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STATE RESPONSIBILITY FOR FORCED MIGRATION

POOJA R. DADHANIA

STATE RESPONSIBILITY FOR FORCED MIGRATION

POOJA R. DADHANIA*

Abstract: International refugee law does not hold states accountable for the forced migration they cause. Using the international law doctrine of state responsibility, this Article aims to shift the discourse on migration policy towards a state accountability approach that considers the role states play in causing forced migration. This Article uses state responsibility to explore the obligations of a state after it commits a violation of international law that results in forced migration. The general principle undergirding state responsibility is that a state should provide full reparation for harms caused by its violation of an international obligation. Applying state responsibility to forced migration, a state must provide reparation for forced migration caused by the state's violation of international law. Potential forms of reparation include monetary remedies and the resettlement of forced migrants. An examination of forced migration through the lens of state responsibility can better protect migrants and hold states accountable for their unlawful actions that cause displacement.

INTRODUCTION

International refugee law ignores the role of states in causing forced migration.[1] This omission has led to a failure to allocate responsibility for forced migration to the states that cause it and a failure to protect many forced migrants. This Article draws from the doctrine of state responsibility to fill some

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[1] *See* INT'L ORG. FOR MIGRATION, GLOSSARY ON MIGRATION 77 (2019), https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf [https://perma.cc/BHW2-DNVK] (defining "forced migration" as "[a] migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion").

of the gaps in international refugee law by advocating for states to provide reparation for forced migration that their unlawful actions have caused.[2]

There is a misperception that international law protects all forced migrants. In reality, however, international law protects only narrow categories of forced migrants, leaving the fate of most forced migrants to the whims of states, which have wide latitude to decide who remains within their borders and whom to exclude.[3] The few treaties that govern migration protect limited subsets of migrants, namely people who fall into the tightly circumscribed category of "refugee," or people who flee torture.[4]

Individuals are forced to migrate for various reasons, which may or may not relate to the grounds for refugee status or torture. Many people are compelled to abandon their homes and cross international borders due to another state's unlawful actions either within their home state or outside of their home state that have ramifications there.[5] This Article terms these individuals "state-impacted migrants."[6] International refugee law does not protect state-impacted

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[2] *See generally* Pooja R. Dadhania, *Reimagining Sovereignty to Protect Migrants*, 47 YALE J. INT'L L. ONLINE 71 (2022), https://scholarlycommons.law.cwsl.edu/fs/384 [https://perma.cc/6RRR-NX9F] (reframing the concept of sovereignty to include, rather than exclude, migrants, and briefly introducing the use of the Articles on Responsibility of States for Internationally Wrongful Acts in the context of forced migration).

[3] *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (explaining that a widely accepted notion in international law is that each state can decide whom to forbid and whom to allow inside its borders); *infra* notes 30–35 and accompanying text (outlining various protections for migrants in international refugee law); *infra* notes 26–39 and accompanying text (examining the fraught distinction between forced and voluntary migrants).

[4] *See* Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention] (defining "refugee"); Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol] (modifying the definition of "refugee" from the Refugee Convention); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter Torture Convention] (prohibiting states from returning a person to a state where that person may face torture). For ease of reference, this Article refers to the international instruments (such as the Refugee Convention and the Torture Convention) and customary international law (such as the principle of *nonrefoulement*) that protect forced migrants as "international refugee law."

[5] *See, e.g.*, George Ramsay, *A Quarter of Ukrainians Have Fled Their Homes. Here's Where They've Gone*, CNN (Mar. 21, 2022), https://www.cnn.com/2022/03/21/europe/ukraine-russia-conflict-10-million-refugees-intl/index.html [https://perma.cc/E9VU-75WJ] (describing how Russia's invasion of Ukraine forced many Ukrainians to flee their homes). This Article focuses on transnational migrants, but the same principles could apply to internally displaced persons who are displaced as a result of another state's violation of international law. *See Internal Displacement*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., https://www.unocha.org/es/themes/internal-displacement [https://perma.cc/G2LK-C36D] (defining "internally displaced persons" as those who are "forced to flee their homes" but remain within the borders of their state of nationality).

[6] *See* Dadhania, *supra* note 2, at 76 (creating the term "state-impacted migrants," which describes a "subset of [forced] migrants who are compelled to leave their homes as a result of another state's violation of international law").

migrants unless they fear individualized harm that brings them within the reach of narrow international instruments and customary international law governing refugees and torture.[7]

Not only does international refugee law fail to protect many state-impacted migrants, but it also fails to hold accountable states that cause forced migration.[8] Instead, the onus to protect migrants frequently is on the states to which they flee, which often are not the states that caused the forced displacement.[9] Too often, neighboring states with limited resources and absorptive capacity shoulder the burdens of housing and supporting migrants.[10] Meanwhile, the states responsible for forced migration face no consequences under international refugee law.[11]

This Article uses the international law doctrine of state responsibility to explore the obligations a state faces after it commits an internationally wrongful act—defined as a breach of an international obligation—that results in forced migration. The thrust of the doctrine of state responsibility is that a state that violates a primary rule of international law must provide full reparation for injuries that the violation causes.[12] This Article identifies opportunities within state responsibility to hold states accountable for forced migration by obligating them to provide reparation, including monetary remedies and paths for permanent lawful migration. A state responsibility-centered approach looks beyond morality- and fairness-based considerations to ground the obligation to protect state-impacted migrants in international law.[13] This Article also foregrounds the broader context of the causes of forced migration, looking beyond

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[7] *See infra* notes 26–41 and accompanying text (discussing the limitations of international refugee law in protecting forced migrants).

[8] *See* James Souter, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 326, 328 (2014) (stating that asylum "focuses solely on the fact of refugees' current plight, rather than the processes that caused it").

[9] *See infra* notes 122–125 and accompanying text (discussing the disproportionate burden on neighboring states to house and support forced migrants and the international obligation of *nonrefoulement*, which prohibits receiving states from returning migrants to a place where they may face persecution or torture).

[10] *See infra* notes 128–129 and accompanying text (explaining that although research shows that migration generally creates a net benefit for economically advantaged states, mass migration can impose hardship on smaller and less economically developed states).

[11] *See infra* notes 120–127 and accompanying text (discussing the failure of international refugee law to assign responsibility for forced migration to states responsible for causing it).

[12] *See* G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, arts. 1, 31 (Dec. 12, 2001) [hereinafter Articles] (codifying the doctrine of state responsibility).

[13] *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 49 (1983) (espousing a moral obligation towards "any group of people whom we have helped turn into refugees"); Souter, *supra* note 8, at 326 (explaining that the "potential function" of asylum "as a form of reparation for past injustice . . . stems from a special obligation on the part of states to provide asylum to refugees for whose lack of state protection they are responsible, whether through their military interventions, support for oppressive regimes or imposition of damaging economic policies").

the situations of individual migrants. This Article thereby contributes to the rich literature on alternative protections for migrants[14] as well as refugee responsibility sharing.[15]

Part I of this Article explores the gaps in international refugee law's protection of migrants and introduces the doctrine of state responsibility to provide the theoretical underpinnings for its use in the context of forced migration.[16] Part II introduces two case studies of forced migration following states' use of force: the 2022 Russian invasion of Ukraine and the 2003 U.S.-led invasion of Iraq.[17] This Article weaves these case studies throughout to illustrate how state responsibility can hold states accountable for forced displacement. Part III analyzes how state responsibility can fill gaps in international refugee law to increase protection for forced migrants and allocate responsibility to states that cause forced displacement.[18] Part IV applies state responsibility in the context of forced migration following the unlawful use of force.[19] More specifically, Part IV analyzes the requirements of state responsibility: an internationally wrongful act, invocation of state responsibility, causation, and repa-

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[14] *See* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1520–21 (2019) (presenting a "significant reconceptualization of sovereignty as interconnection . . . specifically, colonial and neocolonial interconnection" to justify the entry of economic migrants into former colonial powers (footnote omitted) (citing Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT'L L. 392, 447–50 (2013))); Souter, *supra* note 8, at 340 (developing a "provisional theory of asylum as reparation for past injustice"). *See generally* Jaya Ramji-Nogales, *Silos of International Law: Occupation and Forced Migration* (proposing protections for forced migrants in situations of occupation), *in* WAR, OCCUPATION, AND REFUGEES (Richard Falk & Tom Syring eds., forthcoming 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2450228# [https://perma.cc/S3ZB-NXPY]; JAMES SOUTER, ASYLUM AS REPARATION: REFUGE AND RESPONSIBILITY FOR THE HARMS OF DISPLACEMENT (2022) (evaluating the potential reparative function of asylum to remedy harms caused by states).

[15] *See generally* T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME (2019) (suggesting that responsibility sharing is one way to improve the current international refugee regime); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997) (asserting that states sharing burdens will improve refugee protections). In 2022, the *California Law Review* dedicated a symposium issue to the topic of refugee responsibility sharing. *See generally* E. Tendayi Achiume, *Empire, Borders, and Refugee Responsibility Sharing*, 110 CALIF. L. REV. 1011 (2022) (proposing an "empire-centric approach [that] ultimately reframes refugee responsibility sharing—which is typically treated as a distributive justice problem—as a failure to fulfill sovereign obligations, as well as a failure of corrective justice"); Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 CALIF. L. REV. 897 (2022) (analyzing different examples of responsibility sharing); Michael Doyle, Janine Prantl & Mark J. Wood, *Principles for Responsibility Sharing: Proximity, Culpability, Moral Accountability, and Capability*, 110 CALIF. L. REV. 935 (2022) (evaluating how to improve responsibility sharing based on culpability, moral accountability, and capability).

[16] *See infra* notes 21–69 and accompanying text.

[17] *See infra* notes 70–109 and accompanying text.

[18] *See infra* notes 110–135 and accompanying text.

[19] *See infra* notes 136–335 and accompanying text.

ration.[20] Finally, this Article concludes by discussing the broader implications of the use of state responsibility in the context of forced migration.

I. Forced Migration and the Potential Role of State Responsibility

The current international refugee regime is limited, as it only protects a small subset of migrants who fear individualized harm for specific reasons.[21] Thus, international refugee law leaves many gaps in protection, namely its failure to protect all forced migrants and its failure to allocate migrants among states.[22] The doctrine of state responsibility, which requires states to take responsibility for their violations of international law, may fill some of these gaps where states' unlawful actions cause forced migration.[23] Section A of this Part outlines those gaps.[24] Section B explains the basic contours of state responsibility.[25]

A. Gaps in International Refugee Law's Protection of Forced Migrants

Migrants are not a homogenous group. Rather, categories of migrants often are defined by migrants' reasons for leaving home. Categories of migrants include refugees, economic migrants, migrants fleeing war, environmental migrants, climate migrants, and migrants seeking to reunite with family.[26] Further, a migrant may have multiple, overlapping reasons for their movement.

International refugee law protects some individuals whose flight is perceived as forced and entirely excludes others whose flight is perceived as voluntary.[27] The reality, however, is that there is a "continuum of agency" related

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[20] *See infra* notes 136–335 and accompanying text.

[21] *See infra* notes 30–35 and accompanying text (discussing the international instruments and customary international law that protect forced migrants).

[22] *See* Linos & Chachko, *supra* note 15, at 899 (citing Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later* (Yale L. & Econ. Rsch. Paper, Paper No. 480, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330380 [https://perma.cc/FNA6-S2WB]) (describing a lack of refugee responsibility sharing in international law); *infra* notes 36–40 and accompanying text.

[23] *See infra* notes 110–135 and accompanying text (explaining how state responsibility can fill in gaps in international refugee law to protect state-impacted migrants and allocate responsibility to states that cause forced displacement).

[24] *See infra* notes 26–41 and accompanying text.

[25] *See infra* notes 42–69 and accompanying text.

[26] *See* International Organization for Migration, *Challenges of Irregular Migration: Addressing Mixed Migration Flows*, ¶ 6, MC/INF/294 (2008), https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/return_migration_challenges_120208/mixed_migration_flows.pdf [https://perma.cc/Y9AJ-N2Y6] (outlining the various categories of migrants).

[27] *See infra* notes 30–41 and accompanying text (explaining the limitations of international refugee law in protecting all forced migrants).

to the decision to migrate.[28] Thus, a strict dichotomy between voluntary and forced migration is artificial.[29]

Even for migrants perceived as "forced migrants," international refugee law only protects the small subset who fear individualized harm—a necessary condition for meeting the international legal definition of "refugee" in the Refugee Convention and Protocol and for qualifying for protection under the Convention Against Torture.[30] States have a legal obligation to protect these individuals from *refoulement*, or return to a state where they are likely to be persecuted or tortured.[31] These protected groups of migrants are tightly circumscribed, as international law defines "refugee" and "torture" significantly more narrowly than common parlance does.[32] Specifically, a "refugee" under international law is a person who has a "well-founded fear" of persecution due to their "race, religion, nationality, membership of a particular social group[,] or political opinion," and because of this fear "is unwilling to avail himself of the protection of [his] country [of nationality]."[33] This definition of "refugee" is significantly narrower than common usage of the term, which also encompasses people who flee their homes for other reasons.[34] For an act to constitute

[28] *See* INT'L ORG. FOR MIGRATION, *supra* note 1, at 77 (noting that there is "widespread recognition that a continuum of agency exists rather than a voluntary/forced dichotomy and that it might undermine the existing legal international protection regime").

[29] *Id.*

[30] *See, e.g.*, Executive Committee of the High Commissioner's Programme, Providing International Protection Including Through Complementary Forms of Protection, ¶ 10, EC/55/SC/CRP.16 (2005) (explaining that "[i]ndividuals who cannot return to their country of origin because of natural or ecological disasters do not generally fall under the protection regime of the 1951 Convention, unless access to national protection is denied on the basis of a Convention ground" (emphasis omitted)).

[31] *See* Torture Convention, *supra* note 4, art. 3 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."); Refugee Protocol, *supra* note 4, art. 1 (modifying the definition of "refugee" from the Refugee Convention to remove temporal and geographic restrictions, and binding states to Articles 2 through 34 of the Convention); Refugee Convention, *supra* note 4, art. 33(1) (mandating that a contracting state not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

[32] *See* Torture Convention, *supra* note 4, art. 1 (defining "torture"); Refugee Convention, *supra* note 4, art. 33(1) (defining "refugee"); Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 274–77 (1985) (comparing common usage of the word "refugee" to various legal and political definitions of the term). This Article uses the term "refugee" as it is used in international refugee law: to describe individuals who fall within the definition in the Refugee Convention and Protocol.

[33] Refugee Convention, *supra* note 4, art. 1.

[34] *Id.* In common parlance, the term "refugee" often is used more broadly than its international law definition, including to describe any migrant who flees their home for climate-related reasons and in response to generalized civil strife. Rebecca Hamlin, *'Migrants'? 'Refugees'? Terminology Is Contested, Powerful, and Evolving*, MIGRATION POL'Y INST. (Mar. 24, 2022), https://www.migrationpolicy.org/article/terminology-migrants-refugees-illegal-undocumented-evolving [https://perma.cc/PV2V-S2XT] ("In popular usage, . . . 'refugee' is sometimes applied to a much broader category of people who have not been processed and individually assessed for formal refugee status [under the Refugee

"torture" under international law, a public official must undertake or acquiesce to the act, which differs from the common usage of the word "torture."[35]

With the exception of refugees and individuals fearing torture, international law excludes most other migrants from protection, even if their migration is forced.[36] States have wide latitude to exclude and expel most of these other migrants as a prerogative of their sovereignty.[37] Because international refugee law does not protect these migrants, their flight often is characterized as voluntary.[38] However, some of these migrants who are not protected by international refugee law may have been forced to flee due to generalized conditions of armed conflict, civil strife, political instability, climate change, or economic collapse. Displacement for these reasons generally does not bring migrants within the purview of the "refugee" definition unless the migrants fear individualized harm on account of a protected ground.[39] Nonetheless, their migration may not be completely voluntary.

One such category of migrants is state-impacted migrants, or migrants compelled to leave their homes due to another state's violation of international law. Although these migrants are forced to flee as a result of another state's unlawful actions, existing international refugee law does not protect them un-

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Convention]."). The United Nations High Commissioner for Refugees also uses a broader definition of "refugee," which encompasses not only people covered by the Refugee Convention and Protocol, but also those fleeing "generalized violence . . . even if they do not have a well-founded fear of persecution linked to a 1951 Convention Ground." DIV. OF INT'L PROT., U.N. HIGH COMM'R FOR REFUGEES, UNHCR RESETTLEMENT HANDBOOK 88–89 (2011), https://www.unhcr.org/46f7c0ee2.pdf [https://perma.cc/2RNQ-BUGD].

[35] *See* Torture Convention, *supra* note 4, art. 1 (defining "torture" as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering *is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*" (emphasis added)).

[36] *See* Dadhania, *supra* note 2, at 74 (explaining how international refugee law excludes from protection some migrants whose flight is forced).

[37] *See id.* at 74–75 (explaining how "[a]n absolutist conception of internal sovereignty justifies a state's exclusive control over who lawfully enters and stays within its territory"). *See generally* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990) (examining the historical origins of the use of sovereignty to justify border restrictions).

[38] *See* REBECCA HAMLIN, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE 1–24 (2021) (criticizing the "migrant/refugee binary" as a "legal fiction," which disregards "the nuanced patterns of global migration and the lived experiences of border crossers").

[39] *See* Refugee Convention, *supra* note 4, art. 33(1) (listing the protected grounds); *e.g.*, Thea Philip, *Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia*, 19 MELB. J. INT'L L. 639, 644–48 (2018) (analyzing unsuccessful refugee claims in Australia and New Zealand by individuals fleeing climate change).

less they independently qualify as refugees or fear torture.[40] Given the lack of international political will to draft additional treaties that would protect more migrants, it is unlikely that states will ratify a new convention to mandate protections for state-impacted migrants in the near future.[41] Accordingly, the creative application of existing sources of international law may be the only option for protecting additional categories of migrants, like state-impacted migrants. The doctrine of state responsibility is one such avenue.

B. The Doctrine of State Responsibility

The widely accepted doctrine of state responsibility provides a framework of legal consequences for a state's violation of an international obligation.[42] The basic function of the doctrine is to obligate states to take responsibility for injuries they inflict on other states when they violate international law.[43] This Article uses the term "responsible state" to refer to a state that breached an international obligation, and "injured state" to refer to the state to which the responsible state owes the obligation.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility or Articles) codify the contemporary doctrine of state responsibility.[44] The Articles are the culmination of nearly

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[40] *See supra* notes 5–7 and accompanying text (defining state-impacted migrants and explaining that international refugee law generally does not protect them).

[41] *See* Dadhania, *supra* note 2, at 79 n.42 (reviewing U.S. President Joe Biden's and Slovak Prime Minister Robert Fico's statements regarding migrants); *see also Covid: Biden to Continue Trump's Title 42 Migration Expulsions*, BBC NEWS (Aug. 3, 2021), https://www.bbc.com/news/world-us-canada-58077311 [https://perma.cc/2TRZ-7PE9] ("I can say quite clearly: don't come over . . . . Don't leave your town or community." (quoting President Biden)); Jeevan Vasagar, Andrew Byrne & Alex Barker, *East-West Tensions Break Out Over Call to Share Migrant Burden*, FIN. TIMES (Aug. 31, 2015), https://www.ft.com/content/ef5179bc-4ff7-11e5-8642-453585f2cfcd#axzz3kSi3wjWA [https://perma.cc/T3SB-SMHQ] ("Ninety-five per cent of these people are economic migrants . . . . We will not assist this foolish idea of accepting anybody regardless of whether or not they are economic migrants." (alteration in original) (quoting Prime Minister Fico)).

