e. publica
public law journal

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Vol. 11 No. 2
July 2024
e-publica.pt

ISSN 2183-184x

Com o apoio de:

Fundação para a Ciência e a Tecnologia

IUS POST BELLUM OBLIGATIONS ON PROTECTION OF DISPLACED PERSONS: MAKING A CASE FOR THE RESPONSIBILITY OF STATES INTERVENING IN ARMED CONFLICTS

OBRIGAÇÕES DE *IUS POST BELLUM* EM MATÉRIA DE PROTEÇÃO DE PESSOAS DESLOCADAS: QUAL A RESPONSABILIDADE DOS ESTADOS INTERVENIENTES EM CONFLITOS ARMADOS

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Abstract: International Law's responses on protection of internationally displaced persons fleeing conflicts are traditionally grounded on International Refugee Law. However, this branch of Law presents several gaps in this context: namely, apart from special arrangements, it does not assign a specific responsibility on protection of displaced civilians to any State in particular. On the other hand, traditional theories on State's responsibility on displacement mainly focus on the responsibility of the State of origin. In this paper, I argue that *ius post bellum* may be used to assign specific responsibilities on protection to the States that intervened in such conflicts. The paper discusses the concept of "intervening State" and then elaborates on which States may be deemed as "responsible". Finally, several possible ways of protection will be put forward, departing from the current International Law's responses in this regard.

Keywords: *ius post bellum*; internationally displaced persons; refugees; complementary protection; subsidiary protection; asylum; resettlement; voluntary return

Resumo: As respostas do Direito Internacional em matéria de proteção de pessoas deslocadas internacionalmente, em fuga de conflitos, baseiam-se tradicionalmente no Direito Internacional dos Refugiados. No entanto, este ramo do Direito apresenta várias lacunas neste contexto: nomeadamente, à parte de acordos especiais, não atribui a responsabilidade específica de proteger civis deslocados a nenhum Estado em particular. Por outro lado, as teorias tradicionais sobre a responsabilidade do Estado quanto ao deslocamento concentram-se principalmente na responsabilidade do Estado de origem. Neste artigo, argumento que o *ius post bellum* pode ser utilizado para atribuir responsabilidades específicas de proteção aos Estados que intervieram nesses conflitos. O artigo discute o conceito de "Estado interveniente" e, em seguida, elabora sobre quais Estados podem ser considerados "responsáveis". Finalmente, serão apresentadas várias possíveis formas de proteção, partindo das respostas atuais do Direito Internacional a este respeito.

Palavras-chave: *ius post bellum*; pessoas deslocadas internacionalmente; refugiados; proteção complementar; proteção subsidiária; asilo; reinstalação; retorno voluntário

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1. Introduction

One of the most serious consequences of an armed conflict is the displacement of the population from the affected territories. Not only during, but also after the war, displaced persons may find many obstacles to live or to return to their countries of origin or to their homes, due to inevitable destruction or instability. Insecurity, lack of access to basic goods, and post-war unsteadiness can indeed continue for decades, which raises the question of where the affected population shall continue to live, if they want to enjoy all their internationally guaranteed human rights.

Usually, the treatment of persons who are displaced due to wars or conflicts is analysed within the framework of the International Refugee Law. However, apart from especial arrangements, international norms generally do not assign specific responsibilities to particular States to receive and protect displaced persons, unless those persons are already present in their territory. Moreover, legal solutions are still enshrined in the premise that the protection is supposed to end once the hostilities are over.

The question this paper seeks to develop is whether it may be argued that some States intervening in an armed conflict may have a special duty to protect those who were displaced as a consequence of the conflict, and for as long as the country of origin does not offer sufficient conditions for the enjoyment of basic human rights. This question may be especially interesting when we consider States who were particularly responsible for the aggravation of the conflict, namely due to violations of international norms on *ius ad bellum* or *ius in bello*. Answers to this question may be found in some *ius post bellum* principles, which are precisely dedicated to ascertaining and making effective possible responsibilities of the States who have intervened in the conflict.

This study tries to elaborate, based in some existing principles and past experiences, on the responsibility of some States as regards protection of the civil population that was forced to flee from armed conflicts in which they had intervened. For that purpose, I will start by pointing out the importance of discussion, highlighting that traditional International Refugee Law does not provide satisfactory answers in this regard. In a second moment, I will address some theories that focus on a perspective of international responsibility of States concerning protection of refugees, which also present some shortcomings. I will then proceed to develop the idea that intervening States in a conflict may have a duty towards protection of displaced persons. As such, I will elaborate on which States can be considered as "intervening" and as "responsible" for such protection. I will then discuss their potential obligations towards displaced persons, elaborating on the principles that must be taken into account in order to fully respect Human Rights Law. Finally, I will draw some conclusions.

2. The lack of answers in traditional Refugee Law on specific responsibility for protecting displaced persons

Traditionally, protection of internationally displaced persons fleeing a conflict is dealt with by International Refugee Law, which presents several gaps in this context. Indeed, this branch of Law does not provide a satisfactory answer as regards to *whom is responsible to protect displaced persons*. Even if some responses have been developed to provide international protection to "forced migrants" fleeing conflicts, they do not provide specific answers on who bears the responsibility for the displacement and, thus, for the protection.

Traditional Refugee Law adopts a somehow generalist "internalist" approach, which views the States of origin as bearing full, or at least predominant, responsibility for the creation of refugees (Chimni, 1998: 360). This is so because Refugee Law, as developed after World War II, is still deeply grounded on the idea that those who need protection are those who are "persecuted" in their country of origin. This idea corresponds to the concept of Refugee, as defined in the 1951 Geneva Convention on the Status of Refugees, and which is still the cornerstone of International Refugee Law[2]. Regional mechanisms have enlarged this protection to encompass persons who are displaced due to wars and conflicts, the so-called "war Refugees". In Central America, the Cartagena Declaration on Refugees[3] sets forth that protection to refugees should also encompass "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation". The African Union enlarged the protection to "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"[4]. Finally, the European Union created a "subsidiary protection" for persons seeking asylum who do not qualify as refugees. This protection encompasses persons who claim that, if returned to their country of origin would face a real risk of suffering serious harm, such as (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict[5].

Even though these instruments are paramount to provide protection to people fleeing armed conflicts, they are still limited in several ways. Some of them, such as the Cartagena Declaration, are not binding. Their territorial scope is restricted. Moreover, the protection that they afford present strict limits regarding its beginning and its end. Finally, they do not answer the basic question regarding *where* can forced migrants seek protection or, from another perspective, who is responsible to protect displaced persons.

The rule on "activation" of international protection is erected under a fundamental premise: States are only bound to protect *those who have*

2. According to Article 1 of the Geneva Convention, and after the 1967 New York Protocol, Refugee is "a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

3. Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984.

