# Refugee-Generating Policies and the Law of State Responsibility

## *A. The Need for a New Approach in International Refugee Law**

The deplorable situation of refugees throughout the world, especially in cases of massive movements of asylum-seekers[1], constitutes a heavy economic burden for the countries of first asylum and is increasingly drawing the attention of the international community. The very considerable and highly commendable activities of international organizations and voluntary agencies have so far been of only partial success, although they have indeed contributed to a significant extent to achieve the primary goal of refugee law which, based upon purely humanitarian considerations, is to offer protection and assistance to persons having left their countries of origin under different forms of coercion. There is, however, a clearly growing international concern as regards the apparent failure of international refugee law with respect to its second goal, i.e. the promotion and implementation of durable or permanent solutions for existing refugee

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* Abbreviations: AJIL = American Journal of International Law; AVR = Archiv des Völkerrechts; BYIL = British Year Book of International Law; EPIL = Encyclopedia of Public International Law, ed. by R. Bernhardt; ILA = International Law Association; RGDIP = Revue Générale de Droit International Public; RIAA = Reports of International Arbitral Awards; YILC = Yearbook of the International Law Commission.

[1] After several years of relative stability, a sudden increase of the overall number of refugees occurred in autumn 1984 when large numbers of people left Ethiopia for Sudan under particularly severe conditions. This event, which was broadly covered by the mass media, resulted in a hitherto unequalled wave of concern for the plight of refugees from Third World Countries in most of the countries of the Northern Hemisphere.

situations. In this context, strong emphasis should be given to voluntary repatriation which is generally considered to be the most satisfactory solution provided conditions in the country of origin are conducive to the refugees' return[2].

*1. Activities within the framework of the United Nations*

The sudden increase in the overall figure of refugees during the late 1970s when large numbers of people left their countries of origin, especially in Indochina, Afghanistan and the Horn of Africa, not only resulted in a different perception of the need to find permanent solutions for existing refugee situations: in addition, as a direct consequence of these events, the first initiatives were taken on the international level to avert new flows of refugees. For the first time, international attention was addressed to the legal implications of the root causes of large-scale refugee movements. This new approach basically followed two paths: the so-called Canadian initiative in the United Nations Commission on Human Rights[3], and the initiative launched by the Federal Republic of Germany in the General Assembly[4].

a) Recognizing that massive exoduses are often caused by serious violations of human rights, the Canadian Government chose the United Nations Commission on Human Rights as its forum which, at its 1981 session, adopted a resolution asking the Secretary-General to appoint a special rapporteur to study the question of human rights and massive exoduses[5]. In this capacity, Prince Sadruddin Aga Khan presented a study in December 1981[6] which, however, did not entirely fulfill one expectation, namely, that it would clearly describe the human rights abuses which lead to massive emigration and would present effective means to deal with the

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[2] Cf. R. Hofmann, Voluntary Repatriation and UNHCR, ZaöRV Vol.44 (1984), p.328 *et seq.*, and P. van Krieken, Repatriation of Refugees under International Law, Netherlands Yearbook of International Law, Vol.13 (1982), p.93 *et seq.*

[3] For an analysis of this initiative, see D. Martin, Large-scale Migrations of Asylum Seekers, AJIL Vol.76 (1982), p.598 *et seq.*

[4] Cf. S. Böhm, Grenzüberschreitende Flüchtlingsströme. Präventive Behandlung im Rahmen der Vereinten Nationen, Vereinte Nationen, Vol.30 (1982), p.48 *et seq.*, and L. Lee, The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, AJIL Vol.78 (1984), p.480 *et seq.*

[5] Commission on Human Rights, Res.29, 37 UN ESCOR Supp. (No.5), p.230; UN Doc. E/CN.4/1475 (1981).

[6] Prince Sadruddin Aga Khan, Study on Human Rights and Massive Exoduses, UN Doc. E/CN.4/1503 (1981).

root causes[7]. The ultimate recommendation of the report nevertheless emphasized the need for a co-ordinated approach to both the country of origin and the country of asylum whenever a large-scale refugee movement seems likely or is already under way. To this end the report proposed the establishment of a UN early-warning system to detect incipient mass exoduses, while also providing as well mechanisms for both monitoring and mediation[8].

b) Acting upon the German initiative, the General Assembly, by Resolution 36/148, decided to establish a 17 member Group of Experts to study the root causes of massive flows of refugees and to recommend steps for international co-operation to avert new flows[9]. Resolution 36/148 had emphasized "the right of refugees to return to their homes in their homelands" and stressed "the right of those who do not wish to return to receive adequate compensation"[10]. Furthermore, the Group was requested to undertake a comprehensive review of the refugee problem in all its aspects and to develop "recommendations on appropriate means of international co-operation in this field, having due regard to the principle of non-intervention in the internal affairs of sovereign States"[11]. At its second session, in 1983, the Group adopted a Programme of Work[12] which includes studies on the causes of massive movements of refugees, both natural and man-made. The Group's main task, however, is the development of appropriate means of improving international co-operation in this field by analyzing existing international instruments, norms, principles, and practices, and by examining other possibilities of a political, legal and economic nature.

c) Both initiatives demonstrate the new phase of attention to root causes

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[7] See Martin (note 3), p.600 *et seq.*

[8] At its session in March 1982, the Human Rights Commission thanked the special rapporteur for his report, urged him to continue discussion on his recommendations, and stressed that he should remain available for consultations with the Group of Experts which had in the meantime been established as a result of the German initiative. By this action, the Commission essentially ended the Canadian initiative.