[42] Articles, *supra* note 12, art. 1 ("Every internationally wrongful act of a State entails the international responsibility of that State."); *see also* KATJA CREUTZ, STATE RESPONSIBILITY IN THE INTERNATIONAL LEGAL ORDER 22–25 (2020) (discussing the systemic importance of state responsibility in international law).

[43] *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I, at 22 (1983) ("The question of responsibility is, in practical terms, a matter of insistence on performance or restoration of normal standards of international conduct.").

[44] *See* CREUTZ, *supra* note 42, at 10 (noting that the Articles on State Responsibility "represent the best available statement on customary law of state responsibility"). *But see* David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 830–32 (2002) (asserting that the Articles depart from existing customary international law). The origins of the doctrine of state responsibility, influenced by concepts of morality, religion, and natural law, can be traced to the sixteenth century's law of nations. *See generally* BROWNLIE, *supra* note 43, at 2–9 (exploring the origins and early evolution of the doctrine of state responsibility); *see also* JAMES CRAWFORD, STATE RESPONSIBILITY: THE

fifty years of work by the International Law Commission, a subsidiary organ of the United Nations General Assembly with a mandate to codify and promote the progressive development of international law.[45] In 2001, the International Law Commission submitted the Articles to the General Assembly, which took note of them in a resolution.[46] In other words, the General Assembly recognized that the Articles had been presented, but neither approved nor disapproved of them.[47] The Articles have not been subjected to a formal diplomatic convention and states have not ratified them.[48] Nevertheless, most of the principles in the Articles reflect customary international law, with states and international tribunals frequently invoking them.[49]

GENERAL PART 3–35 (2013) (tracing the history of the doctrine of state responsibility). The term "state responsibility" is sometimes used narrowly to refer to the field of state responsibility for injuries to aliens. *See* Daniel Bodansky & John R. Crook, *Symposium: The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 776 (2002) ("Even today, the term 'state responsibility' is often used as shorthand for the specialized area of international law on the treatment of aliens." (first citing INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (Richard B. Lillich ed., 1983); and then citing L.F.E. Goldie, *State Responsibility and the Expropriation of Property*, 12 INT'L LAW. 63 (1978))). This Article uses the term "state responsibility" broadly, consistent with the Articles on State Responsibility, to refer to responsibility for a breach of any international obligation. *See* Articles, *supra* note 12, art. 1 (outlining the concept of state responsibility).

[45] *See generally* BROWNLIE, *supra* note 43, at 13–18 (detailing the history of the International Law Commission's work on the Articles).

[46] G.A. Res. 56/83, at 1 (Jan. 28, 2002) ("noting" the International Law Commission's recommendation of the Articles).

[47] *See* U.N. Secretary-General, Exchange of Letters Between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel, at 3, U.N. Doc. A/C.5/55/42 (Apr. 5, 2001) (explaining that "taking note of such report merely takes cognizance that it has been presented and does not express either approval or disapproval").

[48] *See* CRAWFORD, *supra* note 44, at 41–42 ("The [International Law Commission]'s recommendation was a compromise between those members of the Commission who believed that the [Articles] would serve the international legal order best as simply evidence of international law, and those who thought that the potential of the Articles could only be realized via their adoption as an international convention—that is, a source of law in its own right." (footnotes omitted)); David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 861–66 (2002) (detailing the International Law Commission's reasons for recommending that the General Assembly take note of the Articles rather than subject them to a diplomatic convention). *See generally* Federica I. Paddeu, *To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments* (discussing the history and future of the Articles), *in* 21 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 83 (Frauke Lachenmann & Rüdiger Wolfrum eds., 2017); Sixth Committee, Legal Committee Delegates Differ on Applying Rules for State Responsibility: Convention Needed, or Customary Law Adequate?, U.N. Meetings Coverage GA/L/3395 (Oct. 19, 2010) (outlining the Sixth Committee's discussion of the Articles).

[49] *See* U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies*, ¶ 5, U.N. Doc. A/71/80/Add.1 (June 20, 2017) (finding that courts, tribunals, and other bodies referred to the Articles in 163 different cases, for a total of 392 times between the years 2001 and 2016); CRAWFORD, *supra* note 44, at 90, 92 (asserting that, between the years 2001 and 2013, tribunals, both national and international, cited the Articles more than one hundred fifty times and that "the position of the Articles as part of the fabric of general international law will continue to be consolidated and refined through their applica-

The foundational principle of the Articles is that "[e]very internationally wrongful act of a State entails international responsibility of that State."[50] The Articles provide secondary rules of international responsibility that outline consequences of violating primary international law rules.[51] The Articles themselves do not create primary obligations.[52] Rather, they provide general rules about the legal consequences of a state's breach of an international obligation. These consequences apply in a multitude of contexts. The Articles thus are nimble enough to adapt to the evolution of primary international law norms.[53]

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tion by international courts and tribunals"); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 16 & n.48 (2002) (first citing Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶¶ 47, 50–53, 58, 79, 83 (Sept. 25); and then citing Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62, ¶ 62 (Apr. 29)) (providing references by the International Court of Justice to the Articles before their completion); Caron, *supra* note 48, at 873 ("The [A]rticles have already affected legal discourse, arbitral decisions, and perhaps also state practice."); Sixth Committee, *supra* note 48 (explaining how various states incorporated the Articles into their law and decisions). *See generally* U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies*, U.N. Doc. A/74/83 (Apr. 23, 2019) (compiling cases citing the Articles). Even though many of the principles in the Articles reflect customary international law, some articles represent the International Law Commission's progressive development of state responsibility. *See* CREUTZ, *supra* note 42, at 103 ("[T]he articles often are a combination of both customary law and progressive development." (citing Caron, *supra* note 48, at 872)); Caron, *supra* note 48, at 873 ("The [A]rticles are a mix of codification and progressive development; to be frank, it would often be difficult to say which article partakes more of one or the other."); *see also* Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 803–05 (2002) (explaining that Article 48, allowing non-injured states to invoke responsibility "for a breach of an obligation owed to the international community as a whole," is "an important innovation" that "expands the domain within which state responsibility operates and in this sense represents progressive international legal development").

[50] Articles, *supra* note 12, art. 1.

[51] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, at 31, Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001), *reprinted in* 2001 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Commentaries] ("The emphasis [of the Articles] is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.").

[52] *See* BROWNLIE, *supra* note 43, at 40 (articulating that "the rules relating to state responsibility are to be applied in conjunction with other, more particular, rules of international law, which prescribe duties in various precise forms").

[53] *See* Bodansky & Crook, *supra* note 44, at 779–80 (noting that the Articles "encompass[] all types of international obligations regardless of their source, subject matter, or importance to the international community . . . [including] the whole gamut of particular subject areas—human rights law, environmental law, humanitarian law, economic law, the law of the sea, and so forth" (footnote omitted)). Despite their general applicability, use of the Articles in practice depends upon the specific international legal issue. *See* CREUTZ, *supra* note 42, at 16–21 (analyzing the relevance of state responsibility to various branches of international law, such as international security law, international human rights law, and international environmental law); Anita Sinha, *Transnational Migration Deter-*

The Articles are organized into three main parts—first, the content of international responsibility;[54] second, the consequences of international responsibility;[55] and third, the implementation of state responsibility.[56] The first part explains that for international responsibility to attach under the Articles, there must be an "internationally wrongful act" attributable to a state.[57] An internationally wrongful act is one that "constitutes a breach of an international obligation of the State."[58] The second part provides a set of legal consequences requiring the responsible state to remedy the adverse effects its internationally wrongful act caused, including reparation for injuries.[59] The third part explains how states can invoke the Articles to hold responsible states accountable for their actions.[60]

States invoke state responsibility in a variety of contexts, including in cases involving harm to nationals of a state,[61] seizure of state property,[62] treaty violations,[63] and breaches of contracts.[64] In addition, states have raised state responsibility for genocide.[65] States also have raised state responsibility to remedy harms in the context of discrete types of transboundary pollution, such as from nuclear testing and debris from satellites that have fallen out of space.[66] More novel applications of state responsibility exist in the terrorism,

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rence, 63 B.C. L. REV. 1295, 1343–44 (2022) (applying the Articles to transnational migration deterrence).

[54] Articles, *supra* note 12, arts. 1–27.

[55] *Id.* arts. 28–41.

[56] *Id.* arts. 42–59.

[57] *Id.* art. 1 ("Every internationally wrongful act of a State entails the international responsibility of that State.").

[58] *Id.* art. 2.

[59] *Id.* arts. 28–41; *see infra* notes 292–318 and accompanying text (describing reparation under the Articles).

[60] Articles, *supra* note 12, arts. 42–59.

[61] *See* Bodansky & Crook, *supra* note 44, at 776–77 (discussing the use of state responsibility in cases of injuries to nationals).

[62] *See, e.g.*, Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, 36–37 (June 15) (ordering restitution of objects removed by Thai authorities from a temple and the surrounding area under Cambodian control).

[63] *See, e.g.*, Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25) (considering a 1977 treaty between Hungary and Slovakia concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks).

[64] *See, e.g.*, Lighthouses Arb. (Fr. v. Greece), 23 I.L.R. 81 (Permanent Ct. of Arb. 1956) (involving a contract dispute between Greece and France on behalf of a French company).

[65] *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, 120 (Feb. 26) (finding that the doctrine of state responsibility may be used in cases of genocide); *see also* Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, at 205–18 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (discussing state responsibility).

[66] *See, e.g.*, Dep't of External Affs., Can., Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, No. FLA-268 (Jan. 23, 1979), *reprinted in* 18 I.L.M. 899

climate change, and racial discrimination contexts, but these uses remain largely theoretical.[67] In the context of migration, some injured states have sought monetary compensation for their nationals who were immediately displaced during hostilities.[68] Yet, states have not sought remedies for forced migration that occurs after the responsible state has withdrawn from such hostilities and also have not sought resettlement as a remedy for displaced migrants.[69] This Article aims to expand the current usage of state responsibility to include these situations and, in turn, more comprehensively protect state-impacted migrants and hold states accountable for the forced migration they cause.

II. Overview of the Forced Migration Case Studies

This Article uses two case studies to illustrate both the opportunities and challenges of using state responsibility in the context of forced migration: the 2022 Russian invasion of Ukraine and the 2003 U.S.-led invasion of Iraq.[70] Both case studies involve a state's use of force against another state's territorial integrity, which resulted in forced migration.[71]

This Article highlights these two case studies for several reasons. First, these relatively straightforward examples of the use of force and violation of sovereignty provide a foundation for rethinking migration policy through the

(1979) (discussing Canada's claim against the Soviet Union based on a satellite crash); Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20) (analyzing Australia's claim against France's nuclear testing); Nuclear Test Case, (N.Z. vs. Fr.), Judgment, 1974 I.C.J. Rep. 457 (Dec. 20) (evaluating New Zealand's claim that France's nuclear tests violated international law). *See generally* Phoebe N. Okowa, State Responsibility for Transboundary Air Pollution in International Law 99–130 (2000) (discussing the role of state responsibility in transboundary and long-distance air pollution, including radioactive contamination).

[67] *See, e.g.*, Tal Becker, Terrorism and the State: Rethinking the Rules of State Responsibility (2006) (applying the doctrine of state responsibility to private acts of terrorism); Anna Spain Bradley, *Human Rights Racism*, 32 Harv. Hum. Rts. J. 1, 34–35 (2019) (asserting that state responsibility could play a role in addressing racism); Benoit Mayer, *Climate Change Reparations and the Law and Practice of State Responsibility*, 7 Asian J. Int'l L. 185 (2017) (applying state responsibility to issues of climate change); Christina Voigt, *State Responsibility for Climate Change Damages*, 77 Nordic J. Int'l L. 1, 2–17 (2008) (discussing state responsibility in the context of environmental harms); Christian Tomuschat, *Global Warming and State Responsibility* (applying the doctrine of state responsibility to the issue of global warming), *in* Law of the Sea in Dialogue 3 (Holger Hestermeyer, Nele Matz-Lück, Anja Seibert-Fohr & Silja Vöneky eds., 2011).

[68] *See, e.g.*, *infra* notes 238, 242, 255–257 and accompanying text (providing examples of injured states seeking monetary remedies for forced displacement following a responsible state's unlawful use of force).

[69] *See, e.g.*, *infra* notes 238, 242, 255–257 (showing that the injured states sought reparation for forced displacement that occurred while the use of force was ongoing).

[70] *See infra* notes 73–335 and accompanying text.

[71] *See infra* notes 78–93 and accompanying text (describing Russia's use of force in Ukraine); *infra* notes 95–109 and accompanying text (describing the United States' use of force in Iraq).

lens of state responsibility.[72] Although there are some gray areas in terms of the legality of the invasions, these case studies allow for exploration of state responsibility in the context of forced migration without getting too bogged down in the thorny issues of whether the states' actions violated international law.

Second, although the Ukraine and Iraq case studies are similar in terms of violations of international law, they differ in significant ways. These differences allow for a nuanced examination of various facets of state responsibility, including causation and reparation. Specifically, the Ukraine invasion presents a straightforward application of state responsibility, whereas the Iraq invasion introduces complexity that may arise in many other cases of forced displacement. Additionally, by comparing the different responses of the international community to Ukrainian and Iraqi migrants, these case studies show how state responsibility can equalize the treatment of migrants and mitigate discrimination in their protection.[73]

On the other hand, one limitation of these case studies is that they may not capture some aspects of the heterogenous nature of states, such as the differing power dynamics of responsible states.[74] Both case studies involve responsible states that are relatively powerful in the international system and have veto power in the United Nations Security Council, which could hinder enforcement of state responsibility, as discussed further below.[75]

Section A of this Part explains the first case study, the 2022 Russian invasion of Ukraine and the resulting forced migration.[76] Then, Section B presents the second case study, the 2003 U.S.-led invasion of Iraq and the forced displacement that followed.[77]

A. The 2022 Russian Invasion of Ukraine

The ongoing Russian invasion of Ukraine is a recent example of a state's use of force against another state that has resulted in forced migration. In Feb-

[72] Later work may build upon these foundational examples to explore state responsibility for forced migration in the context of more legally complex violations of international law involving, for example, climate change and economic imperialism.

[73] *See infra* notes 116–119 and accompanying text.

[74] *See infra* notes 210–211 and accompanying text (suggesting that comparatively less powerful responsible states may be more likely to face enforcement than more powerful states that commit international law violations).

[75] *See infra* notes 208–209 and accompanying text (discussing the role of Security Council veto power in the enforcement of state responsibility).

[76] *See infra* notes 78–93 and accompanying text.

[77] *See infra* notes 95–109 and accompanying text.

ruary 2022, Russian armed forces invaded Ukraine.[78] Ukrainian forces have met Russian troops with staunch resistance, but Russian forces show no signs of withdrawing.[79] With the conflict still ongoing, the outcome remains to be seen both in terms of the future of Ukrainian territory and the forced displacement of Ukrainians.

The Russian government has advanced a self-defense justification for the invasion, which most of the international community has rejected.[80] Russian President Vladimir Putin explained that Ukraine poses a threat to Russia until Russia "demilitarise[s] and de[-Nazifies]" Ukraine.[81] Putin disclaimed any intention to occupy Ukraine.[82] At the same time, however, he previously stated that Ukraine "is entirely the product of the Soviet era," that "it was shaped . . . on the lands of historical Russia," and that "Russians and Ukrainians were one people."[83]

These latter statements may reflect Russia's true motivations behind the invasion. Many members of the international community view the invasion as an unlawful act of aggression. Specifically, U.S. and European officials rejected Russia's self-defense justification, and instead concludeed that the invasion is an attempt to overthrow the Ukrainian government and replace it with a puppet regime that supports Russia.[84] Further, Russia's past behavior towards

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[78] *Timeline: The Events Leading Up to Russia's Invasion of Ukraine*, REUTERS, https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/ [https://perma.cc/9QQ2-PCEN] (Mar. 1, 2022).

[79] *See* Jack Detsch, *What Does Russia Want in Ukraine?*, FOREIGN POL'Y (Mar. 29, 2022), https://foreignpolicy.com/2022/03/29/russia-withdrawal-kyiv-ukraine-war-not-over/ [https://perma.cc/C4C9-2ZQ7] (stating that Ukrainian troops pushed back against Russian forces, but still, Russia is continuing to fight and gather supplies).

[80] *See, e.g.*, John B. Bellinger III, *How Russia's Attack on Ukraine Violates International Law*, PBS NEWS HOUR (Mar. 4, 2022), https://www.pbs.org/newshour/world/how-russias-attack-on-ukraine-violates-international-law [https://perma.cc/M87A-T4KZ] (analyzing Russia's self-defense claim and describing international reactions to Russia's use of force).

[81] *See* Paul Kirby, *Has Putin's War Failed and What Does Russia Want from Ukraine?*, BBC NEWS (Feb. 24, 2023) (quoting President Putin), https://www.bbc.com/news/world-europe-56720589 [https://perma.cc/XLS4-CDX5].

[82] *Transcript: Vladimir Putin's Televised Address on Ukraine*, BLOOMBERG NEWS (Feb. 24, 2022), https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24 [https://perma.cc/R3UQ-EP99] (stating that it is not Russia's "plan to occupy Ukrainian territory" (quoting President Putin)).

[83] Vladimir Putin, *Article by Vladimir Putin "On the Historical Unity of Russians and Ukrainians*,*"* PRESIDENT OF RUSS. (July 12, 2021), http://en.kremlin.ru/events/president/news/66181 [https://perma.cc/5Q38-JD6A].

[84] *See* Detsch, *supra* note 79 (discussing the retreat of Russian forces in response to staunch resistance by Ukrainian troops).

Ukraine, namely its unlawful annexation of Crimea in 2014, may provide additional evidence against Russia's self-defense justification.[85]

Though the Russian invasion of Ukraine continues to unfold, it has already resulted in the widespread flight of Ukrainians both within the country and externally due to the brutality of the invasion. Some politicians and commentators have classified Russia's actions in Ukraine as war crimes.[86] Since the invasion began, over 8 million Ukrainian nationals have crossed into neighboring states and beyond.[87] Starting in the spring of 2022, some have started to return home to Ukraine.[88] It remains to be seen how many Ukrainian nationals in total will be displaced by the invasion.

Many people use the word "refugee" to describe Ukrainian migrants.[89] Yet, many of the migrants who fled following the invasion of Ukraine may not qualify as refugees under international refugee law.[90] There is ongoing debate about whether people fleeing generalized conditions of armed conflict fall under the definition of "refugee" in the Refugee Convention,[91] and many states interpret

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[85] *See* Andriy Zagorodnyuk, *The Case for Taking Crimea: Why Ukraine Can—and Should—Liberate the Province*, FOREIGN AFFS. (Jan. 2, 2023), https://www.foreignaffairs.com/ukraine/case-taking-crimea [https://perma.cc/X4U9-DAWF] (describing Russia's annexation of Crimea in 2014). President Putin reasoned that the purpose of the annexation was to correct what he views as the Soviet Union's incorrect transfer of Crimea to Ukraine in 1954. *Id.* Yet, many states view the annexation as unlawful under international law. *Id. See generally* G.A. Res. 68/262 (Apr. 1, 2014) (affirming Ukraine's territorial integrity in the context of the annexation of Crimea).

