Between Sovereigns: A Reexamination of the Refugee's Status

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INTRODUCTION

A refugee leaves the country of his or her national origin because the political community will not or can no longer vouchsafe the refugee's life, liberty, or peace of mind. In many cases, the sovereign of national origin actively and coercively deprives the refugee of those basic components of human dignity. By taking flight, refugees enter a precarious realm between sovereigns. They may no longer rely upon the solicitude of their native sovereign, yet international law gives them no effective replacement for that power. They gain neither a right to asylum in other countries nor one to the assumption of a new nationality. Yet only the tie of nationality furnishes the full protection of international law, since individuals as such have no rights under that body of law. Covenants on the status of refugees and stateless persons and the organization of the United Nations High Commissioner for Refugees (UNHCR) have not changed this aspect of the world order.

Another field of international law—that of international human rights—provides at least a complement to, and perhaps even a replacement for, international refugee law. Norms defining international human rights constrain governments in their treatment of individuals, be they citizens, foreign nationals, or stateless migrants. Thus, as limitations on the power of sovereigns to abuse individuals are given greater recognition, the refugee's loss of nationality, so detrimental to his or her fate under older approaches to international law, becomes of lesser consequence. The application of human rights norms to refugee situations should minimize the failures of government that provoke refugee movements, provide adequate succor for refugees once they arrive in a new jurisdiction, and allow the

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application of sanctions against those states which generate refugees. This article, which advocates the application of human rights standards to refugees, and describes the salutary effects of such a development, is more an exploration of policies and principles implicit in international law than a discussion of explicit rules binding on states.

INDIVIDUALS AND NATIONALITY UNDER INTERNATIONAL LAW

As persons in flight, refugees take themselves beyond the pale of protection offered by their original sovereign to its own nationals. Often a change of government precipitates a refugee exodus, as certain inhabitants of a national territory despair of receiving that solicitude for life, liberty, and personal advantage which is the aspiration of most people and is the due of every citizen living under a government that acknowledges the rule of law. Refugees leave the jurisdiction most responsible for their welfare and, as stateless individuals, enter the territory of a foreign sovereign. Under international law, therefore, refugees and other stateless persons have no effective bond to any sovereign political community which is recognized under the law of nations. They can only be considered in their capacity as individuals, not as nationals.

To be sure, as a matter of legal literalism refugees may still be nationals of the sovereignty from which they have fled. Such a construction of their status, however, is misleading. Their prior sovereign usually has little interest in promoting their felicity and may only wish them ill. They themselves may harbor the desire to frustrate politically and even to sabotage with armed force the designs of that prior sovereign. The tie of nationality in legal theory is a reciprocal exchange of loyalty and political commitment from the individual for a warrant from the collective national authority of full and complete succor and protection. When a person becomes a refugee, the act of flight acknowledges the failure of that reciprocal relationship.

Such a definition of the status of refugee as a person at odds with his or her nominal sovereign is made explicit by Article 1 of the Convention relating to the Status of Refugees which defines a refugee as anyone who, fearing persecution in his homeland, "is unwilling to avail himself of the protection of that country." The Convention also applies to stateless persons or those without any claim to a nationality at all when they, owing to fear of persecution, are unable or unwilling to return to their country of former habitual residence.

Since refugees and stateless persons stand isolated as individuals and not as members in good standing of some political community which will
defend their rights and privileges, their status must be addressed initially from the perspective of the standing of individuals under international law. While there have been those who find higher principles of humanism in the law of nations, the practice of sovereign nation-states has confirmed the preference of governments to appropriate unto themselves exclusively the burdens and the benefits of international law. The traditional rule is that states are the subjects of international law and individuals only the indirect objects of international legal rules.

