unlikely there will be a general exception against immunity, unless specifically provided.<sup>467</sup> According to Pepper, the war crimes and violations of human rights against Kuwaiti and other nationals during the Iraq invasion of Kuwait, and the abuses of Kurds who were or are Iraqi nationals could, possibly be

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<sup>463</sup> See above section 5.4.1, ‘Compelling a State to Investigate and Prosecute Human Rights Violations’.

<sup>464</sup> *Velásquez Rodríguez case*, reprinted in (1989) 28 I.L.M. at 325, para. 175.

<sup>465</sup> Section 13(4); similar position exists for the US, Singapore and Australia, amongst others; Greig, D.W., ‘Forum State Jurisdiction and Sovereign Immunity Under the International Law Commission’s Draft Articles’ (1989) 38 Int’l. & Comp. L.Q. 243, 264.

<sup>466</sup> Greig, *supra*, at 265.

<sup>467</sup> For example, under the ILC Draft Articles, Article 13 removes immunity from execution of judgement in personal injury and death, only where act or omission occurred in whole or in part within the forum state, and the author of the act or omission was present at the time of commission in the forum state. This is comparable to the situation in the US and Canada, which are based on where the injury or damage occurred, and in the UK and Australia, where the tort occurred; see Greig, forum state jurisdiction, *ibid*, at 566-568.

actionable in the UK or US if the victims were now within that jurisdiction.<sup>468</sup> The difficulty lies not with the jurisdiction to bring an action, but the enforcement of judgement. In the UK, sovereign immunity would apply, unless waived under the State Immunity Act 1978, such that Iraqi assets and property would not be available for attachment to judgement.<sup>469</sup> The situation in the US is no better, as sections 1609 and 1610 of the U.S.C. - FSIA of 1976<sup>470</sup> - as interpreted by the courts in *Letelier v. Republic of Chile*, immunises property and assets belonging to the state, unless waived.<sup>471</sup> Plaintiffs applied to execute judgement against the Chilean government airline, which was permitted by the district court, but reversed by the Second Circuit.<sup>472</sup> Thus the 5.2 million dollar judgement against Chile remains unenforceable.<sup>473</sup>

The problem with immunity from the enforcement of judgement seems to prevail in most domestic jurisdictions. Pepper claimed that for the US, ‘... in seeking to ensure reciprocal security, protection and immunity for its own property outside of the United States, as well as to secure a more friendly environment for United States corporations and state agencies, instrumentalities and quasi-government entities, the United States Government, through the FSIA, has created a formidable barrier to noncommercial actions against foreign states.’<sup>474</sup> Immunity from enforcement is a hurdle even in international documents. The European Convention of State Immunity (1985) prohibits any enforcement except by an express waiver.<sup>475</sup> This situation exists in many jurisdictions where states will deny enforcement of property or assets designated for public purposes, as opposed to private commercial purposes.<sup>476</sup> It would seem, the provision of jurisdiction to hear a cause of action does not necessarily imply a right to enforce the judgement.<sup>477</sup> In such a situation,

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<sup>468</sup> Pepper, *supra*, at 320-1 (UK); at 325 (US).

<sup>469</sup> *Ibid*, at 323-4.

<sup>470</sup> FSIA *reprinted in*, (1976) 15 I.L.M. 1388, and amendments in (1989) 28 I.L.M. 396.

<sup>471</sup> 488 F. Supp. 665 (D.D.C. 1980).

<sup>472</sup> 567 F. Supp. 1490 (S.D.N.Y. 1983); 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2656.

<sup>473</sup> Bazlyer, *supra*, at 722-23.

<sup>474</sup> Pepper, *supra*, at 339; FSIA Section 1610; and see Bazlyer, *supra*, at 739.

<sup>475</sup> Article 23.

<sup>476</sup> Pepper, *supra*, at 347, note 130-34, citing France, Austria, Germany, Belgium and the Netherlands.

<sup>477</sup> However, note Steinhardt, *supra*, at 68, and note 14, who cites the *Marcos* litigation which may be the first non ‘judgement-proof’ litigation on the ATS.

where there is a right does not mean there will be a remedy, which contradicts a well established maxim, *ubi jus, ibi remedium*.

The protection of immunity should not apply in non-commercial actions, particularly when a violation of a *jus cogens* has been proved.<sup>478</sup> It is already an accepted principle in international law that a state may not cite the provisions of domestic laws to justify the violation of international law,<sup>479</sup> so why should the provisions of another state's domestic law prevent the enforcement of a judgement against the offending state's assets and property? Immunity is granted by one state to another for commerce, not to shield that other state from the operation of international law or their pursuit of wrongful conduct. The outcome of *Letelier* is more lamentable because a judgement was made against Chile for the violation of human rights. In practice, treaties already provide for claims between individuals and states, for example the Iran-US Claims Tribunal, the American Convention, the European Convention and historically, the Mixed Arbitration Tribunals. Does the violation of a *jus cogens* imply a waiver of immunity? Rabkin found it unlikely,<sup>480</sup> and the court in *Princz v. Federal Republic of Germany* held that to imply a waiver of immunity simply on the violation of a *jus cogens* was inconsistent with international law, as to imply a waiver required stronger evidence of the intention to waive.<sup>481</sup>

A further reason for states to remove immunity in human rights actions between a state and an individual is because it does not apply to similar actions between states. Article 2(7) of the UNC might operate to prevent intervention in essentially domestic affairs, yet intervention is acceptable under Chapter VII of the UNC and for the violations of obligations owed *erga omnes*, without any recourse to the exclusion of Article 2(7). As was found by Arbitrator Huber, responsibility is the necessary corollary of a right, and rights of an international character involve international responsibility.<sup>482</sup> Thus, where the

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<sup>478</sup> Lininger, *supra*, at 185, note 53.

<sup>479</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 125.

<sup>480</sup> Rabkin, *supra*, at 2134-2135.

<sup>481</sup> 26 F.3d 1166, 1174 (D.C. Cir. 1994); see further, Belsky, *et al.*, 'Implied Waiver under the FSIA: a Proposed Exception to Immunity for Violations of Peremptory Norms of International Law' (1989) 77 Cal. L. Rev. 365.

<sup>482</sup> *Spanish Zone of Morocco Claims case* (1925), 2 R.I.A.A. 615.

action is not essentially within the domestic jurisdiction of a state, then Article 2(7) would provide an argument against the grant of immunity as by implication, competence would exist to provide redress for the violation.<sup>483</sup> It is clear that violations of human rights are not the exclusive jurisdiction of the violating state, thus immunity should therefore not apply to that violating state.<sup>484</sup> In practice, the grant of immunity would act to either support or ignore the illegality, by excluding judicial consideration.<sup>485</sup> International law and inter-state relations already confirm that the legitimacy of a government is questionable where there is a practice of gross violations of human rights.<sup>486</sup> Further there is a trend to interpret the concept of sovereignty as ‘popular sovereignty’ rather than absolute sovereignty.<sup>487</sup> Granting sovereign immunity would alleviate the status of an unacceptable regime in the political arena, when there are judicial processes to adjudicate based on the interests of justice.<sup>488</sup>

Individuals may be immune where they fall under the definition of ‘an agency or instrumentality of a foreign state.’<sup>489</sup> However, individuals have to be acting in their official

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<sup>483</sup> Paust, federal jurisdiction, at 221, although arguing criminal jurisdiction for extraterritorial acts of terrorism.

<sup>484</sup> *Ibid*, at 223; see generally, Fonteyne, ‘The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter’ (1974) 4 Cal. W. Int’l. L.J. 203; Henkin, ‘Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 3’ (1982) 76 Am. J. Int’l. L. 653, 656; Lauterpacht, H., *International Law and Human Rights* (1950), 178; and Reisman, ‘Responses to Crimes of Discrimination and Genocide: An appraisal of the Convention on the Elimination of All Forms of Racial Discrimination’ (1971) 1 Denv. J. Int’l. L. & Pol’y. 29, 39-41 and 63; also, *Filartiga*, 630 F.2d 876, 888-889 (2d. Cir. 1980); and *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

<sup>485</sup> Paust, federal jurisdiction, at 227.

<sup>486</sup> For example the situation in apartheid South Africa, the puppet regime in Cambodia, the military regime in Haiti, and historically, the regime in Manchukuo in 1931.

<sup>487</sup> Reisman, W.M., ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) 84 Am. J. Int’l. L. 866, 869; and Reisman, ‘Coercion and Self-Determination: Construing Charter Article 2(4)’ (1989) 78 Am. J. Int’l. L. 642; note Schachter, ‘The Legality of Pro-Democratic Invasion’ (1984) 78 Am. J. Int’l. L. 645, who does not agree that the use of force is permitted, but who agrees that foreign support for repressive regimes should be strongly criticised (at 647); and Reisman, ‘Haiti and the Validity of International Action’ (1995) 89 Am. J. Int’l. L. 82, 83.

<sup>488</sup> The FSIA does provide exceptions to immunity, for example in section 1605(a)(5), for injury and loss occurring in the US, *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983); other examples are, express or implied waiver, section 1605(a)(1) and (6), commercial activities, section 1605(a)(2), taking of property within the US, section 1605(a)(3), acquisition of gift or succession of property currently in the US, section 1605(a)(4), and certain maritime activities, section 1605(b).

<sup>489</sup> 28 U.S.C. section 1603(a) and (b); elaborated in *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1099-1103 (9th Cir. 1990).

capacity and immunity would not apply where the individual was acting beyond the scope of the authority empowered by the state.<sup>490</sup> Torture and disappearances had to be conducts that were outside the official mandate, were exceeding official authority and therefore not attract immunity.<sup>491</sup> In *Re Estate of Marcos*, the court found that Marcos-Manotoc acted in her personal capacity and was therefore not immune, eventhough she acted under the colour of authority. Thus attacking the individual who tortures would be a fruitful process because a state would be presumed never to authorise the application of torture.<sup>492</sup>

### 5.8.3 Possibilities for Overcoming the Hurdles

It is claimed that the application of immunity in suits against foreign sovereigns is 'ironclad'.<sup>493</sup> However, the arguments above may apply to influence and persuade the inapplicability of immunity where the subject-matter deals with the violation of international law, particularly the violation of human rights recognised and established in international law. Providing immunity effectively assists the violating state in the commission of the offence. Where the violation amounts to an international crime, the violators should not be immunised, whether they are states or individuals. Bringing a suit against individuals rather than states does in itself have merits, as it specifically targets the human violator. In practice, dictatorial heads-of-states are generally wealthy and the enforcement of judgement against their personal assets would act as a more equitable form of suit, than attaching assets belonging to the state. In fact, such heads-of-states may have diverse investments in developed states, which could provide a potentially fruitful cache to claim from.

A unique way of excluding Executive intervention and the grant of immunity was articulated by D'Amato.<sup>494</sup> Although limited to its particular set of circumstances and the necessity of haste because of the hunger strike, it nevertheless shows a creative two-pronged approach in obtaining a just result. In order to prevent the US government from

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<sup>490</sup> *Chuidian*, 912 F.2d at 1106; and *Re Estate of Marcos*, (1993) 32 I.L.M. at 110.

<sup>491</sup> *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994).

<sup>492</sup> *Lininger*, *supra*, at 186; although what amounts to torture may be defined differently from state to state.

<sup>493</sup> *Ibid*, at 182.

<sup>494</sup> D'Amato, relation of the individual, 1-12.

interfering in the proceedings by giving immunity to the defendant state, D'Amato cited the US as co-plaintiff under an obscure legal procedure;<sup>495</sup> he then applied for an interim injunction for a suit against the USSR.<sup>496</sup> The inability of the US government to grant immunity and the fear that the injunction would be granted against the economic interest of the USSR in Chicago (even for one day), caused the USSR government to guarantee the free movement of the individual and ended the hunger strike.<sup>497</sup> This example effectively excluded the grant of sovereign immunity and the intervention of the Executive, but its application is case specific and would probably not be applicable as a general precedent.