[9] Since more than 20 countries applied for membership in this Group, the General Assembly enlarged it to 25 (GA Res.37/121); of the 25 members, one each was nominated by Afghanistan, Australia, Austria, Bulgaria, Cuba, Czechoslovakia, Djibouti, Ethiopia, France, Federal Republic of Germany, Honduras, Japan, Lebanon, Mexico, Nicaragua, Pakistan, Senegal, Somalia, Sudan, Thailand, Togo, USSR, USA and Vietnam. The 25th seat is to be rotated among the Latin American, African and Asian regions.

[10] GA Res.36/148, para.3.

[11] *Ibid.*, para.5.

[12] UN Doc. A/38/273, Annex (1983).

of large-scale refugee movements. There seems to be growing concern as to the appropriateness of the general approach of international refugee law which so far has insufficiently addressed these causes and has not considered massive flows of refugees as only a symptom of an underlying problem.

### *2. Activities outside the framework of the United Nations*

Considering the evident political implications of this new approach to international refugee law it is hardly surprising that progress in the relevant work within the framework of the UN is painfully slow. Special attention should therefore be attached to the pertinent activities of non-governmental institutions and learned societies which have taken up the issue and might more easily tackle the crucial questions unhindered, relatively, by political influences.

In this context, particular importance is to be attributed to the activities of the International Institute of Humanitarian Law in San Remo, Italy, which has organized several meetings on different aspects of international refugee law during recent years[13]. An analysis of the reports and conclusions of these meetings of experts shows clearly the general agreement that the pre-, actual and post-flow aspects of large-scale refugee movements have to be seen as aspects of a single continuum[14]. Obviously, as long as the root causes of such a massive exodus prevail there will not be any chance for a programme of voluntary repatriation to be successful; therefore, special emphasis should be given to efforts leading to an improvement of the situation in the country of origin.

Gross and persistent violations of human rights, situations of armed conflict and foreign occupation constitute principal causes of coerced transfrontier movements. In some circumstances, difficult socio-economic conditions might be contributory factors[15]. It is within this context of so-called man-made refugee-flows that the notion of "refugee-generating" policies appears, which necessarily draws attention to the legal position of

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[13] See e.g. Report of the Round Table on Pre-Flow Aspects of the Refugee Phenomenon, San Remo, 27–30 April 1982 (hereinafter cited as Report) and the Conclusions of the IXth Round Table on Current Problems in International Humanitarian Law, San Remo, 7–10 September 1983 (hereinafter cited as Conclusions).

[14] See Report, p.4.

[15] *Ibid.*, p.5.

the country of origin, especially as regards its responsibility under international law[16].

The potential importance of the rules of State responsibility for international refugee law, particularly in regard to the country of origin, was also stressed at the recent meeting of the newly established International Committee on the Legal Status of Refugees within the framework of the International Law Association in Paris[17].

### *B. International Refugee Law and the Law of State Responsibility*

This paper does not attempt to examine all the various aspects of responsibility of the country of origin. It is limited to the question whether refugee-generating policies resulting in large-scale refugee movements entail the responsibility of the country of origin in relation to the country of asylum and, as a second aspect, to third countries and the international community as a whole. Questions connected with the legal relationship between the country of origin and the individual refugees themselves fall outside the scope of this study. It should be stressed that this paper neither attempts to reach final answers and conclusions in respect to the legal

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[16] See also Conclusions (note 13), p.2 *et seq.*, where it is stated:

"(1) In order to deal adequately with a refugee problem, including such of its manifestations as affect physical safety and national security, it is necessary to deal with the problem as a whole. This entails dealing with causes, manifestations and solutions, and understanding the inter-relationship of these basic aspects;

(2) the general response to a refugee problem, particularly one arising from a large-scale influx, should be directed, therefore, not only to protecting and assisting refugees but also to every other aspect of the problem. This includes both the relationship of individuals to States and the relationship of States to each other. It includes not only the intermediate aspects of protection and assistance but also the aspects of durable or permanent solutions, prevention and causes (including related aspects, such as responsibility and liability);

(3) the issue of the responsibility of the country of origin for a refugee situation should be a fundamental element in determining the appropriate overall response, particularly in regard to a durable or permanent solution. It would be a grave distortion of the purposes and principles of refugee law, rightly conceived, to see them as unrelated to general issues of human rights and humanitarian law and to the responsibilities of statehood generally. Obligations in regard to a refugee problem, including those relating to the eventual obtaining of conditions necessary for a satisfactory solution, may devolve also on the refugees themselves and on the country of asylum or refuge, and on the competent international organizations".

