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THE OBLIGATIONS OF THE STATE OF ORIGIN OF REFUGEES: AN APPRAISAL OF A TRADITIONALLY NEGLECTED ISSUE

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Abstract

Over the last two decades, the growing restrictive attitudes of Western States towards asylum-seekers have caused much ink to flow concerning the individual and collective responsibilities of the host countries in sharing the "burden." In contrast, the role and the responsibilities of the State of origin of refugees have remained quite unexplored in legal doctrine. The present article strives to fill this gap, analysing both the content of the pertinent international norms as well as their practical relevance in situations of mass flows. In the first part, this article will analyse whether the source State can be held responsible, or liable, towards receiving countries for the refugee influx. The article will then investigate the precise scope of the country of origin's obligations vis-à-vis its fleeing citizens, particularly with respect to return and reparations. As will be shown, the enjoyment of the refugees' rights in this regard has been significantly limited as a result of the characterization by States of repatriation as the best durable solution.

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I. INTRODUCTION

When dealing with the obligations of the State of origin of refugees, one cannot avoid considering the reasons that gave birth to international refugee law. This corpus of international norms poses several obligations on third States, but none directly on the country of origin. The refugee regime is indeed essentially "exilic" in nature.[1]

The exclusive focus on host countries is due to the fact that refugee law starts from two factual premises: 1) the voluntary lack of protection of individuals by their own State; and 2) its possible backlashes at the international level, symbolized by the crossing of the national frontier. Therefore, the obligations imposed on third States do not substitute those of the country of origin, which – by virtue of its sovereignty – continues to be individually responsible for the persons who are under its territory and jurisdiction, but rather complement them when the refugees arrive in the formers' respective jurisdictions.[2]

Despite its humanitarian objective, the Geneva Convention also accords a central role to sovereignty, as shown by the absence of a right to be granted asylum.[3] Moreover, it does not oblige States to agree upon, nor to offer, a durable solution. As a consequence, the country of origin is not exempted from establishing conditions permitting return [4] and reassuming its responsibilities towards its nationals. However, as anticipated, its obligations are to be searched outside the area of international refugee law, and considered separately depending on whether they are due to refugee-receiving States or to the same individuals who were forced to flee.

II. RESPONSIBILITIES TOWARDS RECEIVING STATES

Through refugee law, States have committed to host refugees arriving on their territory and accord to them the set of rights affirmed in the 1951 Geneva

1. George Okoth-Obbo, *Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 7, 13 (Vera Gowlland-Debbas ed., 1994) (paper presented at the Colloquium organized by the Graduate Institute of International Studies). "[R]efugee law must necessarily be 'exilic' in its strength . . . as it is the *failure* of any effective protection in the country of origin that kicks it into gear." The expression "exilic bias" was coined by former UNHCR official Gervase Coles. *Cf.* Gervase Coles, *Approaching the Refugee Problem Today, in* REFUGEES AND INTERNATIONAL RELATIONS 373, 389-90 (Gil Loescher & Laila Monahan eds., 1989).

2. *See* Gregor Noll, *Rejected Asylum Seekers: The Problem of Return*, 37 INT'L MIGRATION 267, 268 (1999) ("While the 1966 Covenants were designed to safeguard human rights under national jurisdictions, the 1951 Refugee Convention, the Convention Relating to the Status of Stateless Persons and the Agreement Relating to Refugee Seamen were conceived as secondary means of human rights protection. Broadly speaking, their rationale was to safeguard human rights, when the country of origin had failed to protect individuals under its jurisdiction.").

3. James C. Hathaway, *Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 133 (1990). As acutely observed by Hathaway, "[c]urrent refugee law can be thought of as a compromise between the sovereign prerogatives of states to control immigration and the reality of coerced movements of persons at risk. Its purpose is not specifically to meet the needs of the refugees themselves (as both humanitarian and human rights paradigms would suggest), but rather to govern disruptions of regulated international migration in accordance with the interests of states." *Id.*

4. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 489 (3d. ed. 2007).

Convention.[5] This poses the question whether the country of origin can be held responsible for the financial and social burden associated with the flow of refugees to receiving States.

For international responsibility to be established, a wrongful act must have been committed.[6] Applied to refugee flows, however, this requirement is of limited applicability. First of all, the flight of single individuals generally does not suffice, considering that it could be based on a *mere*, though well-founded, fear of persecution or other fundamental human rights violations, rather than on concrete breaches. The problem is instead posed with respect to large-scale flows.

Back in 1939, Professor Jennings argued: "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 population is as clear an abuse of right as can be imagined."[7]

Nowadays, following the development of international obligations, the establishment of the country of origin's responsibility can be based on more solid grounds. A distinction must nonetheless be made depending on the circumstances in which a mass exodus takes place. Indeed, the existence of a rule to the effect that "States shall not create refugees" is generally excluded.[8] Thus, a source State could hardly be considered responsible whenever the flow results from external events such as natural disasters or armed conflicts, except if it contributed to the latter events, e.g., not respecting prevention obligations.[9] On the contrary, international responsibility is certainly triggered when the State engages in mass expulsions or in flagrant human rights violations towards a part of its population. In these latter cases, the refugee flow is a direct consequence of the source State's conduct.[10]

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5. These obligations, though, are premised on the recognition by the receiving State of the refugee status.

6. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Nov. 2001, Supp. No. 10 (A/56/10), chp.IV.E.1 [hereinafter Draft Articles].

7. R. Yewdall Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT. Y.B. INT'L L. 98, 112-13 (1939).

8. *See* Christian Tomuschat, *State Responsibility and the Country of Origin*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 59, 73 (V. Gowlland-Debbas ed., 1994); GOODWIN-GILL & MCADAM, *supra* note 4, at 3. According to Goodwin-Gill, such a rule "is too general and incomplete. An ambulatory principle nevertheless operates, obliging States to exercise care in their domestic affairs in the light of other States' legal interests, and to cooperate in the solution of refugee problems. Such cooperation might include, as appropriate, assisting in the removal or mitigation of the causes of flight, contributing to the voluntary return of nationals abroad, and facilitating, in agreement with other States, the processes of orderly departure and family reunion. Where internal conflict or non-State actors are the primary cause of flight, the theoretical application of rules and principles may be as difficult to achieve as practical and political solutions." GOODWIN-GILL & MCADAM, *supra* note 4, at 3

9. While mass exoduses have multiple and complex causes, it is accepted that the most common ones with respect to refugee flows are conflicts and gross violations of human rights. *See, e.g., Round Table on Pre-Flow Aspects of the Refugee Phenomenon*, *in 25th Roundtable on Current Problems of International Humanitarian Law*, San Remo, 27-30 (Apr. 1982); Int'l Inst. of Humanitarian Law, *Conclusions of the IXth Round Table on Current Problems in International Humanitarian Law*, *in 25th Roundtable on Current Problems of International Humanitarian Law*, San Remo, 7-10 (Sept. 1983).

10. Jack Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 485-86 (1985). Garvey remarks that many outflows of refugees are in fact mass expulsions because it is the abuses inflicted by the State of origin which forces its citizens to flee. *Id.*

Apart from the violation of specific rules of international law, refugee-receiving countries could also claim that the source State, by forcing people to flee *en masse*,[11] is making an attempt on their sovereignty and territorial integrity.[12] Indeed, while in principle States have the sovereign right to decide who to admit in their territory, such a right would be seriously limited if a country were confronted with a mass flow of people who could not be refouled for legal or humanitarian grounds.[13]

Alternatively, some authors have claimed that the country of origin, irrespective of its involvement in causing of the mass flow, is liable for the damages incurred by refugee-receiving States on the basis of the *Trail Smelter* principle.[14] According to this principle, a State must prevent considerable ecological damage from arising in other States due to activities in its own territory, even if such activities are not prohibited by international law.[15] Comparing a massive influx of people with environmental pollution, these authors suggest that in both cases the trans-boundary harm deriving from legal but "dangerous" activities should be compensated by the source State.[16] However, apart from the uneasiness that such a comparison legitimately provokes,[17] there seems to be no practice allowing for the extension of said principle beyond the field of environmental law.[18] Moreover, the no-harm rule only imposes a due diligence standard.[19]

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11. Conversely, if the country of origin only encouraged people to leave, the doctrine of abuse of rights could still be invoked as a proper basis of liability.

12. To the extent that a direct link between the source State's conduct and the flow can be established, the objection that "l'intégrité territoriale d'un Etat ne peut être violée que par un autre Etat" loses ground. Briggette Stern, *Commentaire Sur: La Responsabilité de l'Etat d'Origin des Réfugiés*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES, *supra* note 8, at 90.

13. Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. SOC'Y INT'L L. 532, 532, 535-54 (1986). The scope of the legal and humanitarian constraints will obviously vary depending on the international obligations assumed by the host State. It suffices here to remember that the principle of *non-refoulement* is formulated in much wider terms in the 1969 African Refugee Convention than in the 1951 Geneva Convention.

14. *Trail Smelter Arbitral Tribunal*, 33 AM. SOC'Y INT'L L. 182 (1939) [hereinafter *Trail Smelter I*]; *Trail Smelter Arbitral Decision: US & Can.,* 35 AM. J. INT'L L. 665, 684 (1941) [hereinafter *Trail Smelter II*]. *Cf.* Jack Garvey, *The New Asylum Seekers: Addressing Their Origin*, *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S: THE NINTH SOKOL COLLOQIUM ON INTERNATIONAL LAW 181, 187 (David A. Martin ed., 1988).

15. Garvey, *supra* note 14, at 187.

16. GERVASE J. L. COLES, STATE RESPONSIBILITY IN RELATION TO THE REFUGEE PROBLEM, WITH PARTICULAR REFERENCE TO THE STATE OF ORIGIN 148 (1993); Alex Takkenberg, *Mass Migration of Asylum Seekers and State Responsibility*, *in* THE REFUGEE PROBLEM ON UNIVERSAL, REGIONAL AND NATIONAL LEVEL 787, 799 (1987).

17. According to Peavey-Joanis, the application of the Trail Smelter principle as a basis to claim compensation would also contravene the humanitarian basis of refugee law. Jennifer Peavey Joanis, *A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 254-65 (Rebecca M. Bratspies & Russell A. Miller, eds. 2006). Her critique is however more general, as she challenges the same idea of holding a State liable for creating a refugee flow, arguing that it "would only further a downward economic and social spiral in the refugee-creating society." *Id.*

18. RAINER HOFFMAN, *Refugee Generating Policies and the Law of State Responsibility*, *in* 45 ZAÖRV 694, 707 (1985); Tomuschat, *supra* note 8, at 78.

19. *See* International Law Commission, Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Art. 3. *in* Y.B. OF INT'L L. COMMISSION, 2001, VOL. II.

Consequently, in the all-too-frequent cases in which the refugee flow is a result of the conduct of private parties, it would be necessary to prove that the State has not taken appropriate action to prevent such acts.[20] In addition, to prove the existence of the causal link between the source State's conduct and the outflow, host States would have to demonstrate that the standard of due diligence has not been respected.

Even conceding that the country of origin could be held internationally responsible, or liable, for a refugee flow, the existence of a duty to pay compensation for the damage incurred by host States is not substantiated by State practice. The reluctance of receiving countries to enforce such a duty is probably due to the fact that source States are mostly poor countries going through conflicts and dire conditions.[21] For the same reasons, in several cases, affected States have instead resorted to coercive actions in order to stop the mass influx.[22]

Practice shows that host States, rather than openly invoking the responsibility of source countries, have found it more practicable to limit their own. Vis-à-vis refugees, this has resulted in policies aimed, on the one hand, at rendering more difficult the access to host States' territory and protection, and on the other hand, at enacting premature repatriations.[23]

III. COUNTRY OF ORIGIN'S OBLIGATIONS *VIS-À-VIS* ITS FLEEING NATIONALS

In 1948 the General Assembly, in a famous resolution on Palestine, affirmed that:

> [T]he refugees wishing to return to their homes and live at peace with their neighbours should be

20. *See* HOFFMAN, *supra* note 18, at 701-02 ("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. […] 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 is increasingly questioned as to its adequacy in present-day international law. 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. 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.").

21. *See* Garvey, *supra* note 14, at 194, n.30 ("It must be recognized that in some situations of refugee flow, particularly the flow that is all too common from poor third world countries, actual compensation will not be practicable.").

22. IDEAN SALEHYAN, *The Externalities of Civil Strife: Refugees as a Source of International Conflict*, 10, Migration, International Relations, and the Evolution of World Politics Conference, Woodrow Wilson School of Public and International Affairs, Princeton University (Mar. 16-17, 2007). ("While refugee flows can contribute to low-level tensions between states, major military conflicts may also arise when receiving states forcefully intervene in the refugee-sending state to remove the regime in power and/or induce a major change in policy. Military invasions in Haiti and Kosovo were partly motivated by the desire to stem further refugee migration.").

23. On this issue, see the following paragraph.

> permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.[24]

Strikingly, the focus here was already on the two main issues, which have dominated the discourse on refugee repatriation over the last twenty years: the return to one's own home and the restitution of, or compensation for, property left behind.

A. The Right to Return

Irrespective of the reasons that induce refugees to flee, their country of origin has an obligation to guarantee them the right to return.

The right to return finds its roots in classical principles of the law of nationality and State succession, which require each country to readmit its own nationals[25] and successor States not to arbitrarily denationalize and expel persons found on their territory.[26] Various obligations to repatriate are then affirmed in international humanitarian law instruments with respect to prisoners of war and civilians.[27]

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24. G.A. Res. 194 (III), ¶ 11, U.N. Doc. A/RES/194 (Dec. 11, 1948).