Individuals were recognized by international law in the past only in so far as they were nationals of a sovereign state. John Austin wrote that every human being who has rights and duties is either a citizen or a foreigner, that is, either a national of the domestic sovereign or of some other sovereign. Rights, he believed, were created by the positive law of a sovereign only for the members of the independent political community of which the sovereign is the paramount authority. Those without nationality under Austin's scheme of positive law had no rights. Mistreatment of its own nationals abroad gave to a sovereign certain rights to secure redress from the sovereign in whose territory the mistreatment occurred. In this way individuals found protection as the beneficiaries of state prerogatives. Nationality was the only tie between an individual and the succor of international law.

The Universal Declaration of Human Rights has modified this rule with a norm that sovereign states have duties, corresponding to certain enumerated human rights of individuals, to persons under their territorial police power. Exhortation being insufficient to benefit individuals, two covenants, one on civil and political rights and one on economic and social rights, provide for voluntary obligations by states to observe new rules of international law that make individuals subjects and not just objects of that jurisprudence. Yet today, the power of individuals successfully to invoke remedies—the distinctive attribute of any subject of a law—for violations of their human rights is still inconsiderable. Individuals may have more prominence under contemporary international law than they once had, but they are still second in importance to the prerogatives and plenary discretions of state sovereigns. The tie of nationality is still important.

The all-important tie is not really in the hands of those who need it: individuals do not have the power to determine their own nationality. Under international law, the characterization of a person as a subject of this or that state is left to the discretion of municipal laws. For all his or her anglophilia, one can never become a subject of the British Crown in the eyes of international law unless and until such person complies with the laws in force on naturalization in Great Britain and has some meaningful personal tie to that territory. Nationality is a descriptive label attached
to individuals for the purpose of determining the laws and policies that shall be of consequence for their lives. The criteria used by states for determining nationality (birthplace, parentage, or habitual domicile within territorial boundaries agreed upon by states) are "highly artificial and anachronistic from any functional perspective . . . and . . . may bear only an accidental relation to the facts of community membership."  

Unfortunately for the people placed by governments in different national categories, any characterization, no matter how arbitrary, is not without its legal importance. The concept of "nationality" has often been "reified" into a "pseudo-absolute comparable to 'title.'" He who is considered to hold good title is in a favored position, as a consequence of the legal characterization of his relationship to the thing at issue, to invoke state power on behalf of his property ambitions. Just so, characterizations of nationality lend advantages (or at times, in the case of conflict between states, disadvantages) to those coming within the ambit of the defined status. From time immemorial, citizens have been protected while deprivations have been imposed on non-nationals or aliens. In the fifteenth century, the Inquisition in Spain had deprived the Jews of their status as lawful members of the realm and had, accordingly, expelled them. Placing people beyond the law was a penal sanction in medieval England (Robin Hood was an "out-law") and the Athenians had ostracized those citizens whose ambitions had grown beyond temperate bounds. The American Dred Scott decision of 1857 based its denial of right to a black slave on the grounds that slaves and their descendants could not be citizens and that only citizens were protected by the Constitution. In a world organized into states, decisions about nationality affect the access of individuals to a protector and determine the substance of their individual rights.

The ultimate impotence of individuals before international law surfaces in decisions regarding citizenship. Abuse of the power to make and unmake citizens is a danger inherent in sovereignty. States categorize individuals for the advantage of the collective, and individuals have no power to alter these decisions. Denial of nationality membership in the collective to large groups of people has frequently marked repressive modern regimes born in revolution or driven by an ethnic concept of community. In the twentieth century, nationalist doctrines and Rousseauist notions of the social contract as something formed in a revolution have both given increased significance to the status of being a national. In 1921 the Soviet Government revoked their nationality from Russians who had fled their homeland after the October 1917 Bolshevik seizure of power and who had not yet registered with the new authorities as citizens of the Soviet Republic. The Socialist Republic of Vietnam keeps thousands of its former opponents in re-education camps in Saigon six years after Hanoi's conquest of the Republic of Vietnam on the pretext that such people do not
yet deserve to be its "citizens."23 The legal basis for the system of apartheid in South Africa is a conception of citizenship. In legal contemplation, blacks are not citizens of the republic but of various tribal homelands. To travel and work outside of their homeland, they require documents in the nature of an identification passport and a visa issued by the government of the republic to persons it considers as no more than strangers sojourning in its midst.24

Perhaps the high point of modern citizenship denial occurred in Nazi Germany when the citizenship of Jews was revoked by the Nuremberg law of September 15, 1935.25 Supplemental decrees stripped the Jews of entitlements to property and then to police protection. The Final Solution was but the logical extension of a nationality characterization imposed on people who had thereby been denied all rights, privileges, claims, and sufferances within the Nazi order.