Domestic legislation could also be a means of excluding the grant of immunity, whilst enabling extra-territorial jurisdiction. For example, the LIBERTAD Act of 1996,<sup>498</sup> which was based on the finding of massive human rights violations and continued tyranny in Cuba, as well as inspired by the recent action in Haiti,<sup>499</sup> stated as its purpose: to promote democratic elections; to strengthen international sanctions; to protect US national interests; and 'to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.'<sup>500</sup> This form of extra-territorial legislation within a state may effectively impose responsibility upon other states, organisations or individuals who 'traffick' in property unlawfully expropriated by the Castro regime, who trade with Cuba, or who provide technology or other industrial facilities.<sup>501</sup> Title III of the Act provides for a civil remedy to US nationals against trafficking in property confiscated by the Castro regime, on or after 1 January 1959.<sup>502</sup> Although a trade boycott exists between the US and Cuba, many foreign companies pour an estimated five billion dollars into the country.<sup>503</sup> Other states have denounced the Act as

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<sup>495</sup> *Ibid*, at 3.

<sup>496</sup> *Ibid*.

<sup>497</sup> *Ibid*, at 4.

<sup>498</sup> An Act '[t]o seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes.' 104th Congress, H.R. 927. See Appendices, A5

<sup>499</sup> Section 2, LIBERTAD Act.

<sup>500</sup> Section 3, particularly sub-section 6.

<sup>501</sup> Patricia Wilson, 'Anger over Cuba sanctions move', *The Daily Telegraph*, 5 March 1996.

<sup>502</sup> Section 103 (a)(1).

intermeddling in foreign trade and an attack on US allies.<sup>504</sup> It has created a trade war,<sup>505</sup> although President Clinton has put a six month delay in the activation of the Act.<sup>506</sup>

LIBERTAD actually contains provisions that overcome the two large hurdles to an action against a foreign sovereign and the enforcement of judgements, namely the act of state and the application of sovereign immunity. The Act specifically excludes application of the act of state doctrine,<sup>507</sup> it amends immunity where attachment is concerned,<sup>508</sup> and Title IV provides for the exclusion of aliens who have trafficked in or confiscated such property.<sup>509</sup> Although it is claimed that the Act is an election ploy to secure votes in Florida and New Jersey.<sup>510</sup> There are further bills pending, to create the same situation against Iran and Libya,<sup>511</sup> and this may set a precedent for action against Nigeria and Burma.<sup>512</sup> It does provide a model from which the current obstacles may be specifically overcome, and a means of empowering individuals to espouse their interests in international law. It targets specific regimes and sets out the clear purposes for implementation.

Apart from specific statutory provisions, there is some authority to suggest that judgements may be enforced within the jurisdiction of a non-forum state. Anderson refers to the judgement in *Cablevision Systems Development Co. v. Shoupe*,<sup>513</sup> as authority for a

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<sup>503</sup> Adam Zagorin, 'Punishing Cuba's Partners', *Time*, 24 June 1996, 51, the Act would target large corporations like ED and F Man a sugar trading company, ING a Dutch bank, de Beers, Mitsubishi, Body Shop, Benetton, Bayer, Daewoo and BAT a British tobacco company, whilst several other companies have been informed by the State Department that they will soon be *personae non gratae*.

<sup>504</sup> *Ibid*, citing the protests of Canada's Minister of Foreign Trade, Mexico's President and Italy's Prime Minister.

<sup>505</sup> Cornwell, R., 'Cuba vendetta sparks war across Atlantic', *The Independent*, 12 July 1996, 13.

<sup>506</sup> However, Title III which permits individuals to sue for confiscated property has come into force; see, Bremner and Rhodes, 'EU weighs curbs on Americans over Cuba policy', *The Times*, 18 July 1996, 11; and Black and Palmer, 'Europe reacts coolly to Clinton delaying tactics', *The Guardian*, 18 July 1996, 13.

<sup>507</sup> Section 103(a)(6).

<sup>508</sup> Section 103(e).

<sup>509</sup> Section 401.

<sup>510</sup> Cornwell, *supra*, at 13.

<sup>511</sup> Black, I., 'Sanctions bill likely to infuriate EU', *The Guardian*, 18 July 1996, 13; the D'Amato-Kennedy bill.

<sup>512</sup> Black, 'Britain confronts US over Cuba law', *The Guardian*, 12 July 1996, 13.

<sup>513</sup> (1986) 39 West Indian Reports 1

court to enforce a foreign judgement founded upon a cause of action unknown to that forum.<sup>514</sup> *Cablevision* established that a judgement can be enforced according to contemporary practice of private international law. Thus where a defendant has escaped the judgement state or the assets are located in another jurisdiction, the application of private international law according to *Cablevision* may facilitate a claim in another jurisdiction, even where the cause of action is unknown.

Another hurdle is the real possibility that the defendant may leave the jurisdiction of the forum state. For example, in *Filartiga*, the court awarded the plaintiffs 10.4 million dollars in judgement, but because the defendant was permitted to return to Paraguay, the judgement remains unenforced.<sup>515</sup> On the other hand, a positive example was provided by Lininger of Sergio Arvendondo, who fled US jurisdiction before service, but had a pre-judgement attachment award against his prize horse.<sup>516</sup> Thus there is a potential to obtain assets of individuals, where this is planned in advance and executed efficiently.

## 5.9 ACTION BY NGOs AND OTHER INTERNATIONAL ORGANISATIONS

This chapter has identified and discussed the issues of inter-state action, and the possibilities open to individuals to bring actions to enforce their interests. Where the activities of a state do violate human rights or cause forced migration, would an NGO have competence to bring an action for relief against a state agency? The general rule seems to be that *locus standi* depends on consideration of several issues, namely the nature of the primary duty and breach, the nature of the relationship between the applicant and respondent, and the nature of the remedies sought.<sup>517</sup> In domestic actions, for example in the UK, the necessity of having a 'sufficient interest' is a requirement of judicial review.<sup>518</sup>

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<sup>514</sup> Anderson, W., 'Enforcement of Foreign Judgements Founded Upon a Cause of Action Unknown to the Forum' (1993) 42 Int'l. & Comp. L.Q. 697.

<sup>515</sup> Bazylar, *supra*, at 724.

<sup>516</sup> Lininger, *supra*, at 177.

<sup>517</sup> *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All E.R. 93; *per* Wilberforce LJ, at 96. *per* Diplock LJ, at 101 and *per* Fraser LJ, at 108; and *R v. Secretary of State for the Environment, ex parte Rose Theatre Trust Co.* [1990] 1 All E.R. 754, *per* Schiemann J, at 766.

<sup>518</sup> Section 31(3) of the Supreme Court Act 1981. Note also Rules of the Supreme Court Order 53 rule 3(7) which provides that '[t]he Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

However, judicial review may provide a means to question the state that facilitates, through aid, a foreign government that violates human rights, and it may cause the state organs that violate human rights to cease their activities. The judicial review cases in the UK have the potential to catalyse both these possibilities, or at least bring pressure to bear against governmental actions.

In *R v. Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No. 2)*, the Court held that Greenpeace had *locus standi* to bring the action of judicial review because it had a genuine and sufficient interest, with 2,500 supporters, participation in the consultation process, and clearly demonstrated that it was not a 'mere' or 'meddlesome busybody'.<sup>519</sup> It would seem from Otton's dicta that NGOs with international and national recognition, the access to scientific, technical and legal expertise, and the support of nationals within the state, particularly those affected by the actions of the state authority, would be granted *locus standi* to challenge government decisions.<sup>520</sup> The *Greenpeace case* was applied in *R v. Secretary of State for Foreign Affairs, ex parte World Development Movement*, to provide *locus standi* to the applicants also for judicial review.<sup>521</sup> Rose LJ, identified several significant factors in his determination, the importance of maintaining the rule of law, the importance of the issues raised, the absence of other means of challenging the decision, the nature of the breach in relation to the relief sought, the prominence of the applicants and their international and national interests in development aid.<sup>522</sup> It would seem that the provision of standing for NGOs to apply for judicial review is taking a more liberal approach.<sup>523</sup>

The position of NGOs in the international sphere, to bring an action before an international tribunal is also dependant on specific provision of international instruments. For example, standing to originate a complaint to the Inter-American Commission on Human Rights is not limited to victims, but specifically accepts NGOs that are legally

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<sup>519</sup> [1994] 4 All E.R. 329, *per* Otton J, at 349-351..

<sup>520</sup> *Ibid.*

<sup>521</sup> [1995] 1 All E.R. 611.

<sup>522</sup> *Ibid.* at 620.

<sup>523</sup> *Ibid.* at 620, para. c; *per* Rose LJ.

recognised in one of more Member states of the Organisation.<sup>524</sup> NGOs may on the other hand participate, with leave of the courts, as *amicus curiae* and submit briefs on legal, or occasionally, factual issues. Generally, the interest required for such status is less than that required for standing to bring an action.<sup>525</sup> As a general proposition, because of the increase in the number of cases before international courts, the increased diversity and complexity of issues, which concern a broader public interest, NGOs are increasingly granted status as 'friends of the court'.<sup>526</sup> In the ICJ, for Advisory Opinions, an NGO has been granted such status, although it was eventually rejected because of the delay in submission.<sup>527</sup> Such participation is arguably permissible under Article 66 of the SICJ, and Article 50 may provide the Court with a discretion to request the opinion of NGOs as experts in complex and complicated cases.<sup>528</sup> NGOs may be granted *amicus curiae* status in the European Court of Justice,<sup>529</sup> the European Court of Human Rights,<sup>530</sup> and the Inter-American Court of Human Rights.<sup>531</sup>

International organisations have access to an Advisory Opinion of the ICJ, under Article 96(2) of the UNC.<sup>532</sup> An Advisory Opinion does provide a 'binding' effect, although the characteristic of this effect is not the same as *res judicata* of a judgement, but depends on the clauses of organisations that refer to the Advisory Opinion of the court.<sup>533</sup> Thus the

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<sup>524</sup> Article 44, ACHR.

<sup>525</sup> Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 Am. J. Int'l. L. 611.

<sup>526</sup> *Ibid.*, at 616.

<sup>527</sup> *Ibid.*, at 623-4.

<sup>528</sup> *Ibid.*, at 627; also note, in the *Nicaragua case*, the Court recognised that information could be obtained by means not envisaged by the Rules of the Court, [1986] ICJ Rep. 14, 25, para. 31.

<sup>529</sup> Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 Am. J. Int'l. L. 611, 629-30; where the case affects their legal or economic position, or their freedom of action.

<sup>530</sup> *Ibid.*, at 631-38; Rules of Procedure, Article 37(2).

<sup>531</sup> *Ibid.*, at 638-40; Rules of Procedure, Article 34(1), anyone '... likely to assist [the Court] in carrying out its function.'

<sup>532</sup> See generally, Brownlie, principles, at 730-733; Gray, judicial remedies, at 111-118; and Higgins, problems and process, at 198-201.

<sup>533</sup> Ago, R., "'Binding" Advisory Opinions of the International Court of Justice' (1991) 85 Am. J. Int'l. L. 439, 442.

nature of the binding effect is more of a contractual nature.<sup>534</sup> It has been suggested that the advisory jurisdiction could be used to question the legitimacy of World Bank projects, instead of contentious litigation.<sup>535</sup> The bounds on what may be considered within the Advisory Opinion do have significant limits, for example, the court will not consider issues which would affect a current contentious dispute pending between two or more states.<sup>536</sup> This is so that the court would not usurp the principle that the consent of states is required in contentious cases. The Court, in the *Western Sahara Case*,<sup>537</sup> did not contradict the principle forwarded by the Spanish Government, but rejected the request on other grounds.<sup>538</sup> In comparison, the ICJ has had far less reference to the advisory opinion than the PCIJ.<sup>539</sup> The issues concerning the advisory jurisdiction of the court are complex, but there seems to be a growing trend to include clauses that refer disputes for advisory opinions in agreements between states and international organisations.<sup>540</sup>

There are several international organisations that are dedicated to the supervision, promotion and protection of human rights, although they are creatures of international conventions. The main organisations are the Human Rights Committee,<sup>541</sup> the Inter-American Commission on Human Rights,<sup>542</sup> the European Commission on Human Rights,<sup>543</sup> the ILO Governing Body, Commission of Inquiry on the Freedom of

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<sup>534</sup> *Ibid.*

<sup>535</sup> Hutchins, *supra*, at 506, who also notes the slim prospects (at 522).