25. *See* RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 71 (2d ed. 1988) (stating "[t]he proposition that every State must admit its own nationals to its territory is so widely accepted that it may be described as a commonplace of international law."); *see also* PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 53 (2d ed. 1979) ("The State of nationality is also under an obligation to admit a national born abroad who never resided on its territory if his admission should be demanded by the State of residence"); GOODWIN-GILL & MCADAM, *supra* note 4, at 269 ("A State of origin owns to other States at large (and to particular States after entry [of nationals of the state of origin]), the duty to re-admit its nationals").

26. *See, e.g., The Law of Nationality*, 1 JOHN P. GRANT & J. CRAIG BARKER HARV. RES. L. ORIGINAL MATERIALS 11 (1966). Article 20 provides: "A state may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another State, if such person is a national of the first State or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other State." *Id.* at 24. In more recent times it was reaffirmed by the International Law Commission as follows:

> 1. The status of persons concerned as habitual residents shall not be affected by the succession of States.
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> 2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto. International Law Commission, Articles on State Succession, art. 14 (1974). A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto. International Law Commission, Articles on State Succession, art. 14 (1974).

27. *Cf*. Hague Convention (II) with Respect to the Laws and Customs of War on Land, Annex, art. 20, July 29, 1899; Hague Convention (IV) Respecting the Laws and Customs of War on Land and

Over time, return has evolved from an essentially inter-State obligation to a human right of the individual. The first affirmation of a veritable *right* to return dates back to the Universal Declaration of Human Rights ("UDHR"). Article 13(2) declares: "Everyone has the right to leave any country, including his own, and to return to his country." The right was subsequently recognized by the International Covenant on Civil and Political Rights ("ICCPR"), which reformulates it in art. 12(4) as follows: "No one shall be arbitrarily deprived of the right to *enter* his own country." Importantly, the Covenant does not subject such a right to the restrictions envisaged in Art. 12(3), which conversely applies to the right to liberty of movement and the right to leave. As a consequence, the right to enter can be derogated under the Covenant only applying the general derogation clause *ex* Art. 4(1).[28]

The reference to "its own country" shows that the right at issue is not made dependent on nationality, but more broadly on certain ties to the territory.[29] As a consequence, the right to return could also apply to some categories of non-nationals, such as stateless persons and refugees having acquired the nationality of the host State,[30] who wish to go back to their place of origin or former habitual residence.[31]

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its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 20, Oct. 18, 1907; Int'l Comm. of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of* War *(Third Geneva Convention)*, arts. 109, 110, 118, Aug. 12, 1949, 75 U.N.T.S. 135; Int'l Comm. of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (Fourth Geneva Convention)*, arts. 45, 49, 134, 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*].

28. UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, ¶ 21, CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) [hereinafter *General Comment No. 27*]. As to the meaning of the term "arbitrarily," the Human Rights Committee has stated that "[t]he reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country." *Id.*

29. HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 156, 156 (1987). This reading is supported by the *travaux préparatoires*, as shown by the fact that proposals referring to nationality were rejected so not to exclude "those persons who under domestic law enjoy a right to 'return' or reside in a country even though they are not nationals of that country." *General Comment No. 27*, *supra* note 28, at ¶. 20. A similar opinion has been later expressed by the Human Rights Committee, which in interpreting the wording "own country" affirmed: "The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them." *See also* Rex J. Zedalis, *Right to Return: A Closer Look*, 6 GEO. IMMIGR. L.J. 499, 506 (1992).

30. For instance, the Palestinians who flew to Jordan and subsequently became Jordanian citizens.

31. *See* John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIGR. L.J. 223, 233 (1992); Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A*

Apart from the Covenant, the right to return to one's own country is now enshrined in several universal specialized human rights instruments,[32] as well as in human rights treaties of a regional character[33] and in a plethora of UN resolutions and soft law documents.[34] It can thus be considered as firmly grounded in international law.[35]

1. From the Right to Return to Induced Repatriation

As far as refugees are concerned, the right to return is obviously premised on a change of conditions in the country of origin that were the cause of departure.[36] Nevertheless, for a long time, return was not thought to be a viable option. This is

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Human Rights Model for the Twenty-First Century, 23 FORDHAM U. L.J. 1075, 1114-21 (1996); Arthur C. Helton & Eliana Jacobs, *What is Forced Migration*, 13 GEO. IMMIGR. L.J. 521 (1995) (concerning the right to return after arbitrary displacement); *see also* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art 5(d)(ii), 660 U.N.T.S. 195, 220 [hereinafter Convention on the Elimination of all Forms Racial Discrimination] ("The right to leave any country, including one's own, and to return to one's country.").

32. Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 31; Convention on the Rights of the Child, Nov. 20, 1989, art. 10, 1577 U.N.T.S. 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), Art. 2(c), U.N. Doc. A/RES/3068(XXVIII) (July 18, 1976); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, art. 8, ¶ 2 A/RES/45/158. (Dec. 18, 1990) [hereinafter International Convention on the Protection of the Rights of Migrant Workers and their Families],

33. *Cf.* Organization of African States, African Charter on Human and Peoples' Rights, art 12(2), June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter on Human and Peoples' Rights]; League of Arab States, Arab Charter on Human Rights, art. 22 (Sep. 15, 1994). In contrast, other treaties recognize the right to return only to nationals. *See* Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 46 E.T.S. 1, 2, art. 3(2) (Sept. 16, 1963); Organization of American States, American Convention on Human Rights, art. 22(5) (Nov. 22, 1969), O.A.S.T.S. No. 36, 144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

34. M. ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS 81 (1997). *See*, inter alia, G.A. Res. 36/148, U.N. Doc. A/RES/36/148 (Dec. 16, 1981); Vienna Declaration and Programme of Action, ¶ 23, U.N. Doc. A/CONF.157/23 (pt. I) 20 (1993); S.C. Res. 836, U.N. Doc. S/RES/836 (1993); S.C. Res. 1239, U.N. Doc. S/RES/1239 (1999); S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999). *See, e.g.,* S.C. Res. 1145, ¶ 7, U.N. Doc. S/RES/1145 (Dec. 19, 1997) (reaffirming the right of all Croatian refugees to return to their homes of origin); S.C. Res. 1019, ¶ 7, U.N. Doc. S/RES/1019 (Nov. 9, 1995) (demanding that the government of Croatia respect the right of the Serb population to remain or return in safety); S.C. Res. 1078, ¶ 10(b), U.N. Doc. S/RES/1078 (Nov. 9, 1996) (calling on the Government of Rwanda to facilitate the return of Rwandan refugees); *see also* G.A. Res. 46/242, ¶ 11, U.N. Doc. A/RES/46/242 (Aug. 25, 1992); G.A. Res. 47/147, ¶ 11, U.N. Doc. A/RES/47/147 (Dec. 18, 1992).

35. ZIECK, *supra* note 34; Vienna Declaration and Programme of Action, ¶ 23, U.N. Doc. A/ CONF.157/23 (1993); S.C. Res. 836, U.N. Doc. S/RES/836 (1993); S.C. Res. 1239, U.N. Doc. S/RES/1239 (1999); S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999). For authority affirming the right of return has customary status, *see* THE MOVEMENT OF PERSONS ACROSS BORDERS 39-40 (L. B. Sohn & T. Buergenthal, eds., 1992); HANNUM, *supra* note 29, at 7-16.

36. "[I]n the refugee situation the right to return is not just the right to return; it is necessarily also the right to enjoy in the country of nationality all applicable rights. It cannot be said that a right to return exists where conditions in the country of origin, in particular the grave violations of human rights, are such that no reasonable person would wish to return." GERVASE J.L. COLES, VOLUNTARY REPATRIATION: A BACKGROUND STUDY 194 (1985).

also reflected by universal refugee law, which only codifies the prohibition of forced return (*non-refoulement*), i.e. the negative counterpart of the right to return.[37] Durable solutions for refugees are also not addressed by the Convention on the Status of Refugees, which implicitly encourages local integration, and even assimilation, in the host State, as shown by the multiple rights attached to refugee status[38] and the indication that assimilation and naturalization shall be facilitated "as far as possible."[39]

It was only from the mid-1980s, and then more firmly at the beginning of the '90s that repatriation came to be considered internationally as the preferred durable solution.[40] This was the result of a series of factors: the end of the ideological confrontation between the East and the West, the steady growth of refugee flows from a wide array of States and the creation of favourable circumstances for return.[41] Many refugee repatriation cases that have taken place since share two common characteristics: they involve a large group of people and are part of a wider framework (typically, a comprehensive peace settlement). These features lead the attention to some highly controversial aspects of the right to return. The first one is its applicability to mass refugee flow situations.

According to some scholars, the right to repatriation is an individual right, and as such, it cannot be applied in situations involving a mass exodus. The argument is generally that the drafters of the UDHR and the ICCPR did not contemplate such situations.[42] Stig Jagerskjold, for instance, held that:

> Whatever the merits of various "irredentist" claims, or those of masses of refugees who wish to return to the place where they originally lived, the Covenant does not deal with those issues and cannot be invoked to support the right to "return."

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37. *Cf.* Geneva Convention IV, *supra* note 27, at arts. 16, 17, 22.

38. *See* Geneva Convention IV, *supra* note 27, at arts. 16, 17, 22

39. *See* Geneva Convention IV, *supra* note 27, at art. 35.

40. *See cf.* U.N. Doc. A/Res./38/121 (1983); U.N. Doc. A/Res./39/169 (1984). *See* A.C. Hetlon, *The Role of International Law in the Twenty-First Century: Forced International Migration: A Need for New Approaches by the International Community*, 18 FORDHAM INT'L L. J, 1623, 1623-36 (1995); B. S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions* (PDES, Working Paper No. 2, 1999). This does not means that refugee repatriation did not happen during the Cold War, but "[t]hroughout this period, repatriation movements were primarily refugee-led, spontaneous responses to major political events. […] Rather than encouraging or promoting repatriation, UNHCR's engagement focused on the logistics of return." K. Long, *Back to Where You Once Belonged - A Historical Review of UNHCR Policy and Practice on Refugee Repatriation*, UNHCR Policy Development and Evaluation Service, Sept. 7, 2013.

41. The UN High Commissioner for Refugees, Mrs. Sadako Ogata, expressed the hope, which then became true, that from 1992 there would be a "decade of repatriation." Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, Statement at the International Management Symposium, St. Gallen, Switzerland, (May 25, 1992).

42. *See also* HANNUM, *supra* note 29, at 59 ("There is no evidence that mass movements of groups such as refugees or displaced persons were intended to be included within the scope of article 12 of the Covenant by its drafters"); Y. Dinstein, *Book Review*, 17 ISR. Y.B.. H.R. 318, 319 (1987) (affirming that Hannum "justifiably rejects expansive definitions" of the right to return); R. Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B.. H.R. 103 (1986).

> These claims will require international political solutions on a large scale.[43]

Other scholars add that situations of mass expulsion and ethnic cleansing should rather be managed by applying the right to self-determination.[44]

This position cannot be supported for many reasons.[45] First, nothing in the human rights instruments which affirm the right to return, precludes that right's applicability in cases of mass displacement. To hold the contrary would unduly justify restrictions beyond what is provided under those texts. Second, such applicability is widely supported and is indeed crucial for refugees. As was authoritatively affirmed by the Human Rights Committee in General Comment 27: "The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."[46] Third, group rights, like self-determination, should not be invoked to obliterate individual rights. Last but not least, since the ample practice concerning refugee repatriation in the last two decades concerns essentially large-scale phenomena, the right to return would be substantially irrelevant if it were limited to individual or small group cases. These considerations do not, however, deny that the repatriation of masses also depends on highly political factors and hence its implementation generally requires the international cooperation of all the parties concerned.[47]

The second controversial issue surrounding the return of refugees to their country concerns its voluntary character. In human rights law, the principle of voluntariness is an integral part of the various *non-refoulement* obligations, which limit a host State's right to expel or refoule a person in the presence of a real risk of

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43. Stig Jagerskyold, *Freedom of Movement*, *in* THE INTERNATIONAL BILL OF RIGHTS 166, 180 (L. Henkin ed., 1981).

44. Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 294, 324 (1995). Unfortunately, the debate on the issue is biased by the fact that it is often addressed with specific reference to the return of Palestinians.

45. The applicability to mass situations is recognized, inter alia, by Manfred Nowak. MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 220 (1993).

46. *General Comment No. 27*, *supra* note 28, at ¶ 19.

47. Typically, large-scale repatriation programs are preceded by a tripartite agreement between the State of origin, the host State, and the UNHCR. Tripartite agreements, as well as peace agreements, routinely recognize "the right of all citizens to leave and return to their country." *See* U.N. High Commissioner for Refugees, Tripartite Agreement SUDAN-DRC-UNHCR for the Voluntary Repatriation of the Refugees from the Republic of Sudan Living in the Democratic Republic of the Congo, preamble, ¶ (a), Jan. 2006; U.N. High Commissioner for Refugees, Tripartite Memorandum of Understanding Between the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan, and the United Nations High Commissioner for Refugees, preamble, ¶ (a), Dec. 26, 2007 [hereinafter Tripartite Memorandum of Understanding]; Tripartite Agreement of the Voluntary Repatriation of Refugees from the Democratic Republic of Congo Living in the United Republic of Tanzania, Tanz.-Dem. Rep. Congo-UNHCR, preamble, ¶ (a), Jan. 20, 2005 [hereinafter Tripartite Agreement on Voluntary Repatriation of DRC Refugees; Tripartite Memorandum of Understanding between the Government of Norway, the Islamic Republic of Afghanistan and the United Nations High Commissioner for Refugees, preamble, ¶ (a), Aug. 10, 2005; Darfur Peace Agreement, Government of the Sudan (GOS)–Justice and Equality Movement (JEM), art. 3 ¶ 34, May 5, 2006.

violation of his or her fundamental rights in the country of return.[48] In other terms, as long as safety reasons are present, an individual could only return voluntarily, and not be forced.