On the related problem of mass expulsions, see K. Doehring, Die Rechtsnatur der Massenausweisung unter besonderer Berücksichtigung der indirekten Ausweisung, ZaöRV Vol.45 (1985), p.372 *et seq.*

[17] This Committee met in Paris on August 31, 1984; the relevance of the rules of State responsibility for international refugee law has been emphasized during its discussions.

questions dealt with; at this rather early stage of scholarly discussion it seems more appropriate only to indicate possible solutions taking into special account the relevant work of the United Nations International Law Commission (ILC) on State Responsibility.

## I. Refugee-generating policies as an internationally wrongful act

The codification of the rules of State responsibility has been on the agenda of the ILC for several years[18]. Under its general plan of work, the ILC has agreed to divide the draft articles of this intended codification into two Parts[19]. The origin of international responsibility forms the subject of Part 1 which determines upon which grounds and under which circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of responsibility. Part 2 deals with the legal consequences of an internationally wrongful act and considers the content, forms and degrees of international responsibility[20].

On the basis of the work of the former Special Rapporteur, Roberto Ago, the 35 draft articles constituting Part 1 were provisionally adopted by the ILC in the first reading in 1980[21]. They are subdivided into five chapters of which Chapter I defines some general principles. The concept of the internationally wrongful act is of central importance for the draft as a whole and of particular relevance to the subject of this study. Art.3 of Part 1 defines such an act as consisting of a "subjective element" specified in Chapter II (Arts.5 to 15) and of an "objective element" clarified in Chapter III (Arts.16 to 26)[22].

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[18] For an historical account of the work of the ILC on State responsibility, see YILC 1969 II, p.229 *et seq.*

[19] YILC 1975 II, pp.55–56.

[20] The ILC reserved its judgment as to whether adopt a Part 3 on the "implementation" *(mise en œuvre)* of international responsibility and the settlement of disputes, YILC 1975 II, p.56.

[21] YILC 1980 II (Part 2), p.28. These articles are reproduced in ZaöRV Vol.45 (1985), p.357 *et seq.*

[22] Art.3 of the ILC Draft reads as follows: "There is an internationally wrongful act of a State when a) conduct consisting of an action or omission is attributable to the State under international law; and b) that conduct constitutes a breach of an international obligation of the State".

*1. Are massive exoduses attributable to the State of origin?*

The subjective criterion of a State's responsibility with regard to large-scale refugee movements is of primordial importance, since before determining whether a certain conduct of a State resulting in a massive exodus constitutes the breach of an international obligation it has to be established that this exodus is caused by a conduct attributable to the State in question. Large-scale refugee movements usually occur as a consequence of one of the following scenarios:

A) Flagrant violations of human rights involving the persecution of people for reasons of race, religion, nationality, membership of a particular social group or political opinion;

B) Civil war or events seriously disturbing public order in either part or the whole of the country of origin;

C) External aggression, occupation or foreign domination in either part or the whole of the country of origin;

D) Natural disasters or catastrophes forcing people to move to another country in order to survive.

a) The situations described as scenarios C) and D) are not attributable to the country of origin since they do not imply any State conduct at all or do not fall within the sphere of responsibility of this particular State. Large-scale flows of refugees as a result of these circumstances alone are therefore without any relevance for this study.

b) Persons fleeing as a consequence of the situation described in scenario A) are usually considered as refugees according to the definitions laid down in the relevant international treaties[23] provided that systematic persecution has been committed by organs of the State concerned acting in their official capacity[24]. Under these circumstances where one may speak of a refugee-

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[23] See the definition of the term "refugee" given in Art.1 A (2), 1951 Convention Relating to the Status of Refugees and Art.I (1), 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; see also A. Grahl-Madsen, The Status of Refugees in International Law, Vol.I (1966), p.173 *et seq.*, and G. Goodwin-Gill, The Refugee in International Law (1983), p.20 *et seq.*

[24] Arts.5 and 6 of the ILC Draft read as follows:

"5. For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

6. The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State".

generating policy in the proper sense of the word, this conduct is attributable to the State under Art.3 of the ILC Draft.

aa) If the persecution has been committed by persons who do not qualify as organs of the State, this conduct is only to be considered as an act of the State under international law and thus attributable to that State if it is established that such persons were in fact acting on behalf of that State or if such persons were in fact exercising elements of the governmental authority in the absence of the official authority and in circumstances which justified the exercise of those elements of authority[25]. Provided that it can be proved that the authorities of that State are not willing to prevent such persons from committing such persecution one might speak of the existence of a refugee-generating policy.

bb) Even more complex is the legal assessment of persecution committed by organs of a State or by persons empowered to exercise elements of governmental authority if they have been exceeding their competences according to internal law or contravened instructions concerning their activities. The fact that such conduct is generally to be considered as an act of the State under international law and thus attributable to that State[26] does not necessarily mean that there exists a refugee-generating policy on the part of that State. This can only be maintained if it is established that the competent authorities are not willing to prevent these organs from committing such persecution.

cc) It is well-known that many of the recent large-scale refugee movements have occurred as a consequence of persecution by persons not acting on behalf of the State concerned nor exercising any elements of governmental authority. Such a situation does not always amount to what is

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For a discussion of the agents of persecution under general refugee law, see Grahl-Madsen (note 23), p.189 *et seq.*

[25] See Art.8 of the ILC Draft which reads as follows:

"The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

a) it is established that such persons or group of persons was in fact acting on behalf of that State; or

b) such persons or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority".