<sup>536</sup> Gray, *judicial remedies*, at 116-117.

<sup>537</sup> [1975] I.C.J. Repts. 12, 21-3.

<sup>538</sup> *Ibid.* 23-27.

<sup>539</sup> Harris, *supra*, at 957; Gross (ed), *The Future of the International Court of Justice* (vol. 2, 1976); Promerance, M., *The Advisory Function of the of the International Court of Justice in the League and United Nations Era* (1973); and Rosenne, *Intervention in the International Court of Justice* (1993).

<sup>540</sup> Ago, "'Binding" Advisory Opinions of the International Court of Justice' (1991) 85 Am. J. Int'l. L. 439, 449-451; and Gray, *judicial remedies*, at 118.

<sup>541</sup> Under the ICCPR, see Wiessbrodt, 'International Measures against Arbitrary Killings by Governments' (1983) 77 Am. Soc'y. Int'l. L. Proc. 380-381; Lewis-Anthony, S., 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System', in Hannum (ed), at 41, 42-49, although member states have to declare recognition for individual complaints; and note the Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Theo van Boven, 'Progress Report of the Special Rapporteur', UN Doc. E/CN.4/Sub.2/1991/7, at para. 14-23, and 'Final Report', UN Doc. E/CN.4/Sub.2/1993/8, at para. 50-59, on the work of the Human Rights Committee.

<sup>542</sup> Under the ACHR, see Wiessbrodt, *supra*, at 381-382.

<sup>543</sup> Under the ECHR, see Higgins, 'Remarks' (1983) 77 Am. Soc'y. Int'l. L. Proc. 391-397.

Association,<sup>544</sup> the Committee on the Elimination of Racial Discrimination,<sup>545</sup> the UN Commission on Human Rights,<sup>546</sup> the Committee against Torture.<sup>547</sup> The use of reporting measures are favoured by several commentators and organisations, for example under the ILO.<sup>548</sup>

The position of NGOs in both the domestic and international spheres have room for development and would provide advantages, whether in judicial review causes, contentious adjudication, or simply as *amicus curiae*. The situation for other international organisations in the international plane does also provide a further means for bringing actions on behalf of individuals. Clearly these organisations have important parts to play where individuals are concerned.

## 5.10 RESOLVING THE PRINCIPLE OF NON-INTERVENTION IN THE DOMESTIC AFFAIRS OF STATES

As a general proposition, the principle of non-intervention in the domestic affairs of a state stands as the main hurdle against providing a legal interest in a claim, or in the establishment of jurisdiction. The principle precludes intervention by the UN and other states in essentially domestic affairs of another state.<sup>549</sup> The prohibition includes financing,

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<sup>544</sup> Under the Constitution of the ILO, Article 26(4) in 1949, see Brownlie, principles, at 568; Wolf, 'Human Rights and the International Labour Organisation', in Meron (ed), *Human Rights in International Law* (vol. 2, 1984), 273, 288-290; Wiessbrodt, *supra*, at 382; Swepston, L., 'Human Rights Complaint Procedures of the International Labour Organisation', in Hannum (ed), at 99-116; and Theo van Boven, 'Final Report', *supra*, at para. 67-79.

<sup>545</sup> Under the CEAFRD, Lewis-Anthony, in Hannum (ed), at 49-52, although member states have to make a declaration recognising individual complaints; and note Theo van Boven, 'Progress Report of the Special Rapporteur', *supra*, at para. 24, and 'Final Report', *supra*, at para. 60.

<sup>546</sup> Under the ECOSOC in 1946, see Brownlie, principles, at 571.

<sup>547</sup> Under Article 22, Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment, in force, 26 June 1987, Lewis-Anthony, in Hannum (ed), at 52-57; and note Theo van Boven, 'Progress Report of the Special Rapporteur', *supra*, at para. 25-27, and 'Final Report', *supra*, at para. 61-63.

<sup>548</sup> Brownlie, principles, at 568-569; and Meron, 'Remarks' (1983) 77 Am. Soc'y. Int'l. L. Proc. 377, 400-404.

<sup>549</sup> Article 2(7), UNC, Friendly Relations Resolution; also, Article 3, ILC Draft Declaration on the Rights and Duties of States, [1949] Yrbk. I.L.C. 286 (commended by GA in Res. 375 (IV) (1949)); for a detailed discussion see, *Preparatory Document and Further Preparatory Document submitted by Mrs Claire Palley on the question of the role of the United Nations in international humanitarian activities and assistance and human rights enforcement, bearing in mind the principle of non-intervention*, papers submitted to the Sub-Commission on the Prevention of Discrimination and the Protection of

organising or supporting the violent overthrow of the regime of another state.<sup>550</sup> This principle could be argued to prevent an action on behalf of nationals in another state, or the imposition of legislation that has an extra-territorial affect, where that affects the rule of non-intervention. It may be argued that Article 2(7) restates the classic 'constitutional' perspective of the UNC, which limits the competence of the UN and its organs to intervene in domestic affairs.<sup>551</sup> However, other resolutions make clear that essentially domestic issues are excluded from international scrutiny. Several questions therefore need to be addressed. What is essentially a domestic affair, and how would this prevent a state from exercising jurisdiction to implement measures for the protection of individuals?

The Covenant of the League of Nations had a similar provision to Article 2(7),<sup>552</sup> and the PCIJ interpreted this to mean, not whether a party has competence to take a particular action, 'but whether the jurisdiction claimed belongs solely to that party.'<sup>553</sup> The Court went on to elaborate that 'solely', meant an issue that international law did not in principle regulate. An issue which each state was the sole adjudicator, taking into account that this was essentially a relative question that depended on the development of international relations.<sup>554</sup> Brownlie asserted that, '[t]o impose responsibility on a state on the international plane, it is necessary for the complainant to establish that the matter is subject to international law or, more precisely, is not a matter purely within the area of discretion which international law designates as sovereignty.'<sup>555</sup> Article 2(7) of the UNC was designed specifically to restate this general proposition in international law. Thus the

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Minorities, UN Doc. E/CN.4/Sub.2/1993/39, 19 August 1993, and UN Doc. E/CN.4/Sub.2/1994/39, 15 June 1994.

<sup>550</sup> Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131 (XX), 21 December 1965, para. 2; and Friendly Relations Resolution, para. 1. Both the 1965 Declaration and the 1970 Resolution were deemed customary international law in the *Nicaragua case*, (Merits) [1986] I.C.J. Reps. at para. 203.

<sup>551</sup> Brownlie, principles, at 553-4.

<sup>552</sup> Article 15(8) which provided, '[i]f the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.'

<sup>553</sup> *Nationality Decrees Issued in Tunis and Morocco case* (UK v. France) [1923] P.C.I.J. Series B, No. 4, at 23.

<sup>554</sup> *Ibid.* at 24.

<sup>555</sup> Brownlie, principle, at 553.

determination of whether an issue was within the domestic jurisdiction was for the organisation or third party adjudication to determine,<sup>556</sup> as confirmed by GA and SC practice,<sup>557</sup> as well as in similar provisions in other international instruments.<sup>558</sup>

One interpretation of Article 2(7) is that the UN should never apply Chapter VII measures in an essentially domestic matter.<sup>559</sup> Glennon doubts that the situations in Haiti, Rwanda and Somalia could be construed as acts of aggression, breaches of or threats to the peace, and concludes that the pillar of sovereignty was lost in the Haiti situation for unconfirmed gains.<sup>560</sup> He claims that ultimately, there are still no safeguards to the use of force, even if it is collective, and such collective actions are still carried out in an *ad hoc* and piecemeal manner.<sup>561</sup> On the other hand, Reisman claimed that the massive violations of human rights were already determined to be a threat to the peace when economic sanctions were applied in Haiti,<sup>562</sup> and therefore the application of sanctions was clearly consistent with other similar situations, such as Rhodesia's racist regime.<sup>563</sup> The violation of human rights of nationals does cast doubt on the legitimacy of the authorities to govern their state and such violations have already been determined as threats or breaches of the peace.<sup>564</sup>

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<sup>556</sup> Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations' (1976) 25 *Int'l. & Comp. L.Q.* 715, 719-720.

<sup>557</sup> *Ibid.*, at 722-744.

<sup>558</sup> *Ibid.*, at 721, who gives the examples of The Inter-American Treaty on Pacific Settlement, Pact of Bogota (1948), Article 5; the Charter of the OAU (1963), Article 3(2) and (3); and the European Convention for the Peaceful Settlement of Disputes (1957), Article 27(b); and see further, Howell, J.M., 'Domestic Questions in International Law' (1954) 47 *Am. Soc'y. Int'l. L. Proc.* 93; and Ermacora, Felix, 'Human Right and Domestic Jurisdiction (Article 2(7) of the Charter)' (1968) 11 *Recueil des Cours* 440.

<sup>559</sup> Glennon, M.J., 'Sovereignty and Community After Haiti: Rethinking the Collective Use of Force' (1995) 89 *Am. J. Int'l. L.* 70, 72.

<sup>560</sup> *Ibid.*, at 72 (identifying SC Res. 940, 31 August 1994 on Haiti, 929 of 23 June 1994 on Rwanda, and 794 of 3 December 1992 on Somalia), and at 74.

<sup>561</sup> *Ibid.*, at 74.

<sup>562</sup> Reisman, 'Haiti and the Validity of International Action' (1995) 89 *Am. J. Int'l. L.* 82, 82-83.

<sup>563</sup> *Ibid.*, at 83, see also, McDougal and Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern' (1968) 62 *Am. J. Int'l. L.* 1.

<sup>564</sup> See, Glennon, *supra*, at 72; and above section 5.3, 'Obligations Owed *Erga Omnes* as a Basis for Action', section 5.5, 'Coercive Action and Action to Remove a Government' and section 4.3, 'Causes of Action'.

The violation of human rights and the treatment of nationals have been argued to be outside what is essentially a domestic affair,<sup>565</sup> simply because '[t]hey are part and parcel of the integrity and dignity of the human being. They are rights that cannot be given or withdrawn at will by any domestic legal system.'<sup>566</sup> The recent SC resolutions concerning Haiti, Rwanda, Iraq, and Somalia also confirm this. Ermacora qualified the exclusion of the principle of non-intervention by limitation only to gross and consistent patterns of human rights abuse,<sup>567</sup> whilst Fonteyne claims intervention is permissible where the state has violated the Charter or there are flagrant abuses of human rights.<sup>568</sup> It seems consistent that violations of human rights, whatever the specific quality of such violations, are beyond the contention of essentially domestic affairs. International peace and security are interdependent with the protection of human rights,<sup>569</sup> beyond the assertion that such violations are a threat to international peace and security.

In practice, '[r]esolving the problems of the internally displaced must ultimately mean addressing the causes of displacement which, in many instances, means making efforts toward resolving conflicts, ensuring peace and security for all and guaranteeing the rights of citizenship without discrimination, a task that may call for international intervention with all its attendant problems.'<sup>570</sup> Where a government fails to protect its inhabitants or causes massive violations of human rights, then it forfeits its legitimacy as 'custodian of sovereignty'.<sup>571</sup> As Perez de Cuellar once noted, '... sovereignty and international responsibility are different sides of the same coin. They are intricately

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<sup>565</sup> Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am. U. L. Rev. 1, 7.