As far as refugee law is concerned, the 1951 Geneva Convention does not explicitly deal with the right to return. Repatriation is nonetheless indirectly addressed, for *present* refugees, by the ban on refoulement, art. 33,[49] and for *former* refugees, by the cessation clauses, which establish the preconditions for the termination of refugee status.[50] While the voluntary character of *present* refugee repatriation would seem to naturally flow from the same definition of refugee,[51] more problematic is its applicability in the context of the cessation of refugee status. The fifth and sixth cessation clauses in Art. 1C - the so-called "ceased circumstances" clauses - provide for compulsory cessation because of an objective change of circumstances in the country of origin,[52] which can be invoked by the host country to terminate the refugee status independently of the will of the individual concerned.[53] In such circumstances, the host State is also entitled to repatriate the former refugee to its own country. At the same time though, Art.

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48. *See, e.g.*, CORNELIUS WOLFRAM WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT (2009).

49. As remarked by Hofmann, "the principle of *non-refoulement* . . . protects any refugee from being returned to his country of origin against his will" and "thus implies the necessity of any repatriation being voluntary." Rainer Hofmann, *Voluntary Repatriation and UNHCR*, 44 HEIDELBERG J. IN'T L. 327, 333 (1984). The voluntariness of return is instead required by art. V of the 1969 OAU Refugee Convention. Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention), art. v, Sept. 10, 1969, 1001 U.N.T.S. 45. However, according to Hathaway this requirement should be read to apply only to "present refugees," as indicated by the final clause of art. V, which stipulates that voluntariness can be invoked by a person who is (still) a "refugee." James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. DISP. RESOL. 175, 178 n.10 (2005).

50. *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 153, , art. 1C [hereinafter 1951 Convention].

51. "[R]efugees are by definition 'unrepatriable' . . . as long as a person satisfies the definition of refugee in the contemporary instruments, he remains . . . 'unrepatriable' and consequently benefits from the prohibition of forced return." ZIECK, *supra* note 34, at 101-02.

52. "This Convention shall cease to apply to any person falling under the terms of section A if:

> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence."

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, art. 1C ¶¶ 5-6, July 28, 1951, No. 2545.

53. "It may be in the individual's best interest actually to remain in the host country and continue his or her life in exile, but is the State obliged to provide refuge if conditions in the country of origin have become safe within a reasonable time period? Clearly, States never agreed to such legal obligations." Michael Barutciski, *Involuntary Repatriation when Refugee Protection is no Longer Necessary: Moving Forward after the 48th Session of the Executive Committee,* 10 INTL. J. REFUGEE L. 236, 245 (1998).

1C(5) excludes the applicability of the ceased circumstances clauses to refugees having "compelling reasons arising out of previous persecution."[54] This proviso was conceived to apply only to statutory refugees, art. 1A(1) (i.e. pre-1951 refugees), but, in its implementation at the national level, it has received a broader application. Indeed a plurality of asylum States, following the humanitarian recommendations of UNHCR's Executive Committee Conclusion No. 69 (XLIII),[55] have provided that "convention" refugees can also benefit from exceptions concerning severe past persecutions and consequently be accorded an *appropriate* status. The latter, while not necessarily a continuation of refugee status, at a minimum protects refugees from expulsion and forced return.[56] However, despite assertions to the contrary,[57] such practice is not sufficiently widespread to have created a customary norm requiring an extensive reading of the compelling reasons exception.

Repatriation is instead mentioned in the UNHCR Statute, which calls upon the High Commissioner to facilitate and promote *voluntary* repatriation.[58] In this context, facilitation applies when refugees have expressed their desire to repatriate or have already begun to do so, while promotion is undertaken when the UNHCR considers that the conditions in the State of origin justify the initiation of a repatriation operation.[59] Despite its inclusion among the UNHCR's institutional responsibilities, in the beginning the Agency's mandate repatriation "was not [considered any] longer of great importance," as was remarked in 1955 by the first UN High Commissioner for Refugees.[60] It was only in parallel, and indeed as a consequence of the increasing importance that States accorded to this solution in the 1980s, that UNHCR began to be more actively involved in voluntary repatriation, seeking to promote it rather than merely assisting refugees spontaneously returning to their country.

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54. *See* 1951 Convention, *supra* note 50.

55. Executive Committee Conclusion No. 69 calls upon "states to seriously consider an appropriate status" (not necessarily the continuation of refugee status) for: (1) "persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country"; and (2) "persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there." Cessation of Status, No. 69 (XLIII), UNHCR, ¶ e (Oct. 9, 1992), *available at* www.unhcr.org/3ae68c431c.html.

56. *Cf.* Joan Fitzpatrick, Jeffrey Brotman & Susan Brotman, *Current Issues in Cessation of Protection under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention*, UNHCR, 1, 24 (Expert Paper for the Global Consultations on International Protection, UNHCR and Carnegie Endowment for International Peace, 2001) (referring to the practice of Germany, Ireland, Slovakia, Ghana, Liberia, Malawi, Zimbabwe, Azerbaijan, Lithuania, Canada and the United States); David Milner, *Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention*, 16 INT'L J. REFUGEE L. 91, 96 (2004) (also referring to the national legislation of Netherlands, Finland, France, Portugal, Switzerland and New Zealand).

57. *Cf.* William Thomas Worster, *The Evolving Definition of the Refugee In Contemporary International Law*, 30 BERKELEY J. INT'L L. 94, 101 (2012).

58. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. Doc. A/RES/428(V), Introductory Note, ¶ 2(d) (Dec. 14, 1950).

59. *See* UNHCR, VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION HANDBOOK, at ch. 3.1 (1996) [hereinafter VOLUNTARY REPATRIATION].

60. Refugee Problems and their Solutions – Address of Dr. Gerrit Jan van Heuven Goedhart, United Nations High Commissioner for Refugees, at Oslo, UNHCR, at ¶ 14 (Dec. 12, 1955), *available at* www.unhcr.org/ 3ae68fb918.html.

As a result, over time repatriation has come to be conceived as a *goal* itself.[61] This evolution is evident from the Executive Committee's Conclusions, through which the concept of voluntary repatriation has progressively moulded to conform with State priorities. In 1983 EXCOM called upon States to facilitate the work of UNHCR "in creating conditions favourable to and promoting voluntary repatriation, which *whenever appropriate and feasible* is the most desirable solution for refugee problems."[62] Fifteen years later, voluntary repatriation was instead clearly presented as "the most preferred solution."[63] Finally, in its most recent Conclusions on voluntary repatriation, dated 2004, the Executive Committee affirmed "that voluntary repatriation *should not necessarily be conditioned on the accomplishment of political solutions* in the country of origin in order not to impede the exercise of the refugees' right to return."[64]

At first glance, the emphasis placed on voluntary return may appear surprising since the Geneva Convention, through its ceased circumstances clauses, entitles host States to terminate refugee status, and then proceed to repatriation on the basis of a purely objective assessment of the situation in the country of origin. However, the fundamental change required by these clauses sets too high a threshold to be invoked lightly, as also shown by the scarce practice concerning cessation. To the contrary, voluntary repatriation has proven to be a much more flexible concept. Indeed, in devising its policy of voluntary repatriation, the UNHCR has interpreted the subjective element as implying that repatriation can be undertaken at a "lower threshold" of change in the country of origin.[65] In other words, the fact that refugees may return voluntarily justifies the promotion of repatriation even before a fundamental change of circumstances takes place in the home country.

This position, which is widely supported by State practice, poses serious compatibility problems with the obligations deriving from the Geneva Convention. The latter, by providing that refugee status can be terminated by a voluntary decision of the refugee to re-avail himself of his home country's protection, in fact requires not just the return, but rather the *reestablishment* in the State of origin.[66] Moreover, an objective assessment of the situation in the country of origin is

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61. Saul Takahashi, *The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return Over Protection*, 9 INT'L J. REFUGEE L. 593, 595 (1997).

62. *General Conclusion on International Protection, No. 29 (XXXIV)*, UNHCR, at ¶ (l) (Oct. 20, 1983), www.unhcr.org/3ae68c6818.html (emphasis added).

63. *General Conclusion on International Protection, No. 79 (XLVII),* at ¶ (q) (Oct. 11, 1996), www.unhcr.org/3ae68c430.html.

64. *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, No. 101 (LV)*, UNHCR, at ¶ (e) (Oct. 8, 2004), www.unhcr.org/417527674.html (emphasis added).

65. VOLUNTARY REPATRIATION, *supra* note 59, at ¶ 10; *see generally* ZIECK, *supra* note 34; Katy Long, *Back to Where You Once Belonged: A Historical Review of UNHCR Policy and Practice on Refugee Repatriation*, UNHCR (2013).

66. *See* 1951 Convention *supra* note 50, at art. 1C(4). Hathaway notes that "[t]he original draft of this provision, which would have revoked the refugee status of any person who 'returns to his country of former nationality,' was rejected by the Ad Hoc Committee on the grounds that it might bar persons who had been forcibly repatriated to their state of origin, as well as those who had chosen to return to their country of origin only temporarily. Hathaway, *supra* note 49, at 177 n.6 ("The substitute language, which sets the cessation threshold at voluntary reestablishment in the country of origin, was thus intended to ensure that only persons who have willingly resettled in their state of origin are subject to cessation of refugee status.").

extremely important in case of mass exoduses, since "the subjective element is less central, or even absent, from the process of characterizing the cross-border movement as a refugee flow."[67]

Even conceding that voluntary repatriation is the best course of action, a review of relevant practice casts doubts on the effective respect of the refugees' will, and rather shows how easily the latter can be manipulated.[68] Typically, repatriation is agreed upon by the source State, the host State and the UNHCR, who stipulate to this effect a tripartite agreement where the voluntary nature of return is solemnly proclaimed.[69] In its practical application, though, such a solemn engagement is far from being fully respected. Voluntary repatriation agreements are negotiated without any direct involvement of the refugee communities, which are not represented in the tripartite commissions established to monitor the respect of the parties' engagements. As a result, it is not infrequent that repatriation operations be promoted before conditions in the country of origin have sufficiently improved. Additionally, it also happens that a tripartite agreement shortly precedes the cessation of assistance to those refugees who do not want to repatriate.[70] It can thus be asserted that in some cases "employing the notion of 'voluntary' repatriation is arguably a manipulation of language that is used to legitimize politically expedient returns that do not meet basic protection criteria."[71]

A recent repatriation operation appears to fit such a worst-case scenario: the return of Somali refugees from Kenya. In this case, a tripartite agreement was signed on November 10, 2013, setting out the legal framework for returns from Kenya to "safe areas" in southern Somalia.[72] Return, which is expected to be voluntary, is premised on a change of circumstances, epitomized by the formation of the new Somali federal government. Against the backdrop of the September 21, 2013, terrorist attack on Westgate Mall in Nairobi, however, Kenya's renewed resolve to repatriate Somali refugees is seen more as a move buttressed by the Kenyan government's security concerns.[73] In this context, serious doubts are raised as to whether Somalia's current environment is amenable to voluntary repatriation, and whether Kenya will observe its human rights obligations relating to Somali refugees. Moreover, the ration cut imposed on those living in the Dadaab camp –

67. Guy Goodwin-Gill, *Refugees: The Functions and Limits of the Existing Protection System, in* HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW 143, 163 (Alan Eric Nash & John P. Humphrey eds., 1988).

68. Long, *supra* note 40 ("The grey area between consent, persuasion and coercion mean that refugees may be potentially manipulated into return.").

69. Not coincidentally, these agreements are also called "voluntary repatriation agreements."

70. *Cf.* Barbara E. Harrell-Bond, *Repatriation: Under What Conditions is it the Most Desirable Solution? An Agenda for Research*, 32 AFR. STUD. REV. 41, 56 (1989) (arguing that as a result, such agreements may limit the options available to refugees who believe that return is not practicable for safety reasons).

71. Long, *supra* note 40, at 1.

72. *Tripartite Agreement for Repatriation of Somalia Refugees in Kenya: NGO's Welcome an Agreement with Potential to Enhance Opportunities for Durable Solutions for Somali Refugees*, INT'L RESCUE COMM. (Nov. 13. 2013), www.rescue.org/sites/default/files/resource-file/CommenttoTripartiteAgreementFinal.pdf.

73. Hawa Noor & Emmanuel Kisiangani, *The controversial repatriation of Somali refugees from Kenya*, INST. FOR SECURITY STUDIES (Jan. 15, 2014), *available at* http://www.issafrica.org/iss-today/the-controversial-repatriation-of-somali-refugees-from-kenya.

the biggest Somali refugee camp in Kenya – seriously limits the possibility for refugees to freely decide whether to stay or repatriate.

According to a statement issued by ten NGOs just before the signing of the Tripartite agreement, the requisite security and living conditions are not yet in place to allow for large-scale returns.[74] As explained by an analyst with the Mogadishu-based Heritage Institute, Anab Nur: "The Somali government lacks both the capacity and resources to re-settle such a large number of people."[75] Indeed, it is:

> unable to guarantee security, rule of law and fully functioning institutions that can facilitate resettlement of such a population […]. This is illustrated by the way that the IDPs in Mogadishu alone are treated. The government has been ineffective in executing their plan to relocate them to safer areas where they would be better supported and protected. Instead, the government (along with private landlords) have been forcefully evicting them and leaving them more vulnerable. It is my view that many of the refugees who return to Somalia will face similar fate to the current IDPs.[76]

As shown, international law clearly recognizes a right to return to one's own country, whose enjoyment, as far as refugees are concerned, is premised on the restoration of their home State's protection. At the same time, in order to effectively be a durable solution, refugee repatriation would require the active cooperation of the international community, which should sustain the country of origin in the process of reassuming its responsibilities towards returned citizens. However, instead of assisting the State of origin in reintegrating its nationals, host and donor countries have shown a worrisome tendency of promoting premature repatriations, with the clear intention of buck-passing their obligations towards

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74. Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia, and the UNHCR Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, Report from Danish Refugee Council, COOPI - Cooperazione Internazionale, Norwegian Refugee Council, Lutheran World Federation, INTERSOS, Tearfund, Terre des hommes, Handicap International, Action Contre la Faim, International Rescue Committee (Nov. 13, 2013).