[86] *See, e.g.*, *Ukraine War: Biden Calls for Putin to Face War Crimes Trial After Bucha Killings*, BBC NEWS (Apr. 5, 2022), https://www.bbc.com/news/world-europe-60990934 [https://perma.cc/8RZ3-8BBW] (explaining that President Biden referred to President Putin as "brutal" and "a war criminal" (quoting President Biden)); David J. Scheffer, *Can Russia Be Held Accountable for War Crimes in Ukraine?*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/article/can-russia-be-held-accountable-war-crimes-ukraine [https://perma.cc/95QU-Y6EX] (Apr. 4, 2022) (stating that "the Russian military continues to commit various atrocity crimes, a category which includes war crimes, crimes against humanity, and genocide").

[87] U.N. Hum. Rts. Comm'n, *Ukraine Refugee Situation*, OPERATIONAL DATA PORTAL, https://data2.unhcr.org/en/situations/ukraine [https://perma.cc/L3ER-4GE4] (Mar. 20, 2023).

[88] *See* Lauren Egan, *As Millions of Ukrainians Flee War, Hundreds Are Heading Back Home in Spite of Violence*, NBC NEWS (Apr. 7, 2022), https://www.nbcnews.com/news/world/ukraine-war-russian-invasion-refugees-return-home-rcna22792 [https://perma.cc/9H4X-N24L] (stating that some Ukrainians returned home to reconnect with family members they left behind).

[89] *See, e.g.*, Caitlin Dickerson, *'You Cannot Host Guests Forever': How Long Will Polish Solidarity with Ukrainian Refugees Last*, THE ATLANTIC (May 3, 2022), https://www.theatlantic.com/magazine/archive/2022/06/ukraine-refugees-warsaw-polish-border/629630/ [https://perma.cc/B2YK-U646] (remarking on "the casual use of the term *refugee* on the streets of Warsaw as a synonym for *Ukrainian*").

[90] *See* Hamlin, *supra* note 34 ("[F]ew of the millions of people fleeing Russia's invasion into Ukraine have applied for and been granted the particular and narrow legal status of a refugee, yet this is the word that has overwhelmingly been used to refer to them.").

[91] *See id.* (discussing the global debate over the most accurate use of the term "refugee").

the Refugee Convention narrowly, as to exclude protection for these people.[92] Therefore, many Ukrainian migrants may not meet the circumscribed definition of "refugee" under international refugee law because they do not fear persecution on account of a protected ground or because they are able to avail themselves of the protection of their government.[93] Thus, many Ukrainian migrants may not qualify for long-term protection under international refugee law. Nevertheless, the international community's response to Ukrainian migrants has been uncharacteristically cooperative and welcoming, with the European Union and the United States swiftly providing migrants with temporary protections.[94]

B. The 2003 U.S.-Led Invasion of Iraq

Another example of a state's use of force that resulted in forced migration is the 2003 U.S.-led invasion and subsequent occupation of Iraq.[95] In March 2003, the United States, along with troops from the United Kingdom, Australia, Czech Republic, Poland, and Slovakia, invaded Iraq.[96] Soon after, in May 2003, President George W. Bush declared that major combat operations in Iraq

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[92] *See* U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION 38, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) ("Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol."); *see also* GUY S. GOODWIN-GILL & JANE MCADAM WITH EMMA DUNLOP, THE REFUGEE IN INTERNATIONAL LAW 149 (4th ed. 2021) (discussing refugee status and asserting "[t]oo often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution"); Hugo Storey, *Armed Conflict in Asylum Law: The "War-Flaw,"* REFUGEE SURV. Q., June 2012, at 1, 4 (explaining that individuals "fleeing from hostilities [were not protected by the Refugee Convention] unless they were otherwise covered by Art[icle] 1 of the Refugee Convention'" (quoting 1951 Conference of Plenipotentiaries Delegate Neremiah Robinson)).

[93] *See* Bill Frelick, Opinion, *Ukrainians Are Refugees, but Our Laws Don't Consider Them Such*, THE HILL (Mar. 29, 2022), https://thehill.com/opinion/immigration/599879-ukrainians-are-refugees-but-our-laws-dont-consider-them-such/ [https://perma.cc/69TG-HSRX] (describing how Ukrainians fleeing Russia's invasion may not constitute refugees under the 1951 Refugee Convention); Jean-François Durieux & David James Cantor, *Refuge from Inhumanity? Canvassing the Issues* (analyzing the term "refugee" and asserting that international refugee law fails to protect those fleeing due to armed conflict), *in* 2 REFUGE FROM INHUMANITY? WAR REFUGEES AND INTERNATIONAL HUMANITARIAN LAW 3, 3–9 (David James Cantor & Jean-François Durieux eds., 2014).

[94] *See, e.g.*, Egan, *supra* note 88 (describing how the European Union offered Ukrainian migrants temporary authorization to live and work in the European Union); Dickerson, *supra* note 89 (noting how an overwhelming number of Americans volunteered to help Ukrainians).

[95] *See 2003–2011: The Iraq War*, COUNCIL ON FOREIGN RELS. [hereinafter *Iraq War Timeline*], https://www.cfr.org/timeline/iraq-war [https://perma.cc/6KQL-YCN9] (detailing the events surrounding the U.S.-led invasion of Iraq).

[96] *See* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 173 n.1 (2004) (citing *The War in Numbers*, WASH. POST, Apr. 20, 2003, at A20) (providing detailed estimates on the number of troops involved in the Iraqi invasion by nationality).

had ended and created the Coalition Provisional Authority in Iraq.[97] On December 14, 2003, U.S. troops captured Iraqi President Saddam Hussein.[98] The United States later tried and executed Hussein.[99] The United States maintained a presence in Iraq for many more years, despite the official end of U.S. occupation in June 2004. In 2010, the United States ended combat operations in Iraq, leaving some U.S. troops in Iraq to train Iraqi security forces.[100] A year later, in 2011, the United States removed all troops from Iraq.[101]

The U.S.-led invasion and occupation of Iraq triggered an insurgency against the U.S.-led occupation and a sectarian civil war, resulting in a large number of Iraqi casualties. Over one hundred thousand Iraqi civilians have been killed since the U.S.-led invasion began.[102] Many Iraqis left their country to escape the significant instability and danger the invasion and resulting civil war caused. Specifically, an estimated two million Iraqis fled to Syria, Jordan, and other neighboring states.[103] In addition, another estimated 2.7 million Iraqis sought safety in other parts of Iraq.[104]

Today, displaced Iraqis are still languishing, especially those who have crossed international borders.[105] One reason for this situation is because some Iraqis may not qualify as "refugees" under international law, and even if they do, not all states that house Iraqi migrants have ratified the Refugee Convention or Protocol, which provide the foundations of the international refugee regime. Therefore, these states may not provide formalized protections for refugees.[106] For example, neither Syria nor Jordan, states to which many Iraqis

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[97] *See Iraq War Timeline*, *supra* note 95.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *See* Elizabeth Ferris, *Remembering Iraq's Displaced*, BROOKINGS (Mar. 18, 2013), https://www.brookings.edu/articles/remembering-iraqs-displaced/ [https://perma.cc/A2G8-E7L4] (describing people who were displaced during Iraq's sectarian conflict following the U.S.-led invasion in 2003); RHODA MARGESSON, JEREMY M. SHARP & ANDORRA BRUNO, CONG. RSCH. SERV., RL33936, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS? 6 (2008) (stating that most displaced Iraqis traveled to Jordan or Syria).

[104] MARGESSON ET AL., *supra* note 103, at 1–2.

[105] *See Iraqi Refugees and Displaced People*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/where-we-work/middle-east/iraq/displaced-people-and-refugees-in-iraq [https://perma.cc/BD3G-MF2Q] (stating that displaced Iraqis continue to struggle).

[106] *See generally* Maja Janmyr, *Non-signatory States and the International Refugee Regime*, FORCED MIGRATION REV., July–Aug. 2021, at 39, 39 (examining the role of non-signatory states in the development of international refugee law). Although the principle of *nonrefoulement* is a part of customary international law, *nonrefoulement* does not provide additional protections afforded in the Convention and Protocol, such as regularized status for refugees. *See* GOODWIN-GILL ET AL., *supra* note 92, at 300–01 ("The principle of *non-refoulement* now forms part of customary international

fled, is a signatory to the Refugee Convention or Protocol.[107] As a result, these states have not provided regularized status, work authorization, or benefits even to Iraqis who may qualify as refugees.[108]

Many Ukrainians and Iraqis do not qualify for long-term protection under the existing international refugee regime. Nevertheless, state responsibility can expand protections for these migrants. The next Part lays out this theory and the advantages of using state responsibility in the context of forced migration.[109]

III. Opportunities for State Responsibility in the Context of Forced Migration

State responsibility provides a new lens through which to examine migration policy. State responsibility can fill in some gaps in the international refugee regime by protecting additional categories of forced migrants—namely state-impacted migrants—and allocating responsibility for forced migration to the states that cause it.

It is important to note at the outset that migration is not the internationally wrongful act, and that migration to another state is not a harm per se. Rather, in the context of forced migration, the internationally wrongful act is an action of a state that violates international law, subsequently causing people to flee their homes. For example, Russia's invasion of Ukraine and the U.S.-led invasion of Iraq constitute internationally wrongful acts under the Articles on State Responsibility as discussed further below.[110] Given that the internationally wrongful act is not the migration itself, the states to which migrants flee generally cannot invoke state responsibility to seek reparation for themselves.[111]

Rather, the state to which the responsible state owed the international obligation is the one that can invoke state responsibility. For example, in the case studies described throughout this Article, Russia and the United States owed

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law."); *see also* G.A. Res. 57/187, ¶ 4 (Feb. 6, 2003) (affirming generally the importance of the principle of *nonrefoulement*).

[107] *See* Refugee Convention, *supra* note 4, at 35–51 (failing to list either Syria or Jordan as participants); Refugee Protocol, *supra* note 4, art. 5 (failing to list either Syria or Jordan as participants).

[108] *See* Alexandra Francis, Carnegie Endowment for Int'l Peace, Jordan's Refugee Crisis 20 (2015), https://carnegieendowment.org/2015/09/21/jordan-s-refugee-crisis-pub-61338 [https://perma.cc/M9RT-SPKU] (explaining how Iraqi migrants in Jordan are "unrepresented and . . . second-class citizens"); Dallal Stevens, *Legal Status, Labelling, and Protection: The Case of Iraqi 'Refugees' in Jordan*, 25 Int'l J. Refugee L. 1, 24 (2013) (explaining the lack of protections Jordan provides refugees); Margesson et al., *supra* note 103, at 6–7 (explaining that the status of displaced Iraqis remains unclear).

[109] *See infra* notes 110–135 and accompanying text.

[110] *See infra* notes 141–179 and accompanying text (explaining what constitutes an internationally wrongful act, and why the invasions of Ukraine and Iraq are internationally wrongful acts).

[111] *See infra* notes 180–192 and accompanying text (outlining how a state may invoke the Articles).

the states they invaded, Ukraine and Iraq, respectively, the obligation to respect their territorial integrity and refrain from the unjustified use of force. Accordingly, Ukraine and Iraq could raise state responsibility claims for reparation against Russia and the United States for injuries they suffered as a result of the unlawful actions.[112] Those injuries include the forced migration of Ukrainians and Iraqis caused by Russia's and the United States' use of force.

State responsibility can broaden the categories of forced migrants that international law protects by including state-impacted migrants. International refugee law developed following World War II. At the time, because the international community's priority was developing protections for Europeans fleeing Nazi and Soviet persecution by their own governments, the Refugee Convention focused on individualized persecution at the hands of state actors.[113] Yet, today, this narrow focus on individualized persecution excludes large swaths of forced migrants from the purview of the "refugee" definition.[114]

State responsibility, a doctrine of general application, can be a vehicle to protect an additional subset of forced migrants—state-impacted migrants. Under current international refugee law, many Ukrainians and Iraqis who fled as a result of the invasions are not considered "refugees."[115] Yet, these same migrants can be protected under state responsibility because they were forced to flee due to another state's violation of international law.

State responsibility can also play a role in mitigating racial and religious discrimination against migrants by requiring responsible states to make reparation for forced migration-related harms, regardless of migrants' personal characteristics or the responsible state's motivations behind its unlawful actions. The current refugee regime, on the other hand, allows states to choose whom to resettle, often leading to discrimination against certain groups.[116] For exam-

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[112] *See infra* notes 180–192 and accompanying text (discussing which state(s) may invoke the Articles to obligate a state to take responsibility for its violations of international law).

[113] *See generally* Pooja R. Dadhania, *Gender-Based Religious Persecution*, 107 MINN. L. REV. 1563, 1577–80 (2023) (analyzing the origins of the Refugee Convention following World War II and its limited protection of migrants).

[114] *See* Schuck, *supra* note 15, at 245 ("Although few . . . migrants are likely to meet the legal qualifications for Convention refugee status, many of them nevertheless seek some form of temporary or permanent protection and must be processed . . . until their status can be determined—with the attendant fiscal, social, and political burdens on the receiving state that such processing ordinarily entails." (footnote omitted)).

[115] *See supra* notes 91–93 and accompanying text (explaining why Ukrainian migrants may not qualify as refugees under international refugee law); *supra* note 106 and accompanying text (explaining why Iraqi migrants likely do not fall under international refugee law's definition of refugee).

[116] *See* Cathryn Costello & Michelle Foster, *(Some) Refugees Welcome: When Is Differentiating Between Refugees Unlawful Discrimination?*, 22 INT'L J. DISCRIMINATION & L. 244, 258–61 (2022) (explaining how the Refugee Convention both prevents and allows discrimination); *e.g.*, Memorandum for the Secretary of State on Presidential Determination on Refugee Admissions for Fiscal Year 2022, THE WHITE HOUSE (Oct. 8, 2021), https://www.whitehouse.gov/briefing-room/statements-

ple, the responses of the international community to Ukrainian and Iraqi migrants differ starkly—states have openly welcomed Ukrainians, but have been reluctant to protect Iraqis.[117] Two reasons stand out as potential explanations for the differential treatment of Ukrainian and Iraqi migrants: (1) the responsible states' justifications for the invasions, and (2) the migrants' race and religion. More specifically, Russia's invasion of Ukraine, characterized as a war of aggression or conquest, has generated unprecedented levels of international cooperation and sympathy for fleeing migrants, who are largely white and Christian.[118] On the other hand, the Iraq invasion, termed Operation Iraqi Freedom and justified by the United States as a "just war," generated less willingness to provide formalized protection for displaced Iraqis, who are largely Muslim and often perceived as potential security threats.[119] Under state responsibility, these two factors, the responsible state's reasons for an unlawful invasion and the personal characteristics of migrants, would not affect whether migrants receive a safe haven.

The opportunities for state responsibility in the forced migration context expand beyond protections for migrants. State responsibility can allocate re-

releases/2021/10/08/memorandum-for-the-secretary-of-state-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2022/ [https://perma.cc/7SKN-CJ7N] (displaying the Executive Branch's allocation ceilings for refugee admissions by region).

[117] *See* Laurel Wamsley, *Race, Culture and Politics Underpin How—Or If—Refugees Are Welcomed in Europe*, NPR (Mar. 3, 2022), https://www.npr.org/2022/03/03/1084201542/ukraine-refugees-racism [https://perma.cc/GKK4-KVQF] (contrasting European treatment of Ukrainian migrants with that of migrants from Iraq, Syria, and Afghanistan).

[118] *See id.* (explaining the reasons for the difference in treatment between Ukrainian and other migrants); Elena Chachko & Katerina Linos, *Sharing Responsibility for Ukrainian Refugees: An Unprecedented Response*, LAWFARE (Mar. 5, 2022), https://www.lawfareblog.com/sharing-responsibility-ukrainian-refugees-unprecedented-response [https://perma.cc/BUN4-HB2Y] (comparing the international response to Ukrainian migrants with earlier such responses to migrants from other states).

[119] *See* Ferris, *supra* note 103 ("Host governments have been generous in allowing the Iraqis to enter their countries but those policies have been ambiguous and the Iraqis have never had formal refugee status."); Chris J. Dolan, *Waging War Against Iraq:* Jus Ad Bellum *Considerations*, 1 POL. & ETHICS REV. 158, 158 (2005) (explaining the concept of a just war); Wamsley, *supra* note 117 (analyzing how race differentiates treatment of migrants); CNN Editorial Research, *Operation Iraqi Freedom and Operation New Dawn Fast Facts*, CNN, https://www.cnn.com/2013/10/30/world/meast/operation-iraqi-freedom-and-operation-new-dawn-fast-facts/index.html [https://perma.cc/745L-6HXU] (Apr. 1, 2022) (explaining that the Iraq War was called "Operation Iraqi Freedom"); *see also* Mark Greenberg, Julia Gelatt & Amy Holovnia, *As the United States Resettles Fewer Refugees, Some Countries and Religions Face Bigger Hits Than Others*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/news/united-states-refugee-resettlement-some-countries-religions-face-bigger-hits [https://perma.cc/YL4Y-7LZE] (Oct. 17, 2019) ("Exceptionally dramatic reductions have occurred in refugee admissions from particular countries, most notably from the Middle East, with an attendant plunge in resettlement of Muslim refugees."). A so-called "just war" may or may not be lawful under international law—for example, humanitarian intervention without Security Council authorization may be unlawful. *See* Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. 1242, 1248 (2017) (describing "the dominant view that humanitarian intervention without Security Council authorization is illegal").

sponsibility to states that cause forced migration in ways that international refugee law currently does not.[120] The allocation of responsibility for forced migrants among states has been a longstanding issue in migration policy.[121] International refugee law creates an obligation of *nonrefoulement* on receiving states.[122] Specifically, *nonrefoulement* prohibits a state from returning fleeing refugees or individuals who fear torture to another state where they will likely face persecution or torture.[123] Thus, this obligation of *nonrefoulement* is borne by receiving states. *Nonrefoulement* and the concomitant responsibility of hosting migrants often disproportionately fall on the states that border the migrants' home state, which may not have the resources to absorb and support a large influx of people.[124] International refugee law does not currently place obligations upon states that cause the forced migration, but state responsibility can do just that.[125]

State responsibility, therefore, can level the playing field between stronger states and less economically advantaged states. Economically advantaged states, including those that cause migration, often expend significant resources to police their borders to prevent entry of migrants and to find and remove them.[126] In

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[120] *See, e.g.*, Ramji-Nogales, *supra* note 14 (manuscript at 7) ("The United Nations Convention Relating to the Status of Refugees is focused on the criteria for establishing refugee status and the treatment of refugees, not on which state bears responsibility for protection.").