In most of these situations where citizenship was denied to classes of people, large refugee movements have occurred. With the bond of nationality broken by official ostracism, the refugees found themselves between sovereigns in a no-man’s land of international law.

THE STATUS OF REFUGEES AND STATELESS PERSONS

Until modified by a signed convention and by the creation of supranational organizations, international law provided no protection for persons, such as refugees, for whom the tie of nationality had failed. Such persons are, in the general sense, stateless. Prior to the Convention relating to the Status of Stateless Persons26 stateless persons fell into two categories: de jure stateless persons who have no claim at all to a nationality and de facto stateless persons who had a nationality which has become of null effect.27 Persons might fall into the category of de jure statelessness through the operation of nationality laws regarding, for example, the status of persons born out of wedlock or aboard ship or else through procedures to strip them of nationality.28 De facto stateless persons are most likely individuals who for political, economic, or social reasons have ceased being members in good standing with the authorities of their homeland but who have not been stripped of formal status.

Whether de jure or de facto, stateless persons had no right to protection under traditional international law. Even today they may be denied entrance to a foreign state by the territorial sovereign, although other aliens who are nationals of some state have a claim to enter. The Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws left each state free to establish its nationality laws as it wished.29 States therefore have no obligation to provide a home for stateless persons
in their laws. Robert Frost put the legal essence of the matter accurately when he defined home as "the place where, when you have to go there, they have to take you in." Stateless persons have no home. National status must be deserved and nationality laws explain how it can be acquired.

In 1954, a Convention relating to the Status of Stateless Persons was opened for subscription to provide a standard of treatment for *de jure* stateless persons. By its terms, the Convention only applies to persons who cannot be considered a national under the laws of any nation. While the definition of refugee turns on an individual's subjective perception of susceptibility to persecution, the definition of a stateless person looks to municipal laws in force, not to how individuals regard those laws. Be that as it may, the Convention of 1954 gives *de jure* stateless persons a certain status. However, under Article 3, contracting states are not prohibited from discriminating against *de jure* stateless persons on the grounds of sex, social origin, or political opinion.

The Convention relating to the Status of Stateless Persons provides for rights of judicial access, livelihood, religion, and education suitable for a reasonable life shorn of the advantages provided by participation in the political community of the territory of residence. Most jurisdictions otherwise reserve such advantages for citizens.

Long before 1954 a special category of stateless persons had been considered to have a special claim to the solicitude of foreign sovereigns even though they were not entitled to such favorable treatment under then accepted rules of international law. These persons were called refugees. That they had lost the protected status of nationals due to political persecution through no personal fault of their own was no doubt the factor which evoked considerations of equity on their behalf. Under the League of Nations, a "High Commissioner on behalf of the League in connection with the problems of the Russian refugees in Europe" was appointed as efforts were made to give those particular refugees some legal status in the international order. The problem of refugees was approached only on an ad hoc basis as a limited, one-time problem. This was appropriate in responding to people caught outside the normal channels of international legal relations. Then in 1933 a High Commissioner was appointed to assist persons fleeing Nazi Germany. Conventions were also signed by various powers granting these European refugees travel documents, permitting them to seek asylum in alien lands, and allowing them enjoyment of various civil rights and economic privileges. World War II and the subsequent imposition of Communist rule in Eastern Europe generated their own large refugee movements. Again, concerned governments responded in an ad hoc manner. First they established the UN Relief and Rehabilitation Administration (UNRRA), in 1943, next the International Refugee
Organization (IRO) in 1947, and then the United Nations High Commissioner for Refugees (UNHCR) in 1951 to assist these people in resettling and in finding new nationalities.  