75. *Briefing: Repatriating Somali Refugees from Kenya*, IRIN AFR., http://www.irinnews.org/report/99117/briefing-repatriating-somali-refugees-from-kenya (last visited Feb. 3, 2015); Ben Rawlence, *Politics Not Refugees at Heart of Repatriation to Somalia*, AFR. ARGUMENT (Nov. 12, 2013), http://africanarguments.org/2013/11/12/politics-not-refugees-at-heart-of-repatriation-to-somalia-by-ben-rawlence/ ("Let us be clear, this is an agreement driven more by politics than by an assessment of the situation on the ground. It is a game of make-believe. Both governments are desperate for there to be peace in Somalia, but neither, despite their foreign financing and the support of 18,000 African Union troops, can defeat the rebel group al-Shabaab. So instead, they focus on the cosmetics of peace – repatriation of the refugees. Britain, as a lead booster of the idea of peace in Somalia and vested in the outcome because of the London conferences, shares some of the blame for the forcing of the pace.").

76. *Id.*

refugees. As a result, refugee repatriation has increasingly become a Hobson's choice,[77] and often creates internal displacement or new refugee flows.

2. The Right to Return *Home* and Property Restitution

Under international law, refugees, like all nationals, have the right to return to their home country. Recently, though, practice has shown a growing tendency to affirm that the right to return involves not just the repatriation in one's State of origin but, more specifically, the return to one's home.[78]

This specification, which in fact could already be found in some General Assembly resolutions of the 1980s,[79] has become common since the 1990s in the practice of the Security Council. The first resolution of this kind was adopted in 1993 in the context of the Bosnian conflict, wherein the Council "*reaffirmed*" that "all displaced persons have the right to return in peace to their former homes and should be assisted to do so."[80] Subsequent resolutions show a recurring reference to such a right, which is recognized to all those displaced as a consequence of conflict, be them refugees or internally displaced persons (IDPs).[81]

A similar affirmation of the right to return to one's home for all refugees and IDPs can be found in the practice of other UN bodies, such as the General Assembly, [82] the Human Rights Commission, [83] the Sub-Commission on the Promotion and Protection of Human Rights [84] and the Committee on the

77. As clearly remarked by Zieck, "Although it is often assumed that everyone wants to return to the country of origin, i.e. "home", no attempt will be made to assess the validity of the assumption since it appears, in the absence of other options, to be largely irrelevant." ZIECK, *supra* note 34, at 77.

78. Rhodri C. Williams, *The Significance of Property Restitution to Sustainable Return in Bosnia and Herzegovina,* 44 INT'L MIGRATION 39, 39 (2006) (shifting the focus from the highly politicized concept of return to a more impartial 'rule of law' approach, connoting an emphasis on individuals' rights to their former homes).

79. *See, e.g.*, G.A. Res. 35/124, U.N. Doc A/RES/35/124 (Dec. 11, 1980) (which concerned "international co-operation to avert new flows of refugees" and recognized "the right of refugees to return to their homes in their homelands"); G.A. Res. 51/126, ¶ 1 U.N. Doc A/RES/51/126 (Feb. 4, 1997) ("reaffirming the right of all persons displaced . . . to return to their homes or former places of residence.").

80. S.C. Res. 820, ¶ 6, U.N. Doc S/RES/820 (Apr. 17, 1993).

81. S.C. Res. 876, ¶ 5, U.N. Doc. S/RES/876 (Oct. 19, 1993); S.C Res. 971. Preamble, ¶ 5, U.N. Doc. S/RES/971 (Jan. 12, 1995); S.C. Res. 1009, ¶ 2, U.N. Doc. S/RES/1009 (Aug.10, 1995); S.C. Res. 1036, preamble and ¶ 6, U.N. Doc. S/RES/1036, (Jan. 12, 1996); S.C. Res. 1199, preamble, U.N. Doc. S/RES/1199 (Sept. 23, 1998); *See generally* S.C. Res. 1244, preamble, U.N. Doc. S/RES/1244 (June 10, 1999); S.C. Res. 1287, ¶ 8, U.N. Doc. S/RES/1287 (Jan. 31, 2000); S.C. Res. 1554, ¶ 15, U.N. Doc. S/RES/1554 (July 29, 2004); S.C. Res. 1615, ¶, U.N. Doc. S/RES/1615 (July 29, 2005).

82. G.A. Res. 48/153, ¶ 13 U.N. Doc. A/RES/48/153 (Dec. 20, 1993).

83. UN Comm'n on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Violations of Human Rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, E.S.C. Res. 1994/72, U.N. Doc. E/CN.4/RES/1994/72 (Mar. 9, 1994).

84. UN Commission on Human Rights, *Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, E.S.C. Res. 1998/26 ¶ 1, U.N. Doc. E/CN.4/RES/1998/26 (Aug. 26, 1998) [hereinafter Resolution 1998/26] (in which it was 'reaffirmed' "the right of all refugees . . . and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish.").

Elimination of All Forms of Racial Discrimination (CERD).[85] The need to secure the return of all the displaced to their homes is also affirmed in various peace agreements[86] and voluntary repatriation agreements,[87] even though such treaties do not always express it in terms of a right.[88] Finally, the mere "possibility" for

85. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. XXII: Article 5 and Refugees and Displaced Persons*, 49th sess., A/51/18 (Aug. 24, 1996). The CERD reaffirmed this principle in its General Recommendation XXII on article 5 and refugees and displaced persons, in which it states: "[a]ll . . . refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety." *Id.*

86. A right to return at their place of origin or residence for refugees and IDPs is affirmed, for instance, in the following peace agreements: the Erdut Agreement, Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, U.S.-Croat., ¶ 7, A/50/757, (Nov. 12, 1995); Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, Dec. 14, 1995 [hereinafter Dayton Agreement]; Protocol Between the Government of Sudan (GoS), the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of Abyei Conflict, art. 2.5, May 26, 2004; Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GOS) and Liberation and Justice Movement (LJM), art. 1.9, Mar. 18, 2010,; Catherine Phuong, *Forcible Displacement in Peace Agreements* 1 INT'L. COUNCIL ON HUM. RTS. POL'Y 5,5 (2005) (according to Phuong, "with the exception of the 1999 Lome agreement, virtually all peace agreements which have been concluded since 1995 contain provisions which explicitly refer to return to one's former home, and not just to the country of origin.").

87. *Cf. e.g.,* Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons, art. 3(a), Apr. 1994, The Agreement between the Government of the Republic of Liberia and the UNHCR for the Voluntary Repatriation and Reintegration of Liberian Returnees from Asylum Countries, preamble, ¶ 5, Jan. 3, 1996.

88. *See e.g.*, The Tripartite Agreement on the Voluntary Repatriation of Refugees from the Democratic Republic of Congo living in the United Republic of Tanzania, art. 1, cl. 5: Settlement of Returnees (Jan. 20, 2005) (having affirmed the right to return to the country of origin, engages the DRC's Government to "take all measures possible to allow returnees to settle in their place of origin or habitual residence and shall ensure access to their property, immovable and movable."). The Peace Agreement between the Government of the DRC and LeCongrès National Pour la Défense du Peuple (CNDP), art. 6: Return of Refugees and Internally Displaced People, ¶ 1 (Mar. 23, 2009) (instead affirmed "[b]oth Parties agree that living in peace in one's country and fully enjoying one's citizenship are inalienable rights for every Congolese. For this reason, the quick return of Congolese refugees and displaced people from neighbouring countries to their original environments *is a necessity*.") (emphasis added). *See also* The Memorandum of Understanding between the Government of the Union of Myanmar and UNHCR, art. 2. Nov. 5, 1993 (binding Myanmar to ensure that "returnees will be allowed to return to their respective places of origin."). *See also* the two Tripartite Memoranda of Understanding signed by Afghanistan with UNHCR and, respectively, Norway and Sweden, where the Afghan State "accepts" (*sic*) the freedom of choice of destination within the country for returnees. Tripartite Memorandum of Understanding between the Government of Norway, the Government of the Islamic Republic of Afghanistan and UNHCR, art. 6, Aug. 10, 2005; Tripartite Memorandum of Understanding between the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan and UNHCR, ¶ 6, June 23, 2007. It bears noting that some agreements go so far as to grant a veritable freedom of choice of residence for refugees. *See e.g.*, Tripartite Memorandum of Understanding between the Government of Norway, the Islamic Republic of Afghanistan and the UNHCR, art. 6: Freedom of Choice of Destination, Aug. 10, 2005. Some do the same for IDPs. *See, e.g.,* The Comprehensive Peace Agreement Held between the Government of Nepal and the Communist Party of Nepal (Maoist), ¶ 7.3.3., Nov. 21, 2006 [hereinafter Nepal Peace Agreement]; *see also* The Darfur Peace Agreement signed by the Government of Sudan and the Sudan Liberation Army, ¶ 176, May 5, 2006.

refugees to return to their place of origin is envisaged by the UNHCR's Executive Committee in its Conclusion No. 101.[89]

On the other hand, treaty law gives only sectorial relevance to the issue, limited as it is to indigenous peoples and post-conflict settings. Indeed, a veritable right to return to their own *lands* is recognized to indigenous communities by virtue of the ILO Convention No. 169.[90] Return home is then envisaged in the context of international armed conflicts; however, the relevant rule is conceived not as an individual right but rather as an obligation of the conflicting parties, who shall transfer evacuated persons "back to their homes as soon as hostilities in the area in question have ceased."[91]

The right to return home could also be implied in the right to freedom of movement. In this case, though, it would not be unconditional but rather subject to the same restrictions States are entitled to impose on the latter right.

The reference to the place of residence, far from being the object of a general binding norm,[92] should thus be considered in light of the main characteristics of forced displacement in the post-Cold War era: its mass proportions, its roots in ethnic conflicts, and its predominantly internal character. This contextualization helps explain why the return of the displaced to their homes has mostly been utilized with the objectives of reversing ethnic cleansing and guaranteeing stability.

In conjunction with such an expanded version of the right to return, a right to reclaim and reoccupy one's original home has been affirmed. A crystal-clear association between return to one's home-place and property restitution was made by the CERD in its General Recommendation 22, dated 1996.[93] The Committee, referring to all those displaced as a consequence of conflict "on the basis of ethnic

89. UNHRC Exec. Comm., Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, ¶ (c), No. 101 (LV), Oct. 8, 2004 ("[R]efugees, in exercising their right to return to their own country, should, in principle, have the possibility to return to their place of origin.").

90. *Cf.* ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 16(3), June 27, 1989 (stipulating that "[w]henever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist."). The special relationship and attachment which binds indigenous groups to their land is also recognized in the UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 art. 10, U.N. Doc. A/61/L.67, Sept. 13, 2007. *See also* World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*, Report No. 25332, (Jan. 10, 2003); OECD Development Assistance Committee, *Guidelines for Aid Agencies on Involuntary Displacement* at 2 (1992); *see also* Rep. of Special Rapporteur, Resettlement in Development Projects and the Basic Principles and Guidelines on Development-Based Evictions and Displacement, U.N. Doc. A/HRC/4/18 (June 11, 2007).

91. *Cf.* Geneva Convention IV, *supra* note 27, at art. 49(2). *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(4)(b), June 8, 1977, 1125 U.N.T.S. 3 (qualifying as a grave breach and unjustifiable delay in the repatriation of civilians when committed willfully and in violation of the Geneva Conventions and the Protocol). No similar provision exists concerning non-international armed conflicts, but the ICRC Study on customary international humanitarian law derived from State practice the following rule applicable in both international and internal conflicts states that: "Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist." J-M. HENCKAERTS & L. DOSWALD BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 132 (2005).

92. *Cf.* Phuong, *supra* note 86, at 4 (affirming "Considering the uncertain status of this right [to one's former home] . . . , it would be useful to restate it in peace agreements.").

93. *Cf.* CERD, General Recommendation XXII: Article 5 and Refugees and Displaced Persons, Aug. 24, 1996.

criteria," affirmed that those displaced persons "have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them."[94] More generally, the 2001 Durban Declaration, adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, solemnly recognized "the right of refugees to return voluntarily to their homes and properties in dignity and safety, and urge[d] all States to facilitate such return."[95] A similar recognition was made by the UNHCR in its background note on voluntary repatriation for the 2002 Global Consultations on International Protection, stating that refugees "have the right to return not only to their countries of origin but also to recover the homes from which they were previously evicted (restitution)."[96] A certain caution was instead utilized in the 1998 Guiding Principles on Internal Displacement, which built from current international law "the duty and responsibility [of competent authorities] to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement."[97]

Furthermore, since the 1990s, the combined reference just described has become recurrent in both post-conflict and voluntary repatriation settings. As far as peace treaties are concerned, the most renowned example is given by the Dayton Agreement, which ended the Bosnian war in 1995.[98] Annex VII of this Agreement in fact proclaimed, for refugees and IDPs, the right "freely to return to their homes of origin [as well as] the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them."[99] Similar undertakings to ensure recognition of property rights are included, *inter alia*, in the 1992 Mozambican peace agreement,[100] the 2005 Tripartite MOU between Norway, Afghanistan and UNHCR[101] and the Tripartite agreement on the voluntary repatriation of refugees

94. The Committee also specified that "[a]ny commitments or statements relating to such property made under duress are null and void," *Id.* at ¶ 2(c). Similar provisions were then contained in the subsequent General Recommendation XXIII concerning indigenous peoples. The link between housing and property restitution in the context of the return of refugees and internally displaced was also addressed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. *See* Resolution 1998/28, *supra* note 84

95. *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration*, ¶ 65, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001).