4. Convention governing the specific aspects of Refugee problems in Africa, adopted on 10 September 1969 at the sixth ordinary session of the Organization of African Unity, now African Union (AU).

5. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

already entered in their territories and ask asylum therein[6]. In other words, unless there is a special arrangement establishing otherwise, in order to claim a right to receive protection from a *specific State, one must be already present in its territory* (Gil, 2018: 253-297). When those who, being in the host State, ask for asylum therein, and fulfil the conditions to be considered Refugees or to be entitled to any other international protection status, then this State is bound to protect them in their territory, providing them a legal status and a set of social rights. If the asylum-seeker has not yet entered a country where they wish to seek protection, then no specific State is seen as especially responsible for admitting that person. This is commonly considered a "shortcoming" of the International Refugee Law. Although there is a universally recognised human right to "seek and to enjoy in other countries asylum from persecution" (Article 14 of the Universal Declaration of Human Rights), it is acknowledged that no State is considered *prima facie* as holding specifically the duty to receive and protect a certain person, unless that person is present in its territory. In other words, there is no right to obtain asylum in a particular State, or no Sate is more responsible than the others to receive displaced persons (Helton, 1998: 535)

It is true that some regional law systems have created legal arrangements for sharing asylum seekers between their Member States. European Union Law provides a good example, as it sets forth common rules for determining which Member Sate is responsible for analysing an asylum application made in the European Union (EU). Such rules are enshrined in the so-called "Dublin Regulation" [7]. However, they are not meant to assign responsibilities to Sates because of their possible involvement on the causes of the displacement. They are merely a "burden sharing" mechanism, which establishes criteria for the reception of asylum seekers that *are already present in the EU territory*, in the context of the common European asylum policy. These criteria are related to a series of other considerations, such as family unity (if an asylum seeker has family members that are already residing in a Member State, then this State shall be responsible), recent possession of visa or residence permit in a Member State, or the State through which the applicant has entered in the EU. Therefore, this is not strictly speaking a set of rules regarding which States in the world should, from the beginning, be especially held responsible towards persons who flee conflicts. It only provides principles on burden sharing of asylum seekers who have already managed to enter in the EU. The same can also be said regarding some global answers already rehearsed in this regard. For example, the recent 2018 Global Compact on Refugees focuses on equitable and proportionate burden sharing, viewing the protection of refugees in the world as problem calling for *global solidarity*. Even though the idea underlying this approach

6. Even so, the European Court of Human Rights (ECtHR) has been convicting States when they proceed to *push-back* measures, namely when they prevent a group of foreigners to enter in the State. These convictions were done through the prohibition of collective expulsions, foreseen in Article 4 of the 4th Additional Protocol to the European Convention of Human Rights (ECHR). See, amongst others, the landmark decision on the case *Hirsi Jamaa and others vs. Italy*, application, No. 27765/09, 23/02/2012, (push back on the Mediterranean Sea) and *D. and others vs. Poland*, application No. 51246/17, 08/07/2021. In this last case, the Polish authorities made the push back at the border, although some migrants claimed asylum. The Court considered that this decision was also a violation of the right to access to a fair procedure and legal remedy, as enshrined in Article 13 ECHR. Consequently, it could represent a first step towards a right to enter in a country in order to ask for asylum.

7. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

is to be applauded, one can doubt on its potential to provide effective answers to the refugees' problem. Calling for "global solidarity" has not yet proven to be a successful way to provide answers to mass displacement in the world. Mohee claims, correctly, that all these answers have focused mostly on "responsibility without accountability", endorsing a distributive rather than a corrective conception of justice. A view focused on "responsibility" may indeed be a way to provide more effective responses for the protection of internationally displaced persons (2021 :117-118).

Finally, current International Refugee Law also poses some limits as regards the "end" of the protection. International protection is traditionally seen as *temporary*, especially when it concerns persons who fled wars and conflicts. For example, the subsidiary protection scheme in the EU, precisely aimed at protecting persons who flee wars and general violence, is valid for one year, renewable for at least two years. In these renewals, national authorities will analyse whether the reasons that have grounded the protection still exist. Therefore, in principle, when the conflict is over, the protection shall end as well.

International Refugee Law is not concerned at all with whom has caused the conflict or with whom has fuelled the hostilities. As Souter claims, protection of displaced persons is seen as something to be pursued in a neutral manner, independently of contentious questions such as who bears responsibility for causing displacement (2014: 171). It is only relevant that there is someone in a safe territory (irrespective of where it is), who objectively needs international protection because he or she cannot return safely to their country of origin. If the State where the person is staying has signed the 1951 Geneva Convention on the Status of Refugee or is part of a regional scheme where "war Refugees" are protected, this is enough for the activation of International Refugee Law. It does not matter whether a certain State is especially responsible for that displacement and insecurity: the country of origin did not provide protection to the person, and the reception country, whichever it is, is now the only responsible entity for guaranteeing the displaced person's rights.

This lack of "*prima facie* responsibility" to receive displaced persons has led to several disputes in the past and may well aggravate in the future, in the context of mass displaced persons. States have sought to solve the question on who should bear the responsibilities for those fleeing their countries through different solutions, which can hardly be considered to work effectively when dealing with mass displacement. Consider the 2015 and onwards "European Refugee crisis", where Italy and Greece were overwhelmed with thousands of asylum seekers arriving to their shores on a daily basis. The EU rules in this regard, established in the already mentioned Dublin Regulation, proved to be utterly ineffective, as they led to the exhaustion of the countries with European external borders[8]. This led to a real "solidarity crisis" within the EU, with many debates on who should bear the responsibility to welcome migrants in their territories. In the end, the EU Council decided to enact a relocation decision, aimed at distributing asylum-seekers between EU Member-States under different objective and equitable

8. During the 2015 "crisis", many of migrants who arrived at the EU entered through the Mediterranean shores. Since they did not have family residing in the EU, or documents issued by any EU Member-State, the criteria that was applicable in most situations was the one that affords responsibility to the "first State of entry" or to the State where the applicants made their first asylum request. As a result, States with Mediterranean shores were those that were almost always deemed as the responsible ones.

criteria[9]. Notwithstanding, this decision was far from being consensual – quite the opposite: it faced strong opposition from some countries, that considered that they should not bear specific responsibilities towards the protection of migrants[10].

The solution found during the 2022 (and onwards) war in Ukraine was different: bearing in mind that Ukraine had direct borders with EU countries, the European Council enacted for the first time the "Temporary Protection Directive"[11]. According to this Directive, the Council may declare a situation of "mass influx of persons", and those included in the declaration may benefit from temporary protection in all EU Member States. In 2022, the Council's declaration did not foresee any distribution criteria of the displaced persons through the Member States: they could choose freely which EU State they wanted to live in[12]. It was believed that this could lead to a spontaneous and equitable distribution of displaced persons, due to the pre-existent Ukrainian diasporas living throughout the Member States. However, according to the Temporary Protection Directive, protection is accorded for a one-year period, that can be renewed for successive periods of 6 months until the limit of one more year.