<sup>566</sup> Higgins, *problems and process*, at 96; similarly argued by, Reisman, 'Haiti and the Validity of International Action' (1995) 89 Am. J. Int'l. L. 82; and Teson, F.R., 'Le Peuple, c'est moi! The World Court and Human Rights' (1987) 81 Am. J. Int'l. L. 173.

<sup>567</sup> Ermacora, *supra*, at 736.

<sup>568</sup> Fonteyne, *supra*, at 240.

<sup>569</sup> McDougal and Reisman, *supra*, at 18.

<sup>570</sup> Deng, *protecting the dispossessed*, at 4. A distinction should be noted between humanitarian assistance, which seems to correspond to the limits of state sovereignty, and intervention, which does not respect sovereignty in certain situations. In fact, humanitarian assistance does not give official status to a co-operating party, see UNHCR, *state of the world's refugees*, at 75. This would apply equally to the issues concerning transboundary forced migrants.

<sup>571</sup> *Ibid.*, at 14.

connected and one goes with the other.<sup>572</sup> Scheffer advocated that in the post Cold War era, intervention - even armed intervention - is permissible to alleviate suffering,<sup>573</sup> although unilateral armed intervention is still strictly prohibited.<sup>574</sup> When forced migration is caused, suffering is massive, whether that suffering is qualified to an individual or to a group. Rights are often violated and the interests of the affected population are disregarded by the very authorities whose duty it should be to protect them. It is not acceptable to exclude the provision of solutions to forced migration by alleging intervention in domestic affairs.

### 5.11 POPULATION TRANSFER AS A LAST RESORT

One further issue that needs consideration is the possibility that two groups cannot live together within the same community. This disaffection, whether the consequence of specific or historical animosity, may require segregation. Thus where one group is willing to leave, even despite the occurrence of violations of human rights or international norms and the consequent regimes of responsibility, then population transfer might possibly be the only solution. Population transfer, even as a remedy of last resort, cannot violate the elements of forced migration, as the movement has to be voluntary and ideally supervised by the international community. There are immense and complex problems with such situations, which this study is not able to fully consider. Suffice to say that such a possibility may occur, although they should be determined on a case specific scenario,<sup>575</sup> with the 'utmost reluctance' and be implemented only in extremely exceptional circumstances.<sup>576</sup> The emphasis on voluntariness applies not only to the persons relocated, but also to the existing populations in the resettled areas who have to receive the incoming population.

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<sup>572</sup> Commentaries, 'Perez de Cuellar Discusses Sovereignty and International Responsibility', *The Review*, No. 47, December 1991, 24.

<sup>573</sup> Scheffer, David J., 'Toward a Modern Doctrine of Humanitarian Intervention' (1992) 23 *U. Tol. L. Rev.* 259.

<sup>574</sup> Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *Am. U. L. Rev.* 1, 9, particularly under the Friendly Relations Resolution and in accord with the *Nicaragua case*. See above section 5.5.1, 'Use of Force'.

<sup>575</sup> Goebel, C.M., 'A Unified Concept of Population Transfer' (1992) 21 *Denv. J. Int'l. L. & Pol'y.* 29, 31, who notes that the lawfulness of transfers be determined on a case specific basis, although the author gives an overview of the issues concerned and provides several examples of population transfers.

<sup>576</sup> Coles, 1992 study, at 142.

The issues concerning population transfer are similar to this study on forced migration, except in the identification of unlawfulness.<sup>577</sup> Whether or not population transfer amounts to an unlawful act depends on the definition and the individual instance of population transfer. Goebel notes one definition of population transfer was the movement of large numbers of people without their 'free and informed consent' or the consent of the people into whose territory they are moved into.<sup>578</sup> Voluntariness is therefore a vital ingredient, and involuntary population transfers amount to an interference in the right to private life - a sentiment affirmed by the European Commission on Human Rights.<sup>579</sup>

Even transfers pursuant to treaties<sup>580</sup> could amount to war crimes or crimes against humanity,<sup>581</sup> and the only means to legitimately move populations is to make it sufficiently attractive for the persons involved to move voluntarily, to provide suitable compensation and to ensure the transfer is humane.<sup>582</sup> In effect, the foundation for legal population transfers rested on the consent of the persons moving.<sup>583</sup> With respect to internal displacement, de Zayas claims that movement has to be based on a 'clear and present danger', or in the interest of waging war successfully.<sup>584</sup> Thus, population transfer as a last resort still requires that the movement does not amount to forced migration, despite the

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<sup>577</sup> See generally, Erin Mooney, 'Population Transfer: A Suitable Synonym for So-called 'Ethnic Cleansing'?' Draft Paper presented to the Socio-Legal Studies Association Annual Conference, Southampton, 1-3 April 1996; de Zayas, 'International Law and Mass Population Transfers' (1975) 16 *Harv. Int'l. L. J.* 207; and above section 2.4.1, 'Population Movement as an Element'.

<sup>578</sup> Goebel, *supra*, at 31, note 9; Sub-Commission report on 'The Human Dimensions of Population Transfer Including the Implantation of Settlers and Settlements', UN Doc. E/CN.4/Sub.2/1990/17, and UN Doc. E/CN.4/Sub.2/1991/21. The use of 'people' appears in Goebel's article and in the Sub-Commission work.

<sup>579</sup> *Cyprus v. Turkey*, cases. 6780/74 and 6950/75, (1976) 4 *Eur. Hum. Rts. R.* 72-74.

<sup>580</sup> de Zayas, *supra*, at 225-226, provides examples of post-Second World War population transfers pursuant to treaties.

<sup>581</sup> *Ibid.*, at 209-213, reviewing the Geneva Convention on Protection of Civilians; and at 213-214, reviewing the Nuremberg Charter of the International Military Tribunal, Article 6(b) and (c) and state practice.

<sup>582</sup> *Ibid.*, at 224; further, the standard of 'humane and orderly' should be applied and supervised by the ICRC, the UNHCR or such organisations, at 250.

<sup>583</sup> *Ibid.*, at 223-226, 247 and 249; the New Delhi Accord of April 1950, 131 *U.N.T.S.* 3, that facilitated the movement of Hindus out of Pakistan and Moslems out of India, is suggested as an example of voluntary population transfers, because of the significant number of Moslem in India and Hindus in Pakistan, claimed as evidence that the remaining populations had some choice, at 249-250.

<sup>584</sup> *Ibid.*, at 255; see *Hirabayashi v. United States*, 320 U.S. 81, 93 and 99; and *Korematsu v. United States*, 323 U.S. 217-218.

recognition that in certain circumstances, population transfers may be necessary. For example, population transfer for the purpose of ‘ethnic cleansing’ or amounting to ‘demographic manipulation’ is considered unlawful under various international instruments,<sup>585</sup> but population transfer amounting to the peaceful movement of people, although coercive, but *bona fide* in the public interest is not unlawful.<sup>586</sup> Thus although population transfer may be a solution to an otherwise stalemate, its application must be undertaken with the greatest care and caution, with scrupulously investigated motives and aims.

## 5.12 CONCLUSION

This chapter has not set out to invent procedures for the enforcement of violations of international law, but to rehearse what is already in existence, to assess the strength of the assertion that mechanisms are available to states, individuals and other organisations to deal with wrongful conduct in either international or domestic spheres. The reason for developing international responsibility is to permit the imposition of obligations and encourage accountability of individuals and states. There are clearly established causes of action consequent on forced migration, and there are bases of legal and jurisdictional competence for in inter-state action, action by individuals and other organisations. There are also a variety of enforcement mechanisms available to these actors.

van Boven emphasised that, ‘[l]egislation authorizing universal jurisdiction over those who commit gross violations of human rights, as well as the establishment of human rights courts, civil or criminal, regional or universal, should be considered as means that could help make those responsible for gross violations accountable for their actions.’<sup>587</sup> The protection of human rights may be argued to commence from the domestic framework with

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<sup>585</sup> Mooney, *supra*, at 9.

<sup>586</sup> Population transfers are permitted where necessary in armed conflicts, and Parties to a conflict may conclude local agreements for the evacuation from besieged or encircled areas of wounded, sick, disabled and old people, children and women in labour, and for the passage of ministers of all religions, medical personnel and equipment on their way to such areas, Article 17, Fourth Convention. However, population transfers by the Occupying Power is strictly prohibited regardless of motives, Article 49, Fourth Geneva Convention.

<sup>587</sup> Theo van Boven, ‘Final Report’, *supra*, at para. 136(10).

constitutions, statutes, regulations and decrees.<sup>588</sup> Even in analysis of the UN perspective, domestic arrangements to secure the enjoyment of human rights are vital, as are the establishment of formal mechanisms for the vindication of the violations of human rights.<sup>589</sup> State-centred international law may be relegated to mere historical significance, whilst the individuals enforcing their rights according to international law arguably reflects current trends.<sup>590</sup> Both the LIBERTAD Act and the ATS provide a foundation to develop models for the enforcement of human rights within a domestic sphere. Although the application of statutory provisions for individuals do provide some optimism for enforcement of human rights and against the violation of international law, their application is still contentious and confusing, although their consistent application and development are evolving challenges.<sup>591</sup> Because of the gaps in the application of such measures, perhaps a convention specifying specific redress for human rights violations in domestic spheres, the choice of law, the enforcement of judgement and the specific human rights may still be desirable.<sup>592</sup>

Three lessons may be learned from the genocide of the Armenians from a sociological perspective.<sup>593</sup> Firstly, ‘... nations generally will not be able, and thus cannot be expected, to effectively police or punish themselves’;<sup>594</sup> secondly, the punishment of genocide depends on the cohesive will of all states;<sup>595</sup> and finally, if human rights are to be

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<sup>588</sup> Lillich, in Hannum (ed), at 228; and generally, Kirby, M., ‘The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms’ (1988) 62 *Austl. L.J.* 514; and Claydon, J., ‘The Use of International Human Rights Law to Interpret Canada’s Charter of Rights and Freedoms’ (1987) 2 *Conn. J. Int’l. L.* 349.

<sup>589</sup> Alston, P., ‘The UN’s Human Rights Record: From San Francisco to Vienna and Beyond’ (1994) 16 *Hum. Rts. Q.* 375, 386.

<sup>590</sup> D’Amato, ‘Judge Bork’s Concept of the Law of Nations is Seriously Mistaken’ (1985) 79 *Am. J. Int’l. L.* 92, 102-103, and reply at 112.

<sup>591</sup> Rabkin, *supra*, at 2155; Lillich, in Hannum, at 241; and Lininger, *supra*, at 179, who suggests ensuring that the suit attacks as far up the chain of command as possible - creating a ‘supervisory liability’ situation (at 192), and establishing a database of torturers and tracking their movements (at 193), an example of such an organisation is the Etty Hillesum Project, at url: <http://www.argyronet.com/etty>, which publishes a list of ‘barbarians’, Theo van Boven also made a similar recommendation, ‘Final Report’, *supra*, at para. 136(14).

<sup>592</sup> Steinhardt, *supra*, at 69 and 102; and Lininger, *supra*, at 195, who advocates for lobbying other governments to legislate or establish a convention for a world-wide framework of such laws.

<sup>593</sup> Dadrian, *supra*, at 226-27.

<sup>594</sup> *Ibid*, at 226.