[26] See Art.10 of the ILC Draft which reads as follows: "The conduct of an organ of a State, of a territorial governmental entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity".

described above as scenario B) characterized by a civil war; it rather concerns questions connected with State responsibility for acts of private individuals which cannot be dealt with in detail in this study[27]. However, it seems to be justified to note that the general principle according to which there is no State responsibility for the conduct of private individuals[28] is increasingly questioned as to its adequacy in present-day international law[29]. In the specific context of persecution of persons committed by private individuals for reasons of race, religion, nationality, membership of a particular social group or political opinion, one might argue the existence of a refugee-generating policy if there is clear evidence that the authorities of that State are in the position to prevent such persecution from being committed, but are not willing to do so[30]. Under this condition, such conduct constituting an omission to take protective measures might be considered as an act of the State under international law and thus attributable to that State. It must be stressed, however, that a particularly careful and thorough analysis of the factual situation is needed in order to give a solid and reliable assessment of such a delicate question.

c) Before dealing with the very difficult problem of State responsibility for large-scale refugee flows as a result of circumstances described above as scenario B) it should be emphasized that persons coerced to leave their country of origin as a consequence of such conditions do not yet qualify for refugee status under present-day general international law[31]. There is, however, a growing tendency to develop refugee definitions in order to include such persons usually considered as *de facto* refugees which is al-

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[27] See J. Wolf, Zurechnungsfragen bei Handlungen von Privatpersonen, ZaöRV Vol.45 (1985), p.232 *et seq.*, with further references.

[28] See Art.11 of the ILC Draft which reads as follows:

"1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10".

[29] See Wolf (note 27), ZaöRV Vol.45 (1985), p.237 *et seq.*

[30] For an analysis of the pertinent jurisprudence of the Bundesverwaltungsgericht of the Federal Republic of Germany, see e.g. K. Hailbronner, Ausländerrecht (1984), p.558 *et seq.*, and O. Kimminich, Grundprobleme des Asylrechts (1983), p.144 *et seq.*

[31] For a discussion of the legal situation of these persons usually considered as "de-facto refugees", see e.g. P. Weis, Convention Refugees and de-facto Refugees, in: G. Melander/P. Nobel, African Refugees and the Law (1978), p.15 *et seq.*; E. Lapenna, Les réfugiés de facto: un nouveau problème pour l'Europe, AWR-Bulletin, Vol.19 (1981), p.61 *et seq.*, and A. Grahl-Madsen, International Refugee Law Today and Tomorrow, AVR Vol.20 (1982), p.411 *et seq.*

ready reflected in regional international law[32]. As regards the relevant State practice, it can be noted that several States at present do offer temporary refuge to this category of persons, a highly commendable attitude which, however, seems to be based upon humanitarian grounds rather than legal considerations[33]. As to the question of State responsibility for such massive movements, it seems very doubtful indeed whether they occur in fact as a consequence of any act of the State properly speaking since these situations are usually characterized by the breakdown or the very absence of public order; therefore, such large-scale flows do not appear as the result of what is to be rightly conceived as a refugee-generating policy. Thus, they are not attributable to the State concerned and for these reasons, they fall outside the scope of this study.

d) To sum up, one could state that of all the four refugee-generating situations described above, only scenario A) characterized by flagrant vio-

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[32] Cf. Art.I (2), 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which reads as follows: "The term 'refugee' shall also apply to 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 origin or nationality".

For an analysis of the 1969 OAU Convention, see e.g. P. Weis, The Convention of the OAU Governing the Specific Aspects of Refugee Problems in Africa, Human Rights Journal, Vol.3 (1970), p.449 *et seq.*; O. Kimminich, Der Schutz der politischen Flüchtlinge in Afrika, Verfassung und Recht in Übersee, Vol.3 (1970), p.443 *et seq.*, and R. Hofmann, Zur Flüchtlingsproblematik in Afrika, Jahrbuch für Afrikanisches Recht, Vol.3 (1984), p.105 *et seq.*

