

## CONFERENCE AND SYMPOSIUM REPORTS

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### **The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications**

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After six years of preparatory work and intensive debates, the International Law Association (ILA) approved by consensus the Declaration of Principles of International Law on Compensation to Refugees at its 65th Conference in Cairo in April 1992 (ILA 1992; see below for the text of the Declaration). This Declaration was a logical sequel to the Declaration of Principles of International Law on Mass Expulsion, adopted by the ILA at its 62nd Conference in Seoul in August 1986 (ILA 1986:12-18). Both declarations address the refugee problem from the perspective of the responsibility of countries of origin, in contrast to the traditional focus on the care and maintenance of refugees—a responsibility of first-asylum, resettlement and donor countries, as well as the United Nations and non-governmental organizations. The country-of-origin approach, by dealing with the root causes of refugees and their solutions, may be characterized as preventive; the traditional approach—assisting refugees after they have come into being—is ameliorative in nature. While the two approaches necessarily complement each other, we must still heed the old adage: It is far better to treat the causes of a malady, and not just its symptoms.

Both declarations were drafted by the International Committee on the Legal Status of Refugees of the ILA, which was chaired by the author, with members from Algeria, Australia, Austria, Bangladesh, Brazil, China, Egypt, Finland, France, Germany, Ghana, India, Japan, Korea, Lesotho, Nepal, Netherlands, Philippines, Poland, Senegal, Sweden, Thailand, Togo, United States, Uruguay and Yugoslavia. Established in Paris in 1984 (ILA 1984: 10, 46), the Committee worked in tandem during its early years with the UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, whose membership overlapped that of the Committee. The work of the UN Group is fully reported elsewhere (Lee 1984; 1986; 1987). With the adoption in 1986 of both the UN Group's report (UN 1986) and the ILA's Declaration on Mass Expulsion, the Committee took up the work of refining and elaborating on the Group's conclusion that the 'rights of refugees' include 'adequate compensation'

by countries of origin (*ibid.* para. 66(f)). This was prompted by the need to codify and progressively develop principles of international law governing compensation to refugees (Lee 1992a) in the interests of rendering justice to refugees and averting new flows of refugees.

Since the text of the Declaration on Compensation is appended to this paper and its contents have been extensively discussed and recorded in three successive ILA conferences, it suffices to highlight the salient features of the Declaration as well as to assess its implications for the future—not necessarily confined to refugees *per se*.

### 1. *Compensation as Disincentive for Generating Refugees*

The most significant contribution of the Declaration on Compensation is, of course, its showing that legal theory affirms, and State practice supports, the finding that countries of origin owe a legal obligation to pay compensation to refugees, whether for the loss of their property or for their emotional or mental anguish, injury to life or health, and missed opportunities—educational, economic, professional, and others. Combined with the refugees' right of return, such an obligation would negate whatever incentives these countries might have in forcing directly or indirectly their own citizens to become refugees. Since State responsibility does not diminish with time, there is no statute of limitation on the applicability of the compensation principles. It does not pay, in other words, to generate refugees.

### 2. *Consequences of Nonpayment of Compensation*

The Declaration also shows that, if countries of origin refuse or cannot afford to pay compensation, they must suffer the consequences of nonpayment, which may range from collective sanctions to their denial of economic [in contradistinction to humanitarian] assistance by donors or international organizations. In view of the growing trend to condition economic assistance on compliance with human rights (reflected at least in part by the generating of refugees), the granting or withholding of such assistance would be an important leverage to influence States' conduct. Thus, for example, twelve donor nations decided to condition further aid to Kenya on its improvement in human rights (*New York Times* 1991, p. A1). The World Bank and leading Western donor nations froze developmental aid to Malawi for 1992 and 1993 in response to that country's worsening human rights record (*New York Times* 1992, p. A15; *Washington Post* 1992, p. A16; Cohen 1992).

### 3. *The Genocide Convention*

By associating the act of generating refugees in some situations with genocide, the Declaration accentuates the heinous nature of such act as 'international crime', thus contributing to the preventive approach. In fact, it was partly to lend its official support to such an association that the United States decided,

after a 40-year hiatus, to ratify the Genocide Convention (78 UNTS 277; see Lee 1991)—the first of a series of major human rights treaties to be ratified by the United States.

#### 4. *Equal Treatment of Nationals and Aliens*

Principle 4 of the Declaration posits that there is no valid basis under human rights law to treat aliens more favourably than nationals in matters concerning compensation. This also raises the question whether refugees should be accorded preferential treatment over internally displaced persons if the latter flee their homes for essentially the same reasons as refugees and suffer just as much or more (Bolton 1992, 57–58). In view of the growing number of internally displaced persons, there is an urgent need for a comprehensive and systematic study of principles of international law governing their legal status (Lee 1992b).

#### 5. *Compensation and Rapprochement*

As pointed out in Principle 5, Commentary (4)(a), the United States undertook, under the 1794 Jay Treaty (Treaty of Amity, Commerce, and Navigation between the US and Great Britain), to compensate royalists who fled to Canada for their loss of property or damages suffered in the course of the Revolutionary War. The underlying spirit of fair play has laid a foundation for peaceful and friendly relations between the two countries with the longest undefended borders for two centuries. In the case of the German compensation to Jewish refugees from the Third Reich and to the State of Israel (see Principle 5, Commentary (4)(c)), such compensation has served to heal historical wounds, transforming a relationship marked by hostility between Germans and Jews into one of reconciliation (see Zweig, in this volume). Might not these lessons be relevant to the current Middle East peace process in resolving the Israeli-Palestinian conflicts?