<sup>595</sup> *Ibid*, at 228.

depended upon, then their aspirations must be defended not only within the state, but from external sources as well.<sup>596</sup> This observation applies to issues concerning forced migration, for without external supervision, any coercive displacement amounting to forced migration will be done with impunity. On the other hand, penal action against a state or individuals implicated with causing of forced migration needs to be applied within a regime based on justice, due process and the rule of law, i.e., applied under international criminal law. In lieu of and complimentary to a criminal regime, civil remedies may be made available, for direct application by individuals who are the victims. In fact, the ATS has been described as the ‘civil legacy’ of criminal responsibility from the Nuremberg principles.<sup>597</sup>

Several areas do need development for the future of individual human rights claims. For example, the direct legal representation of individuals, the harnessing of public support, a wider education in human rights issues, and the depoliticising of such claims in judicial proceedings.<sup>598</sup> The controversy between self-executing or non-self-executing treaties stems from the inherent judicial hostility to apply rights for individuals derived from an external process, outside the control of domestic political branches of government.<sup>599</sup> Depoliticising the issue of implicitly recognising the political implications would seem necessary, as to ignore such implications ‘... may lead to disastrous results.’<sup>600</sup> Even if the law were in the plaintiff’s favour, but the executive appeared on behalf of the defence, the courts might dismiss the suit,<sup>601</sup> Thus the distinction between justiciable and non-justiciable matters need to be clearly defined, such that the interference by the Executive and the perceived inapplicability of judicial competence may be eliminated.<sup>602</sup>

The identification of wrongfulness in causing forced migration, the establishment of causes of action, legal competence, jurisdictional basis, the use of inter-state coercive

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<sup>596</sup> *Ibid*, at 228-9.

<sup>597</sup> Steinhardt, *supra*, at 66-67.

<sup>598</sup> Grossman, *supra*, at 380.

<sup>599</sup> Hartman, *supra*, at 744 and 749.

<sup>600</sup> Bazylar, *supra*, at 716.

<sup>601</sup> *Ibid*.

<sup>602</sup> Particularly since derogation and exceptions are provided for under international law principles of *ordre public*, national security, state of emergency, public order, health or morals, and in the interest of the state; see generally, Ingles, *supra*, at Chapter III.

measures, including direct and indirect force by the UN, the inapplicability of the requirement for a nationality link and the competence to act for non-nationals, the obligations upon states to investigate and prosecute human rights violations, the desirability of targeting despotic regimes and their removal, provide a strong starting point to argue for measures, both international and domestic, that empower individuals to bring actions against violations of international law that affect their interests. Such measures, already in existence, are therefore argued to be legitimately within the competence of states, and a positive contribution towards a comprehensive plan of action. In effect, it may be argued that providing a private right of action is one means of exhibiting a serious recognition of the consensus against such violations.<sup>603</sup>

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<sup>603</sup> Steinhardt, *supra*, at 76.

## CHAPTER 6

### NEW PERSPECTIVES, DIRECTIONS AND IMPERATIVES

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The first chapter identified the gaps in existing and continuing work in the area of international responsibility for transboundary and internally displaced persons. Chapter 2 reviewed the arguments for incorporating a new perspective on forced migration, by identifying the subjects based upon a functional approach, which is based upon certain elements: the movement across borders and internally, the causes and the need for protection. Chapter 3 then identified the underlying causes of forced migration by proposing that certain considerations existed within the notion of root causes and clarifying the elements that occurred in the causes of forced migration, which are the intention to cause, the acts of coercion and the detrimental consequences of the intention and coercion. Part II then suggested the fundamental need for a comprehensive global approach to solutions, whilst emphasising in Part III the contribution and nature of legal solutions under the regime of international responsibility. Chapter 4 investigated the link between the causes and international responsibility by reviewing the issue of wrongfulness in causing forced migration. It was proposed that the causing of forced migration was unlawful, either because the acts were themselves individual violations of existing international norms or that the causing of forced migration was itself an international wrongful act. Although the latter view required further elaboration, affirmation and application for it to be a principle *lex ferenda*. Finally, Chapter 5 investigated the legal interest, jurisdiction and enforcement measures applicable to causing forced migration and concluded that a variety of measures

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<sup>1</sup> Chinese idiom; romanised: *qiú xué rú nì shuǐ xíng zhōu, bú jìn zé tuì*. Translated: Learning is like travelling against the current in a boat, if no effort is made to advance, then the boat naturally retreats. Learning is an ongoing endeavour.

were applicable to prevent and redress the occurrences of forced migration, both for individuals, states and other organisations.

This thesis has thus attempted to comprehensively deal with the problems of forced migration by investigating the existing gaps and reviewing the previous studies. Identifying forced migrants based on elements that are connected to unlawful actions rather than *ad hoc* determinations is now possible. Rather than specific incidences such as war or persecution, causes may be distinguished by their underlying considerations, such as political or economic considerations. This also permits a synthesis of issues concerning refugees and the internally displaced, the norms applicable for their protection, as well as the remedies available to them or applied for their benefit. The standards imposed on states not to cause forced migration can now be used for preventive action, or for ameliorative action, by imposing international responsibility for violating international norms when causing forced migration. There is also clear legal justifications for the application of sanctions or action aimed at the removal of governments, and even for instituting domestic measures for individuals to enforce their rights in international law, to permit displaced persons to return to their homes, to facilitate resettlement or to obtain remedies. From the identification of the subjects, the solutions, the applicable norms and the enforcement measures, this thesis thus proposes a legal structure to address the problem of causing forced migration and the part individuals themselves may play in enforcing international law.

It would however be disingenuous to claim that this thesis has exhausted all the possible measures to alleviate the problem of forced migration or that legal solutions trump other solutions, as ultimately, a comprehensive plan of action must incorporate both legal and non-legal solutions. The struggle for equality and respect for human dignity also continues throughout the world, yet without unity of ideas or the will to enforce the rule of law and establish the responsibility for violating international law, that struggle is barren and futile. Unless the rule of law is upheld, international affairs would be more akin to 'new world disorder',<sup>2</sup> than a brave era of enlightenment. Academics and practitioners have to

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<sup>2</sup> Coles, 1992 report, at 88.

continue to be motivated, innovative and forward looking, such that a comprehensive solution may be applied. Coles set the agenda by emphasising,

‘[m]ankind must be liberated from the scourge of war; there must be faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small; a sincere effort must be made to establish conditions under which justice and respect for the obligations existing under treaties and other sources of international law can be maintained; and a dedication to the promotion of social and economic progress and better standards of living, in greater freedom, must be affirmed.’<sup>3</sup>

This thesis cannot ignore the weakness inherent in the international legal system and the obvious chasms in the system of protection. Thus it is important to recognise the need for organisations such as UNHCR, to mediate and extend good offices for the co-operation of states, in the protection of human rights. It is also important to acknowledge and maintain the role of the right to seek asylum and non-refoulement, and the obligations of receiving states to maintain the rights of refugees or asylum-seekers in those states. The part played by NGOs and aid agencies in caring and providing for those who are displaced should also be remembered.

Voluntary repatriation remains the best solution to the movement of persons across borders.<sup>4</sup> There is a direct correlation to the subjective fear that gives rise to flight and the willingness to return,<sup>5</sup> because basically there is a general (although not generalised) desire to return.<sup>6</sup> So what actions or activities would facilitate voluntary repatriation and re-settlement? Is the creation of new laws or more laws necessarily the best option? Is it the development of enforcement mechanisms? Would either of these promote and enforce respect for human rights and fundamental freedoms? Would they change government attitudes, promote equality and provide a foundation for the inherent recognition of the importance of human dignity? Imposing a strict regime of human rights enforcement might

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<sup>3</sup> Coles, in Loescher and Monahan (eds), at 407-408, although aimed at refugees, it would apply to forced migrants in general.

<sup>4</sup> See generally, Goodwin-Gill, in Loescher and Monahan (eds), at 256, who notes, ‘... in the uncertain and fluid dynamics which characterize mass exodus, the fact of return can itself be an element in the change of circumstances, contributing to the re-emergence of stability and to national reconciliation.’

<sup>5</sup> *Ibid*, at 257.

<sup>6</sup> Martin, refugee women, at 65, who notes the general assumption that refugee women would return given the opportunity, from interviews and anecdotal information, because they wish to see their parents ‘before it is too late’ and aspire that their children will see and know of their home country.

cause some social instability, particularly where it causes a change in government or by introducing radical reforms within a state. A fundamental issue is whether the rights of states trump the rights of individuals and their human rights. Whose interests are being served, the inorganic entity called the state, the powerful positions of governments and their officials, or the individual, his/her inherent value and worth?

It is imperative that the issues of forced migration be addressed as a whole, with all its component parts: the causes, preventive and ameliorative remedies, assurances for safe return and guarantees against violations of human rights; and the implementation of political and legal measures to achieve lasting solutions. Lee questioned, '[i]s it not time that we extend our helping hands to *all* forcibly displaced - whether from their homes or from their countries - who are in need of assistance and protection?'<sup>7</sup> And Ogata emphasised that,

'... as international concern for human rights expands, on the one hand, and the nature of States changes on the other, the challenge will be to strike a balance between individual and collective responsibilities of States. The role of the international community, including UNHCR, is two-fold: ... to devise more effective means to address humanitarian needs, and ..., to recognize, emphasize and encourage the responsibility of States for their own citizens.

'The unfolding tragedy in Rwanda has starkly exposed the failure of State responsibility as well as the limits of international responsibility. Whatever the gaps in law or the uncertainties on interpretation and application, operational agencies such as mine must continue to work, in a practical and pragmatic manner, to address urgent protection and assistance needs of the victims. I hope that our action on the ground, and its endorsement by the international community will contribute to the work of legal experts and scholars as they seek to develop legal norms and establish new standards for addressing the protection of uprooted populations and solutions to their plight.'<sup>8</sup>

This sets the agenda for the application of a comprehensive plan of action with a wider perspective that incorporates the complex and multi-dimensional structures of the problem. A new perspective is justifiable and desirable, that incorporates both transboundary and internally displaced persons, that uses certain underlying elements to identify the subjects, who are the victims, by the causes of movement. The global solutions, both legal and non-legal are clearly identifiable and applicable, through collective state measures on the

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<sup>7</sup> Lee, internally displaced persons, at 40 (emphasis original, footnote omitted).

<sup>8</sup> Ogata, 'Keynote Address', in Gowlland-Debbas (ed), at xxiii-xxiv.

international and domestic plane, and by empowering the individual for specific circumstances. The causing of forced migration is wrongful in international law, whether because of specific violations in the causing or because the causing of forced migration is itself a wrongful act. The legal precedence and tools for action are all in existence, but they need to be consistently applied.

## 6.1 EXTERNAL SUPERVISION

External supervision may be facilitated by early warning measures, not so much on prediction, but on clear evidence. For example, the prelude to the breakdown of civil order may have mass protests, followed by determined forceful governmental action and consequent violations of human rights. Sri Lanka's downward spiral from a country, fairly applying democratic values and respect for human rights to its current condition, provides a learning experience - where early warning measures combined with international supervision might have contributed to preventing or alleviating the situation.<sup>9</sup> In fact, early warning measures are not sufficient or effective if no external supervision is applied. Dadrian's observations concerning the Armenian genocide clearly shows that Ottoman Turkey had a liberal constitution that afforded guarantees of liberty, citizenship irrespective of religion and equality before the law;<sup>10</sup> whilst the lessons observed from Hyndman's article on Sri Lanka also showed a country with a (previously) good democratic record and liberal constitution.<sup>11</sup> Yet in both these examples, a spiral of deteriorating circumstances was permitted mainly because external interference was non-existent.

The application of regional instruments for the protection and promotion of human rights would involve two positive attributes: firstly, the instillation of everyday mechanisms that would inform the world of problems; and secondly, to provide a common minimum

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<sup>9</sup> Hyndman, *supra*, at 303, this was the main thrust of Hyndman's conclusion; see at 286-87, the analysis of the 'erosion of democracy'; and at 293, she noted that '[t]he current situation of violence and ethnic tensions within Sri Lanka is one which perhaps wise statesmanship could have avoided. Unfortunately, as is so often the case, the steps taken were frequently steps to secure short-term political advantage while the rights of many of the people of Sri Lanka or of particular groups of them were ignored.'