See also Report on the Round Table on the Problems Arising from Large Numbers of Asylum Seekers, San Remo, 22–25 June 1981, International Institute of Humanitarian Law (San Remo 1981), p.4: "In view of the complex nature of many large-scale influx situations, particularly those arising from armed conflict, the Round Table considered that the definition of a 'refugee' which should serve as a basis for dealing adequately with large numbers of asylum-seekers for the purposes of protection and assistance should be that found in the present mandate of the United Nations High Commissioner for Refugees as enlarged by successive resolutions of the United Nations General Assembly and should therefore be interpreted to include 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 was compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality". Cf. G. J. L. Coles, Problems Arising from Large Numbers of Asylum-Seekers: A Study of Protection Aspects, International Institute of Humanitarian Law (San Remo 1981), p.15 *et seq.*

[33] See e.g. G. J. L. Coles, Temporary Refuge and the Large Scale Influx of Refugees, Australian Yearbook of International Law, Vol.8 (1978–1980), p.189 *et seq.*, and Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Sub-Committee of the Whole on International Protection, Executive Committee of the High Commissioner's Programme, UN Doc. EC/SCP/16 (1981).

lations of human rights resulting in the persecution of people for reasons of race, religion, nationality, membership of a particular social group or political opinion may imply a refugee-generating policy constituting an act of the State under international law which is attributable to that State. This is particularly true for all cases where persecutions are systematically committed by State organs or persons acting on behalf of the State and within their legal competences as a deplorable expression of an established official policy. Under all other circumstances the existence of a refugee-generating policy constituting an act of the State under international law attributable to that State can only be maintained provided it can be established that State authorities, while in the position to prevent such persecution from being committed, are clearly not willing to do so. If these conditions are met, the requirements of the subjective element of an internationally wrongful act as determined in Art.3 of the ILC Draft are fulfilled.

*2. Refugee-generating policies as breaches of an international obligation*

Having thus established that there are certain refugee-generating policies which constitute an act of the State attributable to that State under international law, the next problem to be dealt with concerns the question whether such policies are to be considered as a breach of an international obligation as the objective element of an internationally wrongful act.

In this context it is appropriate to recall that the ILC decided not to define the rules imposing on States obligations the breach of which can be a source of responsibility, and which are referred to as "primary rules". In its draft on State responsibility, the ILC is undertaking, on the contrary, to define those rules which seek to determine the legal consequences of failure to fulfill obligations established by such "primary rules" and which are referred to as "secondary rules"[34]. Thus, whether such refugee-generating policies as mentioned above constitute the breach of an international obligation incumbent upon the State of origin cannot be decided simply upon an analysis of Arts.16 to 26 of Part 1 of the ILC Draft. It is to be noted, however, that Art.19 of the ILC Draft gives some indications as to which rules are to be considered as "primary rules". As is well known, this provision distinguishes between international crimes and international delicts and gives some examples of international obligations the breach of which may result in an international crime. All internationally wrongful

[34] YILC 1980 II (Part 2), p.27.

acts which do not fall within this category of international crimes are to be considered as international delicts[35].

International obligations the breach of which may entail the responsibility of the country of origin in relation to the country of asylum are frequently said to include the duty of a State to accord to its nationals a certain minimum standard of treatment in the matter of human rights and, more rarely, a duty "not to create refugees".

a) Already in 1939, Jennings stated that "the wilful flooding of other states with refugees constitutes not merely an inequitable act, but an actual illegality, and *a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition". In his view, this conduct should thus result in the responsibility of the country of origin for the repercussions which a refugee influx has "on the material interests of third

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[35] Art.19 of the ILC Draft reads as follows:

"1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict".

Among the literature on the subject of international crimes, see e.g. C. Dominicé, Die internationalen Verbrechen und deren rechtliches Régime, in: Völkerrecht und Rechtsphilosophie, Festschrift für S. Verosta (1980), p.228 *et seq.;* P. M. Dupuy, Observations sur le «crime international de l'Etat», RGDIP Vol.84 (1980), p.449 *et seq.;* M. Spinedi, International Crimes of States in the United Nations Work of Codification of State Responsibility, Working Document prepared for the Conference on State Responsibility and Crimes of States, Firenze, 27–28 October 1984; A. Verdross/B. Simma, Universelles Völkerrecht (3rd ed.1984), p.847 *et seq.*, and R. Hofmann, Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit, ZaöRV Vol.45 (1985), p.195 *et seq.*

states". The "doctrinal ground for regarding as illegal the conduct of a state of origin to destitute refugees" would be the "generally accepted doctrine of the abuse of rights. Domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas.* And for a State to employ these rights with the avowed purpose of saddling other states with unwanted sections of its populations is as clear an abuse of rights as can be imagined"[36]. Thus, the doctrine of abuse of rights served as a means to challenge the argument that a State's treatment of its nationals is not governed by international law.

Only in recent years has scholarly attention again been given to the question of international responsibility of the State of origin for conduct resulting in massive flows of refugees. It must be stressed, however, that this renewed interest has usually resulted in statements that there exist certain principles regarding a duty not to maintain refugee-generating policies but very little has been said on their legal nature[37].