#### 6. *Compensation to Oppressed Minorities*

The discussion in Section 4 above concerning equal compensation treatment for nationals and aliens, as well as for refugees and internally displaced persons, leads logically to the question whether oppressed minorities are entitled also to compensation, and not merely to legal reforms in such areas as voting registration and other civil and political rights. For a strong case can be made that legal reforms alone can never undo the injustices that drive members of these minorities into high rates of unemployment, drug or alcohol abuse, or the depth of despondency that erupts periodically into the type of riots in Watts or Los Angeles. What is needed is a massive infusion of compensation funds to finance massive educational, economic and social reforms and restructuring.

As the Draft Declaration on Compensation pointed out (ILA 1988:676–718), Japanese-Americans were expelled from their homes in the West Coast during World War II on account of their race. As such, they were analogized to refugees. In 1988, President Reagan established a trust fund of \$1.25 billion to pay reparation to those who were placed in camps and their families

(*New York Times* 1988a p. A16). Likewise, the Canadian Government agreed to pay the equivalent of \$17,325 in compensation to each of about 12,000 surviving Japanese-Canadians who were forcibly removed from their homes in British Columbia, interned and deprived of their property during World War II. The total sum reached \$238 million, which included individual payments as well as payments to two funds (*New York Times* 1988b p. A10). Since these people of Japanese origin were compensated for their *temporary* expulsion, detention, and relocation, how much more should Afro-Americans be compensated for their *centuries* of slavery and slave-like treatment? If German Jews have continued to receive compensation for their persecution and discrimination in the 1930s, why should Afro-Americans not receive compensation for their discrimination in education, which was not *formally* ended until 1954 (see *Brown v. Board of Education*, 347 U.S. 483 (1954)), or in civil rights, not *formally* ended until the mid-1960s?

Only compensation on a gargantuan scale can begin to 'right a grave wrong'.

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\*The views expressed in this paper do not necessarily reflect those of the US Government.

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**Declaration of Principles of International Law on Compensation to Refugees**

*The International Law Association 65th Conference, Cairo April 1992*

THE INTERNATIONAL LAW ASSOCIATION,

RECALLING that the General Assembly in Resolution 41/70 of 3 December 1986 unanimously endorsed the Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees (UN Doc. A/41/324), which calls upon Member States to respect as their 'obligations,' *inter alia*, 'the rights of refugees to be facilitated in returning voluntarily and safely to their homes in their homelands and to receive adequate compensation therefrom, where so established, in cases of those who do not wish to return' (paragraph 66(f));

RECALLING FURTHER that the General Assembly in Resolution 194(III) of 11 December 1948, which has since been reaffirmed every year, resolved that:

[T]he refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practical date, and that compensation should be paid for the property of those choosing not to return and for loss or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible; . . . (paragraph 11);

NOTING, however, that neither the 1986 nor the 1948 resolution identifies or elaborates upon specific principles of international law governing compensation to refugees;

RECOGNIZING the need to provide such elaboration with a view both to rendering justice to refugees and to averting new flows of refugees;

BEARING IN MIND the significant contribution of the International Law Association in adopting by consensus at its 62nd Conference in Seoul, 24th–30th August 1986, the complementary Declaration of Principles of International Law on Mass Expulsion;

DECLARES the need for adopting the following principles, in the interest of the progressive development and codification of international law, in order to facilitate compensation, as appropriate, to persons who have been forced to leave their homes in their homelands and are unable to return to them.

**PRINCIPLE 1**

The 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.

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### PRINCIPLE 2

Since refugees are forced directly or indirectly out of their homes in their homelands, they are deprived of the full and effective enjoyment of all articles in the Universal Declaration of Human Rights that presuppose a person's ability to live in the place chosen as home. Accordingly, the State that turns a person into a refugee commits an internationally wrongful act, which creates the obligation to make good the wrong done.

### PRINCIPLE 3

The act of generating refugees in some situations should be considered genocide if it is committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .'

### PRINCIPLE 4

A state is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien.

### PRINCIPLE 5

A State that has committed an 'internationally wrongful act' through the generation of refugees shall be required, as appropriate:

- (a) to discontinue the act;
- (b) to apply remedies provided under the municipal law;
- (c) to restore the situation to that which existed prior to the act;
- (d) to pay compensation in the event of the impossibility of the restoration of the pre-existing situation; and
- (e) to provide appropriate guarantees against the repetition or recurrence of the act.

### PRINCIPLE 6

In implementing the right of refugees to compensation, States shall, directly or through the United Nations and intergovernmental organizations, tie the granting of economic or developmental assistance to countries of origin to their fulfilment of this right.

### PRINCIPLE 7

The United Nations may, in the discharge of its role as guardian of the interests of refugees, claim and administer compensation funds for refugees.

### PRINCIPLE 8

The possibility that refugees or UNHCR may one day successfully claim compensation from the country of origin should not serve as a pretext for withholding humanitarian assistance to refugees or refusing to join in international burden-sharing meant to meet the needs of refugees or otherwise to provide durable solutions, including mediation to facilitate voluntary repatriation in dignity and security, thereby removing or reducing the necessity to pay compensation.