<sup>10</sup> Dadrian, *supra*, at 237; the Midhat Constitution, Articles 9, 8, and 17, *reprinted* (1908) 2 Am. J. Int'l. L. - Supp. 367.

<sup>11</sup> Hyndman, *supra*, at 290.

standard for governments in the region.<sup>12</sup> Ultimately such standards and changes can only be acceptably imposed within the region and not by some outside force.<sup>13</sup> The national guarantees of human rights rests with the leaders of the state.<sup>14</sup> Unless some form of external supervision and accountability is maintained, internal mechanisms alone are insufficient because no matter how transparent they seem, ultimately they are implemented by human beings and are open to abuse.<sup>15</sup> External supervision could incorporate several positive actions, for example, building regional structures that foster supervision of human rights observance, economic co-operation, and ultimately peaceful settlement of internal and international disputes. It could also be more interventionist, such as applying preventive protection for certain populations within the state.<sup>16</sup>

## 6.2 CLOSING THE GULF BETWEEN LAW AND POLITICS AND ESTABLISHING THE RULE OF LAW

Political policies are often designed to suppress the visibility of forced migrants, or to treat them as if they did not exist. The reasons for their predicament and the underlying causes could be shielded in political rhetoric and excuses. Political power, economic supremacy, and the maintenance of unequal structures of relationships all contribute to obstruct the application of durable solutions. An obvious indication of the failings of international law concerning forced migration is the lack of general acknowledgement of the responsibility for states of origin.<sup>17</sup> The failure to articulate responsibility not only renders any legal regime inapplicable, but also acts as a barrier to political solutions because

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<sup>12</sup> Cerna, *supra*, at 749.

<sup>13</sup> *Ibid*, at 752.

<sup>14</sup> Hyndman, *supra*, at 294, who observed that '[t]he reality is that national guarantees of fundamental rights, however impressive their appearance, will only be as effective as those wielding real power allow them to be.'

<sup>15</sup> External supervision could be supervised by NGOs, international organisations, other states, regional arrangements or a dedicated UN body.

<sup>16</sup> For example the enforcement of safe havens in Iraq, SC Res. 688 (1991); and the protection of ICRC personnel in some parts of Rwanda, SC Res. 918, 925 and 935 (1994); however, note the criticisms of the safe havens in the former Yugoslavia, which were discredited, mainly because they were ill thought of, constituted cities and towns of military significance and were in fact controlled by one of the sides to the conflict.

<sup>17</sup> Garvey, in Martin (ed), *new asylum seekers*, at 183, who suggests this particularly to refugees.

states of refuge or resettlement states view the situation in terms of political strategy.<sup>18</sup> In effect, some claim that the fault lies with state-centred concepts that operate to serve the greater interests of dominant states,<sup>19</sup> and that ‘the United Nations remains highly protective of state sovereignty, even where there is overwhelming evidence, not simply of minor violations, but of widespread murder and genocidal massacre. It is no wonder that it may seem to be a conspiracy of governments to deprive their people of their rights.’<sup>20</sup>

Although the concept of ‘global governance’ does not exist, the removal of the veil of sovereignty has already begun and the process of accountability is developing, but it needs to be intensified and improved.<sup>21</sup> Accountability does not begin simply with the individuals within a state government department, but also with organs and individuals in the UN. The UN structure functions according to the limits and authorities imposed in their respective mandates,<sup>22</sup> although some bodies have limited competence to interpret their own mandate. The subordination of politics to law requires a regime of accountability, where the competence of an inherently political body should be subjected to review.<sup>23</sup> The UNC acts like a constitutional document, where the world political system meets legal requirements. These two elements, sit either easily or uneasily, depending on the willingness or otherwise of states to submit their actions for judicial review, whether or not review is possible.<sup>24</sup> Attack on ‘unpopular’ states, like Libya for alleged complicity in the Lockerbie incident, the application of sanctions against Iraq, and the authorisation to restore President Aristide in Haiti, are all coercive actions that adversely affect the

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<sup>18</sup> *Ibid*, at 184.

<sup>19</sup> Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harv. Int’l. L.J.* 129, 174-5, although directed primarily at refugee law and refugee issues, is equally applicable generally to forced migrants.

<sup>20</sup> Kuper, L., *Genocide: Its Political Use in the Twentieth Century* (1981), 182.

<sup>21</sup> Deng, protecting the dispossessed, at 19.

<sup>22</sup> Palley, C., ‘Legal Issues Arising from Conflicts between UN Humanitarian and Political Mandates - a Survey’, in Gowlland-Debbas (ed), at 148-150.

<sup>23</sup> For example reviewing SC decisions and actions, see note 202, section 5.5.2, ‘Sanctions’, Chapter 5.

<sup>24</sup> For example, it may be claimed, with particular reference to the SC, that ‘[p]olitical bodies have difficulty, when convinced that their objectives are “good”, in seeing that they may be acting beyond their powers and invading the spheres of power or mandates of other competent bodies.’ See Palley, in Gowlland-Debbas (ed), at 158.

respective populations.<sup>25</sup> What safeguards are there against abuse and what measures might ensure uniform application?

In the context of nation-building, strengthening the rule of law is an element that might prevent forced migration and contribute to a comprehensive plan of action. As Fitzmaurice noted, '[t]he principle that a State cannot plead the provisions (or deficiencies) of its constitution as a ground for the non-observance of its international obligations... is indeed one of the great principles of international law, informing the whole system and applying to every branch of it...'<sup>26</sup> Thus the domestic system should comply, or at the very least complement the international system, which implies that the international system should lead the way. Essentially, it is necessary for international stability that international law be certain and decisive. It is essential that states and individuals be made accountable for their wrongful or criminal acts. 'Political action must be directed to ensuring the respect for law and to maintaining the rule of law. Greater respect for law, not less, is thus required; for law is, finally, the definitional principle of society.'<sup>27</sup> Accountability for wrongful acts requires enforcement against violations of international law. Without such redress, future regimes will possess the idea that repressive and oppressive actions are immune from justice.<sup>28</sup> In this respect a system of free democratic elections, where the actions of governments are held accountable, and where policies and decisions are made based on the respect of human rights, is advocated.<sup>29</sup>

Maintaining the rule of law is fundamental in combating oppression and violence, yet even a state that has a grounding in the maintenance of the rule of law may nevertheless descend into lawlessness and tyranny. The example of Sri Lanka shows how the

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<sup>25</sup> Palley, in Gowlland-Debbas (ed), at 159.

<sup>26</sup> Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) ii *Recueil des Cours* 1, 85.

<sup>27</sup> Coles, 1992 study, at 9.

<sup>28</sup> Roht-Arriaza, *supra*, at 452.

<sup>29</sup> Makau Wa Mutua, *supra*, at 45; and Panjabi, *supra*, at 3, who noted that Indira Gandhi's declaration of emergency in 1977, resulted in her defeat in parliamentary elections when democracy was resumed. Thus concluding, to acknowledge that the application of human rights in developing countries is dependent on the rulers, is to recognise the realities of political life, because, '... [democratic] government usually implies the rule of law, judicial independence and legal safeguards against tyranny.'

independence of the judiciary may be compromised,<sup>30</sup> and how a state endowed with so much economic resources could be entirely stifled in its development by racism, oppression and violence.<sup>31</sup> Whether individual or collective rights, whether in the international or domestic sphere, the courts and the legal processes only initiate and act to persuade those in power to enforce or protect those rights.<sup>32</sup> Ultimately, without the political will, the machinery would never produce credible results, although the machinery should also act to persuade obedience and compliance to the law. A multi-dimensional framework where politics, economics, self-interest and the law combine as co-operative aspects of any solution is thus advocated. To this end, the promotion of equal treatment on the international sphere is vital, where the '... violations of every country be treated with equal attention, with the same due process, and with severity proportional to the offence, rather than to the influence of the offending state.'<sup>33</sup> Legal norms have potential application in both policies and aspirations, as well as to acts of states and other organisations.<sup>34</sup>

Political policy should be guided by legal rules, but the application of legal rules requires the political will. It needs to be recognised that law and politics are not mutually exclusive or destructive, but independent branches of the same tree. Too much emphasis on one without the other will create an unbalanced and unjust society. If forced migration is to be addressed in a comprehensive manner, the economic and political conditions within the state of origin have to be dealt with together with the policies of states that contribute indirectly to the causes of forced migration.<sup>35</sup>

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<sup>30</sup> Hyndman, *supra*, at 287-89.

<sup>31</sup> *Ibid*, at 290-1.

<sup>32</sup> Neier, 'Remarks - Panel Discussion on Human Rights - Effective Remedies' (1983) 77 Am. Soc'y. Int'l. L. Proc. 377, 387.

<sup>33</sup> Meron, 'Remarks' (1983) 77 Am. Soc'y. Int'l. L. Proc. 377, 397.

<sup>34</sup> Schachter, 'United Nations Law' (1994) 88 Am. J. Int'l. L. 1, 22.

<sup>35</sup> Note Palley, in Gowlland-Debbas (ed), at 146, who suggested that the Security Council 1992 Summit Declaration included the possibility that economic, social and ecological elements could represent a threat to international peace and security.

### 6.3 SOCIAL AND ECONOMIC NEEDS

Establishing the rule of law and the relationship between law and politics might facilitate consideration of economic and social structures.<sup>36</sup> Legal responsibility cannot be totally separated from issues of economic and social development. One cannot possibly exist, to the satisfaction of law and order, without the other. Thus in a sense, the debate between the dominance of certain sets of human rights over the other serves to obscure the pragmatic fact that economic and social needs must exist with political and civil needs. To put it crudely, one must provide not only for the structures of power and control, but also contemporaneously, the feeding of the masses, the provisions of jobs and homes, which was emphasised by the GA.<sup>37</sup> Neither can be accomplished where the fabric of society is governed by corruption and greed rather than the observance of the rule of law. In fact, it may be claimed that ‘... the people’s willingness to return is a potent symbol of a new government’s legitimacy, particularly one striving to show that it has established democratic institutions.’<sup>38</sup> Even for repatriation to succeed, reintegration programmes must include those same economic and social needs.<sup>39</sup>

The basic existence of law does not depend on economic or social conditions, but is independent of those conditions.<sup>40</sup> In a situation where a state is in economic or social decline, the rule of law may nevertheless be an essential tool in ensuring the future of that state. For example enacting constitutional rules may ensure the validity of a government chosen by the people, or in re-establishing a credible system of justice for the redress of grievances. All this may not be possible without the concept of international responsibility and the credible intervention of the international community. Although the role of civil and political rights is clearly significant, the contribution of rights like the right to development

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<sup>36</sup> Note also the second report of the Special Rapporteur on the Protection of Minorities to the Sub-Commission concerning the former Yugoslavia, UN Doc. E/CN.4/SR.2/1992/37.

<sup>37</sup> GA Res. 32/130, 16 December 1977, para. 1(b), affirming the Proclamation of Tehran in 1968. See section 4.9, ‘Advocating Against the Use of Human Rights Provisions’.

<sup>38</sup> Martin, refugee women, at 66.

<sup>39</sup> *Ibid*, who notes that, ‘[c]itizens who have remained in their country through the fall of one regime and the emergence of a new one may be antagonistic towards the prospect of expending scarce resources to assist those who fled. It may even be seen to be in the interest of those who remained for the exiles to stay abroad.’