An even more recent phenomenon concerns the consideration whether there is in present-day international law a general rule limiting the sovereignty of States in as far as they may not allow activities on their territory which will cause damage on the territory of other States. It seems to be justified to say that this rule is today recognized as forming part of international law as regards the particular field of transfrontier pollution[38]. The validity of this rule based upon the classic principle *sic utere tuo ut alienum non laedas* is reflected by international treaty law[39], the jurispru-

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[36] R. Y. Jennings, Some International Law Aspects of the Refugee Question, BYIL Vol.20 (1939), p.98 *et seq.* (at p.111); see in general A. Kiss, Abuse of Rights, EPIL, Instalment 7 (1984), p.1 *et seq.*, with further references.

[37] See e.g. Report (note 13), p.6 where it is stated: "It was agreed that principles of international law existed relating to the obligations of States in regard to avoiding the creation in their own territories or elsewhere of conditions recognized as leading to mass flows. These principles could be found among the general principles of law embodied in such instruments as the Charter of the United Nations and the Declaration on Friendly Relations, in treaties such as those on human rights and humanitarian law (especially the 1949 Geneva Conventions and the 1977 Protocols) and the practice of States. It was considered desirable to re-affirm and develop principles specifically in the context of obligations to prevent transfrontier flows". See also Goodwin-Gill (note 23), p.226 *et seq.*

[38] See in particular the references given by U. Beyerlin, Klagebefugnis von Ausländern gegen grenzüberschreitende Umweltbelastungen. Anmerkung zum Urteil des Verwaltungsgerichts Straßburg vom 27. Juli 1983 im Rechtsstreit zwischen der Provinz Nord-Holland und der Französischen Republik, ZaöRV Vol.44 (1984), p.336 *et seq.* (at p.340), and in general G. Handl, Territorial Sovereignty and the Problem of Transnational Pollution, AJIL Vol.69 (1975), p.50 *et seq.*; M. Bothe/M. Prieur/G. Ress, Rechtsfragen grenzüberschreitender Umweltbelastungen (1984), and Verdross/Simma (note 35), p.643 *et seq.*

[39] See e.g. the references given by Verdross/Simma, *ibid.*, p.648.

dence of international courts and arbitrations[40], and numerous resolutions adopted by international organizations[41] and learned societies[42]. It has been rightly pointed out that "to compare the flow of refugees with the flow of, for example, noxious fumes may appear invidious; the basic issue, however, is the responsibility which derives from the fact of control over territory"[43]. But even if it seems to be beyond doubt that present-day international law obliges States not to allow activities to be carried out within their sphere of jurisdiction which will cause damage to the environment of other States and that this obligation stems from the general principle *sic utere tuo ut alienum non laedas*, it remains to be seen whether a legally binding norm may be derived from this general principle which would prohibit States to maintain refugee-generating policies, this being an obligation the breach of which would entail responsibility under international law.

Since there is no provision in international treaty law establishing such an obligation, only international customary law could serve as its legal foundation. This would require the existence of a pertinent State practice based upon the conviction that this practice reflects binding legal obligations[44].

At this point it must be emphasized that there does not seem to exist any such State practice; apparently States have never invoked the international responsibility of a State on the grounds that refugee-generating policies would constitute a breach of an international obligation.This attitude of States might be explained by their conception of the legal value of the general principle *sic utere tuo ut alienum non laedas*. Indeed, this principle, formulated in such an extremely abstract way, may not hold too much legal relevance unless it is linked with a specific right of the other State such

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[40] See in particular the awards delivered in the *Trail Smelter* Arbitration, RIAA Vol.3 (1949), p.1903 *et seq.*, and the *Lac Lanoux* Arbitration, RIAA Vol.12 (1963), p.281 *et seq.*; for a discussion and further references, see K. J. Madders, Trail Smelter Arbitration, EPIL, Instalment 2 (1981), p.276 *et seq.*, and D. Rauschning, Lac Lanoux Arbitration, EPIL, Instalment 2 (1981), p.166 *et seq.*

[41] See Principle 21 of the Stockholm Declaration, Report of the UN Conference on the Human Environment, UN Doc. A/CONF.48/14, p.5.

[42] See Art.3 (1) of the Rules of International Law Applicable to Transfrontier Pollution, approved by the ILA in 1982, in: ILA, Report on the 60th Conference (Montreal 1982), p.2, and the report by D. Rauschning, Legal Aspects of the Conservation of the Environment, *ibid.*, p.157 *et seq.*

[43] Goodwin-Gill (note 23), p.228.

[44] See in general R. Bernhardt, Customary International Law, EPIL, Instalment 7 (1984), p.61 *et seq.*

as territorial sovereignty, life or property of its nationals, or the maintenance of public order. This concretization has been achieved in the field of international environmental law. It could and should be done in regard to refugee-generating policies.