The same lack of effectiveness can also be pointed out to resettlement schemes. Although this may be the current solution that most guarantees the displaced persons' human rights, for it does not depend on the one's capacity to finance their travel and to arrive securely to a safe country willing to receive them, its functioning in practice still faces plenty of obstacles. It is known that the volume of persons that are waiting to be resettled grossly outnumbers the quantity of available resettlement vacancies. That is so because resettlement functions purely on a voluntary basis. States in the world are completely free and sovereign to decide whether to open "vacancies" to receive individuals who are waiting for resettlement in refugee camps. Moreover, the resettlement procedure is very slow. As a result, a large number of displaced persons spend a big part of their lives in refugee camps, with hopes of being resettled someday. Some of these settlements turn into complete towns and accommodate several generations of displaced persons who have not known a life outside the camp. Their permanence in the camps may be due to the perpetuity of long-lasting conflicts or to the destruction of the countries of origin. In either case,

9. Council Decision (EU) 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

10. *Slovak Republic and Hungary v Council of the European Union*, joined cases C-643/15 and C-647/15. The European Court of Justice decided that the EU had not extrapolate its competences by issuing the relocation decision. In the judgment in *Commission vs. Poland, Hungary and the Czech Republic* (C-715/17, C-718/17 and C-719/17), delivered on 2 April 2020, the ECJ upheld the actions for failure to fulfil obligations brought by the Commission against those three Member States, stating that by refusing to comply with the temporary mechanism for the relocation of applicants for international protection, these States have failed to fulfil their obligations under European Union law, and they could rely neither on their responsibilities concerning the maintenance of law and order and the safeguarding of internal security, nor on the alleged malfunctioning of the relocation mechanism to avoid implementing that mechanism.

11. Council Directive 2001/55/EC of 20 July 2001, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

12. Council Implementing Decision (EU) 2022/382 of 4 March 2022, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

a solution that was thought to be temporary becomes the perpetual life of generations of displaced families.

International Refugee Law is, thus, still based in two dogmas that hamper a satisfactory response for the protection of internationally displaced persons fleeing war and conflict: on one hand, the dogma according to which no country is especially responsible for welcoming refugees, and on the other hand, the dogma that welcoming solutions shall be temporary and, when enacted because of a conflict, shall cease once the conflict is over.

3. Traditional Approaches on State's International Responsibility for Refugees

In order to overcome the apparent lack of answers to the question on "who shall bear the responsibility for refugees", some authors have already focused on a perspective that departs from the theories of the State's international responsibility. However, many of these theories only view the State of origin as the sole responsible for the *exodus*. Moreover, the majority frames the responsibility for the creation of displacement as a responsibility towards *other States* – namely those who received the influx of migrants. Nevertheless, the importance of these constructions is undeniable, as they may pave the way for further developments on States' responsibility for displacement.

An idea of developing Sate's responsibility for the displacement of persons was firstly broached by Sir Robert Jennings (1938: 98), who elaborated on this topic as follows: "in the conduct of affairs in their territories, States are obliged not to violate the rights of other States. By prompting the displacement of its nationals, the State of origin restricts the exercise of territorial jurisdiction of third States by impinging on their sovereign right to decide whom to admit to their territories" (Mohee, 2021: 117). Responsibility for displacement was seen as fully pertaining to the State of origin and enforced by States that were affected by the migratory flows. With the same view, G. Goodwin-Gill claimed that this responsibility *vis à vis* other States could be supported with an analogy with a territory substantial transboundary harm (Beyani, 1995: 132). However, this approach corresponds to an already overcome vision of International Law, as a branch of Law only concerned with inter-State relations.

Some authors, however, started to develop an idea of responsibility for displacement that would work towards the displaced persons themselves. In this regard, Mohee's work is particularly important. It departs from the idea of violation of Human Rights, and highlights several human rights that are breached in a context of forced displacement, including some that usually are not taken into account, such as identity, heritage, possible sociocultural isolation, assimilation, or discrimination in receiving countries (Mohee, 2021: 112).

On the other hand, most works on international responsibility for displacement focus on the responsibility of the States of origin. N. Ahamad, for example, strongly argues that "countries of origin should squarely be held responsible for refugee flows: it is their responsibility not to create problems of galling proportions for other states, and they thus should have a higher degree of responsibility than receiving states in international law" (2009: 1). This perspective is indeed very important for all those – unfortunately numerous cases – where the country of origin persecutes its own citizens. However, it falls short on cases where the displacement was provoked by an armed conflict. Indeed, in some cases, States of origin may

also be responsible for displacements in these contexts, for the beginning of the conflict (which can be a result of a self-defence), or for possible breaches of *ius in bello* norms. However, they certainly are not responsible for all conflicts that may occur in their territory, and also not for all the consequences of such conflicts. That is why a broader approach to responsibility is needed in this realm.

4. A new approach: responsibilities of States intervening in armed conflicts towards the displaced persons

It must be discussed whether the *several States that intervene in armed conflicts* should bear stronger duties to protect *persons who flee these conflicts*. Possible arguments in this direction can have the support of *ius post bellum* theories, as this "branch of Law" aims, *inter alia*, to establish norms and principles regarding responsibilities of *all States* that were involved in a conflict for the harms that they have created. Therefore, it may pave the way to ascertain whether these States may have special responsibilities towards displaced persons, and also what obligations would this responsibility give rise to.

Traditionally, the centre of the debate on legitimacy and war has been focused in the *ius ad bellum* and the *ius in bello*. Few legal scholars have addressed comprehensively the issue of an eventual *ius post bellum*, apart from studies on responsibility for payment of damages. A debate around a "*ius post bellum*" gained some attention in the aftermath of the Iraq and Afghanistan wars in the 2000s. B. Orend was one of the first scholars to theorize on this topic, mentioning an *ius post bellum* branch of International Law that would be based on three axes: compensation for damages, punishment of international crimes, and establishment of measures for long peace (2013). Several authors continued to develop this "branch of law", widening it to more areas than mere duties to reconstruct. Moreover, the application of *ius post bellum* was further extended as regards its time frame: indeed, more recent authors correctly stress that the application of its norms and principles does not depend on the end of the conflict [13]. In particular, principles regarding enforcement of responsibilities for possible harms may be applicable while the conflict is still pending.