<sup>40</sup> Coles, 1992 study, at 124.

cannot be totally excluded. Economic and social needs cannot be divorced from the search for a comprehensive solution, particularly where so many variants contribute towards forced migration. Developing states do have special needs. There is substantive inequality amongst states and these issues do need global attention.<sup>41</sup> In fact, Western states have an interest to address the problems of forced migration to preserve democratic values and economic comfort.<sup>42</sup>

Although the capitalist democracies are not free of injustices, the relative abundance of food and other basic necessities will limit social anger and mitigate against armed revolution.<sup>43</sup> Singapore's Senior Minister of State K. Y. Lee claimed, 'what is necessary for growth and progress is good government, one that is honest and effective and works for the benefit of the people.'<sup>44</sup> As President Mandela pointed out, nation-building of the new South Africa needs to implement three stones as the foundation for development: to establish national unity - one nation, one destiny irrespective of race - for equality and non-discrimination; to promote and establish democracy, equality before the law and fundamental human rights, as well as to involve citizens intimately in the system of government;<sup>45</sup> and to level the disparity of wealth and income, to rebuild and modernise the economy to end poverty and unemployment.<sup>46</sup>

An important subsidiary issue is the general economic and social needs of women and children who are displaced, whether internally or across borders.<sup>47</sup> These two groups

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<sup>41</sup> Rich, R. Y., 'The Right to Development as an Emerging Human Right' (1983) 23 Va. J. Int'l. L. 287, 328; and Bedjaoui, M., 'Some Unorthodox Reflections on the 'Right to Development'', in Snyder and Slinn (ed), *International Law of Development: Comparative Perspective* (1987), 87.

<sup>42</sup> Panjabi, Ranee K.L., 'The Global Refugee Crisis: A Search for Solutions' (1991) 21 Cal. W. Int'l. L.J. 247, who emphasised that '[s]erious international efforts have to be made to create a secure, financially stable life for the millions of frightened, deprived men, women and children in Third World nations.'

<sup>43</sup> Panjabi, 'International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis' (1991) 10 Dick. J. Int'l. L. 1, 8.

<sup>44</sup> Singapore Bulletin, vol. 22, No. 1, Jan. 1994, at 1 and 2, at the African Leadership Forum (8 November 1993).

<sup>45</sup> To establish from the constitution a Commission for the promotion and protection of culture, language and religion.

<sup>46</sup> 'Mandela at Westminster', live transmission of President Mandela's address to the Houses of Westminster on the 11 July 1996, at 11am.

<sup>47</sup> See generally, Martin, refugee women; and Camus-Jacques, G., 'Refugee Women: The Forgotten Majority', in Loescher and Monahan (eds), 141; and for a discussion of the failure of protection of

need special attention because they have specific needs and are particularly 'at risk',<sup>48</sup> a concern recognised by the UN for both transboundary and internally displaced women and children.<sup>49</sup> Women and children face real dangers, violence, rape, discrimination, forced labour, under-nourishment, and they need specifically identified solutions, such as gender specific solutions, education, participation in decision-making, and health care.<sup>50</sup> Women may face persecution simply because they are women.<sup>51</sup> In fact, special attention should also be given to enhance the return of women in peace and dignity.<sup>52</sup> Redressing the situation in the state concerning violence against women or the elevation of their status is a complex issue, but needs to be addressed if there is to be a comprehensive approach towards the elimination of forced migration.<sup>53</sup>

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children in armed conflicts, see Cohn, I. and Goodwin-Gill, G.S., *Child Soldiers: The Role of Children in Armed Conflict* (1994).

<sup>48</sup> Camus-Jacques, in Loescher and Monahan (eds), at 142-157.

<sup>49</sup> GA Res. 35/135, 1980, 'noting with great concern that women and children constitute the majority of refugees and displaced persons in most areas, ...urges the international community to provide urgent and adequate assistance to all refugee and displaced women and to developing countries providing asylum or rehabilitation, especially the least developed and most seriously affected countries.'

<sup>50</sup> Camus-Jacques, in Loescher and Monahan (eds), at 152-155; Indra, D., 'Gender: A Key Dimension of the Refugee Experience' (1987) 6 *Refugee* 1; and Kelley, N., *Working with Refugee Women: A Practical Guide* (Geneva, 1989).

<sup>51</sup> Castel, J.R., 'Rape, Sexual Assault and the Meaning of Persecution' (1992) 4 *Int'l. J. Refugee L.* 39, 40; and generally, Amnesty International, *Women in the Front Line: Human Rights Violations Against Women* (1990), 8, identifying the official use of rape as torture to intimidate and deter perceived subversive activities; and Bower, K., 'Recognizing Violence Against Women as Persecution on the Basis of Membership of a Particular Social Group' (1993) 7 *Georgetown Immigration L.J.* 173, 184-188, who argues that gender-based violence be considered persecution, particularly where it is entrenched in domestic custom or ignored in domestic laws.

<sup>52</sup> Martin, refugee women, at 74, to analyse the specific needs for protection of women and children, country-specific analysis, especially the availability of information; to ensure that women who desire to return are able to do so and those fearing persecution are adequately protected; and to integrate women fully into development projects designed to ease the reintegration of refugees; and see generally, Women's Commission for Refugee Women and Children, Proceedings of the Symposium, 'Going Home: The Prospect of Repatriation for Refugee Women and Children' Washington D.C., 8 June 1992.

<sup>53</sup> For example, the *Zina* laws in Pakistan although neutral and applicable to both men and women are applied against women, see Bower, *supra*, at 185-186; and the interpretation of the Koran in Egypt that grants men the unconditional right to punish and educate their wives, at 186; see generally, Heise, L., 'Crimes of Gender' (March/April, 1989) *World Watch* 12, 13.

## 6.4 FINAL REMARKS

Moral responsibility is an element that does need reference to concepts such as good governance and policy considerations.<sup>54</sup> D'Amato contended that one cannot describe the law without reference to morality,<sup>55</sup> and Brownlie believed that although positive law governed the regime of international responsibility, there is nevertheless no rubicon between law and morality.<sup>56</sup> Moral standards may be applicable, to some extent, in persuading political action or for guidance in determining whether actions are legitimate. Where a right is recognised, then a moral duty exists for the international community to enforce its observance. Dadrian noted that the Armenians were promised rights of autonomy and thus relied on that promise, but what resulted was oppressive denial and genocide.<sup>57</sup> The international community and each member state of the UN has at least this moral obligation to fulfil the promises announced in the UNC.<sup>58</sup>

A degree of sensitivity should however be observed when serving the perceived 'greater good' of mankind, particularly where that perception emanates from a Western source. Colonialism and the practices of Western states in the past, although not a justification for under-development and the wide-spread violations of human rights by developing states, has had a profound, detrimental effect on economies and values within those oppressed states.<sup>59</sup> Perhaps one should not condemn the practices of developing states without considering their traditions, religions and cultures, which maintain basic values such as hospitality and sharing. Cerna noted that, '[i]nternational human rights law has, in some sense, become the substitute for religion in secular societies. It aims to establish a minimum standard of decency, a common denominator of what is morally

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<sup>54</sup> Coles, 1992 study, at 24.

<sup>55</sup> D'Amato, A., 'Foreword', in Teson, *Humanitarian Intervention*, at ix, who claims, '[I]aw floats upon a sea of morality, and even though the legal vessel is distinct from the water in which it is immersed, one could not begin to explain the shape or purpose of the vessel without making any reference to water.'

<sup>56</sup> Brownlie, 'Causes of Action in the Law of Nations' (1979) 50 *Brit. Yrbk. Int'l. L.* 13, 40.

<sup>57</sup> Dadrian, *supra*, at 229.

<sup>58</sup> See Appendices, A1.

<sup>59</sup> See generally, Bedjaoui, M., 'Some Unorthodox Reflections on the 'Right to Development'', in Snyder and Slinn (ed), *International Law of Development: Comparative Perspectives* (1987), 87.

acceptable in a civilized society.’<sup>60</sup> Thus instead of imposing this concept of human rights, some regard should be given to cultural traditions and religious teachings. Instead of the ‘melting pot’, where all cultures, languages and religions are amalgamated into one fictitious nationalistic ideal, the ‘salad bowl’ has been proposed, that maintains the distinct flavour of each race, culture and religion, yet combining them together with a ‘dressing’ of common agendas, endeavours and needs.

Ultimately, the solution lies not so much in the proliferation of international or domestic measures, but in the attitudes of governments, their commitment to applying such measures for the improvement of standards of living, and the enjoyment of fundamental freedoms. Promoting good governance must therefore develop with all the other mechanisms, particularly the acknowledgement that governments do not possess a *carte blanche* licence to treat their nationals badly. As Perez de Cuellar claimed, ‘[t]he international standards thus prescribe that sovereignty shall reside in the people and that governments shall pursue strategies of governance aiming for the realization of human rights - strategies of governance that should never involve departures from fundamental rights.’<sup>61</sup>

Why revisit concepts that have already been studied and researched by so many others without much application? Why develop a regime of international responsibility when its practice in contemporary inter-state relations have been so poor? Schachter concluded that international law, particularly the law within the UN, is complex and diverse, but its full potential can ensure ‘the promise of continued legal developments responsive to practical needs and shared ideals.’<sup>62</sup> The answer is both a valued argument and a personal one. It is simply to walk in the footsteps of those who have come before, to add another set of (hopefully) distinctive footprints, so that one day the path will become well trodden, clear of obstacles, even and comfortable to use. The opportunities of massive movements that created the brave new worlds are no longer applicable, as no new worlds are available to build new lives. But forced migrants can build upon their old lives, to live in

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<sup>60</sup> Cerna, *supra*, at 749.

<sup>61</sup> Commentaries, ‘Perez de Cuellar Discusses Sovereignty and International Responsibility’ *The Review*, No. 47, December 1991, 24, 25.

<sup>62</sup> Schachter, ‘United Nations Law’ (1994) 88 Am. J. Int’l. L. 1, 23.

peace and dignity, to live under the rule of law, safeguarded by the application of judicial checks and balance with a regime of accountability applicable to all.

## APPENDICES

### A1 Preamble, Charter of the United Nations

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practise tolerance and live together in peace with one another as good neighbours, and

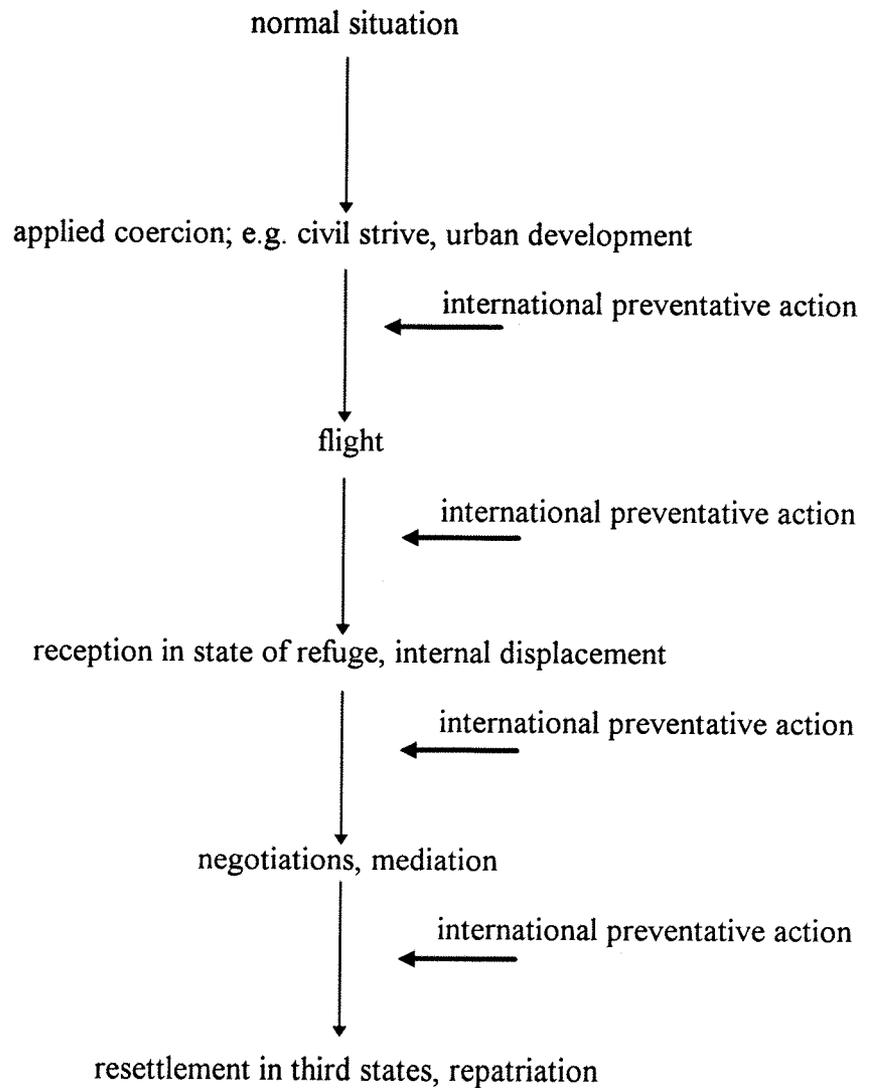
to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS...