[121] *See* Schuck, *supra* note 15, at 253 ("I wish to emphasize one systemic, institutional failure [of the current refugee regime:] . . . the failure of refugee burden-sharing among states.").

[122] Refugee Convention, *supra* note 4, art. 33(1); Torture Convention, *supra* note 4, art. 3.

[123] Refugee Convention, *supra* note 4, art. 33(1); Torture Convention, *supra* note 4, art. 3.

[124] *See* Doyle et al., *supra* note 15, at 937 (characterizing the current refugee regime as "[r]esponsibility by [p]roximity" and explaining that "globally, the developing world—which is both relatively poor and home to so much of the world's armed conflict—also serves as the place of refuge for 86 percent of the world's refugees . . . [and], it does so without adequate international funding" (footnote omitted) (citing *Refugee Data Finder*, U.N. HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/refugee-statistics/ [https://perma.cc/5MZ4-EQ9G] (Oct. 27, 2022))); Schuck, *supra* note 15, at 253 ("Although the entire international community ought to shoulder the burdens of dealing with massive refugee flows, only a relatively small number of nations and regions actually do so. Some of those least capable of bearing these burdens have in fact carried a disproportionately large share of them."); *see also* T. Alexander Aleinikoff & Stephen Poellot, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VA. J. INT'L L. 195, 200 (2014) (discussing the problems of protracted refugee situations, which are caused by "unresolved political instability at home, a host country set against local integration, and an international community unwilling to increase resettlement opportunities").

[125] *See* Refugee Convention, *supra* note 4, art. 33(1) (placing the obligation of *nonrefoulement* on the receiving state); Torture Convention, *supra* note 4, art. 3 (mandating that receiving states do not return those who fear torture).

[126] *See, e.g.*, Sinha, *supra* note 53, at 1297 ("Global North states that are migrants' intended destination have been increasingly devising ways to prevent migrants from reaching their borders."); Irina Ivanova, *Rich Nations Failing Poor Countries in Fight Against Climate Change: Report*, CBS NEWS (Oct. 28, 2021), https://www.cbsnews.com/news/climate-change-carbon-emitting-countries-border-security/ [https://perma.cc/5FGE-WVFZ] (stating that wealthy states, such as the United States, France, and Germany, are spending more on border security than climate change initiatives).

contrast, states with fewer resources to exclude migrants and more porous borders may shoulder the onus of housing migrants. State responsibility can obligate a state to provide reparation for forced migration that it causes and shift the burden away from third-party states that may not have the capacity to absorb or provide supportive services to large numbers of migrants.[127]

To be clear, long-term migration often confers a net economic benefit on states.[128] Nevertheless, many states to which large numbers of migrants flee due to geographic proximity are economically less advantaged than other states. They may be unable to bear the costs of providing emergency housing and supplies to an influx of migrants, especially when the influx is sudden and large. These states, particularly those that are smaller, also may not have the absorptive capacity to resettle the migrants on a long-term basis.[129]

By requiring resettlement of state-impacted migrants in the responsible state where appropriate, specifically by providing lawful status to migrants from the injured state, state responsibility can offer alternative durable solutions to migration emergencies and prevent future protracted refugee situations.[130]

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[127] *See* MARGESSON ET AL., *supra* note 103, at Summary ("Many of Iraq's neighbors fear that they are being overwhelmed by refugees who have fled over Iraq's borders. There are heightened concerns about the absorptive capacity of neighboring countries, whether they can provide adequately for the populations that have moved across borders, and the impact of refugee flows on stability in general.").

[128] *See, e.g.*, Jonathan Portes, *The Economics of Migration*, CONTEXTS, Spring 2019, at 12, 13 (explaining how migration tends to increase GDP per capita); Uri Dadush & Mona Niebuhr, CARNEGIE ENDOWMENT FOR INT'L PEACE, THE ECONOMIC IMPACT OF FORCED MIGRATION 11–14 (2016), https://carnegieendowment.org/2016/04/22/economic-impact-of-forced-migration-pub-63421 [https://perma.cc/5F6B-QYBE] (asserting that a state's output and investment could increase, depending on the number of migrants entering the state relative to its size); Alexandra Fielden, *Local Integration: An Under-reported Solution to Protracted Refugee Situations* 3 (U.N. High Comm'r for Refugees, Rsch. Paper No. 158, 2008) (explaining that refugees "offer a great opportunity for economic development" by "constitut[ing] a new labour force with skills that can be utilized to benefit the host community by developing under-populated areas").

[129] *See* Fielden, *supra* note 128, at 3 (describing some challenges of local integration of migrants, including security threats, environmental harms, increased competition for limited land and jobs, and the strain on infrastructure).

[130] *See* Aleinikoff & Poellot, *supra* note 124, at 198 (explaining that durable solutions are those which remedy refugee displacement and provide refugees with "legal and social membership in a national community"). Durable solutions include voluntary repatriation to the refugees' home state, local integration in the first receiving state, and resettlement in a third state. *See* U.N. High Comm'r for Refugees, *Rethinking Durable Solutions* (proposing durable solutions for refugees), *in* THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 129, 129 (2006). "Protracted refugee situations are those in which at least [twenty-five thousand] refugees from the same" state remain outside of their state of origin for over five years. *Protracted Refugee Situations Explained*, USA FOR UNHCR (Jan. 28, 2020), https://www.unrefugees.org/news/protracted-refugee-situations-explained/ [https://perma.cc/3N76-NQAH]. Protracted refugee situations include people who do not qualify as refugees under the international refugee law definition. *See* Aleinikoff & Poellot, *supra* note 124, at 198 (defining the term "protracted refugee situation" more broadly than the Refugee Convention's definition of refugee); *see also* Refugee Convention, *supra* note 4, art. 1 (defin-

Finally, importing a state responsibility framework into forced migration policy may incentivize states to more carefully evaluate future conduct that would run afoul of international law to the extent that states are rational actors.[131] Although the Articles are not meant to deter states, use of state responsibility in the context of forced migration may nevertheless have the positive collateral benefit of affecting state behavior.[132] In the context of the use of force, when deciding whether to pursue armed initiatives, states may begin to consider the costs of taking responsibility for displacement alongside other costs, such as those of military equipment and long-term occupation.[133] If responsibility for the unlawful acts that cause forced migration becomes routine, it may cause states to factor that cost into their calculus when deciding whether to pursue a course of action that may violate international law.

Despite these potential benefits, the use of state responsibility for forced migration comes with some caveats. First, state responsibility perpetuates the distinction between people whom international law does and does not protect by creating another category of protected migrants—state-impacted migrants—to the exclusion of other migrants. Second, a framework for forced migration using state responsibility does not challenge the central role of sovereignty and borders in the international system; rather, it works within the constraints of the existing system.[134] That being said, the doctrine of state responsibility is

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ing the term "refugee"). In addition, protracted refugee situations can span much longer than five years, with generations being born in refugee camps. *See* Aleinikoff & Poellot, *supra* note 124, at 196 (noting that the Dabaab refugee camp in Kenya that houses primarily Somalis includes thousands of "children born to refugees who themselves were born in Dabaab").

[131] *See generally* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (updated ed. 2014) (analyzing some of the most powerful states in the international community and how they interact with one another); John J. Mearsheimer, *Reckless States and Realism*, 23 INT'L RELS. 241 (2009) (evaluating state behavior and the resulting outcomes).

[132] *See* CREUTZ, *supra* note 42, at 6 (explaining that "the overarching goal of maintaining peaceful relations between states [was] the original motivation for codification of state responsibility" (citing G.A. Res. 799 (VIII), at 7 (Dec. 7, 1953))); Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 845 (2002) ("Concern for the larger consequences of an internationally wrongful act may suggest a response that will deter the responsible state from repeating the breach and deter others from emulating the conduct. In this respect, the [A]rticles, by limiting themselves to remedial measures, seem to have missed an opportunity to strengthen measures to promote compliance.").

[133] *See, e.g.*, AMY BELASCO, CONG. RSCH. SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, at 19 (2014), https://sgp.fas.org/crs/natsec/RL33110.pdf [https://perma.cc/7C2N-4RD5] (detailing the costs of the U.S.-led invasion of Iraq); Sarah Childress, Evan Wexler & Bill Rockwood, *The Iraq War: How We Spent $800 Billion (and Counting)*, FRONTLINE (Mar. 18, 2013), https://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/the-iraq-war-how-we-spent-800-billion-and-counting/ [https://perma.cc/C4HC-LT5K] (same).

[134] *See* Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 196 (2003) (arguing for "eliminating the border as a legal construct that impedes the movement of people"); *cf.* Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4085100 [https://perma.cc/K7RB-VH7B] (critiquing reform strategies that "provide cover for contin-

not the exclusive solution to forced migration. State responsibility should be pursued in conjunction with other policies that promote increased protection and accountability in migration policy and challenge states' use of sovereignty to justify the exclusion and mistreatment of migrants.[135]

Third, the purpose of this Article is to begin a broader conversation about state responsibility in the context of forced migration. It is beyond the scope of this Article to provide a detailed roadmap on operationalization of state responsibility in this context, which requires a deep dive into the nuts and bolts of adjudicating state responsibility claims. This Article instead focuses on the theory of using a state responsibility framework in the context of forced migration.

IV. Applying State Responsibility to Forced Migration

This Part applies state responsibility in the forced migration context, using the case studies outlined above as illustrations.[136] Section A explains that before legal consequences for forced migration can attach under state responsibility, the injured state must show that the responsible state committed an internationally wrongful act.[137] Next, Section B analyzes invocation and enforcement of state responsibility in the context of forced migration.[138] Section C details the causation requirement and analyzes the challenges of proving that forced migration was caused by an internationally wrongful act.[139] Finally, Section D assesses potential forms of reparation in the context of forced migration, including monetary remedies and resettlement in the responsible state as appropriate.[140]

A. Internationally Wrongful Act of a State

The Articles on State Responsibility trigger legal consequences only for internationally wrongful acts of states, as opposed to lawful actions.[141] The Articles define an internationally wrongful act of a state as an action or a failure to act that "(a) is attributable to the State under international law; and (b)

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ued deportations" and "normaliz[e] expanded enforcement," instead advocating for "choos[ing] battles that aim at dismantling immigration enforcement").

[135] *See supra* notes 14–15 and accompanying text (citing scholarly proposals on the protection of migrants and refugee responsibility sharing); *see also* Johnson, *supra* note 134, at 199 (exploring arguments in support of open borders).

[136] *See infra* notes 137–335 and accompanying text.

[137] *See infra* notes 141–179 and accompanying text.

[138] *See infra* notes 180–217 and accompanying text.

[139] *See infra* notes 218–291 and accompanying text.

[140] *See infra* notes 292–335 and accompanying text.

[141] *See* Articles, *supra* note 12, art. 2 (outlining responsibility only for wrongful acts). *See generally* Göran Lysén, State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles 40–43 (1997) (critiquing the Articles for focusing too heavily on which actions are deemed legally permissible and which are not).

constitutes a breach of an international obligation of the State."[142] Notably, the Articles omit a fault or wrongful intent requirement in the determination of whether an actor has committed an internationally wrongful act.[143] In addition, the Articles rely on international law to the exclusion of domestic law when deciding whether an act constitutes an internationally wrongful act.[144] The Articles do not define international obligations in detail, leaving the content to primary rules of international law.[145]

International obligations may stem from a variety of sources, including bilateral and multilateral treaties, customary international law, and "general principle[s] applicable within the international legal order."[146] Some international obligations, like peremptory norms of international law, apply to the international community at large, whereas others only apply to the states that are parties to an agreement. No fixed list of international obligations exists. In fact, international obligations can change over time and cover a wide array of substantive areas.

In both the Ukraine and Iraq case studies, the internationally wrongful act is the unjustified use of force against the territorial sovereignty of another state.[147] The relevant primary international obligations are the prohibition on the use of force and respect for state sovereignty, both of which are peremptory norms of general international law.[148] Numerous international law instruments

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[142] Articles, *supra* note 12, art. 2.

[143] *See* Brigette Stern, *The Elements of an Internationally Wrongful Act* ("We are dealing here with an objective idea of non-conformity [with an international obligation]: whatever may have been the subjective intention of the perpetrator of the internationally wrongful act is irrelevant."), *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 193, 209–10 (James Crawford, Alain Pellet & Simon Olleson eds., 2010). Yet, even though the Articles do not consider intent in evaluating a violation of international law, for certain violations, intent may be an element. *Id.* at 210.

[144] Articles, *supra* note 12, art. 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

[145] *See* CRAWFORD, *supra* note 44, at 93 (explaining that the Articles do not "attempt to set out the content and scope of the international obligations breach of which gives rise to responsibility: this is the function of primary rules, whose codification would involve restating most of substantive customary and conventional international law").

[146] Commentaries, *supra* note 51, at 55.

[147] *See* BROWNLIE, *supra* note 43, at 66 ("[T]here is little doubt that violation of the sovereignty of a state by specified acts is a sufficient cause of action.").

[148] *See* Commentaries, *supra* note 51, at 85 (explaining that "[t]hose peremptory norms that are clearly accepted and recognized include the prohibition[] of aggression . . . and the right to self-determination"); DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW 16 (2017) ("The lists of peremptory norms typically include . . . the prohibition of aggression . . . and the prohibition of infringing upon a people's right to self-determination."). *But see* James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215, 217 (2011) (questioning "the widespread uncritical acceptance of the prohibition as a *jus cogens* norm").

reaffirm the primacy of these obligations. First, the United Nations Charter admonishes member states against using force or threatening to do so against a state's "territorial integrity or political independence . . . ."[149] In addition, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States confirms the inviolability of a state's sovereignty.[150] Lawful justifications for use of force are (1) self-defense in response to an armed attack and (2) United Nations Security Council authorization to use force to preserve and restore international peace and security.[151] In the case studies, both Russia and the United States committed internationally wrongful acts because they used force against the territorial integrity of another state without lawful justification. Thus, both states committed internationally wrongful acts triggering state responsibility.

Russia violated international law by using military force against Ukraine without legal justification when it invaded Ukrainian territory in February 2022.[152] As legal justification, President Putin invoked self-defense under Article 51 of the United Nations Charter and customary international law.[153] To bolster the self-defense justification, Putin asserted that the invasion was necessary to protect people facing "humiliation and genocide" in Ukraine.[154] Putin also raised the military threat of the eastward expansion of the North Atlantic Treaty Organization (NATO).[155] He linked NATO member states to "far-right nationalists and neo-Nazis in Ukraine . . . [who will] kill innocent people" and have "openly laid claim to several . . . Russian regions."[156]

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[149] U.N. Charter art. 2, ¶ 4.

[150] G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) (stating that "[t]he territorial integrity and political independence of the State are inviolable").

[151] *See* U.N. Charter art. 51 (allowing use of force for self-defense "if an armed attack occurs"); *id.* art. 42 (authorizing the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" including actions such as "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations").

[152] *See id.* art. 2, ¶ 4 (prohibiting the use of force against another state).

[153] *See Transcript: Vladimir Putin's Televised Address on Ukraine*, *supra* note 82 (quoting President Putin) ("[I]n accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation [in Ukraine]."); *see also* Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russian Federation), Order, 2022 I.C.J. 1, 8–9, ¶¶ 32, 39 (Mar. 16) (summarizing Russia's legal defense of the Ukrainian invasion).

[154] *See Transcript: Vladimir Putin's Televised Address on Ukraine*, *supra* note 82 (quoting President Putin) ("The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime.").

[155] *Id.*

[156] *Id.*

International consensus resoundingly rejected Russia's self-defense justification as baseless. Specifically, the international community overwhelmingly characterized Russia's military actions in Ukraine as an unlawful war of aggression or conquest. For instance, the International Court of Justice expressed concern about Russia's use of force, explaining that it triggers international law issues.[157] The International Court of Justice also ordered Russia to immediately end military operations in Ukraine by thirteen votes to two.[158] Similarly, the European Council denounced Russia's military action as a war of aggression.[159]

Furthermore, many states labeled Russia's actions a violation of international law. Eleven of the fifteen members of the United Nations Security Council supported a resolution deploring Russia's use of force against Ukraine as a violation of the United Nations Charter's admonition to respect state sovereignty.[160] The resolution ultimately failed, however, due to Russia's veto power.[161] Subsequently, the General Assembly approved a resolution recognizing that Russia should face legal consequences and remedy the harms its unlawful actions have caused.[162]

In contrast, the illegality of the U.S.-led invasion of Iraq is less clear-cut than Russia's invasion of Ukraine. The United States maintains that its actions were lawful. The United States contended that a prior Security Council resolution justified the 2003 invasion, as it authorized military action against Iraq to restore peace in the region after Iraq's 1990 invasion of Kuwait.[163] Many

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[157] *See Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide*, 2022 I.C.J. at 5, ¶ 18 (expressing "profound[] concern[] about the use of force by the Russian Federation in Ukraine," and explaining that it "raises very serious issues of international law").

[158] *Id.* ¶ 86(1). Vice-President Kirill Gevorgian of Russia and Judge Xue Hanqin of China dissented. *Id.*

[159] European Council Press Release, European Council Conclusions on the Russian Military Aggression against Ukraine, 24 March 2022 (Mar. 25, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/european-council-conclusions-on-the-russian-military-aggression-against-ukraine-24-march-2022/pdf [https://perma.cc/2B72-7VSD].

[160] *Russia Blocks Security Council Action on Ukraine*, UN NEWS (Feb. 26, 2022), https://news.un.org/ en/story/2022/02/1112802 [https://perma.cc/HY78-2RFP].

[161] *Id.*

[162] *See* G.A. Res. ES-11/5, ¶ 2 (Nov. 14, 2022) (stating that Russia should "bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury . . . caused by such acts," such as "its aggression in violation of the Charter of the United Nations").

[163] *See* Permanent Rep. of the United States to the U.N., Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003) (declaring that "[t]he actions being taken are authorized under existing [Security] Council resolutions" (citing S.C. Res. 687 (Apr. 3, 1991))). The United States also cited various policy rationales for the 2003 invasion, including protection of the international community, national security, and humanitarian reasons. *See, e.g.*, Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 342, 342 (Mar. 19, 2003) (citing the dis-

members of the international community rejected this justification and criticized the United States' invasion as unlawful.[164] Even before the invasion, the United States failed to find majority support in the Security Council for its planned military action in Iraq.[165] After the invasion, United Nations Secretary-General Kofi Annan stated that the invasion was inconsistent with the United Nations Charter.[166] Annan viewed the invasion as contravening international law, specifically its prohibition of the use of force without legal justification.[167] Thus, although the U.S. invasion of Iraq may be a closer legal question than Russia's invasion of Ukraine, there is strong support for the proposition that the invasion of Iraq violated international law, despite U.S. arguments to

armament of Iraq as an objective of the invasion); Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 338, 339 (Mar. 17, 2003) (emphasizing the threats Iraq poses and that the United States' use of force is necessary to preserve national security); Address to the Nation on Iraq from Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1716, 1717 (Oct. 7, 2002) (describing Iraq as a threat to the world); *see also* THE COMM'N ON THE INTEL. CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES (2005) (providing findings on Iraq's weapons of mass destruction and correcting pre-war assumptions about their presence in Iraq); U.N. SCOR, 58th Sess., 4701st mtg. at 14–16, U.N. Doc. S/PV.4701 (Feb. 5, 2003) (providing a statement by U.S. Secretary of State Colin Powell before the Security Council, where he expressed concern regarding Iraqi weapons and terrorism); Peter Slevin, *Powell Casts Attack on Iraq as 'Liberation'; U.S. Would Emphasize Democracy, 'New Era*,*'* WASH. POST, Sept. 20, 2002, at A20 (summarizing Secretary of State Powell's statement).