Adopted as a resolution of the General Assembly, the Statute of the UNHCR gives the High Commissioner the dual functions of providing protection in the international arena for refugees and of seeking permanent solutions for the refugee problem. But the authority of the High Commissioner embraces only persons defined as refugees in the Statute, not every stateless person in need of help. The exception, then, to the existing rules on international law which validate sovereign state prerogatives is only a limited one. The statute contains a narrow conception of who is a refugee. A particular subjective intent—fear of persecution—present in the refugee’s mind at the moment of flight, distinguishes a refugee from stateless persons in general. The fear also has to meet an objective test: it must be “well-founded.” With the passage of the Statute of the UNHCR, refugees gained no change in their formal status under international law (they still had none) but could at least now look to an institution of some consequence, if not to a territorial sovereign power, for help and assistance.

As the establishment of the UNHCR was being debated, simultaneous consideration was given to the formulation of a new legal status for refugees under international law so that territorial sovereigns would have some obligations towards them without regard for protective actions taken by the High Commissioner. To accomplish this restriction of traditional sovereign powers, a convention was opened for signature in the summer of 1951. Following the ad hoc approach, the Convention did not provide for a universal status of refugee. Only persons involved in events occurring before January 1, 1951, either in Europe or elsewhere, could hope to benefit from the status it offered. A subsequent Protocol updated the Convention to include within its protective umbrella persons affected by events occurring after 1951. Even though the Convention was restrictive in its definition of who deserved refugee protection, there was no rush of countries to accept its obligations.

The Convention relating to the Status of Refugees created a new status for some individuals under international law, something less than national but more than stateless. This is the status of “refugee.” However, to speak of a refugee status under international law is still somewhat misleading, because the Convention does not impose any obligation on national sovereigns to recognize such a status within their territorial jurisdictions. Refugees have no right of asylum. Countries can always close their borders and so find no one within their jurisdiction who fits the definition of a refugee. Nonetheless, the Convention describes a discrete status which can be applied to individuals should states agree to do so.

Assuming that a territorial sovereign recognizes an individual as a ref-
ugee, that person gains certain protections under the Convention. Refugees enjoy the freedom to practice their religion and to educate their children after their own fashion to the same extent provided by the sovereign to its own nationals. The Convention provides that refugees may not be denied justice by the sovereign of refuge. Refugees are to have free access to courts of law in all states party to the Convention, and in the state of the refugee’s residence, a refugee shall enjoy such access on the same terms as do nationals of that country. In other ways the Convention also provides refugees with protections against abuse of power by the state of refuge. In a number of provisions the Convention provides for the economic well-being of refugees to prevent them either from being preyed upon while in the jurisdiction of the state of refuge or from becoming impoverished dependents in their new residence.

While sovereigns of refuge are under no obligation to grant their nationality to refugees, they may expel a refugee from their territory only in accordance with due process of law and on grounds that the refugee is a threat to national security or public order. But they may not expel a refugee or return him or her to a territory where the life or the freedom of the refugee would be threatened on account of his or her race, religion, nationality, social group, or political opinion. Countries of refuge may, however, so place in jeopardy refugees who constitute a danger to such countries.

The Convention thus defines a legal status for refugees to give them some way to live out their lives as dignified humans in a world parceled out among sovereign national communities. The Statelessness Convention provides similar status for de jure stateless persons. The status of a refugee or a de jure stateless person is not that of a national who belongs fully to one or another of the world’s constituent legal units, but rather is that of a territorial resident who is able to live a private life without participation in the social contract of the political society of the state in which the person resides. This concept of a territorial resident is also a part of the international law of human rights, as discussed in Part IV below; its appearance in both the law of human rights and the law of refugees and stateless persons provides the basis for the thesis that international human rights standards can and should be incorporated into international refugee law.