However, protection of the affected population, namely of internationally displaced persons, has been seldom studied the realm of *ius post bellum* theories, apart from some important contributions, such as those from Souter and Zanetti (2019: 294). This is a remarkable omission since mass displacement is one of the most dramatic consequences of armed conflicts. In fact, when one questions on whether intervening Parties in a conflict have legal obligations towards displaced persons, one finds almost only responses pointing towards *moral obligations*. However, bearing in mind that some of these States may have indeed caused harm to these persons, namely by contributing to make their country of origin an impossible place to live, shouldn't they bear a *stronger duty* to protect them, comparing to other States in general?

In order to develop possible argument in this direction, one must start by asking who the "intervening States" in a conflict would be, and who, among them, would bear specific duties towards displaced persons fleeing the conflict. Thus, there are two different questions to be answered: who would be the intervenient States and, from those, who would be the ones bearing

13. See, for example, Rojas-Orozco (2021: 36).

special responsibilities to protect displaced persons? Answers to both questions have different levels of latitude.

4.1. The concept of "intervening States"

A traditional approach to an international armed conflict would consider as "intervenient States" only the parties that are directly opposed in the hostilities, those that use armed force to break the adversary's resistance. One may indeed adopt a strict concept, which would only encompass the States that *are directly fighting* in a war theatre. This concept would encompass not only the two direct opponents in a hostility, but also their allies, as long as they intervene directly with their armed forces. Some authors, however, adopt a broader concept, claiming that also those who were responsible for training or who have somehow helped one of the parties to the conflict, should also be seen as "intervening States" in that armed conflict. Examples include covert operations, availability of military bases in the territory, supply of weaponry, or training of military or paramilitary forces during a civil conflict, among others (Alexander, Norris, 2020: 3). This enlargement is especially important, given that these types of interventions have largely come to define participation in wars in the late 20th and 21st centuries. Moreover, this perspective could be especially relevant in the context of civil wars, where non-State actors are often supported by another State.

There are some strong moral arguments to claim that States that have helped those directly responsible for conflicts should bear a special responsibility towards protection of displaced persons. In this context, Pope Francis reproved States that sell weapons to aid conflicts in other States but refuse to accept refugees displaced by those conflicts. Alexander & Norris also claim that States that engage in these actions retain special obligations to people displaced by the conflict they have helped to provoke or prolong, so long as unrest and/or violence continue (2020: 3). However, a broader perspective seems to present obvious justification not only from a moral point of view, but also from an International Law perspective. It is vastly known the number of cases where powerful States have subsidized militias or insurgents to overthrow a particular political regime in power, oftentimes giving rise to long and violent civil conflicts. International Law strongly condemns these actions, as they represent a clear violation of the cornerstone principle of non-intervention in internal affairs, as enshrined in Article 2 (7) of the UN Charter. In this context, one should recall the famous International Court of Justice decision in the case *Military and Paramilitary Activities in and against Nicaragua,* where the U.S. was considered to have breached this principle by supporting the *Contras* in their rebellion against the Sandinistas in Nicaragua[14]. This could also be the case for situations where there could be doubts on whether the principle of non-intervention was indeed breached[15].

14. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986.

15. Cases where this breach is not clearly established are more frequently currently, especially since the NATO's intervention in Kosovo was, and other cases where States "recognise" the independence of other entities to justify that they are acting under the right of collective self-defense (as enshrined in Article 51 of the UN Charter). This is also the case of some controversial interventions based on the theory of "responsible to protect".

The solutions adopted by current International Law on responsibility of States also support a "broader" concept of "intervening States" for the purposes of attributing duties for reparation of harms to displaced persons. Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "Draft Articles") [16] extends responsibility to those who have provided aid or assistance in the commission of an internationally wrongful act [17]. This is an important data to uphold the somehow "broad" concept of intervening State sustained in this paper.

All these considerations may support the idea that "intervening States" must encompass not only those States that are directed opposed in hostilities, but also the States that have directly and indirectly interfered in the conflict, by assisting one of the parties – be it a country or rebels, insurgents or terrorists.

4.2. The "responsible" intervening States

Now it is time to ascertain whether all intervenient States in an armed conflict – as defined above - must be considered as holding a specific responsibility towards displaced persons. Not willing to dwell in the theories of just war, humanitarian intervention or the theories on responsibility to protect, it could be argued that a State who entered in a conflict claiming a "just intervention" against an unfair political regime that has already caused thousands of refugees, would not be responsible for those who had fled the country after the intervention, as its intervention was just, fair or justified with the willingness to enforce internationally protected Human Rights.

A maximalist approach in this regard is taken by Zanetti, who considers that as far as it goes for a responsibility to protect displaced persons, it is irrelevant whether a State's intervention is qualifiable as just or unjust (2019: 294). The author argues that protection of affected persons shall not be seen as a punishment, but as a form of compensation for an unjust violation of the fundamental rights of those affected (Frowe, Lazer, 2018). Then, a State's obligation for protecting these persons would be independent from the questions on whether its intervention was licit or illicit (May, 2012: 297). This would be almost as defending an "objective" responsibility: all intervenient in a conflict should have a duty to protect displaced people, even when they claim that they had intervened to protect these people in the first place. It would be an immediate consequence for the mere intervention. Zanetti further argues that this perspective would avoid a paradoxical result: harming innocent people on account of defending their human rights (2019: 302).

On the contrary, Souter – one of the scholars that has most studied responsibility towards displaced persons – considers that interventions in conflicts that were overall justified and carried out in the most humane manner possible should not engage the responsibility of their actors. As such, the author claims that reparation must only be required from the actors who bear responsibility for unjust harms. The author adopts, thus, a traditional approach to responsibility, which would be grounded on the classic requirement of an "illicit act" (2014: 183).

16. Adopted by the International Law Commission at its fifty-third session, in 2001.

17. We are aware that the use of Article 16 leads to several controversial questions. In particular, it must be stressed that, for the purposes of this paper, Article 16 is considered as to being the basis of an autonomous internationally wrongful act of the State that aids or assists the other State.

Zanetti´s point of view has one important advantage: it may combat abusive interventions, where States falsely claim important values to intervene, but in reality are just contemplating their own national interests. However, his broader theory may raise some problems in practice and may seem too unrealistic to be upheld by the global community. Indeed, it raises problems in cases where intervention was licit and has followed a legitimate procedure. Interventions made under the UN Security Council's decisions, either under the Chapter VII or Peacekeeping operations (that do not have a specific provision under the UN Charter and are frequently seen as taking place under "Chapter VI and a half") (Peter, 2019) are undoubtfully licit and should not engage any responsibility of the participants – as long as they comply with their mandate. Advocating otherwise could prevent UN States from willing to participate in these operations. Moreover, a *specially aggravated responsibility* to protect displaced persons towards these States would not be morally arguable. On the contrary, one could perfectly advocate that these States had already "done their part" while trying to solve the conflict or to stabilize peace in the affected territory.