96. UNHCR, *Global Consultations on International Protection: Voluntary Repatriation*, U.N. Doc. EC/GC/02/5 (Apr. 25, 2002).

97. UNHCR, *Guiding Principles on Internal Displacement*, principle 29.2, UN DOC. E/CN./4/1998/53/ADD.2 (April 17, 1998). *See also* Luke T. Lee, *The Cairo Declaration of Principles of International Law on Compensation to Refugees*, 87 AM. J. INT'L L. 157 (1992); UNHCR *The Realization of Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/Sub.2/1997/7 (June 11-13, 1997).

98. Dayton Agreement, *supra* note 86, at annex VII, art. I(1).

99. Dayton Agreement, *supra* note 86, at annex VII, art. I(1).

100. General Peace Agreement for Mozambique, Protocol III, § IV e, Oct. 4, 1992.

101. "The Islamic Republic of Afghanistan recalls in this respect the guarantees contained in Decree No. 297, dated 13.03.1380 (3 June 2002) on the dignified return of Afghan refugees, which fully applies to Afghans returning from Norway under this MoU. These guarantees also include the right of

from the DRC living in Tanzania.[102] Less engaging is the language utilized in the 1994 Georgia Quadripartite agreement concerning the return of the displaced, which provides that "[r]eturnees shall, upon return, get back movable and immovable properties they left behind and should be helped to do so, or to receive whenever possible an appropriate compensation for their lost properties if return of property appears not feasible."[103] Similarly, the 2006 Nepal peace agreement obligates the parties "to allow without any political prejudice the people displaced during the armed conflict to return voluntarily to their respective places of ancestral or former residence, to reconstruct the infrastructure destroyed as a result of the conflict and to honourably rehabilitate and reintegrate the displaced people into the society."[104] Finally, a general recommendation to include the right to return and restitution of housing, land and property "in all future peace agreements and all relevant Council resolutions" can be found in the Report on the Protection of Civilians in Armed Conflict released by the UN Secretary General in 2007.[105]

How can the relevance accorded to property restitution be based on existing international norms? Logically, it could be affirmed that the right to property restitution is part and parcel of the broader right to return home, assuming that the former is necessarily implied in the latter.[106] This construction, though, presents a major problem. Indeed, as we have tried to demonstrate, hitherto the right to go back to one's home-place cannot be considered as having attained customary status. At most it could be claimed, as some authors have, that we are dealing with an "emerging" human right.[107] As such, the right to return home does not provide a

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recovery of movable and immovable properties." Tripartite Memorandum of Understanding, *supra* note 47, at art. 5, ¶ 2.

102. Tripartite Agreement on Voluntary Repatriation of DRC Refugees, *supra* note 47, at cl. 5,.

103. Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons, Abkhaz-Geor.-Russ.-UNHCR, ¶ 3(g), Apr. 4, 1994.

104. Nepal Peace Agreement, *supra* note 88, at art. 5.2.8.

105. Security Council Report on the Protection of Civilians in Armed Conflict, ¶ 59, U.N. Doc. S/2007/643 (2007).

106. This was also the interpretation embraced by Pinheiro in one of his preliminary working papers: "The international community has correctly recognized housing restitution to be an essential element of the right to return to one's home of refugees and displaced persons and as a necessary component of any lasting solution involving the voluntary, safe, dignified and durable repatriation of refugees and displaced persons. Indeed, housing restitution is an indispensable component of any strategy aimed at promoting, protecting and implementing the right to return." UNCHR, *Economic, Social, and Cultural Rights: The Return of Refugees' or Displaced Persons' Property Working paper submitted by Mr. Paulo Sérgio Pinheiro pursuant to Sub-Commission decision 2001/122*, ¶ 61, U.N. Doc. E/CN.4/Sub.2/2002/17 (June 12, 2002). *See also* Tomuschat, *supra* note 8, at 69-70; Scott Leckie, *Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice*, 19 REFUGEE SERVICE Q. 5 (2000). Guilia Paglione argues that "the right to return to one's former homes necessarily implies a consequent right to reoccupy and repossess the former properties." Giulia Paglione, *Individual Property Restitution: From Deng to Pinheiro – and the Challenges Ahead*, 20 INT'L J REFUGEE L. 391, 393 (2008).

107. Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, 38 STUD. TRANSNATI'L LEGAL POL'Y 1, 132 (2008) (finding in this respect "a certain trend in general human rights instruments, along with the progressive development of international law." According to M.J. Ballard, "the right to property restitution following displacement caused by armed conflict should be viewed as a new right based on the evolution of international law, rather than one firmly grounded in international law." M.J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT'L L. 462, 483 (2010). *See also* Scott Leckie, *New Directions in*

stable legal basis for property restitution, *a fortiori* considering that relevant practice does not always qualify house and property recovery in terms of a right.[108]

Alternatively, property restitution could be considered as a mere context-specific reaffirmation of the right to property.[109] Nonetheless, this normative base is also weak.[110] Indeed, the right to property, while being recognized in universal[111] and regional[112] instruments, is subject to limitations and varies in scope and content depending on the instrument and the geographic context.[113] In particular, States generally enjoy wide margins of appreciation in determining the general interest, which justifies the legitimate control or expropriation of property. Moreover, in case of lawful expropriation, compensation is not always explicitly required, nor is there a universally recognized standard of compensation.[114] As a consequence, absent specific conventional engagements by the State concerned, it is hard to ground property restitution in the right to property.

Paulo Sérgio Pinheiro also acknowledged the fragile normative base offered by the right to property before being appointed Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons. In one of his preliminary working papers on the issue, he recognized that "housing rights are

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Housing and Property Restitution, *in* RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 24 (Scott Leckie ed., 2003); Paglione, *supra* note 106.

108. The strongest formulation in this regard is still the one contained in the Dayton Agreement. *Cf*. Dayton Agreement, *supra* note 87.

109. This seems to be the rationale, for instance, in the 2006 Great Lakes Protocol on Property Rights, which is the first multilateral treaty affirming the property restitution rights of displaced people. *See* Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, Nov. 30, 2006.

110. *Cf.* Paglione, *supra* note 106, at 395.

111. *Cf*. Universal Declaration of Human Rights, art. 17, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Int'l Labour Org., Indigenous and Tribal Peoples Convention, C169, arts. 14, 16, June 27, 1989, 1650 U.N.T.S. 383. Other human rights treaties dedicated to particular categories of persons oblige States parties to guarantee equality in property ownership. *See e.g.,* Convention on the Elimination of all Forms of Discrimination against Women, arts. 15(2), 16(1)(h), Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Protection of the Rights of Migrant Workers and their Families, *supra* note 32, at art. 15; Convention on the Rights of Persons with Disabilities, art. 5(3), G.A. Res. 61/106, A/RES/61/106 (Dec. 13, 2006). By contrast, ideological confrontations between the blocs during the Cold War explains its absence from the two 1966 U.N. Covenants, which nonetheless mention property in the provision on non-discrimination. *See* International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 2(2), Dec. 16, 1966, 999 U.N.T.S. 3.

112. American Convention on Human Rights, *supra* note 33, at art. 21; European Convention on Human Rights, Protocol 1: Enforcement of Certain Rights and Freedoms not included in Section I of the Convention, art. 1, Mar. 20, 1952; African Charter on Human and Peoples' Rights, *supra* note 33, at art. 14; Arab Charter on Human Rights, *supra* note 33, at art. 31; Charter of Fundamental Rights of the European Union, art. 17, Dec. 18, 2000, 2000 O.J. (C 364).

113. According to Caterina Krause, "the content of the right to property ultimately remains a question of interpretation by the supervisory organs." Catarina Krause, *The Right to Property*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TEXTBOOK 143, 196 (Asbjørn Eide, et al., 2nd rev. ed. 2001). Commenting on the weak formulation contained in Principle 29 in Kälin, *supra* note 107, at 131, Kälin observed that "at the universal level, none of the human rights conventions contains a full-fledged guarantee of property (Art. 17 of the 1948 "Universal Declaration of Human Rights" is in principle non-binding), and the regional guarantees can be limited." Walter Kälin, *Internal Displacement and the Protection of Property*, *in*, 1 REALIZING PROP.RTS. 175, 182 (2006).

114. *See* Krause, *supra* note 113, at 151-52.

enshrined in international law to a far greater degree and encompass far more, substantively speaking, than are more general property rights."[115] There are indeed numerous international instruments that guarantee some housing rights.[116] Yet, despite suggestions to the contrary, property restitution could hardly be grounded on such rights, and the combined reference to property and housing restitution is also contradictory. The property rights of formal owners, in fact, inevitably conflict with the housing entitlements of secondary occupants, and any solution to such competing claims should necessarily be based on the prioritization of either property *or* housing rights.[117]

Probably conscious of the difficulties just described, the drafters of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons decided to base property restitution on more solid grounds: restitution is thus conceived in the text as the "preferred *remedy* for displacement."[118]

At the same time, though, the Pinheiro Principles do not depart from the general trend associating restitution to return. The focus on return, which resulted from the restrictive mandate envisaged by the Sub-commission, was progressively

115. U.N. Econ. & Soc. Council, *Sub-Commission on Promotion & Protection of Human Rights, Housing and Property Restitution in the Context of the Return of Refugees and Internally Displace Persons - Preliminary Report of the Special Rapporteur*, ¶ 5, U.N. Doc. E/CN.4/Sub.2/2003/I1 (June 16, 2003). The importance of the right to housing in this context has been emphasized in the UNCHR's Global Consultations on International Protection, where it is so affirmed: "The right to return to one's own country is increasingly seen as closely linked with the right to adequate housing. In this context, the right to adequate housing is understood to embrace the right not to be arbitrarily deprived of housing and property in the first place. For refugees this means they have the right to return not only to their countries of origin but also to recover the homes from which they were previously evicted (restitution)." *Id.* at ¶ 23.

116. Universal Declaration of Human Rights, *supra* note 111, at art. 25; Dayton Agreement, *supra* note 87, at art. 11.1, 17.1. *See also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S, 267. UNHCR, Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 31, at arts. 5(e)(iii), 2, 14.2 (h); Convention on the Elimination of all Forms of Discrimination against Women, *supra* note 111, at art. 27.3; Convention on the Rights of the Child, *supra* note 32, at art. 43.1(d); International Convention on the Protection of the Rights of Migrant Workers and their Families, *supra* note 32. The right to adequate housing is also protected by regional human rights instruments: Arab Charter on Human Rights, *supra* note 33, at art. 38; Organization of American States, Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), ¶ 31(k), Feb. 27, 1967; Council of Europe, European Social Charter, ¶ 31(1), May 3, 1996, ETS 163.

117. The complex issues that such contrasting claims pose in practice were recognized, for instance, in a UNHCR study on access to lands in refugee repatriations: "It is . . . questionable whether it is admissible to make pure and simple restitution in the face of rights acquired in good faith by the present occupants. Each situation calls for an ad hoc response, which should take into account, in a spirit of justice and equity, the contradictory interests of the groups of persons concerned." UNHCR Inspection & Evaluation Services, *The Problem of Access to Land and Ownership in Repatriation Operations*, ¶ 48, EVAL/03/98 (May 1998).

118. UN Restitution Principles, Principle 2.2 (emphasis added). The Restitution Principles was the outcome of an intensive series of consultations with legal experts, UN agencies, States and civil society groups. The final text was presented to the Sub-Commission on the Promotion and Protection of Human Rights and formally endorsed by it on Aug. 11, 2005. Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).

nuanced during the drafting process but not abandoned in the final text.[119] As a consequence, other forms of repatriation are subordinated to restitution, which can be dismissed by States only if the latter is materially impossible, "namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal."[120]

On a practical level, the prominence of property restitution in post-displacement settings is due to multiple claims, all of which converge in assuming that, repatriation being the best durable solution, repossession of property is a powerful pull for refugees to go back home. Nonetheless, each of these rationales, together with their underlying assumption, can be disproved.

In the first place, restitution of properties has been considered necessary to guarantee the sustainability of repatriation in the long term.[121] Such a rationale assumes that the return and reintegration of refugees into their community of origin is key to social reconciliation, the rule of law, and economic and social stability.[122] Yet, the said objectives may hardly be attained if restitution were not accompanied by other factors such as physical security, employment and social services. The Bosnian experience is particularly instructive in this respect.[123] International donors, who did not want to be seen as underwriting ethnic cleansing,[124] put significant resources into reconstructing houses while neglecting the funding of the socio-economic and political structures necessary for a sustainable return.[125] The

119. This is shown, for instance, by the fact that durable solutions are mentioned just once in the text (cf. Principle 10.3) and that the problems associated with property restitution in the context of local integration or resettlement are nowhere tackled.

120. *Id.* at Principle 29.2.

121. This is what the UNHCR Voluntary Repatriation Handbook calls "reintegration", ie. "the achievement of a sustainable return – in other words the ability of returning refugees to secure the political, economic, [legal] and social conditions needed to maintain life, livelihood and dignity." U.N. OFFICE OF THE HIGH COMM'R HUMAN RIGHTS, VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION HANDBOOK 52 (2004).

122. *Cf.*, inter alia, Leckie, who associates housing and property restitution with economic and social stability and affirms that restitution programs can be considered as "part of a larger process of development, [that] contribute[s] greatly to the rule of law and overall stability." Scott Leckie, *Introduction*, *in* RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSON, *supra* note 107, at 39. Along similar lines, Paglione argues that restitution "enables [the] rebuilding [of] livelihoods" as a "means of achieving social reconciliation and stability." Paglione, *supra* note 106, at 394.

123. In 2006, ten years after the end of the conflict, it was reported that return was still significantly obstructed by discrimination, ethnically biased educational curricula and insecurity. *Bosnia and Herzegovina: Sectarian Divide Continues to Hamper Residual Return and Reintegration of the Displaced*, INTERNAL DISPLACEMENT MONITORING CTR. (Oct. 25 2006), http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/bosnia-and-herzegovina/2006/overview-2006-10-25.