THE EFFECTIVENESS OF PRESENT PROTECTIONS FOR REFUGEES AND STATELESS PERSONS

Stateless persons, de jure and de facto, and refugees are not well provided for by the legal mechanisms, discussed in Part II, which were adopted to fill the lacunae of traditional rules of international law. The conventions
themselves do not provide either for automatic refuge or permanent resettlement. Situations also arise which the UNHCR and the conventions do not meet well. UNHCR is underfunded and depends not on international law but on the compassion of well-to-do nations for its achievements. The many nations that have not subscribed to either convention deal with refugees and stateless persons out of political expediency. The refusals of Malaysia and Singapore to accept Vietnamese boat people for resettlement are cases in point.51

Refugees and stateless persons are not given a right of asylum. Sovereign governments may deny access to their territories to aliens who displease them.52 When the Shah of Iran terminated his support for the Kurds in Iraq in 1976, some 200,000 Kurds fled Iraqi troops by crossing over the Iranian border. The Shah then returned 40,000 of them to Iraq.53 Recently the Bahamas expelled Haitians who had fled there.54 Hong Kong authorities routinely send back to the People's Republic of China persons seeking a new life in that tiny crown territory. A right of asylum is not included in the Universal Declaration of Human Rights. Article 14 of the Universal Declaration only gives people the right "to seek" enjoyment of asylum from persecution. States are not enjoined to provide such enjoyment upon request.55 Nor does the 1951 Convention on Refugees contain such a right. After ten years of effort, a Declaration on Territorial Asylum was adopted by the General Assembly of the United Nations on December 14, 1967.56 As a hortatory document, it too provides no right of asylum.

If persons denied the benefits of group membership by one sovereign political community cannot place themselves in the territory of any other sovereign, then the protections offered by a refugee status defined under international law are illusory. A defined protected status is of little moment if that status cannot be enjoyed. Refugee law is analogous to the recognition of a right where no remedy is allowed.

Similarly, no one yet has a right to choose a new nationality. Membership in political communities is established for individuals by the ruling powers who control territory; it is not subject to individual volition.57 Article 15 of the Universal Declaration of Human Rights says that while everyone has "a right to a nationality," states are prevented only from arbitrarily depriving anyone of his or her nationality and from denying such person the right to change nationality. The Universal Declaration is silent on the obligations of states to grant nationality when it is requested. The Convention on Refugees suggests only that contracting states "facilitate" the assimilation and naturalization of refugees "as far as possible."58 This is an instruction to be helpful, not a mandate to light high the lamp beside a Golden Door as the U.S. Statue of Liberty claims to do.59

Consequently, both the resettlement of refugees and their adoption of a new nationality rely upon the good will of the nations of the world to
accept some aliquot portion of refugee populations as they arise. The good offices of the UNHCR are most instrumental in eliciting commitments for resettlement. For Indochinese refugees, the Secretary General of the United Nations convened a conference in Geneva in the summer of 1979 so that countries might agree to accept refugees on their soil. A similar conference in 1938 at Evian, France failed to parcel out the Jews of Germany. Denied German citizenship by the Nuremberg Law and unwanted by any sovereign, they were consigned to a policy of removal from the face of the earth.

Apart from questions of a right to asylum and a right to a nationality, international law fails refugees—in the broad sense—and stateless persons in a third way as well. Protection for refugees and stateless persons is diminished by restricted definitions of the individuals who may benefit from refugee or de jure stateless status. This niggardly approach to the problem of categorization is another defect in the present international scheme of protection for persons who flee their homelands; a number of needy cases are simply neglected by the definitions.