[164] *See, e.g.*, *Iraq War Was Unjustified, Putin Says*, ABC NEWS (Dec. 18, 2003), https://www.abc.net.au/news/2003-12-19/iraq-war-was-unjustified-putin-says/108124 [https://perma.cc/J892-UM9S] (explaining that President Putin believed the Iraq invasion was not justified because the United States failed to get authorization from the Security Council); Letter from Kjell Magne Bondevik, Prime Minister of Nor., to George W. Bush, U.S. President (Mar. 21, 2003), https://reliefweb.int/report/iraq/norway-statement-storting-situation-iraq [https://perma.cc/9WE8-UCSU] (refusing to support the war because it did not have Security Council authorization); Press Release, Gov't of Swed., The Swedish Government's View on the Iraq Issue (Mar. 20, 2003), https://reliefweb.int/report/iraq/swedish-governments-view-iraq-issue [https://perma.cc/PBX9-R5TJ] (articulating that the United States violated international law because it engaged in the Iraq War without Security Council authorization); *see also* Carol Kopp, *Chirac Makes His Case on Iraq*, CBS NEWS (Mar. 16, 2003), https://www.cbsnews.com/news/chirac-makes-his-case-on-iraq/ [https://perma.cc/F39L-LAYP] (revealing that French President Jacques Chirac disapproved of the U.S. invasion of Iraq and believed that the United States failed to pursue other options before resorting to war).

[165] Letter from Kjell Magne Bondevik to George W. Bush, *supra* note 164 (describing the opposition of most of the Security Council members to the 2003 Iraq invasion and the failure of the United States and United Kingdom to obtain a resolution authorizing the use of force).

[166] *See Lessons of Iraq War Underscore Importance of UN Charter—Annan*, UN NEWS (Sept. 16, 2004), https://news.un.org/en/story/2004/09/115352 [https://perma.cc/ESD8-ZUUP] (describing how Secretary-General Annan stated, "I have indicated it is not in conformity with the UN Charter, from our point of view, and from the Charter point of view it was illegal" (quoting U.N. Secretary-General Kofi Annan)).

[167] *See* Patrick E. Tyler, *Annan Says Iraq War Was 'Illegal*,*'* N.Y. TIMES (Sept. 16, 2004), https://www.nytimes.com/2004/09/16/international/annan-says-iraq-war-was-illegal.html [https://perma.cc/K634-A3EW] (describing Secretary-General Annan's view that the U.S.-led invasion of Iraq should have been approved by the Security Council); *see also* U.N. Charter art. 42 (outlining Security Council authorization as one justification for the use of force).

the contrary. An in-depth analysis of the legality of the U.S.-led invasion is beyond the scope of this Article and has already been rigorously undertaken by numerous scholars and researchers.[168] Rather than reiterate these arguments, this Article proceeds to other facets of state responsibility doctrine on the assumption that the U.S. invasion was unlawful.

In addition to an internationally wrongful act, the Articles on State Responsibility require that the internationally wrongful act is attributable to a state.[169] To satisfy this requirement, the act must be attributable to an organ of a state—for example, its executive branch, legislative branch, or the judiciary.[170] Attribution is not limited to direct actions by a branch of government, however; other forms of attribution include actions by persons or entities who exercise governmental authority but are not themselves organs of the state.[171]

Although questions of attribution can be complex, especially when the internationally wrongful act involves nonstate actors, attribution in both case studies used in this Article is straightforward.[172] In the Ukraine case study, President Putin ordered the invasion of Ukraine, which was carried out by Russian armed forces.[173] Similarly, the U.S. government authorized and carried out the U.S.-led invasion of Iraq.[174]

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[168] *See, e.g.*, Ronald Kramer, Raymond Michalowski & Dawn Rothe, *"The Supreme International Crime": How the U.S. War in Iraq Threatens the Rule of Law*, SOC. JUST., no. 2, 2005, at 52, 52 (arguing that "[t]he 2003 invasion and subsequent occupation of Iraq by the United States and its allies was a violation of international law"); Murphy, *supra* note 96 (evaluating and critiquing the United States' justifications for the Iraq War); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 610–14 (2003) (arguing that the U.S.-led invasion of Iraq violated the U.N. Charter); Michael E. O'Hanlon, Opinion, *Why the War Wasn't Illegal*, BROOKINGS (Sept. 26, 2004), https://www.brookings.edu/opinions/why-the-war-wasnt-illegal/ [https://perma.cc/3MJS-YFKN] (conceding that the war "admittedly occurred on legally ambiguous grounds" but maintaining that "it was not illegal"); *see also supra* note 164 and accompanying text (outlining support for the notion that the invasion of Iraq was illegal).

[169] Articles, *supra* note 12, art. 2. The Articles' rules on attribution are reflective of customary international law. *See* Bodansky & Crook, *supra* note 44, at 782–83 (explaining that the Articles' rules on attribution "are generally traditional and reflect a codification rather than any significant development of the law").

[170] Articles, *supra* note 12, art. 4; Commentaries, *supra* note 51, at 40–42.

[171] Articles, *supra* note 12, art. 5; Commentaries, *supra* note 51, at 42–43.

[172] *See generally* BECKER, *supra* note 67 (exploring the complexities of applying state responsibility to acts of terrorism committed by private actors).

[173] *See Timeline: The Events Leading Up to Russia's Invasion of Ukraine*, *supra* note 78 (stating that on February 24, 2022, President Putin authorized troops to engage in military operations in Ukraine).

[174] *See Iraq War Timeline*, *supra* note 95 (stating that on March 20, 2003, the U.S. government announced the start of military operations in Iraq).

Yet, one key difference between the two invasions is that the invasion of Iraq involved other states in addition to the United States.[175] The involvement of multiple states complicates the issue of state responsibility, particularly because the issue of shared responsibility in international law is significantly underdeveloped.[176] Indeed, the Iraq invasion is a textbook example of the thorny issues that arise when considering the responsibility of multiple states.[177] Due to a dearth of legal opinions on this issue, there are no clear answers in terms of allocation of responsibility among multiple responsible states.[178] Nevertheless, the general consensus is that all states involved in a single act of wrongdoing are independently responsible, but the injured state's compensation cannot exceed its injuries.[179] When allocating responsibility for forced migration due to the concerted unlawful actions of multiple states, to equitably share responsibility, the responsible states could contribute to the remedies in proportion to their involvement. Due to the unresolved issues concerning shared responsibility and the principle that all responsible states incur responsibility, however, this Article focuses on the responsibility of the United States.

B. Invoking the Articles

After a responsible state commits an internationally wrongful act, the Articles on State Responsibility allow an injured state, as well as third-party

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[175] *See* Murphy, *supra* note 96, at 173 n.1 (stating that ground forces were comprised of "approximately 125,000 U.S. forces[,] . . . 45,000 U.K. forces, . . . 2,000 Australian forces, and a total of 600 Czech, Polish, and Slovak forces" (citing *The War in Numbers*, *supra* note 96)).

[176] *See* André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359, 363 (2013) ("The principles of international law on the basis of which responsibility among multiple actors is currently allocated are, in the words of Brownlie, 'indistinct' and do not provide clear guidance." (footnote omitted) (first quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 457 (7th ed. 2008); and then citing Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 PEPP. L. REV. 233 (2011))).

[177] *See* CREUTZ, *supra* note 42, at 134 (providing the 2003 invasion of Iraq as an example of an action involving multiple states).

[178] *See supra* note 176 and accompanying text (discussing the unsettled nature of shared responsibility).

[179] *See* East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 170 (June 30) (dissenting opinion of Weeramantry, J.) ("Principles of State responsibility, based on the autonomous and individual nature of each State, require that where two States are accessory to a wrongful act, each State must bear international responsibility for its own internationally wrongful act."); CREUTZ, *supra* note 42, at 134 ("[S]everal states can be co-perpetrators of a wrong; thus, all incur responsibility independently."); Christian Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State* ("The international legal regime of responsibility establishes that in the case of a plurality of responsible States, the injured State can invoke the responsibility of each of them, provided that the injured State does not obtain compensation greater than the injury sustained." (citing Articles, *supra* note 12, art. 47)), *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 143, at 281, 282.

states in limited circumstances, to invoke the Articles to obligate the responsible state to remedy the harms its actions caused.[180] Injured states, like Ukraine and Iraq, can invoke the Articles in a variety of ways; the only requirement the Articles set forth is that an injured state must give notice to the responsible state.[181] The Commentaries to the Articles further explain that invocation is fairly formal.[182] More formal methods of invocation include protests and international tribunal and court proceedings.[183] States also use relatively less formal channels, including diplomatic correspondence and unofficial and confidential written communications, to raise state responsibility issues.[184]

In limited circumstances, third-party states, even if unaffected by an international law violation, may invoke the Articles. They may raise state responsibility if the responsible state breached an obligation owed to the international community.[185] For example, third-party states can use the Articles to hold a state accountable for the consequences of its serious breaches of peremptory norms of international law.[186] Third-party states are limited in the remedies they may claim from the responsible state: they may request only (1) cessation of the internationally wrongful act, and (2) reparation on behalf of the injured state or other beneficiaries of the obligation that was breached.[187] Because use of force without lawful justification is a serious breach of a peremptory norm of international law, third-party states may invoke state responsibility against Russia and the United States for the invasions.[188]

The Articles are state-centric—under the Articles, states invoke the Articles and states face responsibility for their breaches of international law. The

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[180] Articles, *supra* note 12, arts. 42, 46; *see also* Commentaries, *supra* note 51, at 116–17 ("Central to the invocation of responsibility is the concept of the injured State. . . . Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the 'injured State.'").

[181] Articles, *supra* note 12, art. 43.

[182] *See* Commentaries, *supra* note 51, at 117 (stating that "invocation should be understood as taking measures of a relatively formal character").

[183] *See id.*

[184] *See* CRAWFORD, *supra* note 44, at 68 ("In many cases, quiet diplomacy is the most effective method of ensuring the performance of international obligations and even reparations for breaches thereof."); *see also* Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. Pleadings 253–55 (June 26) (describing the letters sent by the President of Nauru to Australia to raise state responsibility issues); BROWNLIE, *supra* note 43, at 89–119 (providing examples of "standard diplomatic notes containing protests and claims for reparation"). It is not sufficient for an injured state to "merely . . . criticize[] [the responsible state] for a breach and call[] for observance of the obligation, or even reserve[] its rights or protests." Commentaries, *supra* note 51, at 117. Rather, the responsible state must make "specific claims . . . such as for compensation for a breach affecting it . . . ." *Id.*

[185] Articles, *supra* note 12, art. 48.

[186] *Id.*

[187] *Id.*; Commentaries, *supra* note 51, at 126–28.

[188] *See supra* note 148 and accompanying text (discussing the nature of the prohibition on the use of force as a peremptory norm of international law).

Articles do not cover invocation by nor responsibility of nonstate actors.[189] Generally, individuals cannot independently invoke state responsibility.[190] Therefore, an individual Ukrainian or Iraqi national who was forcibly displaced could not use the Articles directly to seek reparation from Russia or the United States. Still, a state may use the Articles on behalf of its nationals to ask the responsible state to remedy harms that the nationals suffered.[191] Therefore, for state responsibility to provide solutions for forced migration, Ukraine, Iraq, or another state must be willing to invoke responsibility on behalf of Ukrainian and Iraqi nationals.[192]

Whether an injured state is willing to invoke the Articles on behalf of its nationals is uncertain, however. A state may be reluctant to demand that another state face the legal consequences of its unlawful actions for a variety of reasons. For example, some states may be hesitant to facilitate the emigration of their citizens due to fear of "brain drain" and negative economic consequences.[193] In addition, less powerful states may avoid confronting more powerful states due to fear of adverse foreign policy consequences.[194]

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[189] *See* Commentaries, *supra* note 51, at 95 ("The [A]rticles do not deal with the possibility of the invocation of responsibility by persons or entities other than States . . . . It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account."); *see also* Brown Weiss, *supra* note 49, at 799 (critiquing the Articles for failing to "deal sufficiently with the right of individuals and nonstate entities to invoke the responsibility of states").

[190] *See* Articles, *supra* note 12, art. 33 (outlining the scope of responsibility as obligations owed to other states or the international community as a whole). Although the Articles do not address invocation by nonstate entities, those entities may nevertheless have standing to assert a claim of responsibility for an internationally wrongful act, depending on the scope of the primary obligation. *See* CRAWFORD, *supra* note 44, at 549 ("[I]t will be the relevant primary obligations that will determine whether or not a non-state party has any entitlement to claim in the particular circumstances, for example by initiating a complaint under human rights treaty monitoring mechanisms, or invoking bilateral investment treaty provisions that permit recourse to arbitration." (citing Commentaries, *supra* note 51, at 95)); Brown Weiss, *supra* note 49, at 809–15 (critiquing the Articles' general exclusion of the obligations of states towards individuals and examining the role of international agreements and *lex specialis* in providing individual complaint procedures to invoke state responsibility).

[191] *See* BROWNLIE, *supra* note 43, at 29 (explaining that a state can choose to invoke a state responsibility claim on behalf of its nationals who are injured by another state's unlawful actions); *see also infra* notes 195–198 and accompanying text (providing examples of states invoking responsibility on behalf of their nationals).

[192] *See* BROWNLIE, *supra* note 43, at 29 ("In the absence of [a state's] willingness to raise the issue on the part of the potential claimant the question of state responsibility cannot arise.").

[193] *See generally* GILLIAN BROCK & MICHAEL BLAKE, DEBATING BRAIN DRAIN: MAY GOVERNMENTS RESTRICT EMIGRATION? 36–84 (2015) (explaining the losses that a less developed state may face when its workers leave the state). The term "brain drain" refers to the "migration of high-skill workers . . . ." *Id.* at 43.

[194] *See id.* at 46–48 (describing how developing states interact with other states to handle migration and its economic impacts). Still, there are examples of less powerful states raising responsibility claims against more powerful states. *See, e.g.*, BROWNLIE, *supra* note 43, at 89–119 (providing various examples of states invoking responsibility against other states). Additionally, in a different context, small

Nevertheless, the requirement that a state raise the issue of responsibility on behalf of its nationals is not an insurmountable hurdle. There are many examples of states raising the issue of responsibility on behalf of their nationals as well as assisting their nationals in obtaining lawful immigration status in other states. For example, after Iraq's invasion and occupation of Kuwait from 1990 to 1991, many states brought claims against Iraq for injuries to their nationals, including harms related to forced displacement.[195] Similarly, in 1925, the United States invoked responsibility solely on behalf of U.S. nationals before the General Claims Commission when Mexico failed to take steps to apprehend the murderer of a U.S. citizen.[196] Additionally, outside of the state responsibility context, some states have aided their nationals in seeking immigration opportunities abroad. Examples include Vietnam's cooperation under the Orderly Departure Program[197] and Mexican consulate funding for U.S. non-

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island states that have been heavily impacted by climate change have asked more economically advantaged states that pollute to take responsibility for their actions. *See, e.g.*, Simona Marinescu, *COP26: Major Polluting Countries Face Legal Action from Small Island States Over Rising Sea Levels*, U.N. SUSTAINABLE DEV. GRP. (Nov. 17, 2021), https://unsdg.un.org/latest/blog/cop26-major-polluting-countries-face-legal-action-small-island-states-over-rising-sea [https://perma.cc/LLJ7-7M4U] (describing how small states, like the Marshall Islands and Kiribati and Samoa, requested that larger, more powerful states provide economic assistance in battling climate change); Roxana Saberi, *Island Nations Seek a Way to Sue Big Polluters Over Climate Change That Could Leave Some Underwater*, CBS NEWS (Nov. 3, 2021), https://www.cbsnews.com/news/climate-change-antigua-barbuda-tuvalu-lawsuit-polluters/ [https://perma.cc/W6GN-3LJ4] (explaining how Antigua and Barbuda and Tuvalu formed a new commission within the United Nations to seek damages from polluting states).

[195] *See generally* Norbert Wühler, *The United Nations Compensation Commission* (stating that a number of states submitted claims on behalf of nationals), *in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 213, 213–14, 216–18 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999); Fred Wooldridge & Olufemi Elias, *Humanitarian Considerations in the Work of the United Nations Compensation Commission*, 85 INT'L REV. RED CROSS 555, 562–63 (2003) (stating that over ninety states "submitted claims on behalf of their nationals, corporations, and/or themselves").

[196] Janes v. United Mexican States, 4 R.I.A.A. 82, 83 (Gen. Claims Comm'n 1925) ("Claim is made by the United States of America . . . 'on behalf of Laura May Buffington Janes, individually, and as guardian of her two minor children . . . ; and Elizabeth Janes and Catherine Janes.'"). In July 1918, a man named Pedro Carbajal shot and killed U.S. citizen Byron Everett Janes. *Id.* Mexican authorities failed to act promptly to capture and punish Carbajal. *Id.* Although this example predates the Articles, it is nevertheless relevant because the United States invoked state responsibility on behalf of its nationals. *See id.* at 93–94. Indeed, the United States and Mexico created the General Claims Commission by treaty in 1923 to adjudicate claims related to state acts against the nationals of the other state. General Claims Commission (Agreement of Sept. 8, 1923) (United Mexican States, United States of America), 4 R.I.A.A. 7, 11–12 (Sept. 8, 1923).

[197] *See* U.N. High Comm'r for Refugees, *Flight from Indochina* (explaining that the Orderly Departure Program aimed to face a refugee problem head-on through cooperation between Vietnam, resettlement countries, and UNHCR), *in* THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 79, 86 (2000).

profit organizations serving Mexican nationals seeking lawful status in the United States.[198]

Although injured states may be willing to invoke state responsibility, responsible states may hinder enforcement and resolution of claims. For example, a responsible state may be reluctant to admit that it committed an internationally wrongful act. Neither Russia nor the United States has acknowledged that the invasions of Ukraine and Iraq, respectively, were in violation of international law, and they are unlikely to do so.[199] This unwillingness to publicly acknowledge illegality may stall resolution of state responsibility issues.

Nevertheless, many states may wish to privately resolve issues of state responsibility through diplomacy and negotiations.[200] Moreover, if state responsibility in the context of forced migration becomes a new norm, the international community could pressure states to accept responsibility through diplomatic channels or other, harsher measures. For example, states that have already imposed sanctions on Russia following its invasion of Ukraine could refuse to lift those sanctions until Russia accepts responsibility for the forced displacement its invasion caused.[201]

Another hurdle to enforcement is the potential unwillingness of responsible states to participate in the adjudicatory process. The Articles do not delineate which international entities will ascertain whether a state has breached an international obligation, but the Commentaries explain that "competent international organizations" would likely undertake such determinations.[202] Different international tribunals, including established international courts as well as

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[198] *See Mexican Consulate Awards Funding to Catholic Charities for Immigration Work*, CATH. CHARITIES OF THE DIOCESE OF RALEIGH (Aug. 3, 2017), https://www.catholiccharitiesraleigh.org/mexican-consulate-awards-funding-to-catholic-charities-for-immigration-work/ [https://perma.cc/DH5S-YFTF] (stating that the Mexican Consulate awarded funding to Catholic Charities to provide immigration services to Mexican nationals).