Thus, I consider that it is more realistic and morally more justifiable if we consider that only those who have intervened *illicitly* in an armed conflict may have a special responsibility towards displaced persons. This conclusion is also aligned with current International Law on State's responsibility. Article 1 of the Draft Articles clearly states that "every internationally wrongful act of a State entails the international responsibility of that State". According to the Draft Articles, the concept of internationally wrongful act of a State consists of an action or omission that (a) is attributable to the State under International Law; and (b) constitutes a *breach of an international obligation* of the State (emphasis added) [18]. Therefore, only those interventions that have provoked the harm (displacement) due to *violations* of international norms must be considered [19].

What one must question now is the type of violations of international norms that may be deemed relevant in this context. Both an *ius ad bellum* and an *ius in bello* perspectives must be considered.

Beginning with *ius ad bellum*: after the new world order emerged from the World War II and a new system of collective security, the prohibition of unilateral use of force became the paramount norm of International Law. It is one of the UN Charter's basic principles, being expressly mentioned in Article 2 [20]. The only exception to this rule is the right to self-defence, enshrined in Article 51 of the UN Charter. In the present context, the right to collective self-defence may emerge as particular important, as it has been advocated a few times as legitimizing the use of force. A rightful use of force in the name of self-defence cannot be deemed illicit and precludes

18. See, also, *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 3, at p. 29, para. 56.

19. As regards which acts may be attributable to the intervening States, special questions may arise on the field of *ius in bello*. Chapter II of the Draft Articles deal, in detail, with the problem of attribution of a conduct to a State, which should be read together with Humanitarian International Law's norms.

20. There has been some controversy on whether this principle could be considered as an *ius cogens* principle. In 1966, the International Law Commission seemed to have recognized that (see Paragraph (1) of the commentary to article 50 of the Draft Articles on the Law of Treaties, Yearbook of 1966, vol. II, p. 247). However, the Draft Conclusions on identification and legal consequences of peremptory norms of general international law of 2019 and 2022 established a list of peremptory norms, where the general prohibition of the use of force is not mentioned, although the prohibition of aggression is referred to.

international responsibility. Indeed, according to Article 21 of the 2001 Draft Articles, the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Special importance must be paid, though, to the substantial and procedural conditions of collective self-defence, as this clause cannot be an open door to illicit interventions. An intervention grounded in the right of individual or collective self-defence may only take place if an armed attack, as defined by the UN, occurs against a Member of the United Nations. The intervention must respect the principle of proportionality and necessity in all their dimensions [21]. Moreover, measures taken by Member Sates shall be immediately reported to the Security Council and may only be maintained until this body has taken action.

Finally, even when the intervention was licit, it may become illicit when *ius in bello* rules – that is, International Humanitarian Law norms – are not respected. In this context, the International Committee of the Red Cross highlights a duty, established by State practice, for parties to the conflict to prevent displacement (Mohee, 2021: 122). If *ius in bello* norms are broken, the intervention ceases to be legally justified, and a ground to engage the responsibility of the intervening State may arise. Thus, a State that had a legitimate title to intervene, may acquire an aggravated responsibility towards displaced persons once its conducts in the intervention become illicit. In this context it must be stressed that the ILC's Draft Conclusions on identification and legal consequences of peremptory norms of general international law of 2019 and 2022 recognise, as *ius cogens* norms, the basic rules of International Humanitarian Law. This recognition may indeed support the idea of an aggravated responsibility for States that breach these norms.

As a conclusion, one could uphold a special responsibility of intervening States in conflicts which have caused displacement of civilians. I am completely aware of all the opposing voices in this regard. For example, although discussing responsibility for displacement *vis à vis* receiving States, Akhavan & Bergsmo claim that engaging responsibility of the aggressor Sate is not "realistic" (1998: 246). However, the lack of "realism" does not seem a strong and convincing argument, for it was not tested yet. Indeed, the type of obligations may be varied and dependant on which State is responsible, as will be discussed below. Moreover, as seen above, it is not only the "aggressor" that shall be considered responsible, but also other interveners in the conflict. The authors also claim that "it may be exceedingly difficult to denigrate one state as an aggressor since the use of armed force in determining liability may prove to be difficult". These arguments do not seem conclusive either. Indeed, according to my view, *ius ad bellum* and *ius in bello* will serve to precisely establish the practice of wrongful acts and their authors.

So, it seems reasonable to defend that some States have stronger responsibilities to protect forced migrants who have fled violence and instability. That is the case of States which have caused or aggravated displacement with their participation or support in the conflict, even if the causal link may not seem direct. Alexander and Norris argue that such a duty may well happen when the cause for displacement is only remotely connected with the Sate's action (2020). Since this displacement was a

21. On the principle of proportionality in the use of force, see Corn and Geoffrey (2020), as well as J.G. Gardam (1993: 391–413).

consequence of the conflict, it is tenable that those States that have intervened in the war in some illegitimate way may be deemed as especially responsible for providing solutions for the harm that the war has caused – in this context, by providing protection to displaced persons.

As a final remark in this context, one must stress that this responsibility shall work towards *displaced persons themselves*. Indeed, as mentioned, current International Law does no longer take the view that responsibility of States works exclusively towards *other States*. This approach can find some support in the 2001 Draft Articles, which do not exclude that responsibility may be directed towards other subjects of law besides States. Moreover, the International Human Rights' Law monitoring mechanisms have been recognising - and even enforcing - the State's responsibility towards individuals, when they find that one of the Contracting States has breached its Human Rights' obligations [22]. Also, in a noteworthy example, the UN Security Council has determined, in Resolution 687(1991), that Iraq was "liable under international law for any direct loss, damage [...] or injury to foreign Governments, *nationals* and corporations as a result of its unlawful invasion and occupation of Kuwait" (emphasis added). According to Ahmad, this was the first time that it was unequivocally recognized that serious breaches of international law in the context of armed conflict may entail direct responsibility towards the individuals injured (2009: 10).

As a conclusion, States' responsibility shall work *vis à vis* individuals themselves. As such, it is suitable that responsibility may be upheld towards the displaced persons who have suffered consequences for the intervening State's wrongdoings [23].

In addition, it is defensible that illicit displacement may also be advocated by the international community as a whole. Indeed, according to Article 48 (1) (b) of the Draft Articles, if the obligation breached is owed to the international community as a whole, other States may invoke responsibility. This is of the utmost importance, since the obligations discussed in this paper (namely on *ius ad bellum and ius in bello*) are enshrined *erga omnes* norms (customary norms, Human Rights Treaties, the UN Charter, etc.).