The political theory of the sovereign nation-state which evolved in Western Europe and provided the logic behind the basic principles of traditional international law permits a distinction to be made between those categorized as "refugees" and others who flee less obviously politicized disturbances. But persons may lose the protective mantle of nationality for reasons other than the persecution contemplated by the Convention on Refugees or the de jure loss of nationality required by the Convention on Stateless Persons. De facto stateless persons who are not refugees under the relevant convention still have no status. People may flee their native land because they do not feel they can be full participants in that community. While not the objects of persecution, they may still feel that they have been denied opportunities for social or economic advancement. Among these people are Haitians, Mexicans, and Cubans seeking entrance to the United States, and citizens of the People’s Republic of China fleeing to Hong Kong. These people are not the victims of conscious political persecution, but of a socioeconomic order. Or, as members of a minority religious or ethnic group, they may perceive that the government of their territory will not provide them with a supportive environment. In this category one can place Palestinians who choose to stay in Lebanese refugee camps rather than seek a return to land now ruled by Israelis, Afghan tribesmen in Pakistan, Ogaden Somalis in Somalia (some 848,000 persons as of October 1980), and Tibetans who fled the Chinese Communist conquest of Tibet. These people are not necessarily persecuted; they felt alienated from the ruling class. In both these cases, people seek a better life for themselves and their children outside their country of origin because they believe that those with political power in their homelands provide
there only an uninspiring vision of the future. A third group of persons who are neither refugees nor *de jure* stateless persons are those who flee flood, famine, or war.

Where persecution exists, the intent of a ruling power to deny those in flight any chance of participation in the political community of their homeland is clear. The state recognizes no obligation to protect them and in all likelihood, they have no desire to be loyal to that authority. No basis for citizenship exists.\(^{65}\) Continuing to place them in the category of national of that sovereign state makes no sense. They must be given some alternative status until they become incorporated into the life of a new sovereign community. People who flee economic destitution, natural disasters, and conditions of general social disorder have made no such sharp statement as to their political loyalties. They may indeed contemplate returning home once conditions change; their original sovereign presumably would welcome them back. Accordingly, it is felt with some justification that these migrants need not be considered "refugees." Indeed, the Statute of the High Commissioner for Refugees explicitly states that no one may use reasons of a purely economic character to refuse to avail oneself of the protection (and the laws, such as they may be) of the country of his or her nationality.\(^{66}\)

But people flee all the same, and the categories of an international legal regime seeking protection for all individuals must correspond more than haphazardly to this reality. Providing a protected status for people who cannot benefit from any national identification requires above all recognition of the forces that push people into flight and of how those forces are or are not dealt with in an international order of nation-states.

In this connection, the expanded definition of refugee provided in the Refugee Convention adopted in 1969 by the Organization of African Unity is of more than passing interest.\(^{67}\) In Africa, where sovereign nation-states bear little relationship to the communities, largely tribes, which engage the political commitment of most people, the problem of refugees could be faced more squarely than it could in Western Europe, where the sanctity of nation-state sovereignties has a stronger tradition. In addition to the refugees recognized by the 1951 Convention on Refugees, the OAU Convention also considers a "refugee"

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\text{every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or nationality.}\(^ {68}\)
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Refugees and most stateless persons are created when a social contract
has failed. Typically, after a revolution, a coup d'etat, or a change of
government, certain people may no longer be welcome in the community
fostered by the new rulers. Or economic conditions may have been so
badly mismanaged that people see nothing for themselves in continued
participation in that society.

Floods and famine in nomadic or village societies, where rural people
rarely consider themselves to be members of the national community
promoted by the elite leadership of the land in which they live, have the
same impact on loyalty as government oppression and ineptitude. Such
people may be said never to have joined the national community. Without
a developed economy to provide the means for rapid recovery, people may
prefer to move with their relatives and neighbors to avoid the conditions
following upon natural or other disasters and find new circumstances more
sustaining of life, liberty, and personal property without regard for nation-
al boundaries. The tie of nationality, so important in international law, has
little, if any, meaning in their lives. They stand outside the social contracts
supporting the sovereigns of the world.