States admitting large numbers of refugees onto their territory fulfill an obligation imposed upon them by international law which by now seems to include the principle of *non-refoulement* in its wide sense, i.e. States are in general obliged not to reject refugees at the frontier who would then have to remain in a country where they would be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion[45]. Therefore, it might be maintained that refugee-generating policies constitute a violation of a country's right to territorial sovereignty. This violation is moreover qualified by the fact that the socio-economic structures of most of the States of asylum would be excessively strained coping with sudden large-scale influxes of asylum-seekers[46]. Refugee-generating policies of the kind defined above therefore might be considered as an internationally wrongful act falling under the category of an international delict entailing the responsibility of the State of origin in relation to the State of asylum.

b) "A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid" constitutes an international crime under Art.19 (3) of the ILC Draft on State Responsibility[47]. Therefore, if large-scale flows of refugees are caused by policies involving genocide, apartheid, and gross and persistent violations of the basic rights of the human person, these refugee-generating policies are to be considered as internationally wrongful acts, falling under the category of international

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[45] See the references given by Goodwin-Gill (note 23), p.69 *et seq.;* the principle of *non-refoulement* is laid down in Art.II (3), 1969 OAU Convention whereas Art.33, 1951 Convention only provides for the prohibition of expulsion or return of refugees; Art.II (3), 1969 OAU Convention reads as follows: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2".

[46] See Coles (note 32), p.8 *et seq.;* for an analysis of the need of an international response to sudden large-scale influxes of asylum-seekers, see J. P. C. Fonteyne, Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees, Australian Yearbook of International Law, Vol.8 (1978–1980), p.162 *et seq.*, and Grahl-Madsen (note 31), AVR Vol.20 (1982), p.439 *et seq.*

[47] See the commentary of the ILC to Art.19 of the ILC Draft, YILC 1976 II (Part 2), p.121 para.70.

crimes. It must be stressed, however, that in this case responsibility is entailed irrespective of whether these violations of international law actually do result in a massive refugee movement or not. This factor is, however, of decisive importance for the legal consequences of such an internationally wrongful act.

## II. Legal consequences of refugee-generating policies as internationally wrongful acts

Having thus determined that refugee-generating policies might under specific circumstances entail the responsibility of the country of origin, the next problem concerns the legal consequences of such internationally wrongful acts. In answering this question, special importance will be given to the draft articles contained in the Fifth Report presented to the ILC by Willem Riphagen in 1984[48]. At the present early stage of discussion, some of these draft articles are still of a quite controversial nature; it seems, however, that the general structure of the report has been accepted by a majority of the ILC members[49]. Indeed, most of the proposed articles seem to reflect the current state of law, at least as regards the legal consequences of international delicts.

### *1. Legal consequences of refugee-generating policies as international delicts*

As stated above, refugee-generating policies not involving genocide, apartheid or gross and persistent violations of the basic rights of the human person might nonetheless qualify as international delicts entailing the responsibility of the country of origin towards the country of asylum. The new rights of the country of asylum, seen as the directly injured or affected State, are set out basically in Arts.6, 8 and 9 of the draft presented by Riphagen. Under these provisions, the country of asylum would be entitled, *inter alia*, to require the country of origin to end its refugee-generating policy and to claim the payment of a sum of money as compen-

[48] UN Doc. A/CN.4/380, p.2; the proposed draft articles are reproduced in ZaöRV Vol.45 (1985), p.357 *et seq.*; for a discussion of the proposed legal consequences of internationally wrongful acts, see Verdross/Simma (note 35), p.873 *et seq.*; Hofmann (note 35), ZaöRV Vol.45 (1985), p.195 *et seq.*, and P. Malanczuk, Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit, ZaöRV Vol.45 (1985), p.293 *et seq.*

[49] See Hofmann, *ibid.*, p.216 *et seq.*

sation for damages incurred[50]. These will primarily consist of the costs for maintenance of the refugees including food, housing, medical aid and possibly administrative expenditures. In order to enforce its claims, the country of asylum might resort to peaceful reprisals observing, however, the principle of proportionality[51]. In practice, such reprisals might include economic sanctions such as the suspension of treaties of commerce and trade or the revocation of preferential treatment for goods imported from the country of origin[52].

*2. Legal consequences of refugee-generating policies as international crimes*

It is a generally held opinion that the commission of an international crime results in new legal relationships between the State responsible for the act and all other States and the international community as a whole[53]. Thus, Art.5 (e) of the draft presented by Riphagen corresponds to the

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[50] See Verdross/Simma (note 35), p.873 *et seq.*, and Hofmann, *ibid.*, p.222.

[51] See Verdross/Simma, *ibid.*, p.907 *et seq.*; Hofmann, *ibid.*, p.222 *et seq.*, and Malanczuk (note 48), ZaöRV Vol.45 (1985), p.302; it should be stressed, however, that under present-day international law only peaceful reprisals may be considered as legitimate countermeasures with respect to internationally wrongful acts with the sole exception of the international crime "armed aggression", see Verdross/Simma, p.912; Hofmann, *ibid.*, p.215, and Malanczuk, p.298 *et seq.*, all with further references. This means that humanitarian interventions are to be considered as prohibited by present-day international law under Art.2 (4) of the Charter of the United Nations, see e.g. U. Beyerlin, Humanitarian Intervention, EPIL, Instalment 3 (1982), p.211 *et seq.*, and A. Randelzhofer, Use of Force, EPIL, Instalment 4 (1982), p.265 *et seq.*, both with further references.