124. Charles B. Philpott, *From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina*, 18 INT'L J. REFUGEE L. 30, 45. As was observed by Brubaker, "[t]hroughout the Bosnian story, there were specific times when the international community's insistence that ethnic cleansing be reversed seemed to trump their considerations for the preferences or even the security of those forcibly displaced." Rebecca Brubaker, *From the Unmixing to the Remixing of Peoples: UNHCR and Minority Returns in Bosnia* 15 (NEW ISSUES IN REFUGEE RESEARCH, Research Paper No. 261, 2013).

125. *Cf.* Anders H. Stefansson, *Homes in the Making: Property Restitution, Refugee Return, and Senses of Belonging in a Post-War Bosnian Town*, 4 INT'L MIGRATION 115 (2006). The strong preference shown by international actors for repossession also explains why the provisions of the

limited engagement of the international community, coupled with the lack of security and the obstructionist behaviour of local authorities,[126] induced returnees not to go back to areas where, after the conflict, they would be the ethnic minority.[127] It can thus be said that in this case, the exclusive focus on repossession greatly contributed to the failure of the repatriation process.[128]

A recent comparative study on minority return after conflicts generalizes this outcome, claiming that minority repatriation has proven unsuccessful throughout history, and that return is viable only when returnees are members of the majority in the area of return or, rarely, when repatriation happens as a result of military victory.[129] The authors successfully show that property restitution is not a sufficient incentive for minority return.[130] Such a conclusion is well demonstrated by the Bosnian case, where those who decided to relocate elsewhere, sold or leased their properties after having received them back.[131]

Dayton Agreement on compensation were not implemented. Annex VII in fact foresaw "just compensation" when properties "cannot be restored" (Annex 7, ch. 1, art. I(1)), but a compensation fund was never established. *Cf.* Paul Prettitore, *The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study*, BADIL RES. CTR. FOR PALESTINIAN RESIDENCY AND REFUGEE RIGHTS 16 (2003).

126. A year after the signing of the Dayton Agreement, the UN High Representative for Bosnia so described the situation on the ground: "A precarious human rights situation characterised by frequent arbitrary arrests, widespread abuse of ethnic minorities and obstruction of the right to return, continues to reign . . . Harassment of ethnic minorities, including mandatory evictions and intimidation, continues, and the responsible authorities have failed to act decisively to address this problem in both entities. The destruction of hundreds of minority owned homes . . . which began in late October [1996] and has continued, presents not only a grave challenge to the right to return, but also a threat to remaining minority residents. Widespread discrimination against ethnic minorities in the fields of employment, education and access to government services, also contributes to the trend toward ethnic separation." Office of the High Representative, Rep. of the High Representative for the Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations, ¶ 60-1, (Dec. 10, 1996).

127. "More than two million people from Bosnia-Herzegovina became refugees or were internally displaced during the conflict which began in 1992. Of these only some 250,000 have been able to return, almost exclusively to areas where they were members of the majority nationality, since 14 December 1995, when the parties to the conflict signed the peace agreement, the General Framework Agreement, in Paris, France. . . . Most of the people who were forced to flee their homes have been unable to return . . . . because their safety cannot be guaranteed and almost all of the perpetrators of the gross abuses during the conflict have so far escaped justice." AMNESTY INT'L, *Bosnia-Herzegovina: Who's Living in my House? Obstacles to the Safe Return of Refugees and Internally Displaced People*, AI Index EUR 63/001/1997 (Mar. 19, 1997), *available at* http://www.refworld.org/pdfid/45b5067e2.pdf.

128. "Full implementation of annex 7 requires not only that people can return to their homes, but that they can do so safely with equal expectations of employment, education and social services." SCOTT LECKIE, HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS: LAWS, CASES AND MATERIALS 138 (2007).

129. HOWARD ADELMAN & ELAZAR BARKAN, NO RETURN, NO REFUGE: RITES AND RIGHTS IN MINORITY REPATRIATION (2011).

130. *Id.*

131. Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice,* 37 N.Y.U. J. INT'L L. & POL. 441, 445 (2005); A. Stefansson, *Return and the Politics of Property in a Post-War Bosnian Town*, paper delivered at the 9th Conference of the International Association for the Study of Forced Migration, Sao Paulo, Jan. 9-13, 2005.

Closely linked to the first argument is the proposition that in post-war contexts restitution is essential for lasting peace.[132] The connection is made evident in the UNHCR's Global Consultation on International Protection which, when addressing property-related issues in the context of voluntary repatriation, states that: "[t]he restitution of housing, land and property […] is an essential part of the reconstruction, peace-building and national reconciliation processes." [133] The Security Council expressed the same claim in its resolutions addressing the conflict in Bosnia from 1992 to 1996.[134] In the Bosnian case, similar to the return of Albanians to Kosovo, repossession of property was considered as a means to reverse the effects of ethnic cleansing and *consequently* to regain peace and stability. However, these two cases have instead shown that property restitution alone cannot ensure the said objectives. Indeed, absent adequate security guarantees and, more importantly, a resolution of the underlying causes of conflict, the rapid and massive return of the displaced may on the contrary destabilise an already fragile environment, further undermining the prospects of peace.[135]

Frequent has also been the claim that facilitating return home can guarantee a durable solution for both refugees and IDPs, so avoiding new displacement. This claim, though, as just seen, is disproved by practice. Moreover, it unduly equalizes the situation of refugees with that of the internally displaced, forgetting that the two groups, despite the apparent similarities of their plight, do not enjoy the same legal protection under international law.[136] Compliance with the fundamental guarantees which should accompany refugee repatriation, as well as the availability of alternative durable solutions (for refugees) are consequently threatened by the described focus on property restitution.

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132. The preamble to the Pinheiro Principles states that "the right to housing, land, and property restitution is essential to the resolution of conflict and to post-conflict peacebuilding," and that "the implementation of successful housing, land, and property restitution programs, as a key element of restorative justice, contributes to effectively deterring future situations of displacement and building sustainable peace." A convincing critique of this assumption is offered by Fitzpatrick and Fishman, who remark: "The proposition that restitution is essential to peacebuilding is often asserted as a matter of a priori reasoning, rather than a conclusion of causation derived from a representative sample of conflict case studies. In fact, there is no empirical evidence to support the assertion, and the case that restitution contributes to peacebuilding is not so clear." Daniel Fitzpatrick & Akiva Fishman, *Land Policy and Transitional Justice After Armed Conflicts*, *in* JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 283 (D.N. Sharp ed., 2014).

133. UNHCR, *Global Consultations on International Protection, Broader Principles,* Annex IIa.

134. *Cf.* Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1106 (1998).

135. Simon Bagshaw, *Benchmarks or Deutschmarks? Determining the Criteria for Repatriation of Refugees to Bosnia and Herzegovina*, 9 INT'L J. REFUGEE L. 566, 585 (1997).

136. "Being a victim of displacement is not the quality that has historically justified additional human rights protection for refugees. . . . the kinds of rights granted to refugees would not make sense for displaced persons who are still in their country of origin. Refugee rights include basic socio-economic entitlements that allow them to survive in a foreign country where they do not have citizenship rights. These rights would be redundant if granted to citizens in their own states. If a government is responsible for having internally displaced its own people in the first place, is it useful to insist that it gives partial rights to employment or access to certain types of welfare benefits?" Michael Barutciski, *Tensions Between the Refugee Concept and the IDP Debate*, 3 FORCED MIGRATION REV. 11, 12 (1998). On the difference between the two groups and the opportunity of their distinct legal treatment, *see also* Catherine Phuong, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS, 13-37 (2005).

Furthermore, all the cited rationales embrace a narrow conception of "home," merely corresponding to a physical place and as such, unconnected to the bundle of social, cultural and economic factors that also characterize a certain geographical location as home.[137]

The underlying assumption that property restitution induces refugees to return to their homes is also unsupported by reality.[138] Nevertheless, the said rationales just criticized have informed even the most recent standards for housing and property repossession regimes, i.e., the Pinheiro Principles. By requiring that all recoverable assets be restored to their owners or users, the Principles seem to presuppose that the solution to displacement lies essentially in turning back the clock to the status quo ante.[139] Their application thus threatens to perpetuate inequality and discrimination in land access and, most importantly, to limit reparations for refugees to the recovery of some housing and property rights.

The characterization of return as the ideal durable solution has resulted in a focus on restitution as the preferred remedy for displacement. Such a construction, by unduly associating reparations with return, has contributed to overshadowing the voluntariness of repatriation and, ultimately, to seriously compromising the chances for refugees to avail themselves of other durable solutions. Only in recent years, as will be seen in the following paragraph, the described trend has been partially reversed, and critiques have finally mounted against it.[140] This brings us now to investigate whether under international law refugees have a right to reparation *vis-à-vis* their own State and what this right amounts to.

B. The Right to Reparation

1. Preliminary Observations on the Right to Reparation in International Human Rights Law

It is a well-established principle of general international law that every breach of an international obligation entails a duty to make reparation for the injury caused by such an act.[141] In other words, reparation is an automatic and immediate legal

137. *See* Stefansson, *supra* note 125, (arguing that displaced persons may (re)create livelihoods and a full sense of home only when a positive relationship starts to develop between housing and the surrounding local and national environment.).

138. Williams aptly remarks that "the return of property to people has not always resulted in the return of people to property" because many people opt to sell or rent returned properties." Williams, *supra* note 131, at 445.

139. This results quite clearly from the text, where it is affirmed that restitution "should, whenever possible, restore the victim to the original situation before the [violations] occurred." *Cf.* Comm'n on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons, 56th Sess., E/CN.4/Sub.2/2005/17, at ¶ 15 (June 28, 2005) [hereinafter Pinheiro Principles].

140. *See* Paglione, *supra* note 106; *see also* Jose Maria Arraiza & Massimo Moratti, *Getting the Property Question Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009)*, 21 INT'L J. REFUGEE STUD. 421, 426 (2009); Miriam J. Anderson, *The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (The Pinheiro Principles): Suggestions for Improved Applicability*, 24 INT'L J. REFUGEE STUD. 304, 304–05 (2011). It should be noted that the Pinheiro Principles, contrary to the Guiding Principles on Internal Displacement, have not been referred to in resolutions of the main bodies of the United Nations.

141. *Draft Articles, supra* note 6.

consequence of a wrongful act, and as such it needs not be expressly provided in a treaty.[142] This was most clearly expressed by the Permanent International Court of Justice in the *Chorzow* case,[143] where the aim of reparation was outlined: "[t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[144] To put it simply, according to the Permanent Court, reparation has essentially a corrective function; it should thus be proportional to the harm suffered and consist, whenever possible, of restitution. These principles were subsequently acknowledged by the International Court of Justice[145] and finally enshrined in the articles on State responsibility drafted by the International Law Commission (ILC).[146] To be sure, the ILC articles only concern inter-State relations. At the same time, though, the Project stipulates that it does not prejudice "any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[147] Moreover, in the commentary to that provision, the ILC acknowledged that with respect to human rights, "the ultimate beneficiaries and in that sense the holders of the relevant rights" are the individuals.[148]

For a long time, the multiple theoretical issues surrounding reparation claims by individuals received scant attention in legal doctrine, which instead mostly

142. Nor is it contingent upon a demand or protest by any State. *Cf.* Rep. of the Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 2 Y.B. INT'L L. COMM., art. 31, ¶ 4.

143. "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." *Chorzów Factory* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26); *aff'd*, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, ¶ 184 (Apr. 11); *aff'd*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14).

144. *Chorzów Factory*, *supra* note 143, Indemnity, 47.

145. *Cf.* I.C.J., *Case Concerning the Gab˘cíkovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. ¶ 149-50 (Nov. 25); *Case Concerning the Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. ¶ 259 (Dec. 19).

146. The obligation to make full reparation for the injury caused, together with the obligation to cease the wrongful conduct, are set out by the ILC draft articles as the core legal consequences of an internationally wrongful act (cf. Arts. 30-31). On reparations under the ILC Articles, *see, inter alia,* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility,* 96 AM. J. INT'L L. 833, 833-56 (2002).

147. *Cf.* Report of the Int'l Law Comm'n, *supra* note 142, at art. 33.

148. Report of the Int'l Law Comm'n, *supra* note 142, at ¶ 3 commentary. As was remarked by the Special Rapporteur Crawford, "in the form of a saving clause, [it] nonetheless clearly envisages that some 'person or entity other than a State' may be directly entitled to claim reparation arising from an internationally wrongful act of a state." James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 887 (2002). It must be noted that back in 1956 Rolin affirmed that the Chorzow principle on reparation "ne gouverne pas seulement la responsabilité interétatique, il s'entend egalement lorsque la responsabilité internationale d'un Etat est engagée directement ou indirectement à l'égard d'un individu." Henri Rolin, *Le rôle du requérant dans la procédure prévue par la Commission européenne des Droits de l'Homme*, 9 REVUE HELLENIQUE DE DROIT INT'L 3, 6 (1956).

focused on the primary norms establishing human rights.[149] Only in the last two decades, thanks to the codification efforts undertaken by UN bodies on gross violations, a growing interest towards such problems has arisen in both academic and political debates.