Breakdown of law and order, through declared war, insurrection,
anarchy, or institutionalized arbitrary oppression, also destroys the social
contract. If the power of the collective cannot provide even a modicum of
personal security, people have little interest in sticking around. The gov-
ernment has failed to meet its obligations. Pufendorf argued that sover-
ignty was conferred only to secure the common weal; thus, a person may
leave a state if its administration has little value for his or her private
interests. The safety of the people should be the supreme law. Conse-
quently, when sovereignty fails, it may be renounced. Uganda under Idi
Amin, Lebanon before the Syrian intervention of 1977, East Pakistan just
prior to the establishment of Bangladesh, and El Salvador torn between
armed extremists, all provide examples of such circumstances wherein
people pick up what they can carry and flee.

Refugees and stateless persons exist in the interstices between sovereign
nation-states because they are products of the breakdown of a nation-state
as a sustaining political community. Where nation-states provide full com-
munity, there are few refugees or stateless persons in flight. But when
community fails, the state as a legal entity remains only as a structure of
officials and armed might, not as an object of loyalty and legitimate au-
thority. As far as those who flee are concerned, there is still a state but no
nation. The state may remain vital in the eyes of international law, but
such sovereign authority and such power do not constitute a common-
wealth in which the refugees or stateless persons can enjoy the benefits of
membership. Unable to receive its benefits, they should not be forced by
international law to retain their nationality and so suffer whatever that
state considers to be their just desserts.
The current regime for refugees and stateless persons under international law provides only a partial solution for the problem, and lurches from crisis to crisis primarily as the compassion of the liberal bourgeois democracies provides funds and homes for those in need.

**REFUGEES AND STATELESS PERSONS UNDER A HUMAN RIGHTS REGIME**

If the problem posed by refugees and stateless persons is how individuals cut off from the tie of nationality, which would normally protect them under international law, may be protected from deprivations imposed by sovereign powers, then a solution lies in the rules that extract from governments some solicitude for individuals, regardless of race, creed, sex, national origin, social class, or political coloration. The emerging law of international human rights does just that. The injunctions of the relevant human rights instruments speak not of citizens or of nationals but of individuals. States are enjoined by human rights standards as to their use of the police power. The injunction runs to wherever in their territory they may use such power, embracing all subject to that power, regardless of nationality. Individuals found within the state's territory may base their claim for protection on their humanity and nothing more. This is but a rebirth of the Roman *jus gentium*, which, in the interest of continued commercial intercourse with foreigners, gave aliens civil and economic rights. The jurisprudential basis for such rights lies more in the capacity of the individual person to deal fairly with other men and women than in the quasi-contractual obligations arising from adherence to a special political community.  

72 The preamble to the Universal Declaration of Human Rights posits the underlying premise of that Declaration as to the nature of sovereign authority: such authority must not be despotic. According to the preamble, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."  

73 The ideal of the rule of law is that government is an office, which must not be abused, to promote the common well-being of those dependent upon its power.  

74 Exclusionary, overbearing arrogance in authority (whether of a man, a faction, a party, or even of the majority) is contrary to the rule of law. Governments that adhere to the rule of law leave room for compromise and tolerance in their societies, social and political spaces where individual opportunity can exist. In providing protection for individuals, such governments always uphold their part of the social contract supporting citizenship, that reciprocal exchange of loyalty for succor.
But according to the Universal Declaration, the obligations of governments under the rule of law run to all people within their territories, not to citizens alone. Article 2 of the Universal Declaration boldly states that "everyone" is entitled to the rights and freedoms listed in the other articles. In particular, no distinction is to be made among people due to their "national or social origin." Further, the status of the sovereign authority of the country or territory to which a person belongs is irrelevant to an individual's claim for enjoyment of human rights. Those who rule non-self-governing states or trust territories must still recognize the applicability of human rights in their domains. This second paragraph in Article 2 of the Universal Declaration merely confirms the principle of the first paragraph that individuals, regardless of national status, are to benefit from the rights and freedoms enumerated therein.