Having a third State speaking in the name of victims before international Courts may be indeed acceptable. The latest developments of the International Courts points towards that direction: in 2022, the International Court of Justice (ICJ) admitted a case filed by The Gambia against Myanmar, regarding the alleged genocide of Rohingya people in the latter. The ICJ claimed that "the question of what may have motivated a State such as Gambia to commence proceedings is not relevant for establishing the jurisdiction of the Court" [24]. This could definitely contribute to overcome a

22. According to Article 41 of the European Convention on Human Rights, the ECtHR "shall, if necessary, afford just satisfaction to the injured party". Also, the Inter-American Court of Human Rights may rule "that the injured party be ensured the enjoyment of his right or freedom that was violated" (Article 63(I) of the American Convention on Human Rights). The UN Human Rights Committee has also been pointing some measures to be adopted by States who fail to fully observe their obligations under the International Covenant on Civil and Political Rights, in the context of individual communications made under the First Optional Protocol. It frequently holds that a victim of a violation was entitled to a remedy, including appropriate compensation.

23. Stressing the legal status of the individual on International Responsibility Law, Peters (2018). See also Klabbers (2013: 107-123).

24. The Court reaffirmed that "all the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of

possible objection regarding the "lack of realism" of displaced persons calling for responsible intervening Member States' duties.

It is now time to address what specific "obligations towards displaced persons" may be demanded from the responsible intervening States.

5. Protection obligations towards displaced persons

According to the traditional theory on international responsibility of States, the State responsible for the wrongful act is under an obligation to make full reparation for the injury caused (Article 30 of the 2001 Draft Articles). The ICJ's well-settled jurisprudence affirms that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" [25]. However, displacement of persons fleeing conflicts raises special problems that must be addressed through specific responses that can be found in International Refugee Law. Indeed, until the causes for displacement have not ended, a full reparation – which would entail return to the people's homes – may not be possible. International Refugee Law has been, for long, developing the best ways to provide protection of internationally displaced civilians in the meantime. These solutions provide some reparation in the traditional sense, as they provide protection to some of these persons' human rights that were being endangered by the conflict, such as their right to personal safety and their right to personal integrity.

According to this branch of Law, the protection of internationally displaced persons may be done through three traditional responses: third-country resettlement, voluntary repatriation when possible, and local integration in the country of asylum. Reasoning with these three "solutions", Souter argues that responsible States are duty-bound to offer the most fitting form of reparation to refugees for whose flight they are liable. This may even encompass resettlement or local integration in the responsible country, if this response is considered the most fitting. For the author, an offer of one of these two solutions is not discretionary but rather obligatory, and a matter of justice (2014: 178).

The choice between one of these solutions must, however, take into account not only the full protection of the persons' human rights, but also the person's will. As Souter claims, an important aim of protection is the restoration of full dignity and agency of the person (2014: 179). This aspect is especially important, as, in practice, displaced persons are often seen as mere units of a collective mass. For example, the European instrument dealing with "mass influx" of persons - the Temporary Protection Directive [26] – establishes a solution of collective protection to groups. It does not require that the persons' aim must be considered for the purpose of deciding where they shall be accommodated. On the opposite, the entire regime only mentions numbers and allocation of persons to Member States according to

genocide, by committing themselves to fulfilling the obligations contained in the Convention". Application of the Convention on the prevention and punishment of the crime of genocide (The Gambia V. Myanmar), 22 July 2022 Judgment.

25. Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 47.

26. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

these latter's reception capacities. It is true that the EU Council Decision that has activated this protection mechanism to persons fleeing the Ukrainian territory after the 2022's Russia's invasion gave weight to peoples' will, as they could choose the EU Member State where to seek protection [27]. However, this was somehow seen as an "exception" to the Directive's scheme, that has even encountered some criticism from several legal scholars (Thym, 2022). If we compare it to the 2015 decision on relocation of asylum seekers who were in Greece and in Italy, the solution was quite different (Gil, 2022: 45-62). The latter did not give any weight to the persons' wills, who were allocated to EU Member States according to objective criteria. In the end, this solution proved to not function effectively, as many persons fled their "responsible Member Sates" to find preferable destinations, namely in States that welcomed members of their extended family or national communities.

However, one can argue that Human Rights Law is currently putting more emphasis on the migrants' personal will. Indeed, one of the most important principles in current International Migration Law is the prohibition of collective, "blind", or automatic decisions, such as collective expulsions. Many scholars already argued that the mentioned prohibition was already part of International customary law (Martínez, 2007: 54), but since 1963, it is codified in Article 4 of the 4th Additional Protocol of the ECHR, and also in Article 19 of the European Charter of Fundamental Rights, and the ECtHR has been quite active on scrutinising the respect for this human right [28]. That being so, the personal will of each displaced person may assume more relevance when searching for protection solutions.

The choice of the most suitable response for displaced persons should be as wide as possible, allowing them to decide between durable solutions and, ideally, permitting them to switch between such solutions (so that, for example, a first decision on local integration would not preclude them to later decide to return to their original home).

As mentioned, traditional Refugee Law sets forth three typical solutions: (1) resettlement (2) stay in the country of asylum and (3) voluntary repatriation.

5.1. Resettlement

Resettlement consists of a relocation of displaced persons from the country where they are staying (either the country where hostilities are taking place or a neighbouring country) to a safe country. It usually corresponds to the best solution for protecting displaced persons' rights, as the travel to the host country is organised, and therefore migrants do not need to leave through unsafe means or using human smugglers. Resettlement may take place while the conflict is still pending. However, since it is a procedure that

27. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

28. According to the Court, an expulsion can be deemed as "collective" when it encompasses a group of migrants who did not had their individual case separately analysed. See *Conka v. Belgium*, No. 51564/99, 05/02/2002. This is so irrespective of the number of migrants or of the context where the measure took place. The important aspect in this regard is whether the immigration services have analysed the personal circumstances of each person of the group individually. The Court has been applying this case-law not only to expulsions *stricto sensu* but also to push backs. See *Hirsi Jamaa and others v. Italy*, No. 27765/09, 23/02/2012.

normally takes time, it may also operate after the conflict, while the country of origin does not offer safe or minimum conditions for living with dignity.

States who, due to their intervention in a conflict, must be deemed responsible for protecting displaced persons, can help in the resettlement process in several ways: from directly admitting displaced persons in their territory to other types of contribution, such as with funds, travel arrangements, and other logistic support to other States. It is especially important to highlight this latter option. Indeed, it is not always reasonable to claim a duty for responsible States to welcome displaced persons in their territory. It would be irrational to advocate a resettlement of civilians in the "enemy country", as displaced persons would obviously fear persecution on the grounds of nationality therein. The same may not be said, though, of countries who have intervened in the conflict but were not one of the directly opposing parties - for example, a State who has participated merely by providing training to one of the fighting sides. In this situation, there might not be any fundamental argument against the resettlement of the displaced persons in its territory. In line with this perspective, Souter (2014: 172) considers that resettlement could fall under the reparation principle (2014: 174). Also J. Carens argues a *general duty to admit refugees* as a causal connection when the actions of States have contributed in some way for the reasons why such persons are no longer safe in their countries (2015: 195). In this scenario, one could argue that, for example, the United States and other coalition forces would have a particular duty to receive Afghan citizens after the invasion of Afghanistan in 2001 and also Iraqi citizens after the Iraq's invasion of 2003.