[199] *See supra* notes 153, 163 and accompanying text (explaining Russia's and the United States' justifications for their invasions of Ukraine and Iraq, respectively).

[200] *See* Michael Waibel, *The Diplomatic Channel* ("Only a small subset of international disputes ever reaches international courts and tribunals. . . . Diplomacy still reigns supreme in settling international disputes, especially when confidentiality and flexibility are important."), *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 143, at 1085, 1085.

[201] *See Fact Sheet: United States, G7 and EU Impose Severe and Immediate Costs on Russia*, THE WHITE HOUSE (Apr. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/ [https://perma.cc/P54R-YJHP] (outlining the sanctions that the U.S. government, along with its allies, imposed on Russia).

[202] *See* Commentaries, *supra* note 51, at 113 (explaining that "competent international organizations" include the United Nations Security Council, such as in cases involving aggression, and the General Assembly).

special tribunals created to resolve specific disputes, have applied state responsibility and the Articles in state disputes.[203]

Although international tribunals can adjudicate claims of state responsibility, restrictions on their jurisdiction may present challenges. Specifically, jurisdiction presents a hurdle to invocation of responsibility against states that have not accepted the compulsory jurisdiction of the International Court of Justice. For a suit to proceed against a state, the state must consent, or the suit must be based on a treaty that provides for judicial settlement in the Court.[204] On the other hand, if a state has recognized the compulsory jurisdiction of the International Court of Justice, it must appear subject to any reservations it has taken if an injured state initiates proceedings against it, such as a state responsibility case.[205]

Notably, neither Russia nor the United States has consented to the compulsory jurisdiction of the International Court of Justice.[206] Proceedings in the Court thus may not prove fruitful because both states have been reluctant to consent to this jurisdiction on a case-by-case basis in the past.[207] Russia and the United States may be especially reluctant to consent to jurisdiction in the context of state responsibility for forced migration as a result of the Ukraine and Iraq invasions, respectively, for fear of opening themselves up to having to provide remedies for similar conduct in the future.

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[203] *See supra* note 49 (discussing the number of international tribunals that have cited the Articles).

[204] *See Basis of the Court's Jurisdiction*, INT'L CT. OF JUST., https://www.icj-cij.org/en/basis-of-jurisdiction [https://perma.cc/7NSK-8MXV] (outlining the basis of the International Court of Justice's jurisdiction).

[205] *See* Statute of the International Court of Justice art. 36, ¶ 2 ("The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes . . . ."); *see also Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST. [hereinafter *Declarations Recognizing I.C.J. Jurisdiction*], https://www.icj-cij.org/en/declarations [https://perma.cc/FX5E-EEBN] (compiling declarations of compulsory jurisdiction and reservations by state).

[206] *See Declarations Recognizing I.C.J. Jurisdiction*, *supra* note 205 (failing to list Russia and the United States).

[207] *See id.*; *see also* Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russian Federation), Document from the Russian Federation Setting Out Its Position Regarding the Alleged "Lack of Jurisdiction" of the Court in the Case, ¶¶ 6–24 (Mar. 7, 2022), https://www.icj-cij.org/sites/default/files/case-related/182/182-20220307-OTH-01-00-EN.pdf [https://perma.cc/8P5U-KVJ5] (discussing the issue of jurisdiction). *See generally* Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EURO. J. INT'L L. 815 (2008) (discussing the nuances of the jurisdiction of the International Court of Justice); Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies* (explaining the relationship between the United States and the International Court of Justice), *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 46, 46–111 (Cesare P.R. Romano ed., 2009).

In addition to the International Court of Justice, the United Nations could play a role in enforcement of state responsibility in the context of forced migration. Following Iraq's invasion of Kuwait, the Security Council created a special body to assess state responsibility, the United Nations Compensation Commission.[208] The Security Council could utilize similar mechanisms to enforce state responsibility for forced migration. The Security Council could be an effective enforcement mechanism, with one limitation. Permanent members, including the United States and Russia, have veto power and would likely block any potential Security Council actions contrary to their interests.[209]

Thus, enforcement of state responsibility in the forced migration context will suffer from the same enforcement issues that plague the international system more generally: powerful states are able to escape enforcement more easily than those with less power. Less powerful states like Eritrea, Ethiopia, Uganda, and Iraq have been subjected to proceedings involving state responsibility.[210] Meanwhile, it will be difficult for Russia and the United States to be held formally accountable for the forced migration they caused given: (1) their unwillingness to accede to International Court of Justice jurisdiction, and (2) their veto powers on the Security Council.[211]

Yet, even when the unanimity of the permanent members of the Security Council is not possible, the General Assembly may be able to play a role in enforcement. If the Security Council is unable to act to maintain international peace and security, the General Assembly is authorized to make recommendations to its members for collective measures.[212] Although the General Assembly does not have the power to make binding resolutions, its resolutions nevertheless can carry political weight and signify international consensus.[213]

For instance, following the deadlock of the permanent members of the Security Council over Russia's invasion of Ukraine, the General Assembly

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[208] *See* Wooldridge & Elias, *supra* note 195, at 555–58 (providing background information on the United Nations Compensation Commission).

[209] *See* Molly Callahan, *The Shackles of the United Nations Security Council Veto, Explained*, NE. GLOB. NEWS (Apr. 14, 2022), https://news.northeastern.edu/2022/04/14/united-nations-security-council-veto/ [https://perma.cc/47PT-T6BB] (explaining the impact of veto power and the frequency with which the permanent members use their veto powers).

[210] *See infra* notes 229–249, 253–259 and accompanying text (describing state responsibility claims against these states).

[211] *See supra* notes 204–209 and accompanying text.

[212] G.A. Res. 377A(V), ¶ 1 (Nov. 3, 1950).

[213] *See* Michelle Nichols, *U.N. General Assembly Again Overwhelmingly Isolates Russia Over Ukraine*, U.S. NEWS (Mar. 24, 2022), https://www.usnews.com/news/world/articles/2022-03-24/u-n-general-assembly-adopts-ukraine-aid-resolution-criticizes-russia [https://perma.cc/MZK2-DWY2] (explaining that a March 2022 General Assembly resolution criticizing the Russian invasion of Ukraine received 140 votes in favor, five votes against, and thirty-eight abstentions).

approved a resolution concerning Russia's responsibility.[214] More specifically, the General Assembly recognized the invasion as an internationally wrongful act and Russia's obligation to provide reparation for the resulting damage.[215] The resolution also recognized the need to establish "an international mechanism for reparation for damage" arising from Russia's internationally wrongful acts against Ukraine.[216] Finally, the General Assembly recommended that member states create a register for damages caused by Russia's internationally wrongful acts.[217] Although states have not yet taken further action pursuant to this resolution, it shows the international community's ability to take steps towards the enforcement of state responsibility against powerful states. The extent to which Russia compensates Ukraine for harms caused by the invasion, including those related to forced displacement, remains to be seen. Nonetheless, if state responsibility for forced migration becomes an established norm of international law, enforcement may become more common.

C. Causation

Under the Articles, a responsible state must provide full reparation for any injuries its internationally wrongful act caused.[218] Generally, the state seeking reparation carries the burden of proving a causal nexus between the internationally wrongful act and the injury.[219]

The Articles themselves do not elucidate the requirements for causation.[220] The Commentaries to the Articles provide some explanation, but it is thin.[221] They state that where harm is caused by several factors, and one of the factors is the actions of the responsible state, there is no reduction of reparation owed by the responsible state.[222] The Commentaries also explain that remedies are available only for injuries "resulting from and ascribable to the wrongful act," instead of "any and all consequences flowing from" the internationally wrongful act.[223] Thus, the causation requirement excludes injuries that are too

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[214] G.A. Res. ES-11/5, *supra* note 162.

[215] *Id.* ¶ 3.

[216] *Id.*

[217] *Id.* ¶ 4.

[218] Articles, *supra* note 12, art. 31.

[219] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. Rep. 32 (Feb. 9).

[220] *See* Articles, *supra* note 12, art. 31 (stating only that a responsible state must make "full reparation for the injury caused by the internationally wrongful act" without explaining the requirements for causation).

[221] *See* Brigitte Stern, *The Obligation to Make Reparation* (stating that the International Law Commission "is particularly silent on causation"), *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 143, at 563, 569–70.

[222] Commentaries, *supra* note 51, at 93.

[223] *Id.* at 92–93.

"remote" or "consequential."[224] The Commentaries describe the causation requirement in a number of different ways including "causality in fact," "losses attributable to [the wrongful] act as a proximate cause," and "'any direct loss . . . or injury to foreign Governments, nationals and corporations as a result of' the wrongful act."[225]

The drafters did not provide more extensive explanation of the causation requirement in the Articles and Commentaries because the requirement differs across primary obligations, and depends on the nature and extent of the injury.[226] Thus, it was not possible for the International Law Commission to craft a single causation requirement that would apply in all instances.[227] Accordingly, to determine the precise contours of the causation requirement applicable to the case studies, it is instructive to consider tribunal decisions involving the unlawful use of force. Even though the number of such decisions is limited, one common theme emerges when reviewing these decisions: despite differences in terminology surrounding causation, several decisions require the harm to be reasonably foreseeable.[228]

For example, the Eritrea-Ethiopia Claims Commission (EECC), established in 2000, considered causation when determining state responsibility for the use of force by both Eritrea and Ethiopia against each other in 1998.[229] The EECC had to determine whether injuries to both states and their nationals were caused by the other state's acts in violation of international law.[230] The EECC concluded that the use of force must have been a proximate cause of the injury

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[224] *Id.*

[225] *Id.* at 92 (first alteration in original) (footnotes omitted) (first quoting Administrative Decision No. II (U.S. v. Ger.), 7 R.I.A.A. 23, 30 (Mixed Claims Comm'n 1923); and then quoting S.C. Res. 687, *supra* note 163, ¶ 16).

[226] CRAWFORD, *supra* note 44, at 493 (reasoning that the Articles do not provide more detail on the causation requirement because it is impossible to cover the entire range of obligations); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. Rep. 32, 33 (Feb. 9) ("[I]t should be noted that the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury.").

[227] CRAWFORD, *supra* note 44, at 493 (explaining the lack of detail on the Articles' causation requirement).

[228] *See* Decision Number 7: Guidance Regarding *Jus ad Bellum* Liability, 26 R.I.A.A. 10, ¶ 21 (Eri.-Eth. Claims Comm'n 2007) ("[T]here have been few modern instances in which a State has been determined to bear responsibility for damages resulting from a war as a matter of international law [under state responsibility].").

[229] *See* George H. Aldrich, *The Work of the Eritrea-Ethiopia Claims Commission* (explaining the organization of the EECC and its awards), *in* 6 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 435, 440–41 (T. McCormack & Avril McDonald eds., 2003). *But see infra* note 231 (explaining that the EECC's definition of causation does not expand upon the Commentaries' definition of causation).

[230] *See* Aldrich, *supra* note 229, at 440–42 (citing Central Front—Ethiopia's Claim 2, Partial Award, 26 R.I.A.A. ¶¶ 27–29, 77 (Eri.-Eth. Claims Comm'n 2004)) (explaining that the EECC evaluated whether the damages claimed by the states were caused by the other state's internationally wrongful acts).

to trigger reparation. The EECC further explained that the proximate cause standard is satisfied when the responsible state could have reasonably foreseen the injuries it caused.[231] More specifically, the EECC considered whether the responsible state's leaders and military could have reasonably foreseen the injuries when the responsible state violated international law.[232] In a situation involving the substantial use of force, reasonable foreseeability encompasses consequences more broadly than situations involving less significant violations of international law.[233] Yet, the EECC cautioned that foreseeability should not extend too far as to make the standard useless by encompassing all consequences.[234]

Applying this causation standard, the EECC investigated the responsible states' actions to determine the consequences that should have been reasonably foreseeable to the states. For example, the EECC concluded that it should have been reasonably foreseeable to Eritrea that Ethiopia would staunchly resist invasion and its actions would trigger immense conflict.[235] The EECC cited the fact that Eritrea had deployed a considerable number of troops to the area in question as evidence that Eritrea should have reasonably foreseen a substantial conflict.[236] The EECC ultimately concluded that Eritrea must compensate Ethiopia for injuries to Ethiopian nationals and damage to their property that occurred until Eritrean forces withdrew.[237] Significantly, the EECC concluded that Eritrea must pay for the costs internally displaced persons incurred while they remained unable to return to their homes, even if those costs extended past the date of Eritrean withdrawal, as damage to this group is not temporally limited.[238] Another example of damage the EECC found to be reasonably foreseeable was the loss of tax revenue to Eritrea due to Ethiopia's destruction of a

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[231] *See Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability*, 26 R.I.A.A. 10, ¶¶ 1, 7, 13 (finding proximate cause when "particular damage reasonably should have been foreseeable to an actor committing the international delict in question"). *But see* CRAWFORD, *supra* note 44, at 494 ("Although containing an additional adjective, the [EECC's] formulation of the causation requirement does not add anything beyond the meaning of 'caused' elaborated by the [International Law Commission] in the commentary.").

[232] *See* Ethiopia's Damages Claims, Final Award, 26 R.I.A.A. 631, ¶ 284 (Eri.-Eth. Claims Comm'n 2009) (considering "the consequences that should have been reasonably foreseeable to [the responsible state's] military and civilian leaders at the time of its unlawful action").

[233] *Id.* ¶ 290 (stating that reasonable foreseeability "should extend to a broader range of outcomes than might need to be considered in a less momentous situation").

[234] *Id.* (warning that foreseeability should not extend "too far into the future, or too far from the battlefield" such that "all results are foreseeable, [and] the test is meaningless").

[235] *Id.* ¶ 293.

[236] *Id.*

[237] *Id.* ¶ 296.

[238] *Id.* (including compensation for the "continuing costs of care for internally displaced persons unable to return to their homes").

financially significant hotel and conference center.[239] On the other hand, the EECC found generalized economic damages, such as increased living costs, insurance costs, and transportation costs, to be too remote to satisfy the causation requirement.[240]

Similarly to the EECC, the United Nations Claims Commission (UNCC), established by the Security Council following Iraq's unlawful invasion of Kuwait, also used the reasonable foreseeability standard for causation in the context of the unlawful use of force.[241] The UNCC permitted state responsibility claims against Iraq, including claims related to forced displacement from Iraq and Kuwait and the breakdown of civil order in these states due to Iraq's invasion and occupation.[242] The Security Council authorized the UNCC to award remedies to states on behalf of their nationals for direct loss, damage, or injury resulting from Iraq's invasion and occupation of Kuwait.[243]

In determining which injuries were directly caused by Iraq's unlawful actions, the UNCC relied on reasonable foreseeability.[244] The UNCC, applying general legal principles, explained that "intervening acts of a third person that are a reasonable and foreseeable consequence of the original act do not break the chain of causation, and hence do not relieve the original wrongdoer of liability for losses which his acts have caused."[245] The UNCC further explained that in complex cases, considerations of "logic, fairness and equity" must factor into determinations of causation.[246]

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[239] *Id.* ¶ 174. Even though Eritrea satisfied the causation requirement for this loss, the EECC ultimately declined to award damages for lack of evidentiary proof of the amount of loss. *Id.*

[240] Decision Number 7: Guidance Regarding *Jus ad Bellum* Liability, 26 R.I.A.A. 10, ¶ 14 (Eri.-Eth. Claims Comm'n 2007) (citing with approval American-German Mixed Claims Commission decisions). Notably, however, in this part of the decision, the EECC did not directly reference reasonable foreseeability. *Id.*

[241] U.N. Comp. Comm'n Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Second Installment of "E2" Claims, at 25, 33, U.N. Doc. S/AC.26/1999/6 (1999) [hereinafter Report and Recommendations Concerning E2 Claims]; *see* Wühler, *supra* note 195, at 213 (describing the origin and purpose of the UNCC).

[242] U.N. Comp. Comm'n, Criteria for Expedited Processing of Urgent Claims, ¶ 18, U.N. Doc. S/AC.26/1991/1 (1991). These claims were limited to the time period of August 1990, when Iraq invaded, to March 1991, when Iraqi forces were expelled. *Id.*

[243] S.C. Res. 687, *supra* note 163, ¶ 16 (permitting remedies "for any direct loss, damage, . . . or injury. . . as a result of Iraq's unlawful invasion and occupation of Kuwait").

[244] *See* Report and Recommendations Concerning E2 Claims, *supra* note 241, at 25, 33 (using reasonable foreseeability to determine whether losses were caused by Iraq's invasion and occupation of Kuwait).

[245] *Id.* at 25.

[246] *See* U.N. Comp. Comm'n Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to U.S. $100,000 (Category "C" Claims), at 20–22, U.N. Doc. S/AC.26/1994/3 (1994) (recognizing "the difficulty . . . in the determination of whether a particular loss falls within the classification of a 'di-

Using this standard, the UNCC found Iraq responsible for reasonably foreseeable harms caused by intervening actors. Even though Iraq and its agents were not the direct perpetrators of the harm, the UNCC nonetheless found such harms to be direct injuries resulting from Iraq's invasion. For example, the UNCC required Iraq to provide reparation for losses to corporations caused by Israeli imposition of security measures, such as curfews and factory closures. The UNCC concluded that most of Israel's security measures were reasonably foreseeable, as a government has a duty to protect its citizens from hostilities.[247] In addition, the UNCC concluded that Iraq could be responsible for traffic accidents caused by the collapse of civil order as a result of the invasion.[248] Related specifically to displacement harms not directly caused by Iraq and Iraqi agents, the UNCC found Iraq responsible for injuries to displaced individuals due to dire conditions in refugee camps.[249]

The Naulilaa Arbitration between Portugal and Germany in 1928 similarly used a more expansive standard for causation, relying on foreseeability, when evaluating German responsibility stemming from its use of force against Portuguese posts in its colony of Angola.[250] Portugal claimed reparation from Germany for casualties and property damage caused by a revolt of the indigenous population following the German use of force.[251] Even though the connection between the use of force and the injuries caused by the revolt was not direct, the arbitral tribunal concluded that Germany must provide reparation for the injuries because it could have foreseen them even if there was an intermediate cause for those injuries.[252]

Using a different approach, the International Court of Justice did not explicitly use reasonable foreseeability in a state responsibility claim by the Democratic Republic of the Congo (DRC) against Uganda for Uganda's internationally wrongful acts between 1998 and 2003, including the unlawful use of

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rect' loss for which Iraq is liable" and explaining that "logic, fairness and equity" are relevant factors in this determination).

[247] *Id.* at 33.

[248] *See* U.N. Comp. Comm'n Governing Council, Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), at 24–25, U.N. Doc. S/AC.26/1994/1 (1994).

[249] *Id.* at 28.

[250] Portuguese Colonies (Port. v. Ger.), Arbitral Award, 2 R.I.A.A. 1011, 1031 (Perm. Ct. Arb. 1928).