[52] Peaceful reprisals should be strictly distinguished from measures of retortion which do not infringe the rights of the target State interfering only with its interests and therefore do not require a special legitimization by international law, see C. Tomuschat, Repressalie und Retorsion. Zu einigen Aspekten ihrer innerstaatlichen Durchführung, ZaöRV Vol.33 (1973), p.179 *et seq.*; P. Malanczuk, Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility, ZaöRV Vol.43 (1983), p.705 *et seq.* (at p.719), and Verdross/Simma (note 35), p.902, all with further references.

[53] For references see Hofmann (note 35), ZaöRV Vol.45 (1985), p.223. For a discussion of the problems connected with the implementation by third States of violations of international obligations *erga omnes*, see M. Akehurst, Reprisals by Third States, BYIL Vol.44 (1970), p.1 *et seq.*; J. A. Frowein, Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung, in: Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, Festschrift für H. Mosler (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.81) (1983), p.241 *et seq.*; P. M. Dupuy, Observations sur la pratique récente des «sanctions» de l'illicité, RGDIP Vol.87 (1983), p.505 *et seq.*; Verdross/Simma (note 35), p.907 *et seq.*, and Hofmann (note 35), ZaöRV Vol.45 (1985), p.224 *et seq.*

qualification of an international crime as one committed *erga omnes*[54].

The special legal consequences of an international crime are tentatively laid out in Art.14 of the draft prepared by Riphagen[55]. In the case of an international crime, all States will have the same rights as directly affected States as well as some additional rights. There is, however, no indication in this provision as to the contents of these additional rights. The exercise of all these rights, however, is subject to the analogous application of the procedure embodied in the United Nations Charter with respect to the maintenance of international peace and security. This somewhat controversial disposition is of major importance since it stipulates the exclusive jurisdiction of the UN organs as the sole representative of the international community with regard to possible reactions by States to the commission of an international crime. It means that States not directly injured will not be entitled to adopt countermeasures such as peaceful reprisals unless they are acting upon a prior authorizing decision or recommendation given by the competent organs of the UN[56].

With respect to large-scale influxes of asylum-seekers due to refugee-generating policies involving genocide, apartheid, and gross and persistent violations of the basic rights of the human person it would follow from the

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[54] Art.5 (e) reads as follows (UN Doc. A/CN.4/380): "For the purposes of the present articles 'injured State' means: ...

(e) if the internationally wrongful act constitutes an international crime, all other States".

[55] Art.14 reads as follows: "1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

a) not to recognize as legal the situation created by such crime; and

b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedure embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail".

[56] For a critique of this approach, see Hofmann (note 35), ZaöRV Vol.45 (1985), p.226 *et seq.*

application of this rule that competent UN organs might oblige or recommend the member States to resort to peaceful and strictly proportional reprisals of an economic nature towards a country considered responsible for such an internationally wrongful act[57]. Measures of this kind could include the suspension of agreements in the field of economic co-operation and development and should apply in particular to development programmes sponsored by the relevant specialized agencies of the UN system.

### *C. Conclusion*

The starting point for this study is the increasingly shared conviction that, in order to achieve a more satisfactory solution to the problems connected with the deplorable situation of refugees throughout the world, a new approach directed towards the root causes of massive flows of asylum-seekers is appropriate. This would include above all the consideration if and to what extent the existing and in particular the developing rules of State responsibility might be applied to deal with refugee-generating policies. Such policies must be regarded as factors resulting not only in a significant disturbance of international relations between neighbouring countries and within the international community as a whole, but also, quite often, in a serious deterioration of the already unbalanced socio-economic structures of the vast majority of the potential countries of first asylum.

Refugee-generating policies as defined in this study should be considered as internationally wrongful acts which, in particular circumstances, might even amount to international crimes. Therefore, it seems to be justified to state that, in general, States directly affected by such policies are entitled under international law to require the termination of such policies and to claim compensation for the financial damage incurred. These claims against the country of origin held responsible under international law may be enforced by resorting to peaceful reprisals. If refugee-generating policies fall under the category of international crimes, a reaction by all the members of the international community involving peaceful and proportional reprisals of an economic nature might be considered as legitimate under international law provided it is based upon a prior decision or recommendation by the competent UN bodies authorizing such measures.

Having thus stated the legality of such actions implemented by the inter-

[57] Consequently, measures of retortion could be taken by any State upon its unilateral decision.

national community, a final aspect of a more political or humanitarian nature should be taken into account. Since the underlying justification for all such activities is to be found in the intention to improve the calamitous situation of the human beings concerned, it might be questioned whether measures such as economic reprisals actually do result in the achievement of this aim or whether they do not rather contribute to a further aggravation of the living conditions of the populations concerned. This fundamental consideration must be of crucial importance for any decision taken in this context.

Rainer Hofmann