Either way, it should be left to the displaced persons to choose which intervening State would be responsible to accommodate them. The respect for the persons' will must be considered as a paramount norm in this context, as mentioned above. Otherwise, there could be cases of forced displacement, which would amount to an intolerable violation of Human Rights Law or even Humanitarian Law.

5.2. Voluntary repatriation

A second possible long-term solution for displaced persons is voluntary repatriation to their country of origin. However, according to International Refugee Law, refugees *lato sensu* have a right not to be forcibly returned to a situation in which their life or freedom is threatened. Otherwise, there could be a violation of the *non-refoulement* principle, enshrined in Article 33 of the Geneva Convention on the Status of Refugees and of the prohibition of torture, inhuman and degrading treatments, as stems from the ECtHR's case-law regarding Article 3 of the ECHR [29]. Consequently, repatriation can only take place when the country of origin becomes safe again.

This apparently clear condition, related to the country of origin's safety, may however be more complex than it may seem. Indeed, the end of a military

29. Helton (2002: 543) argues that States often prefer to recognise a status of "temporary protection" to displaced persons than a more stable one, such as the Refugee Status. The temporary protection is often linked to the provision of "safe return when conditions permit". The Author claims that "no safeguards may exist which bind the host country to ensure that conditions in fact are sufficiently safe to warrant a decision by the host state that refugees must return because they no longer merit international protection". Even though, recent International Law evolutions point towards a prohibition of return in cases of general violence, at least when it achieves a serious level. See recent ECtHR decisions, Syria.

conflict does not necessarily mean that the country of origin is immediately safe and sound. Several reasons may contribute for persistence of risks to lives or physical integrity of residents (Zanetti, 2019: 300). There may be no clear "aftermath" of the war, but a long residual state of conflict and insecurity. Indeed, post-war instability is the most common phenomenon and raises several problems as regards displaced persons' rights. Even if a war has technically ended, if a person's home is destroyed and their security cannot be guaranteed, a safe return to the country is not possible. For example, the Iraq invasion of 2003 resulted in instability, ethnic conflict, and insurgent fighting between Shiite and Sunni groups, with significant forced displacement beginning three to four years after the war concluded; 89% of those displaced claimed that they fled because of sectarian violence that resulted from the instability following the invasion, rather than the U.S. invasion itself (Alexander, Norris, 2020: 4). Mohee correctly stresses that safety, in the context of return, entails a number of layers of protection: it shall include physical safety, "which refers to a secure return environment shielded from attacks and harassment with safeguards of freedom of movement and access to demined land", legal safety, which "pertains to non-discrimination in the exercise of civil, economic, social, political, and cultural rights" and, finally, material safety, which "alludes to access to humanitarian assistance and essential services in the initial stages of the repatriation exercise" (2021: 131). The author further argues that a "sustainable return also necessitates reconciliation", which demands the restoration of a functional State–citizen relationship (2021: 134). The author affirms an optimal scenario that may be impossible to demand in every situation. However, he draws attention to the fact that a return that fully respects human rights may demand more than just the respect of the *non refoulement* principle, which constitutes the minimum level required by International Refugee Law.

Secondly, the return must take place on a *voluntary basis*, in safe conditions and with dignity. This decision should be based on a free, knowledgeable and individual free choice, and refugees and displaced persons must have adequate information to make their decision in an informed way.

The right to return is recognised under International Human Rights hard Law. The International Convent Civil Political Rights of 1966 sets forth the right to return to one's country – which is important for internationally displaced persons. Mohee further argues that there are "compelling evidence of a primary obligation of implementation of the right of mass return in customary international law, drawn from the right to homeland within the right to self-determination" (2021: 114).

Authors who have been studying the responsibility of the States for the displacement traditionally view the right to return as imposing special duties only towards the countries of origin (Mohee, 2021: 111). However, *ius post bellum* theories may also pave the way for a duty from intervening States to *facilitate the return of displaced persons to their country of origin*. It is reasonable that responsible States' duties do not end completely when the asylum ceases to be necessary. It is judicious to consider that they may have a duty to cooperate with the relevant agencies to ensure safe and voluntary return.

In this context, in 1992, the Agenda for Peace of UN Secretary-General Boutros Boutros-Ghali emphasized, as a priority of post-conflict peacebuilding, a smooth and early repatriation and resettlement of refugees

and displaced persons[30]. Also, the 2001 report of the International Commission on Intervention and State Sovereignty that originated the principle of Responsibility to Protect (R2P) stressed the obligations of States and international institutions on "ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons".

From another point of view, in cases where the States of origin have lost their territory, occupant States have the duty to accept displaced persons back – provided, obviously, that these persons so wish and that the prohibition of refoulement is assured. That being the case, once in the territory, the responsibility for their protection falls under the new occupant power. The authorities of the occupant State shall treat returnees according to human rights standards: guaranteeing their right not to be discriminated against, and to political, legal, and physical security. There is nothing new in this: new powers are bound to respect human rights of all those who reside within the territory they now control, irrespective of their nationality.

Souter claims that voluntary repatriation can clearly act as a form of restitution, with the ability of voluntary repatriation to restore the *status quo ante*, by allowing displaced persons to regain their own homes, properties and assets, and resume their lives prior to displacement (Souter, 2014: 175). Holding the same views, Beyani claims that the right to return is the way to impose the *restitutio in integrum*. In the author's perspective this may be accompanied with payment of compensation victims for injury, loss, damage, or expropriation of property rights upon flight (1995: 146). Restitution through voluntary repatriation has indeed been assumed to be the optimal form of redress for the harms of displacement in several documents. International Courts have also been putting special emphasis on protection of displaced persons' right to maintain their former houses. The ECtHR's decision on the *Louizidou* judgment of the Turkish occupation of Northern Cyprus is particularly important in this regard[31]. The Court considered that Turkish armed forces were an occupying power in the North part of Cyprus since 1974 and had forced the applicant, together with other 200.000 other Cypriot nationals out of their homes. Since they were not able to return, Turkey had violated their rights under article 1 of Protocol 1 of the ECHR.