The first initiatives to enhance the position of victims were undertaken within the UN framework during the 1980s, and led to the adoption of soft law instruments dealing with specific categories of victims.[150] The most significant contribution in this context was then made by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,[151] which in 1989 entrusted a Special Rapporteur with the task to undertake a study concerning the right to redress and reparation for victims of gross violations of human rights and fundamental freedoms.[152] In 2005, after a lengthy and wide participatory process, involving delegates from States, as well as intergovernmental and nongovernmental organizations,[153] the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter the Reparation Principles) was finally adopted by the General Assembly without a vote.[154]

Despite the many compromises, which diluted their content in many respects, the Reparation Principles represent a significant contribution to the conceptualization of redress, and to date, are still the only international instrument laying out the rights of victims of gross human rights and humanitarian law violations and the corresponding States' obligations in a comprehensive way. Moreover, although not legally binding, the document has had a remarkable influence on a national and international level. With respect to domestic law, several countries, mostly from South America, have drawn from it in drafting new legislation on reparation.[155] Equally significant is its input in the development of

149. Writing in 1999, Kamminga noted: "No attempt has yet been made to codify the rules of international law which apply in [the case of a breach by a state of an international obligation towards an individual] and practically nothing has been written on it." Menno Kamminga, *Legal Consequences of an Internationally Wrongful Act of a State against an Individual*, in THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER 65, 65-66 (M.L. van Emmerik, P.H. Ph.M.C. van Kempen & T. Barkhuysen eds., 1999).

150. I refer in particular to the following declarations: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Dec. 18, 1998); Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (Dec.16, 2005) [hereinafter UN Reparation Principles].

151. Now the Sub-Commission on Promotion and Protection of Human Rights.

152. *Cf.* E.S.C. Res. 1989/13 (Aug. 31, 1989).

153. Only between 2002 and 2004, the Commission convened three consultative meetings.

154. The UN Reparation Principles was adopted by the UN General Assembly on De. 16, 2005 at its 60th session, through Resolution 147. See UN Reparation Principles, *supra* note 150. The resolution recommends that States take the said Principles into account, promote respect thereof and bring them to the attention of all their officials and bodies, victims and, more generally, all those concerned, including the public in general.

155. Theo van Boven, *Draft Principles and Guidelines on the Right to a Remedy and Reparation*, INT'L COUNCIL ON HUMAN RIGHTS POL'Y 4 (Feb. 13-14, 2005).

international rules and principles on the right to redress. In particular, the UN Principles were taken into account during the elaboration of the ICC Statute[156] and the International Convention for the Protection of All Persons from Enforced Disappearances.[157] They thus provide an indispensable point of reference and departure in our investigation.

As far as reparation is concerned, the Principles affirm its existence as a right consisting of both a substantive and a procedural aspect, and deduce the corresponding State duty from the "obligation to respect, ensure respect for and implement international human rights law and international humanitarian law."[158]

Significantly, such a statement is not confined to the most serious violations of humanitarian norms, emphasizing that the general duty to redress is applicable irrespective of the gravity of the violation or of the nature of the underlying right being violated. Conceptually, it would nevertheless appear more correct to distinguish, in line with the *Chorzow* jurisprudence and the ILC articles, the right to reparation from the primary norms that were breached.[159] Reparation presupposes a violation and arises as a consequence of the breached norms. This implies that an individual right to reparation is premised on the existence of primary norms conferring rights to individuals.[160] By contrast, such a right does not depend on the capacity of individuals to enforce it at the international level.[161]

In order to buttress the existence of an individual right to reparation having general application, the Reparation Principles recall, in the preamble, the many

156. Notably concerning Article 75, which deals with reparations.

157. This Convention, which contains the most elaborate provisions on the right to reparation existing in international human rights treaty law, explicitly refers to the various forms of reparation envisaged in the UN Reparation Principles. *Cf.* UN Reparation Principles, *supra* note 150, at art. 24.

158. *Cf.* UN Reparation Principles, *supra* note 150, at ¶ 3 (affirming "[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: . . . (*d*) Provide effective remedies to victims, including reparation, as described below."

159. Pierre D'Argent, *Le droit de la responsabilité internationale complété? Examen des Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*, 51 ANNUAIRE FRANÇAIS DE DROIT INT'L 44 (2005).

160. This opinion is shared by others. *See, e.g.,* Riccardo Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, 1 J. OF INT'L CRIM. L. 339, 347 (2003); Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT'L REV. OF THE RED CROSS 497, 503 (2003).

161. This was clearly affirmed by the Permanent Court of International Justice. *See Jurisdiction of the Courts of Danzig* (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, 282 ¶ 17 (Mar. 3); *La Grand* (Ger. v. U.S.), 2001 I.C.J. ¶ 77 (June 27). The traditional position according to which without procedural remedies there can be no secondary right is held, inter alia, by Tomuschat. *See* Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position Under General International Law*, *in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 1, 1 (A. Randelzhofer & C. Tomuschat eds., 1999). In any case, it bears noting that at present most human rights treaties envisage judicial or quasi-judicial supervisory bodies to which individuals can submit a complaint. The most recent development in this respect is the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which entered into force on May 5, 2013 and which provides the Committee on Economic, Social and Cultural Rights competence to receive and consider individual complaints. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res 63/117, U.N. GAOR, 63rd Sess., U.N. Doc A/RES/63/117 (Mar. 5, 2009).

different treaty provisions envisaging such a right in its substantial or procedural aspects. Admittedly, these norms vary significantly in their content, making it difficult to infer a general rule from them. However, over time human rights judicial and quasi-judicial bodies have developed a considerable and uniform practice in the field, which consists in applying - with some slight changes - inter-state principles on state responsibility for wrongful acts.[162] Failing any major objection by States, this practice would seem to validate the existence of a customary right entitling individuals to receive reparation.[163]

Concerning human rights having peremptory character, it has been claimed that their violation entails on the responsible States a *jus cogens* obligation to redress.[164] In other terms, the inderogability of peremptory norms would attach itself to the ensuing obligation to remedy their violation.[165] Nevertheless, such an opinion cannot be accepted. In the first place, by assuming that the consequences of a violation of a peremptory norm are part and parcel of said norm or at any rate share its basic features, it obliterates the distinction between primary and secondary norms.[166] Secondly, while certainly fascinating for human rights lawyers, it does not seem to be supported by practice, nor by international case law. It must however be recognized that the international community has acknowledged the particular importance of redressing the infringements of the most fundamental human rights which have achieved the status of jus cogens. A vivid example is

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162. Particularly active in this respect has been the Inter-American Court of Human Rights; *see* Velasquez-Rodriguez v. Honduras, Inter-Am. Ct H.R. (ser. C) No. 7 (1989); and some UN treaty bodies, especially the Human Rights Committee and the CAT Committee.

163. "[I]n the field of human rights one should note that in spite of the differences between the various conventional rules, several international supervisory organs are developing a uniform judicial or quasi-judicial practice concerning reparation. Consequently, one could perhaps maintain that a customary rule is *slowly developing* in the field of human rights. In contrast, in the field of humanitarian law the conclusion should be more pessimistic because, at least for the time being, both international and domestic case law on reparation is lacking." Mazzeschi, *supra* note 160, at 347. Most recently, the same author has come to the conclusion that such a rule is now in existence. *Cf.* Riccardo Pisillo Mazzeschi, *Il rapporto fra le norme di ius cogens e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012*, 6 DIRITTI UMANI E DIRITTO INTERNAZIONALE 310 (2012). Some support can also be found in the I.C.J.'s advisory opinion on the Construction of a Wall in the Occupied Palestinian Territory. Here the Court, without making reference to a specific norm of international law, so affirms: "Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned" and it "also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 196-98 (July 9).

164. *Cf.* Alexander Orakhelashavili, *Peremptory Norms and Reparation for Internationally Wrongful Acts*, 3 BALTIC Y.B. OF INT'L L. 19 (2003).

165. *Id.* Concerning cases involving the rights of individuals, the same author affirms: "If *jus cogens* protects the rights of an individual in the interest of the international community as a whole, it is hardly justified to regard that the enforcement of these rights, inter alia, by way of reparations in case of breach, should be dependent upon the respective will of national States of victims or other States. Individuals' entitlement to reparation, which is independent from possible or actual claims by a State, is therefore a natural continuation of the peremptory nature of basic human rights." *Id.* at 32.

166. *Cf.* Eyal Benvenisti, *Individual Remedies for Victims of Armed Conflicts in the Context of Mass Claims Settlements*, *in* 1 COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RUDIGER WOLFRUM 1085, 1097 (H. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P.-T. Stoll & S. Vöneky eds., 2011).

given by the same UN Reparation Principles, which affirms that "[r]eparation should be *proportional to the gravity of the violations* and the harm suffered."[167] The reference to the gravity of the violations, far from implying that reparation concerning fundamental rights could be substantially unlimited, emphasizes the need to modulate redress on the basis of the intrinsic importance of the norm infringed. In any case, however, redress may not include punitive damages.[168]

As to the forms of reparation, the general principles applicable in inter-State relations are equally a primary reference point. Their utilization, though, has to be made *cum grano salis*, taking into account the specificities of human rights norms and of the State-individual relationship. In this context, it is interesting to note that the Reparations Principles, while taking inspiration from the ILC's Project, do not assign a primacy to restitution over the other forms of redress. To the contrary, they affirm that full and effective reparation "include" five forms of reparation, namely: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[169] Underlying this approach is the understanding that reparation of human rights violations could require a combination of said measures, which are thus meant to be complementary rather than mutually exclusive. The language utilized is in any case cautious: expressing more of a recommendation than an obligation, and reference is made to the need to take into account the circumstances of the individual case at issue.

Another novelty is the insertion, in the list of reparation measures, of rehabilitation and assurances of non-repetition. Far from being a secondary change to accepted principles of international responsibility, this insertion denotes an innovative understanding of reparation, which has influenced subsequent practice in the human rights field.[170]

As far as rehabilitation is concerned, it is a new concept, and as such, is unknown to the law of State responsibility. The Reparation Principles describe it as "medical and psychological care as well as legal and social services."[171] Judging from its content, it could be easily subsumed either under a broad concept of restitution[172] or, if it consists in legal expenses, under compensation. Its distinct

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167. *Cf.* UN Reparation Principles, *supra* note 150. A similar reasoning was more recently made by the CAT Committee with respect to torture: "redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them" Comm. against Torture, General Comment No. 3 (2012), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 6, CAT/C/GC/3 (Dec. 13, 2012) [hereinafter Comm against Torture]

168. According to D'Argent, the reference utilized by the Reparation Principles may nonetheless open the way to the imposition of punitive damages. D'Argent, *supra* note 159, at 51.

169. UN Reparation Principles, *supra* note 150, at 7. A detailed explanation of each form of reparation is provided in Principles 19-23. A similar holistic approach to reparation has later been embraced by the CAT Committee in its General Committee on redress for victims of torture. *Id.* at 13.

170. *See* International Convention for the Protection of all Persons from Enforced Disappearance, art. 24, Dec. 20, 2006, *available at* http://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf; see *also* Pinheiro Principles, *supra* note 139, and accompanying text.

171. *See* Declaration of the United Nations Conference on the Human Environment, Principle 21 (June 16, 1972).

172. "Dans la mesure où la réadaptation est censée effacer autant que possible les séquelles psychologiques et médicales dont souffrent les victimes, elle paraît d'ailleurs constituer une forme particulière de restitution." D'Argent, *supra* note 159, at 52.

mention, though, serves the function of highlighting the particular effects of human rights violations on victims and the correlative need to address such effects with ad hoc reparative measures.

Concerning assurances of non-repetition, their mention among reparation measures may still seem troubling. Nonetheless, at a closer look, such classification can be explained on the basis of a specific feature generally characterizing human rights violations: their reiteration by the same author. As a consequence, it becomes clear why guarantees of non-repetition, which in the law of State responsibility are deemed exceptional, in this context are assigned a central role. Their function, however, is *sui generis*, being preventive rather than remedial: guarantees of non-repetition in fact do not directly benefit the victims but, in perspective, society as a whole.[173]

In conclusion, on the basis of the analysis undertaken, it can be affirmed that international law recognizes an individual right to reparation to victims of human rights violations, in both its procedural and substantial dimensions. At the same time, though, States are allowed wide flexibility to choose among different forms of reparation, a possibility that is not given to the individual recipients of reparation. On the contrary, an analogous flexibility is not permitted with respect to the procedural aspect of redress, which in fact is the "hardest" part of the right to reparation.[174]

2. The Right to Reparation for Refugees

In principle, refugees should be able to claim and enjoy the right to reparation from their own State like every other person. However, since the violations at issue often concern a mass of individuals, it needs to be assessed whether in these cases it is practically possible, and legitimate, for victims to demand reparation.

As a point of departure, it must be acknowledged that the right to redress suffers from a lack of implementation by States, and that this is especially true in the case of large-scale claims.[175] In addition, refugee claims are generally addressed to a weak State, as typically is the one coming out of a conflict or an authoritarian regime. It has thus been asserted that such States lack the financial and structural means to proceed to reparations, meaning that the burden of redress would ultimately be paid by the entire society. While partly true, this remark cannot be accepted to dismiss reparations in general. The Reparation Principles can serve as a guide in this respect, since they propose a legal approach to redress granting to States the necessary flexibility to adapt reparation to the circumstances of the case.

By recognizing that no single form of reparation can by itself be satisfactory in the case of serious human rights violations, and that reparations should be

173. *Cf.* Report of the International Law Commission, 45th Sess., May 3-July 23, 1993, U.N. Doc. A/48/10; GAOR, 48th Sess., Supp. No. 10 (1993) at 81-82.

174. Not coincidentally, the customary status of the right to a remedy is less contested than that of the right to substantial reparation.