## A2 Stages of Forced Migration



Preventative action here includes ameliorative action, which is available at almost every stage. Preventive action also includes legal mechanisms flowing from the regime of international responsibility.

### **A3 1994/24. The Right to Movement**

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Reaffirming the right of everyone lawfully within the territory of a State to liberty of movement and freedom to choose his residence, and the prohibition of arbitrary deprivation of the right to enter one's own country as set out in article 12 of the International Covenant on Civil and Political Rights and article 13 of the Universal Declaration of Human Rights,

Recognizing that practices of forcible exile, mass expulsions and deportations, population transfer, "ethnic cleansing" and other forms of forcible displacement of populations within a country or across borders deprive the affected populations of their right to freedom of movement,

Noting that policies of forcible displacement are one of the major causes of flows of refugees and internally displaced persons,

Concerned that more than 20 million refugees and even larger and growing numbers of internally displaced persons exist world-wide,

1. Affirms the right of persons to remain in peace in their own homes, on their own lands and in their own countries;
2. Also affirms the right of refugees and displaced persons to return, in safety and dignity, to their country of origin and/or within it, to their place of origin or choice;
3. Urges Governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and "ethnic cleansing" in violation of international legal standards;
4. Decides to include under the agenda item entitled "Freedom of movement" a sub-item relating to questions of displacement entitled "Population displacement" and to keep under constant review respect for the right to freedom of movement, including the right to remain and to return.

36th Meeting, 26 August 1994 (adopted without a vote).

#### **A4 Lippman's Hypothetical Scenarios**

Would these acts be condemned?

'(a) The abduction, imprisonment, trial, and execution of high United States embassy officials by a revolutionary regime that charges the embassy officials with involvement in torture, training of security police, surveillance of the civilian population, espionage [etc..].

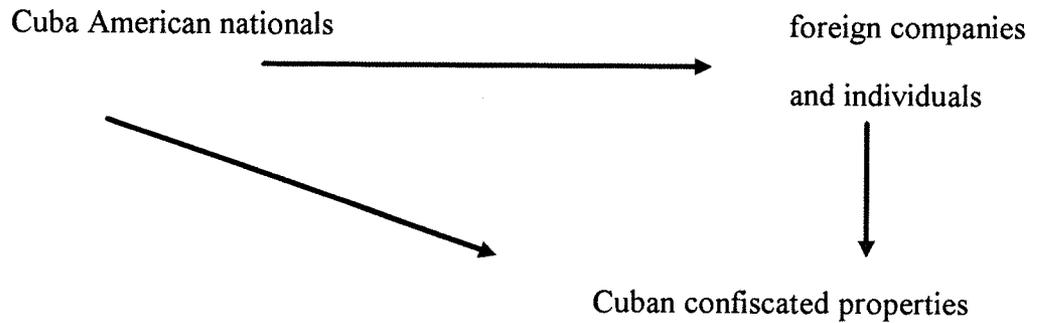
'(b) The abduction, imprisonment, trial, and execution of the head of the South African police by a radical African state which charges the Police Chief with complicity in the international crimes of apartheid and genocide.

'(c) The abduction, imprisonment, trial, and execution of a former high official in the United States Government by Vietnam which charges the former official with "war crimes" and "crimes against humanity" (having been involved in the United States' bombing, pacification, and defoliant programs during the Vietnam War).

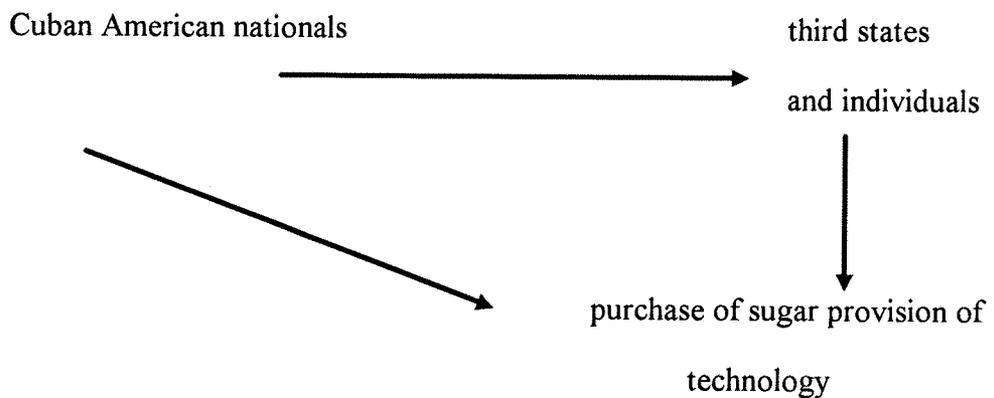
'(d) The abduction of the "Grand Dragon" of the Ku Klux Klan by a radical African state which charges the "Grand Dragon" with the international crime of inciting to social hatred and with conspiracy to deny the civil rights of Black American [who are ethnic Africans].'

Matthew Lippman, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under the International Law' (1982) 5 *Hou. J. Int'l. L.* 1, 33, note 173.

## A5 Possible Relationships Consequent on the LIBERTAD Act

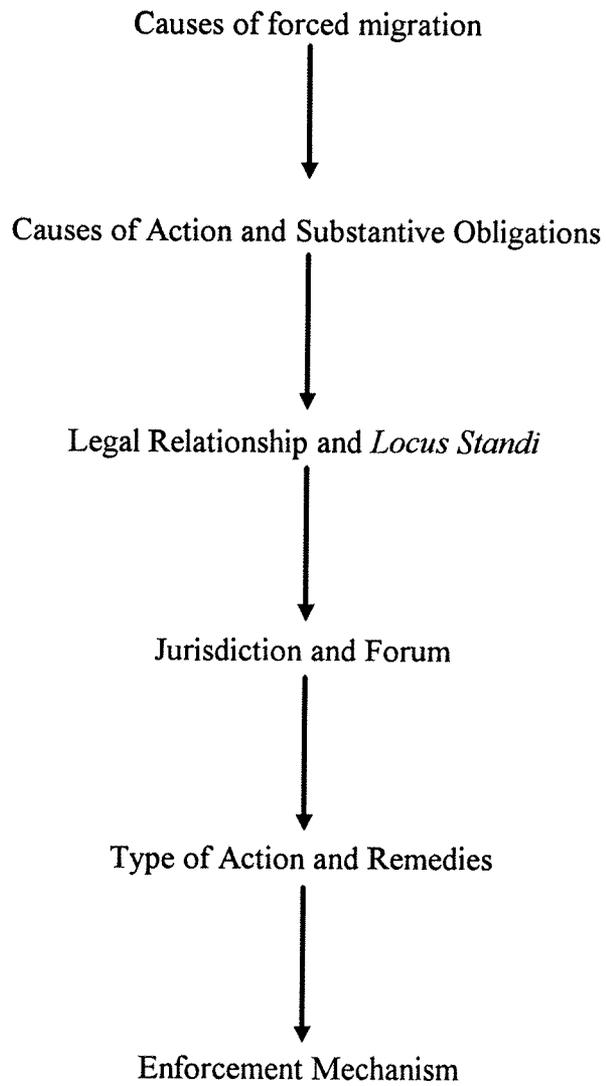


It may thus be possible for the proposed legislation to permit *locus standi* and jurisdiction to bring a claim against individuals and foreign companies for purchasing property confiscated by Cuban authorities over the past three decades.

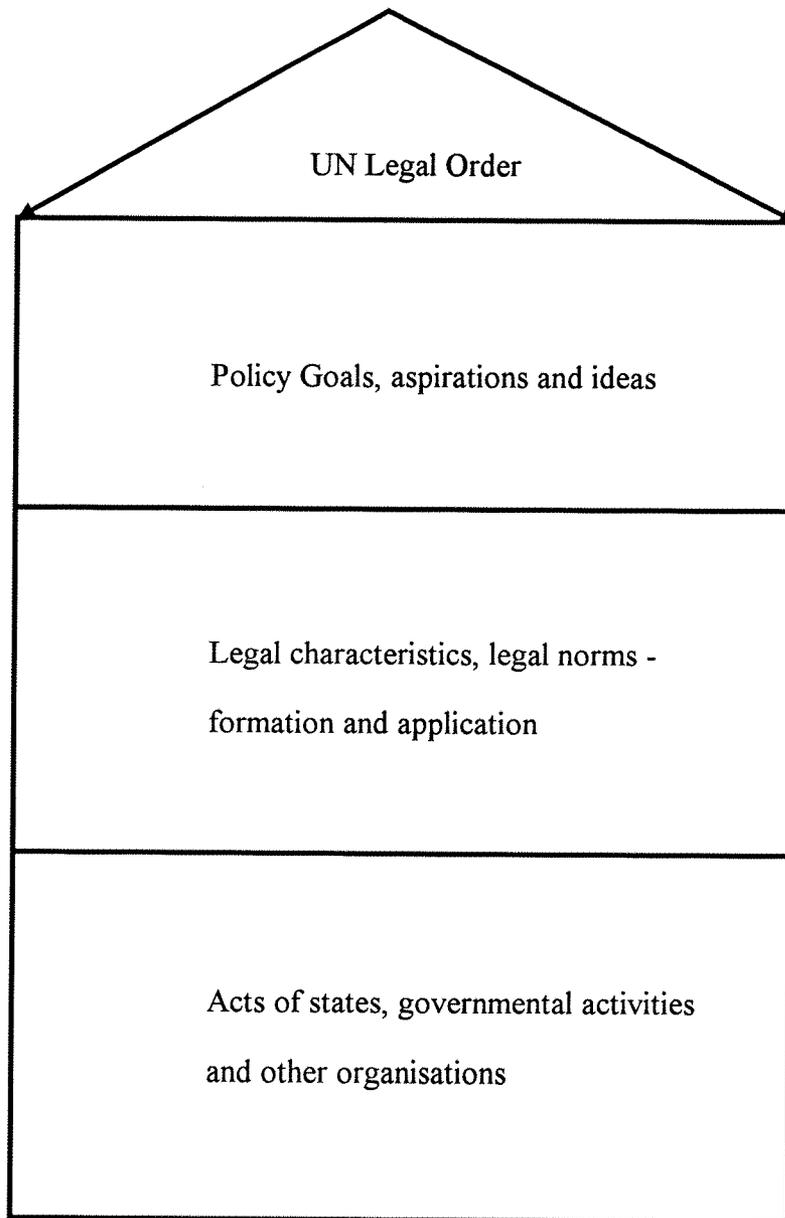


A similar position may also thus exist with respect to the purchase of sugar and other products or the transfer of technology.

**A6 Establishing the Flow of Legal Action from Cause to Enforcement.**



## A7 Three Levels of the UN Legal Order



Metaphor suggested by Oscar Schachter, 'United Nations Law' (1994) 88 Am. J. Int'l. L. 1, 22.

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