Souter points out, conversely, that it is important "not to overstate either the capacity of voluntary repatriation to provide restitution, or the moral desirability of using this solution to achieve restitution for refugees". The author argues that some of the harms of displacement are "so egregious as to be practically irreparable" and, on the other hand, if the *status quo ante* was itself unjust, he considers that it should not be restored in any case. Finally, and perhaps more challenging, the author claims that restitution should not create fresh injustices by displacing secondary occupants who may have developed genuine property rights over the course of their extended residence (Bradley, 2013: 188-189). Although this last idea may be grounded on the protection of human rights of the new inhabitants, it may nonetheless raise some questions on conflicts of rights, which would have to be solved on a case-by-case basis, and always accompanied by the payment of necessary compensation. Adopting a more absolutist view in this context, Mohee stresses that housing and property restitution are paramount to "reaffirm identity and a more entrenched sense of security".

30. Report of the United Nations Secretary-General to the Security Council, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, A/52/871 – S/1998/318, United Nations, New York, 13 April 1998.

31. ECtHR, *Loizidou v Turkey*, No. 15318/89, 23/03/1995.

As such, the author claims that the possible excuse of a lack of capacity for accommodation with the passage of time is not to be accepted (2021: 133).

International Law developments support the conclusion that, irrespective of the cause of a conflict, people that have been displaced should be entitled with restitution of their lands, housing, and property (Martínez, Anabitarte, 2020: 259). On this topic, one should make a reference to the 2005 Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons (Martínez, Anabitarte, 2020: 263). These principles mention that all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore, as determined by an independent, impartial tribunal. An example of good practice in the restoration of housing, land, and property is the case of Bosnia and Herzegovina, where, a decade after the war ended, 90% of approximately 200,000 claims for property restitution for refugees and displaced persons had been resolved (Williams, 2004: 553).

Several times, resolution of disputes concerning the restitution of housing, land, and property of refugees and displaced persons is made through the combination of three mechanisms: specialized courts on the issue of land, ordinary courts, and traditional authorities applying local custom [32] (Martínez, Anabitarte, 2007: 264).

5.3. Stay in the country of asylum

The third traditional solution foreseen for displaced persons is their permanence in the country of asylum. Indeed, even when the country of origin becomes "safe" again, voluntary return may not be desired by refugees, as many of whom may have already rebuilt their lives elsewhere by the time voluntary repatriation became possible (Souter, 2014: 176). In this realm, repatriation should not be imposed. However, it is arguable whether the State of asylum is *legally obliged to provide a right to remain in the territory*, when the country of origin becomes safe again. According to traditional International Refugee Law, protection ceases to be needed and legal obligations of the receiving State end in such cases. Indeed, a return to the country of origin would no longer breach the prohibition of refoulement. Therefore, in general, States of asylum could freely decide whether to continue to provide residence to the displaced persons after the end of the conflict.

In general terms, Carens has powerfully argued that depriving non-citizens of a right to stay in the host society after a number of years may imply denying them the social ties that they have so far developed, and which provide meaning to their lives. Human Rights Law guarantees these interests in some way. The ECtHR has been developing protection against expulsion to integrated foreigners who reside in a country after long time and who are deeply integrated in the host society. That protection is afforded through the guarantee of the human right to private life, protected under Article 8 of the ECHR. In these cases, the Strasbourg judges analyse if the foreigner has developed such strong ties with the host country that make this country and its community the centre of their private lives [33]. They furthermore consider

32. OCAH/DIDI, UN-HABITAT, ACNUR, FAO, ACNUDH y el CNR (2007: 27–28).

33. Among others, *Kurić and others v. Slovenia*, No. 26828/06, 26/06/2012. For more developments, see Gil (2021: 490-512).

the existing ties with the country of origin. In cases where the centre of the person's private life is now the host country, their removal to a country with which they have lost all connections may indeed be an illegitimate interference with their human right to maintain a normal private life. Nonetheless, it must be highlighted that only in cases where such ties are especially strong, and were developed throughout time, and accompanied with almost non-existent social ties in the territory of origin, did the ECtHR find that there was a violation of this human right.

6. Final Remarks

One of the most important consequences of armed conflicts is mass displacement of persons. International Law's traditional answers for the treatment of persons fleeing general violence and persecution are still found in the realm of Refugee Law. Although some evolution has been made in this field of law, namely through the creation of mechanisms, under regional systems, for the protection of persons fleeing context of general violence, several gaps persist. One of the most relevant of these is the lack of criteria for attributing responsibility to a specific State for protecting displaced persons. Indeed, most responses that have been developed so far only focus on the ideas of "burden sharing" and appeal to "global solidarity". These responses have clearly been insufficient to provide effective protection to affected individuals. Recognising these shortcomings, some authors developed the idea of State's responsibility for displacement. Nevertheless, most of these theses have also failed to provide sufficient answers, as they mainly focus on the responsibility of the *State of origin* towards the *States that have received displaced persons*.

In this paper, some principles on *ius post bellum* were used to ground that other States that intervene in conflicts may have special obligations towards displaced persons fleeing the affected territories. It is indeed defensible that States who have intervened illegitimately in the conflict would have special duties to protect displaced persons, adding to the obligations that would already stem from the International Refugee Law. However, this is a perspective of *lege ferenda*. I recognise that current International Law does not directly assign any special responsibilities to these States in any of its sources: International instruments only refer to a general right to seek asylum, and one cannot uphold the existence of a general practice accepted as law in this regard to claim that there is a general international custom for making intervening States in conflicts responsible towards protecting displaced persons. It is true that, in the past, the USA has resettled displaced persons from countries that were affected by conflicts in which it had intervened, such as Iraq, Vietnam and Cambodia. However, one can hardly claim that this represents "a generalised practice" nor that USA acted as convinced that this act was demanded by International Law.

Regardless, upholding that States that have intervened somehow illegitimately in a conflict shall bear a special responsibility regarding the protection of displaced persons is not only morally justifiable but also legally defensible. Indeed, if one considers general principles of international responsibility of States for breaches of International Law, one will indeed consider that intervening States should repair the harms they have caused – even partially. When full reparation is not possible, the way to address their responsibility would be through the protection of displaced persons.

As seen, protection is applied through one of the traditional responses that were developed by International Refugee Law. The specific solutions to be

applied in each case would vary from case to case and according to the responsibilities and capacities of each intervening State. Furthermore, special attention should be given to the person's choice, their place of residence and social ties, their sense of group identity, the State's responsibility in the displacement and, finally, the state capacity and efficiency (Souter, 2014: 174).

Since this cause of mass movement of persons is not expected to end in the future, it is important to more seriously develop the idea of guaranteeing the effectiveness of the responsibility of States for receiving displaced persons, and thus contribute to close this major gap in International Refugee Law, which simply does not provide any answer as regards who should bear the responsibility to protect forced migrants in the world.

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