[251] *Id.*

[252] *Id.* (rejecting the requirement of direct damage and requiring the responsible state to provide remedies for foreseeable damage caused by the unlawful act despite the presence of "intermediate links" in the chain linking the damage to the unlawful act).

force and violation of the sovereignty and territorial integrity of the DRC.[253] Instead, the International Court of Justice explained that any injury, both material and moral, must have a "sufficiently direct and certain causal nexus" with the unlawful conduct of the responsible state.[254] Applying this standard, the Court awarded damages for forced displacement resulting from the war because this flight had "a sufficiently direct and certain causal nexus" to Uganda's unlawful use of force.[255] More specifically, the Court awarded reparation to people who fled deliberate acts of violence against civilians and to people who fled to avoid armed conflict.[256] The Court also concluded that Uganda must provide reparation for forced displacement related to its failure to comply with its occupying power obligations in the Ituri region of the DRC.[257] The Court rejected the DRC's claim for macroeconomic damages resulting from the use of force due to insufficiency of evidence.[258] It did not decide whether international law disallows compensation for such claims, thus leaving open the possibility that a responsible state must remedy macroeconomic damage resulting from the use of force.[259]

These tribunal decisions are instructive when analyzing causation for forced migration during and after the unlawful use of force and determining the contours of the causation standard adjudicators should adopt in this context. When analyzing causation, tribunals should rely primarily on a reasonable foreseeability standard, as used by the EECC and UNCC.[260] A causation standard based on reasonable foreseeability is more effectual than a standard relying

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[253] *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. Rep. 53 (Feb. 9) (evaluating whether there was a "direct causal nexus" between the injuries and the internationally wrongful acts).

[254] *Id.* at 32. The Court recognized some of the challenges that arise in determining causation in the context of protracted and large-scale armed conflicts, including when there are concurrent causes of harm and multiple actors involved. *Id.* at 33.

[255] *Id.* at 62–63 (awarding damages for "[d]isplacement of populations" related to "escap[ing] the impact of war" because this flight had "a sufficiently direct and certain causal nexus to Uganda's violation of the *jus ad bellum*").

[256] *Id.* at 62 (awarding compensation to "persons who fled their homes in order to escape deliberate acts of violence against civilian populations and . . . those who were driven from their homes by the fighting").

[257] *Id.* at 63.

[258] *Id.* at 101. The Court rejected the claim for macroeconomic damage because the DRC did not prove that the damage had a sufficiently direct causal nexus to Uganda's internationally wrongful act. *Id.* Specifically, the DRC's evidence was not "sufficiently reliable" to show direct causal connections between Uganda's unlawful actions and the alleged economic damage. *Id.* at 102.

[259] *See id.* at 101 (declining to decide whether macroeconomic damage caused by an internationally wrongful act is compensable as a general matter).

[260] A reasonable foreseeability standard is not necessarily incompatible with the standard used by the International Court of Justice in DRC's state responsibility claim against Uganda, which focused on direct causal nexus. *See generally id.* at 32. The Court did not explicitly reject a reasonable foreseeability standard in that case. *See generally id.*

on the amorphous difference between direct and indirect loss.[261] A reasonable foreseeability-based standard is clearer because it is guided by questions of whether the responsible state should have anticipated the harm and whether the harm has a "clear and unbroken causal link" to the unlawful act.[262]

Additionally, when analyzing causation, tribunals should bear in mind principles of fairness and equity, as the UNCC did when it held Iraq responsible for harms caused by third parties as a result of Iraq's invasion.[263] These considerations are especially important in the context of forcibly displaced persons, whose lives are upended.[264] Moreover, considerations of fairness and equity are consistent with recognizing the continuing nature of harm to persons who remain displaced, which the EECC concluded is a type of harm that should not be subject to temporal limitation.[265]

Use of reasonable foreseeability and incorporation of fairness and equity principles can equalize the playing field for states when determining causation, regardless of the respective power they wield in the international system.[266] A more stringent focus on directness may be sufficient to hold states responsible for harms that result from wars of aggression, where the responsible state targets civilians and attempts to acquire territory.[267] In such wars, much of the displacement will likely occur during hostilities. Yet, such a standard may be

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[261] *See, e.g.*, War-Risk Insurance Premium Claims (U.S. v. Ger.), 7 R.I.A.A. 44, 62–63 (Mixed Claims Comm'n 1923) (characterizing the distinction between "direct" and "indirect" damages as "frequently illusory and fanciful" and proclaiming that it "should have no place in international law"); *see also* BECKER, *supra* note 67, at 318 (explaining that tribunals have found "the distinction between 'direct' and 'indirect' loss . . . notoriously difficult to apply"); Arthur W. Rovine & Grant Hanessian, *Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission* (describing how the UNCC Governing Council ignored the distinction between direct and indirect loss, and how many tribunals instead use foreseeability in evaluating causation), *in* THE UNITED NATIONS COMPENSATION COMMISSION [THIRTEENTH SOKOL COLLOQUIUM] 235, 248 (Richard B. Lillich ed., 1995).

[262] *See* Gaetano Arangio-Ruiz (Special Rapporteur on State Responsibility), *Second Report on State Responsibility*, [1989] 2 Y.B. Int'l L. Comm'n 12–14, U.N. Doc. A/CN.4/425 (critiquing a causation standard based on "direct" and "indirect" damage "because of the ambiguity and the scant utility of such a distinction," and instead focusing on a "clear and unbroken causal link" between the unlawful act and the harm); *see, e.g.*, Portuguese Colonies (Port. v. Ger.), Arbitral Award, 2 R.I.A.A. 1011, 1031 (Perm. Ct. Arb. 1928) (rejecting the requirement of direct damage and requiring the responsible state to provide remedies for foreseeable damage caused by the unlawful act despite the presence of "intermediate links" in the chain linking the damage to the unlawful act).

[263] *See supra* note 246 and accompanying text.

[264] *See* Souter, *supra* note 8, at 332 (describing the suffering migrants face during displacement).

[265] *See* Ethiopia's Damages Claims, Final Award, 26 R.I.A.A. 631, ¶ 296 (Eri.-Eth. Claims Comm'n 2009) (ordering compensation for the "continuing costs of care for internally displaced persons unable to return to their homes").

[266] *See supra* notes 204–210 and accompanying text (discussing the challenge in state responsibility and international law more generally of powerful states avoiding enforcement).

[267] *See War*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "war of aggression" as one that a state starts for reasons besides self-defense).

less effective in cases of so-called "just wars," where a responsible state, generally a powerful state within the international system, acts for purported humanitarian reasons to topple an existing regime.[268] In these wars, there may be less displacement during the use of force if the responsible state does not have aspirations for acquiring territory and does not focus on harming nationals of the injured state. Rather, where the aim of a "just war" is regime change, the destabilizing effects of the use of force will go beyond immediate flight during the hostilities.[269] A broader approach to causation, which considers principles of equity and fairness, would encompass reasonably foreseeable harms resulting after unlawful "just wars" by powerful states.

The use of fairness and equity principles does not mean that the liability of responsible states is unlimited. The causation requirement and the reasonable foreseeability standard will provide limits on the responsibility of states. Displacement that cannot be traced to the internationally wrongful act or is not a reasonably foreseeable consequence of the act would not be compensable. The reasonable foreseeability analysis would provide case-specific limits to causation, after an intensive inquiry into the facts of the international law violation.

When analyzing causation in the context of forced migration, it is instructive to first identify the three main types of forced displacement that can occur after a responsible state's unlawful use of force. They are explored below in order of clearest causal connection to the unlawful act and in this Section's analysis of causation for the case studies.[270]

The first example of forced displacement is flight caused by the responsible state's military actions during its use of force. Tribunals have routinely found that this type of displacement satisfies causation under the reasonable foreseeability standard.[271] There is little doubt that use of force causes forced displacement while it is ongoing, especially as the duration and magnitude of the use of force increases.[272]

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[268] *See supra* note 119 and accompanying text (explaining the concept of "just war").

[269] *See, e.g.*, *supra* notes 102–104 and accompanying text (discussing the sectarian violence following the U.S.-led invasion of Iraq); *infra* note 287 and accompanying text (same).

[270] *See infra* notes 271–276 and accompanying text.

[271] *See, e.g.*, *supra* notes 242, 255 and accompanying text. Adjudicators have also found that this type of displacement satisfies causation under a direct causal nexus standard. *See supra* notes 255–257 and accompanying text.

[272] *See supra* notes 242, 255–257 and accompanying text. There is a clear and undisputed correlation between violent conflict and forced migration. *See, e.g.*, DAVID VINE ET AL., BROWN UNIV., CREATING REFUGEES: DISPLACEMENT CAUSED BY THE UNITED STATES' POST-9/11 WARS (2021), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_Vine%20et%20al_Displacement%20Update%20August%202021.pdf [https://perma.cc/BUW4-JDWX] (reporting the number of displaced people from various states due to U.S. military action since 2001); Alex Braithwaite, Idean Salehyan & Burcu Savun, *Refugees, Forced Migration, and Conflict: Introduction to the Special Issue*, 56 J. PEACE RSCH. 5, 5–6 (2018) (stating that the number of displaced people due

A second type of forced displacement is caused directly by third-party actors during the responsible state's use of force. An example is when people flee private actors' violence after an injured state is no longer able to provide law enforcement protection during an invasion.[273] As explained by the UNCC, a responsible state should provide reparation for such displacement if the acts of the third party are reasonably foreseeable to the responsible state.[274] Third party violence due to the collapse of civil order is a reasonably foreseeable consequence during a responsible state's use of force, and a responsible state should provide reparation for forced migration that occurs as a result.[275]

Lastly, a third type of displacement, where the causal connection between the internationally wrongful act and the forced migration is more attenuated, is displacement immediately precipitated by third parties after the responsible state's use of force has ended. Although the displacement occurs after the use of force, it is still traceable to that use of force. An example of this third type of displacement is the forced migration of Iraqis during the sectarian violence that followed the U.S. invasion of Iraq.[276] Whether this type of forced displacement is caused by the use of force is murkier.

The Ukraine case study primarily involves the first type of displacement.[277] The causation analysis is straightforward—Ukrainians have been crossing international borders as a direct result of Russian aggression, without any intervening events.[278] The intensity and scale of Russia's aggression makes forced migration reasonably foreseeable. The Russian invasion has been brutal.

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to conflict has increased significantly over the past ten years); *'Unprecedented' 65 Million People Displaced by War and Persecution in 2015*, U.N. (June 20, 2016), https://refugeesmigrants.un.org/%E2%80%98unprecedented%E2%80%99-65-million-people-displaced-war-and-persecution-2015-%E2%80%93-un [https://perma.cc/W7K7-WRGS] ("In all, 86 per cent of the refugees under UNHCR's mandate in 2015 were in low- and middle-income countries close to situations of conflict."). On the other hand, forced migration may not be a reasonably foreseeable consequence of a minor infraction of sovereignty, such as a brief and nonviolent incursion into another state's territory. *See, e.g.*, *Colombian Apology for "Incursion,"* BBC NEWS, http://news.bbc.co.uk/2/hi/americas/4676664.stm [https://perma.cc/75LZ-RKB3] (Feb. 3, 2006) (describing how, in 2006, Colombian helicopters and warplanes allegedly crossed into Ecuadorian airspace but did not cause any physical damage).

[273] *See, e.g.*, *supra* note 242 and accompanying text (explaining that the UNCC permitted claims related to the breakdown of civil order following Iraq's invasion of Kuwait).

[274] *See supra* notes 245–247 and accompanying text.

[275] *See supra* note 248 and accompanying text. This type of harm should also satisfy a causation standard requiring a direct causal nexus because of the clear link between the displacement and the use of force even though it is immediately caused by a third party.

[276] *See infra* note 287 and accompanying text; *see also infra* note 289 and accompanying text (providing additional examples of forced displacement that occurs after a state has ended its use of force).

[277] *See supra* note 271 and accompanying text (describing the first type of forced displacement as displacement caused by a state's military actions during its use of force).

[278] *See supra* note 87 and accompanying text (providing the number of people who fled Ukraine following Russia's invasion).

Russian armed forces have targeted civilians by attacking hospitals, schools, and residential complexes.[279] Between February and December 2022, over 6,800 civilians were killed and an additional 10,900 were injured.[280] The United Nations Human Rights Monitoring Mission has documented Russia's international humanitarian law violations that may constitute war crimes.[281] The invasion has affected large portions of Ukraine, and parts of the eastern border have been under Russian military control.[282] Russia's use of force and violation of Ukraine's sovereignty are significant, and it is reasonably foreseeable that people will flee following such a full-scale invasion that targets civilians.[283] Accordingly, any Ukrainian who has fled since the invasion began or who flees while Russian use of force continues constitutes a state-impacted migrant for whom Russia should have to provide reparation under state responsibility.[284]

Although the question of causation is relatively straightforward for the Russian invasion of Ukraine, the Iraq case study highlights some of the complexities that can arise when considering state responsibility for forced migration. Iraqi migration includes not only displacement caused by the United States and private parties during the use of force (the first and second types of displacement), but also displacement that occurred after the end of the United States' use of force that can be traced to the invasion (the third type of displacement).[285] The United States is responsible for displacement that occurred during the use of force, whether that displacement was immediately caused by U.S. actions or third parties, because such displacement was reasonably fore-

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[279] Matilda Bogner, *Plight of Civilians in Ukraine*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (May 10, 2022), https://www.ohchr.org/en/press-briefing-notes/2022/05/plight-civilians-ukraine [https://perma.cc/UY68-KMF4] (detailing the brutality of Russia's invasion of Ukraine).

[280] *Ukraine: Civilian Casualty Update 26 December 2022*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Dec. 27, 2022), https://www.ohchr.org/en/news/2022/12/ukraine-civilian-casualty-update-26-december-2022 [https://perma.cc/2XUV-6UD3].

[281] *See* Bogner, *supra* note 279 ("The high number of civilian casualties and the extent of destruction and damage to civilian objects strongly suggest violations of the principles governing the conduct of hostilities, namely distinction, including the prohibition of indiscriminate attacks, proportionality and precautions.").

[282] *See* David Brown et al., *Ukraine in Maps: Tracking the War with Russia*, BBC NEWS, https://www.bbc.com/news/world-europe-60506682 [https://perma.cc/U7ZJ-7KLY] (Mar. 9, 2023) (depicting changes in control over territory over time).

[283] *Compare* VINE ET AL., *supra* note 272 (demonstrating a correlation between displacement and significant violations of a state's sovereignty), *with Colombian Apology for "Incursion," supra* note 272 (describing a nominal violation of sovereignty where forced migration is not reasonably foreseeable).

[284] *See supra* notes 5–6 and accompanying text (defining "state-impacted migrants").

[285] *See supra* notes 102–104 and accompanying text.

seeable.[286] Even though the United States did not target civilians in the same way that Russia is, forced migration is nevertheless a reasonably foreseeable consequence of military operations aimed to destabilize a governing regime.

The causation question is thornier when assessing the third type of displacement: forced migrants who fled during the U.S. occupation and prolonged civil war that followed the invasion. The number of these forced migrants was significantly higher than those who fled during the actual invasion, which lasted just over a month.[287] The causal connections between this displacement and the United States' use of force should be sufficient to trigger reparation because it was reasonably foreseeable that the invasion would lead to this type of forced migration even though third parties were the immediate cause.[288] When the intent of the responsible state is to topple an existing governing regime, it is reasonably foreseeable that resulting instability and power struggles will cause forced migration in a state with a history of sectarian disputes.[289] Be-

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[286] *See supra* notes 244–249 and accompanying text (outlining the UNCC's explanation that third party intervening actions that are reasonably foreseeable do not defeat the basis for causation).

[287] *See* MARGESSON ET AL., *supra* note 103, at 2–3 (explaining that "[w]hen the displacement crisis accelerated in 2006 [as a result of increased sectarian violence], UNHCR observed that the humanitarian crisis many feared would take place in March 2003 as a result of the war then began to occur"); *Iraq War Timeline*, *supra* note 95 (marking 2006 as experiencing an increase in sectarian violence). The United Nations recognized the United States, as well as the United Kingdom, as occupying powers in Iraq on May 22, 2003. *See* S.C. Res. 1483, at 2 (May 22, 2003). The U.S. government noted that the occupation began "no later than April 16, 2003 . . . ." Jack L. Goldsmith III, *"Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention: Memorandum Opinion for the Office of Legal Counsel to the President*, *in* 28 OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE 35, 37 (Nathan A. Forrester ed., 2004).

[288] *See* Portuguese Colonies (Port. v. Ger.), Arbitral Award, 2 R.I.A.A. 1011, 1031 (Perm. Ct. Arb. 1928) (allowing reparation for injuries even when there are "intermediate links" between the unlawful act and the injuries).

[289] *See* Souter, *supra* note 8, at 331 (stating that "although internal persecution may be the immediate precipitant of flight, this can be often merely 'epiphenomenal,' that is, a manifestation of deeper structural ills for which external states bear primary responsibility" (citation omitted) (quoting Schuck, *supra* note 15, at 261)). When considering use of force by the United States, there are many examples of U.S.-caused regime changes, outside of the U.S.-led invasion of Iraq, that led to protracted situations of instability and violence that triggered forced migration, such as the U.S. invasions of Libya and Afghanistan. *See generally* Steven Feldstein, *Moral Failure in Libya*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 22, 2018), https://carnegieendowment.org/2018/05/22/moral-failure-in-libya-pub-76423 [https://perma.cc/H2XP-VUY5] ("[T]he roots of the current [migration] crisis are attributable to decisions taken by European and U.S. NATO coalition leaders in 2011, when the alliance deposed Libyan president Muammar Gaddafi without any real plan for the day after."); Micah Zenko, *The Big Lie About the Libyan War*, FOREIGN POL'Y (Mar. 22, 2016), https://foreignpolicy.com/2016/03/22/libya-and-the-myth-of-humanitarian-intervention [https://perma.cc/8CSQ-LLLG] (examining the United States' motivations for regime change in invading Libya); VINE ET AL., *supra* note 272 (stating that 5.9 million people have been displaced from Afghanistan since the U.S. invasion). *See generally* John Quigley, *The Afghanistan War and Self-Defense*, 37 VAL. U. L. REV. 541 (2003) (explaining U.S. military action in Afghanistan and rejecting the United States' self-defense justification). Even other U.S. foreign involvement that was less substantial than direct military opera-

cause the widespread instability following the invasion of Iraq was reasonably foreseeable, Iraqi nationals who fled during the U.S. occupation and the civil war constitute state-impacted migrants for which the United States should provide reparation. Principles of fairness and equity also counsel towards requiring the United States to provide reparation for these state-impacted migrants. U.S. actions had grave ramifications on political stability and upended the lives of many Iraqi nationals, many of whom remain displaced.[290]

Because reasonable foreseeability analysis is intensely fact-specific, determining the exact point at which U.S. responsibility for Iraqi forced migration ends is beyond the scope of this Article. Such a determination requires a deep dive into various matters including the scope and scale of the invasion, the United States' transition planning during the occupation, Iraqi military capability to quell conflict, efficacy of coalition operations, instability in the various regions of Iraq, and the history of sectarian violence in Iraq to ascertain the consequences that were or should have been reasonably foreseeable to U.S. military and civilian leaders.[291]

D. Reparation

After an injured state establishes that the responsible state's internationally wrongful act caused injuries, a responsible state must make full reparation to remedy those injuries.[292] Reparation for forced migration caused by a state's unlawful actions should include monetary remedies as well as resettlement as appropriate.