175. Indeed, as was observed by the Special Rapporteur on Torture Méndez, States usually fail to institutionalize basic principles regarding redress to victims. Mr. Juan E. Méndez, Statement, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 16th session of the Human Rights Council, Agenda Item 3, Mar. 7, 2010, Geneva, 2.

adapted to the local context, the Reparation Principles adopt a totally different approach from the one espoused by the Pinheiro Principles. As shown, the latter focus on a specific manifestation of restitution and, in this respect, have the ambition to propose universal solutions.[176] While recognizing that "[r]efugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their rights to the restitution of their housing, land and property,"[177] the document as a whole has a strong bias for repossession over compensation.[178] Its preference for restitution thus runs the risk of perpetuating inequality or repairing one injustice through another, with the end result of fueling conflicts. Moreover, it proposes a concept of property rights which is not easily applicable to informal land tenure systems.[179] Not coincidentally, the Pinheiro Principles have not had a great success in practice and the utility of restitution as a reparation measure has been questioned in various different contexts.[180]

This can be observed at the regional level, where the primary role of restitution has been recently downsized. A vivid example is offered in this respect by the European Court of Human Rights, which in *Demopolous v. Turkey* has finally reversed its long-standing jurisprudence favoring owners over secondary occupants.[181] In this case, the Strasbourg Court stated that restitution is neither the only nor the primary means of redress for displacement from land, since compensation or other reparation measures may be applied even when the former is not materially impossible.[182] The application of the "material impossibility" standard for restitution could in fact have resulted in the mass evictions of longstanding occupants of claimed homes.[183]

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176. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS: IMPLEMENTING THE 'PINHEIRO PRINCIPLES' 12 (Mar. 2007).

177. *Id.* at 54, Principle 10.3.

178. *Cf. Id*. at 19, in particular Principle 21, which substantially considers the use of compensation as exceptional. On the issue, *see* Anderson, *supra* note 140, at 308. While the Restitution Principles routinely refers to "housing, land and property", it is clear that in practice weak forms of tenure like tenancy and informal occupation are disadvantaged with respect to property because their holders often do not have the means to claim restitution.

179. *See* Ballard, *supra* note 107, at 462. It bears noting in this regard that the drafting of the Principles was highly influenced by the Bosnian experience, as it is shown by the importance attributed to the latter in the 2002 Working Paper; United Nations Econ. & Soc. Council, Sub-Commission on Promotion and Protection of Human Rights, *The Return of Refugees or Displaced Persons Property: Working Paper Submitted by Mr. Paulo Sergio Pinheiro,* U.N. Doc. E/CN.4/Sub.2/2002/17 (June 12, 2002); and the 2003 Preliminary Report submitted by Pinheiro; United Nations, Econ. & Soc. Council, Sub-Commission on Promotion and Protection of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displace Persons - Preliminary Report of the Special Rapporteur,* U.N. Doc. E/CN.4/Sub.2/2003/I1 (June 16, 2003).

180. *Cf.* Rhodi C. Williams, *Restitution at the Juncture of Humanitarian Response to Displacement and Transitional Justice*, INT'L CTR. FOR TRANSITIONAL JUST. (June 2013), *available at* https://www.ictj.org/sites/default/files/ICTJ-Research-Brief-Displacement-Restitution-Williams.pdf (citing as examples the cases of Colombia, Iraq, Timor Leste and Afghanistan).

181. *See*, *e.g.,* Loizidou v. Turkey (Merits) Application no. 15318/89, Eur. Ct. H.R., (1995); Cyprus v. Turkey, App. no. 25781/94, Eur. Ct. H.R., (2001); Application no. 16219/90, Eur. Ct. H.R., (2003); Application no. 16163/90, Eur. Ct. H.R., (2003).

182. Demopoulos v. Turkey, App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, Eur. Ct. H.R., at 40 (2010).

183. *Id.* at 36-37.

Still more relevant in this context is the approach to reparation taken by the African Union in the Convention on Protection and Assistance of internally displaced persons in Africa (hereinafter the Kampala Convention).[184] While only dealing with IDPs, its provisions on reparations clearly reflect a new general understanding of redress in post-displacement settings. In contrast to the Pinheiro Principles and the Guiding Principles on Internal Displacement, the Kampala Convention does not focus on housing and land-related issues but more broadly addresses harms caused by displacement.[185]

Article 12, despite being narrowly titled "Compensation," addresses reparation measures at large and enunciates a broad obligation on States to provide "effective remedies" to all "persons affected by displacement."[186] It then specifies that these remedies will be "for damage incurred as a result of displacement" and that they can include compensation as well as "other forms of reparation."[187] Evidently, these provisions are extremely innovative in that they recognize a general obligation to redress *any* harm caused by displacement, irrespective of its arbitrariness or unlawfulness.[188] Moreover, the beneficiaries of such obligations are not exclusively the internally displaced, but also those belonging to return or host communities. Lastly, and most importantly for our purposes, the relevance of restitution is downplayed with respect to property-related issues. In this case, a relative duty to property restitution is only established in favor of communities "with special dependency and attachment" to a land.[189]

In sum, the Kampala Convention can be considered a successful effort to recognize the broad content of the harm caused by displacement and the correlative State obligation to redress it, as well as to disassociate reparation from return. Reparation, as it is conceived, does not risk to conflict with nor be confused with durable solutions, and may rather serve as a tool for the displaced to freely choose among those solutions.[190]

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184. *Cf.* African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), art. 14, Oct. 22, 2009 [hereinafter Kampala Convention].

185. *Id.* at arts. 11-12.

186. *Id.* at art. 12, ¶ 1.

187. *Id.* at art. 12, ¶ 2.

188. This broad formulation is to be compared with the ones contained in the Guiding Principles on Internal Displacement and the Pinheiro Principles, which only protect from "arbitrary displacement."

189. Kampala Convention, *supra* note 184, at 14 (providing that "States Parties shall take *all appropriate measures, whenever possible*, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration, and reinsertion.") (emphasis added). Apart from such specific case, State shall only "establish appropriate mechanisms providing for simplified procedures where necessary." *Id.* These provisions, which reflect a restrictive approach to property restitution, are clearly inspired by the so-called *Endorois* case, decided by the African Commission on human and people's rights in 2010. *Cf.* African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya* (Feb. 4, 2010).

190. Kampala Convention, *supra* note 184, at 14, art. 11, ¶ 2 (establishing that "States Parties shall enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions.").

This recent practice shows that compensation can have a much more useful role than restitution in post-displacement settings.[191] Compensation has long been disfavoured as a remedy for human rights violations for various reasons, such as the impossibility to monetize the harm suffered, its frequent use to buy the silence of victims and protect perpetrators, and the fear of supporting ethnic cleansing. Furthermore, it has been claimed that compensation could not be financially viable for States in transition.

While certainly not a panacea, compensation has the advantage of being suitable for any kind of violation, in contrast to restitution, which traditionally was meant to remedy the deprivation of assets. As to its costs, it is not necessarily more expensive than restitution. In fact, the implementation of a restitution program generally requires the resolution of housing and propriety disputes through judicial or quasi-judicial mechanisms, as well as the compensation of secondary occupants. Moreover, in its practical application, compensation is not utilized to integrally restore the harm caused, but rather to accord just a minimum relief. States in fact calibrate compensatory measures more on the basis of their financial constraints than of the harm and gravity of the violations.

With respect to refugees, compensation has the advantage of not being linked with any durable solution and can thus be effectively enjoyed even by those who do not want to go back to their home country.[192] It also permits the State of origin to consider the position of persons other than refugees, whose rights would otherwise be sacrificed, such as secondary occupants and more generally, those who have somehow been affected by displacement, especially when the latter was long-lasting. Unlike restitution, which typically has a corrective function, compensation can more easily be utilized to remedy the social inequalities that often are at the roots of victimization. In fact, in many cases, "the idea of *restitutio in integrum* is almost cruel" because it "evades the predicament of victims whose poverty and marginalization is attributable to conflict or systematic repression, such as apartheid, or who were already poor to begin with."[193]

The re-evaluation of compensation can thus be read along with recent efforts to assign to reparation a new transformative or redistributive function. According to its proponents, reparation should essentially address the root causes behind the violations and aim to correct them.[194] Clearly, such proposals concern areas prone

191. In contrast to the mainstream, a focus on compensation can be found in Luke T. Lee, *Declaration of Principles of International Law on Compensation to Refugees*, 87 AM. J. INT'L L. 157 (1993) (affirming "[t]he responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee and/or remain abroad as refugees. The discharge of such responsibility by countries of asylum, international organizations (*e.g.*, UNHCR, UNRWA, IOM) and donors (both governmental and non-governmental), pending the return of refugees, their settlement in place, or their resettlement in third countries, *shall not relieve the countries of origin of their basic responsibility, including that of paying adequate compensation to refugees*"). (emphasis added).

192. *Cf.* Paglione, *supra* note 106, at 18.

193. Ruben Carranza, *The Right to Reparations in Situations of Poverty*, INT'L CTR. FOR TRANSITIONAL JUST.: BRIEFING (Sept. 2009), *available at* https://www.ictj.org/sites/default/files/ICTJ-Global-Right-Reparation-2009-English.pdf.

194. The idea was most clearly formulated in legal doctrine by Uprimny. An implied reference to the transformative character of reparations is also present in the Reparation Principles, which lists among reparation measures the guarantees of non-repetition. *See* D'Argent, *supra* note 159, at 52.

to violence, and indeed they have been embraced by the UN Secretary General in his report on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies."[195] Moreover, their influence can be found in various recent documents[196] and also in some national reparation programs.[197] While the call to correct structural inequalities and vulnerabilities in principle can be shared, the said reinterpretation of reparation which accompanies it is acceptable only to the extent that it does not controvert the main function of reparation, which necessarily is the redress of past violations. Otherwise, the risk could be that States consider the provision of social services as a reparatory measure,[198] with the result of confusing the position and the legitimate expectations of refugees with the entitlements of the population at large.

At any rate, the mentioned advantages of compensation over restitution have to be assessed in each situation, on the basis of the different priorities of both the addressees and the national communities, as well as of their respective conception of justice. Neither of the two remedies could suffice however. Indeed, as it is clearly emphasised by the Reparation Principles, redress of serious human rights violations requires a holistic approach. It is thus essential to recur to a balanced mix of material and symbolic measures of redress. This is particularly true vis-à-vis former refugees, who first and foremost require some "emotional" measures for the bond of trust and allegiance with their own State to be reconstituted. Such measures generally have a collective character and hence equally address all the victims. They include public acknowledgement and apologies from state authorities, public rites and ceremonies, as well as the establishment of memorials and days of commemoration. Symbolic reparations, traditionally named "satisfaction," for a long time were confined to inter-State relations, but with the development of international human rights law, they have begun to be utilized with an increasing frequency also to remedy violations suffered by individuals.

It is often argued that situations of massive violence cannot be addressed with a legal approach. Nonetheless, as we have tried to show, international law allows

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195. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 23, U.N. Doc. S/2004/616 (Aug. 23, 2004).

196. *See* The Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation, ¶ 3, Mar. 19-21, 2006, which was made during an international meeting in March 2007 by women's rights advocates and activists coming from all over the world. The Declaration affirms that "That reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation." *See also* UN Reparation Principles, *supra* note 150, at 2 (affirming that for restitution to be effective, efforts should be made to address the root causes of the violation including all contexts of discrimination).

197. *Cf.* Maria Paula Saffon & Rodrigo Uprimny, *Distributive Justice and the Restitution of Dispossessed Land in Colombia*, *in* DISTRIBUTIVE JUSTICE IN TRANSITIONS 403 (Morten Bergsmo, et al. eds., 2010).

198. Such an attempt was made by Colombia with Law 975; *cf.* art. 47; which was then annulled by the Constitutional Court. *Cf.* Ruling C-1199 (2008) (the Court declared that the national Government should not confuse the granting of social services, to which all citizens are entitled, with reparations, which in contrast are due only to victims). On the distinction between social services and reparations. *Cf.* Rodrigo Uprimny Yepes, *Between Corrective and Distributive Justice: Reparations of Gross Human Rights Violations in Times of Transition*, 27 NETH. Q. HUM. RTS. 625, 15 (2009); Pablo De Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 470 (Pablo De Greiff ed., 2006).

the required flexibility to apply legal principles of reparation in such contexts. Moreover, reparations, which are "the most tangible and visible expression of both acknowledgement and change,"[199] are fundamental not just for their individual addressees, but also for the entire society since they can bring about reconciliation and social reconstruction.

Most of the time, States manage massive violations through reparation programs, which are characterised by a lack of individualization and in some cases, preclude judicial reparations proceedings. The provision of reparation through such administrative programs could thus risk obliterating the individual right to a procedural remedy which, belonging to the individuals, may not be disposed of by the State.[200] In these cases, therefore, the ultimate legitimacy, and legality, of reparation programs depend on their acceptance by the addressees. It would thus seem wise, while not obligatory, to involve former refugees in the design and implementation of said programs. The incorporation of a participatory process could in fact guarantee that the program will not be challenged in the future in jurisdictional or political fora.

CONCLUDING REMARKS

The analysis undertaken has tried to assess the obligations of the State of origin both towards receiving States and the refugees, and their legal and practical relevance in situations of mass flows. As far as inter-State relations are concerned, it has been shown that the responsibilities of the country of origin in creating a refugee flow can be difficult to establish. This, together with the fact that States of origin are generally poor countries, has prompted host States to enforce their rights and interests either with forcible measures, or by vigorously promoting repatriation. Such a stance has negatively impacted the enjoyment of the rights of refugees, both vis-à-vis their own State and the country of asylum.

Concerning repatriation, the proactive engagement of States in affirming the right of refugees to return has resulted in severely limiting the possibility to opt for other durable solutions, and in many cases, so-called voluntary repatriation operations have become an obliged choice for refugees.

Alongside the affirmation of repatriation as the best durable solution, property restitution has been presented as the most appropriate tool to remedy displacement. As we have tried to demonstrate, however, this remedy is not in itself appropriate to redress the severe human rights violations suffered by refugees. Moreover, it has not succeeded as a pull factor to encourage return. Its failure in practice has finally resulted, in the most recent years, in the re-evaluation of other remedies, in particular compensation. Hopefully, this inversion of tendency will help dissociate reparations from durable solutions and demonstrate the importance of redress for both justice and reconciliation.

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199. Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 200 (2004).

200. In this respect the CAT Committee affirmed that "[w]hile collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress." Comm. against Torture, *supra* note 167, at 1.