The Articles frame reparation as an obligation of the responsible state, rather than a right of the injured state.[293] The Articles provide general default

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tions, but still designed to produce regime change, has resulted in political instability and forced migration such as the U.S.-backed coups in Guatemala and Nicaragua during the Cold War. *See generally* Laura Moye, *The United States Intervention in Guatemala*, 73 INT'L SOC. SCI. REV. 44 (1998) (examining the U.S.-backed coup in 1954 to overthrow the elected Guatemalan government); Kenneth Roberts, *Bullying and Bargaining: The United States, Nicaragua, and Conflict Resolution in Central America*, INT'L SEC., Fall 1990, at 67 (analyzing U.S. military involvement in Nicaragua).

[290] *See* Ethiopia's Damages Claims, Final Award, 26 R.I.A.A. 631, ¶ 296 (Eri.-Eth. Claims Comm'n 2009) (explaining that damage to displaced persons does not have temporal limitations).

[291] *See Ethiopia's Damages Claims*, 26 R.I.A.A. ¶¶ 291–305 (analyzing specific facts related to the conflict between Ethiopia and Eritrea including geography, military strategy, number of troops deployed, scale of the use of force, and history); *see also supra* note 236 and accompanying text (discussing evidence relevant to reasonable foreseeability).

[292] Articles, *supra* note 12, art. 31. The Articles also require responsible states to cease the unlawful action "if it is continuing" and to "offer appropriate assurances and guarantees of non-repetition, if circumstances so require." *Id.* art. 30.

[293] *See* Commentaries, *supra* note 51, at 91 ("The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e., as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States.").

rules on consequences for a breach of an international obligation when primary rules of international law do not specify particular consequences of a breach.[294] Under the Articles, the reparation obligations of a responsible state do not change regardless of the seriousness or type of breach.[295]

The main principle undergirding reparation is the requirement that the responsible state make full reparation for injuries its internationally wrongful act caused.[296] Full reparation requires a state to eliminate all consequences of its unlawful act to the extent possible to try to reestablish the situation that would have existed absent the act.[297]

The Articles explain that injury is "any damage" caused by the violation of international law.[298] Thus, injury includes material and moral damage to a state and its nationals.[299] Material damage is damage assessable in financial terms.[300] Moral damage to nationals includes pain and suffering, loss of family, and privacy-related harms.[301] In the context of migration, the relevant harm for which the responsible state must provide reparation is the material and moral damage to the injured state's nationals who are forced to flee. Material damage for displaced persons can include loss of a home, personal property, income, and so forth. Displaced persons also suffer moral damage such as pain and suffering from having to leave their homes.[302]

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[294] Articles, *supra* note 12, art. 55; *see also* Bodansky & Crook, *supra* note 44, at 780 (noting that the Articles "represent only default or residual rules; they do not necessarily apply in all cases" and that "[p]articular treaty regimes or rules of customary international law can establish their own special rules of responsibility . . . that differ from those set forth in the [A]rticles").

[295] *See* Bodansky & Crook, *supra* note 44, at 785–86 (explaining that "the secondary obligations or responsibility are the same, regardless of the gravity of the breach or the subject matter or type of obligation involved").

[296] Articles, *supra* note 12, art. 31.

[297] *See* Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (explaining that full reparation requires a responsible state to "as 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"); *see also* Commentaries, *supra* note 51, at 91 (describing what full reparation entails).

[298] Articles, *supra* note 12, art. 31; Commentaries, *supra* note 51, at 91 (explaining that the Articles' use of "any damage" is meant to both include a broad range of damages, as well as exclude abstract damages and general concerns).

[299] Articles, *supra* note 12, art. 31.

[300] *See* CRAWFORD, *supra* note 44, at 486–87 (describing material damage as damage which can be financially assessed).

[301] *See id.* (describing moral damage as "individual pain and suffering, loss of loved ones or the personal affront associated with an intrusion into one's home or private life").

[302] *See generally* Erin B. Corcoran, *Refugee Resettlement Promotes Human Dignity and the Rule of Law*, UNIV. OF NOTRE DAME (June 24, 2021), https://keough.nd.edu/refugee-resettlement-promotes-human-dignity-and-the-rule-of-law-dd/ [https://perma.cc/U7SB-ELEM] ("Due to conditions outside their control, refugees must leave their houses of worship, sever their community ties, and abandon their homes—and sometimes even their own families—in search of protection.").

The traditional forms of reparation under state responsibility are restitution, compensation, and satisfaction.[303] Restitution aims to "re-establish the situation which existed before the wrongful act was committed . . . ."[304] Restitution is not limited to monetary remedies. In fact, in some cases, monetary damages may be insufficient to reestablish the situation that would have existed but for the breach. Thus, restitution can take many forms including the return of territory, property, or detained persons; the withdrawal of the responsible state's forces from occupied territory; and the reversal of juridical acts.[305] Yet, there is a limit, as the Articles state that restitution should not impose a disproportionate burden on the responsible state.[306]

Compensation covers any financially assessable damage not remedied by restitution.[307] Compensation is monetary payment for "damage actually suffered" as a result of the responsible state's unlawful act.[308] Injured states may not receive compensation for "indirect or remote" damage.[309] Tribunals have assessed the value of compensation in the context of forced migration based upon the length of time of a person's displacement and the struggles faced during the displacement.[310] It is not always necessary for an injured state to prove the specifics of every individual injury for a tribunal to award compensation.[311] Instead, a tribunal can estimate compensation when there are mass injuries, which is often the case after the unlawful use of force.[312] Tribunals order responsible states to pay compensation directly to the injured state even where the harm is to their nationals, as state responsibility involves claims between states.[313] Then, the injured state is responsible for distributing the funds to their injured nationals.[314]

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[303] Articles, *supra* note 12, art. 34.

[304] *Id.* art. 35.

[305] Commentaries, *supra* note 51, at 97–98 ("The term 'restitution' in article 35 . . . has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.").

[306] Articles, *supra* note 12, art. 35.

[307] *Id.* art. 36.

[308] Commentaries, *supra* note 51, at 96.

[309] *Id.*

[310] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2022 I.C.J. Rep. 66 (Feb. 9) (including consideration of the length of displacement and the "difficulty of the circumstances endured" during displacement when valuing compensation).

[311] *Id.* at 37 (explaining that an injured state need not "prove the exact injury suffered by a specific person or property in a given location and at a given time" for an adjudicator to award compensation).

[312] *Id.* ("In cases of mass injuries . . . , [a tribunal] may form an appreciation of the extent of damage on which compensation should be based without necessarily having to identify the names of all victims or specific information about each building or other property destroyed in the conflict.").

[313] *See, e.g.*, Ethiopia's Damages Claims, Final Award, 26 R.I.A.A. 631, 770 (Eri.-Eth. Claims Comm'n 2009) (awarding monetary reparation to Eritrea and Ethiopia for harms to the states' nation-

If a responsible state cannot remedy an injury by restitution or compensation, it must give satisfaction.[315] Satisfaction is the remedy for injuries that are not financially assessable, such as injuries of a symbolic nature.[316] Examples include insults to the national flag of a state, minor violations of sovereignty, and mistreatment of diplomatic officials.[317] The modes of satisfaction are open-ended and allow for some creativity. Examples of satisfaction include inquiry into the causes of an accident that resulted in injury, an award of symbolic damages, a formal apology, and a declaration of wrongfulness.[318]

Where forced migration is the injury from an internationally wrongful act, monetary remedies are typically provided as reparation.[319] Monetary remedies distributed to displaced nationals would be appropriate and most effective when forced migrants eventually want to repatriate and it is safe to do so. Monetary remedies could be framed as restitution to reestablish the situation that existed before the unlawful action or as compensation for losses caused by the forced displacement. Monetary remedies could cover the costs of repatriation as well as rebuilding homes and replacing personal property damaged because of the internationally wrongful act. International tribunals have awarded compensation to remedy the financially assessable damages to forcibly displaced persons.[320]

International tribunals have failed to explore nonmonetary remedies for forced migration, however. Monetary reparation will not always satisfy the purpose of restitution under state responsibility—to erase the consequences of the illegal act and reestablish the situation that would have existed absent the breach.[321] The conditions in the injured state may have greatly worsened as a

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als and expressing "confidence that . . . funds received . . . will be used to provide relief to their civilian populations injured in the war"); *see also supra* notes 189–192 and accompanying text (discussing the state-centric nature of state responsibility).

[314] *See Armed Activities on the Territory of the Congo*, 2022 I.C.J. Rep. at 107, ¶ 408 (explaining the plans of the injured state, the DRC, to distribute the awarded reparation to individual victims).

[315] Articles, *supra* note 12, art. 37.

[316] Commentaries, *supra* note 51, at 106.

[317] *Id.*

[318] *Id.* at 106–07.

[319] *See supra* notes 238, 255–257 and accompanying text (describing decisions of tribunals ordering monetary reparation for forced displacement). *See generally* Stern, *supra* note 221 (stating that restitution is the most common form of reparation).

[320] *See, e.g.*, Ethiopia's Damages Claims, Final Award, 26 R.I.A.A. 631, ¶¶ 259–262, 296, 300 (Eri.-Eth. Claims Comm'n 2009) (awarding monetary reparation relating to the seizure of property of displaced people and the failure to ensure safe repatriation for displaced Ethiopians, and the costs of assisting internally displaced persons).

[321] *See* Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (stating that reparation should "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"); *see also* Commentaries, *supra* note 51, at 91, 96–98 (describing what restitution entails).

result of the internationally wrongful act. Therefore, the effects of some international law violations that result in forced migration may be sufficiently severe or long-lasting that repatriation, even with monetary assistance, would not reestablish the position of the state-impacted migrants prior to the breach.[322] A more effective form of reparation for state-impacted migrants could be requiring responsible states to permanently resettle them in the responsible state as restitution. Resettlement can help restore state-impacted migrants to the status quo that existed before the responsible state's breach of an international obligation. Thus, the nonmonetary remedy of resettlement in the responsible state should be available as a potential form of reparation where appropriate.

Restitution should be conceived of expansively in the forced migration context. Adjudicators should not dismiss restitution as a form of reparation simply because it would be impossible to reestablish the injured state's exact situation prior to the breach. Rather, this remedy should aim to restore state-impacted migrants' general sense of safety and livelihood that existed prior to the breach. If this is no longer a possibility in the injured state due to the consequences of the internationally wrongful act, the responsible state should be obligated to offer permanent resettlement to state-impacted migrants.[323] If responsible states were able to avoid providing restitution for forced displacement when their wrongful actions caused irreversible damage in the injured state, perverse incentives would arise. In addition to restitution, resettlement in the responsible state could also serve as satisfaction if it functions as an apology for the internationally wrongful act that caused forced migration.[324]

Nevertheless, resettlement in the responsible state may not always be appropriate in cases involving unlawful use of force. Resettlement is not a suitable remedy if the responsible state aimed to conquer territory or deliberately targeted civilians in the injured state.

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[322] *See, e.g.*, Souter, *supra* note 8, at 334 (explaining that although "the ideal form of restitution for some refugees may be the recreation of the previous situation in their country to permit their safe return . . . this is often impossible, for the [state]'s actions may have unleashed forces it subsequently cannot check").

[323] *See id.* ("The [responsible] state may be unable to erase the traumas of flight or to enable return for those who desire it, but it can offer refugees state protection of the sort they previously had.").

[324] In the context of climate change-related forced migration, Professor Carmen Gonzalez explains that migration can provide satisfaction "if accompanied by an acknowledgement from Northern states of their responsibility for climate change and for the political, economic, and military interventions that impoverished and destabilized the Global South." Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 440 (2020). Similarly, Dr. James Souter explains that asylum in a responsible state can be "an inward-looking expression of contrition and apology, thereby acting as a form of satisfaction." Souter, *supra* note 8, at 335 (emphasis omitted); *see also infra* note 326 and accompanying text (describing a situation where resettlement in the responsible state would be inappropriate).

The Ukraine case study provides an example of where monetary reparation is sufficient and appropriate. Meanwhile, the Iraq case study illustrates a situation where nonmonetary restitution in the form of resettlement is the more effective and appropriate remedy. Monetary restitution or compensation may be an effective remedy for displaced Ukrainians because many of them desire to return to Ukraine.[325] Moreover, it would be inappropriate and unsafe to resettle Ukrainians in Russia given both Ukrainian unwillingness to move to Russia and Russian hostility towards Ukrainians.[326]

Resettlement may be a more effective remedy in situations involving so-called "just wars," like the U.S.-led invasion of Iraq, where the responsible state's use of force did not focus on targeting the injured state's nationals.[327] The destabilization that resulted from the United States' use of force in Iraq created long-lasting civil strife and unsafe conditions there.[328] Due to the scale of this disruption, no amount of monetary restitution could restore Iraqi state-impacted migrants to the pre-invasion status quo in Iraq. Indeed, the situation in Iraq before the U.S.-led invasion was difficult, especially for the segments of the population that were brutalized by President Saddam Hussein's regime.[329] Still, however, after the U.S.-led invasion and the resulting civil war, the situation became unendurable and life-threatening for many Iraqis.[330] Because the conditions in Iraq have not reached the stability that existed before the invasion, monetary remedies to facilitate repatriation would be insufficient to restore state-impacted migrants to the status quo prior to the United States' use of

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[325] *See As Russia's Invasion Stalls, Ukraine's Refugees Return Home*, THE ECONOMIST (May 24, 2022), https://www.economist.com/europe/2022/05/24/as-russias-invasion-stalls-ukraines-refugees-return-home [https://perma.cc/E37L-RHVY] (explaining that many Ukrainian migrants expressed their intent to return to Ukraine); Lateshia Beachum, *Ukrainian Refugees Vow to Return Home—Even if It's Never the Same*, WASH. POST (Apr. 6, 2022), https://www.washingtonpost.com/world/2022/04/06/ukraine-refugees-uncertainty/ [https://perma.cc/L7DS-G4V4] (explaining that Ukrainian migrants started to return to Ukraine in the late spring of 2022, once Russian forces retreated from the outskirts of one of Ukraine's largest cities, Kyiv).

[326] *See* Beachum, *supra* note 325 (explaining that every state except Russia has been welcoming towards Ukrainians).

[327] *See supra* notes 267–268 and accompanying text (contrasting wars of aggression with "just wars").

[328] *See* MARGESSON ET AL., *supra* note 103, at 3 ("[S]ectarian conflict and general armed violence, local criminal activity, coalition military operations, and fighting among militias and insurgents . . . create an atmosphere of generalized fear for many ordinary Iraqis.").

[329] *See Justice for Iraq*, HUM. RTS. WATCH (Dec. 2002), https://www.hrw.org/legacy/backgrounder/mena/iraq1217bg.htm#:~:text=In%20addition%20to%20abuses%20particularly,and%20summary%20and%20arbitrary%20executions [https://perma.cc/3HZ8-WFBX] (articulating that under President Hussein's regime, Iraqis endured violence, imprisonment, and torture).

[330] *See supra* notes 102–104, 328 and accompanying text (describing the nature of the destabilization and danger in Iraq following the U.S.-led invasion and providing the number of casualties of the U.S.-led invasion and the resulting civil war).

force. Rather, migrants could achieve that level of stability by being resettled in the United States.

Finally, there may be situations where repatriation, even with monetary remedies, is unsafe and resettlement in the responsible state is inappropriate. In such instances, compensation for the displaced persons' financially assessable damage would be the most effective remedy. Such damage may include the harms of displacement and the costs associated with being forced to migrate to and resettle in a third state.

Given the various forms of reparation for forced migration, individual state-impacted migrants from the same injured state may prefer different remedies. State-impacted migrants may have different preferences for a variety of reasons, including the extent of the harm to themselves, their families, and their property; the treatment they may expect upon repatriation or resettlement; family and community ties in the responsible state; and the length of time spent away from their homes. Generally, for ease of administration, international tribunals award standardized monetary remedies to injured individuals in cases involving mass harms. For example, people displaced following Iraq's invasion of Kuwait received a fixed amount of monetary compensation.[331]

Yet, some state-impacted migrants may wish to repatriate after receiving monetary restitution, whereas other migrants may prefer resettlement. Migration policy should prioritize the dignity and self-determination of individual state-impacted migrants by allowing them to choose between remedies. Forced migrants face significant affronts to their dignity, not only in the process of their flight, but also when seeking protection.[332] Many face brutal deterrence tactics by states, grim conditions in camps, and a lack of choice in resettlement options, if fortunate enough to be some of the few selected for resettlement.[333] To truly serve a reparative function, remedies should permit state-impacted migrants to choose between monetary reparation and resettlement in the responsible state, rather than forcing migrants to accept a one-size-fits-all remedy.[334] Although such a proposal may be more logistically challenging, it is not im-

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[331] *See* Wooldridge & Elias, *supra* note 195, at 562 (explaining the fixed compensation amounts for individuals displaced by Iraq's invasion of Kuwait).

[332] *See generally* Corcoran, *supra* note 302 ("In order to survive, a refugee must leave behind much of what defines [their] personhood.").

[333] *See generally* Roger Brownsword, *Migrants, State Responsibilities, and Human Dignity*, 34 RATIO JURIS 6 (2021) (discussing the failure of states to respect migrant dignity).

[334] *See* Souter, *supra* note 8, at 335–36 ("Having had their agency and freedom of movement so restricted by their displacement, special emphasis should be placed upon it when providing reparation."); *see also* Gonzalez, *supra* note 324, at 432 ("Self-determination is the right of subordinated peoples to determine their own destiny rather than having it imposed on them by foreign powers." (citing Robert A. Williams, *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 51 (1991))).

possible. States often collect individual grievances to present to a tribunal assessing state responsibility and could also request the preferences of state-impacted migrants.[335] Tribunals should honor these choices to most effectively remedy the material and moral damage suffered by each state-impacted migrant as a result of the internationally wrongful act and subsequent forced displacement.

CONCLUSION

State responsibility can broaden protections for forced migrants as well as hold states accountable for their unlawful actions that have transnational consequences. Tribunals have used state responsibility narrowly in the context of forced migration, to provide monetary compensation only for immediate forced displacement that occurred during the use of force. Yet, to truly remedy the injuries of forced displacement, state responsibility should be used more expansively, both to (1) remedy subsequent forced migration that is a reasonably foreseeable consequence of a responsible state's internationally wrongful act, and (2) provide more creative forms of reparation, such as resettlement in the responsible state.

Furthermore, state responsibility can apply to any unlawful state action, beyond the use of force, that causes displacement. The trans-substantive nature of state responsibility allows for its application to any unlawful state action that causes forced migration including pollution, economic imperialism, and interference in a state's domestic affairs. State responsibility could also extend to encompass the unlawful actions of migrants' home states that cause flight. Thus, state responsibility has significant potential to increase international law protections for forced migrants.

[335] *See supra* note 195 and accompanying text (discussing the UNCC's process of collecting claims from injured individuals).