Human rights adhere to individuals; they are not derived from national status. Vattel thought that exile and banishment do not take away from man his human personality, nor his right to live somewhere or other. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of Racial Discrimination, the European Convention on Human Rights, and the American Convention on Human Rights do not discriminate between nationals and aliens with regard to basic rights. The preamble to the American Convention even goes so far as to say that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."

The Universal Declaration reserves for nationals of a given country only three of the claims considered as "human rights." Article 21 provides that only nationals have the right to take part in the government of their country and that the right of equal access to public service applies only to people in their capacity as nationals of a given country. Article 13(a) reserves the right to return to a country only to nationals thereof. The remaining rights listed in the Universal Declaration, then, can be taken to define a status of territorial resident applicable to citizens and noncitizens alike, the latter category including aliens, refugees, and stateless persons.

The status created by the Universal Declaration has three principal aspects. First, the state may not abuse any individual and may not deny him or her access to the courts. Second, individuals may surround themselves with intellectual, emotional, and physical privacy free from arbitrary interference by the state. Part of this sphere of privacy consists of freedom of thought, conscience, religion, opinion, and expression. The "nuclear family" is also protected with provisions for freedom of marriage. Third, the Universal Declaration provides in several articles for the economic and social advancement of individuals. These articles provide for the ownership of property, social security, employment opportunities,
The Universal Declaration thus holds out the possibility of a dignified and rewarding life for individuals even though they may not participate as nationals in the political process of their country of residence.

The two international covenants on individual rights proposed after the Universal Declaration was adopted do not significantly detract from the status of territorial resident there provided. Article 2 of the International Covenant on Civil and Political Rights commits each signatory state to ensure the rights enumerated in the covenant to “all individuals within its territory and subject to its jurisdiction.” However, Article 4 permits states, consistent with their other obligations under international law, to derogate from their obligations under the covenant in times of emergency threatening the nation’s life. But provisions relating to protection from cruel and abusive police actions and freedom of thought, conscience, and religion are immune from derogation even in those circumstances.

In general, the International Covenant on Civil and Political Rights provides for the first two aspects of territorial resident status—protection from abusive state action and a sphere of personal privacy. Articles 9, 10, and 11 limit the powers of arrest and incarceration. Article 14 provides for fair and public trials while Article 16 provides for recognition before the law. Article 15, a prohibition of ex post facto convictions, limits the grounds on which persons can be convicted. Article 7 prohibits torture and inhuman punishment and Article 10(3) stipulates humane treatment of those deprived of their liberty. Articles 17, 18, and 19 provide for personal privacy and the attendant rights of free thought and opinion. Article 23 protects the family unit. Articles 24 on children and 27 on ethnic, religious, or linguistic minorities add specific protections for those classes of people which do not appear in the more general provisions of the Universal Declaration. Finally, Article 25 reserves explicitly for citizens the right and opportunity to participate in public affairs, including public service. This last article shows inferentially that the other rights of the Covenant may be enjoyed by noncitizens, the point made by Article 2(1).

The International Covenant on Economic, Social and Cultural Rights provides for the third aspect of territorial resident status, the economic and social advancement of individuals. Articles 6 and 7 of the Covenant establish a right to support oneself through freely chosen work. Article 9 provides for social security for everyone. Article 11 states that people have a right to food, clothing, and shelter, and to an improvement in their living conditions. Article 12 puts forth a right to health while Article 13 provides a right to education, including private education.

Should sovereign powers receive stateless persons and then treat them as the international human rights instruments insist that all territorial residents be treated, then stateless people, impelled by a variety of circum-
stances, will receive adequate protection under international law. Once people come under the authority of a state, human rights law covers them with the status of territorial resident. Unfortunately, the international law on human rights does not bear on the most important opportunity for a refugee or stateless person: obtaining access to a land of refuge. Human rights law speaks to the treatment of people within a jurisdiction but not to their ease of entry. The drafters of the Universal Declaration consciously refused to adopt asylum as a universal human right when such a right was proposed. Under current law, therefore, the most serious obstacle confronting stateless persons seeking a measure of protection is entry into a sovereign’s jurisdiction. Only a right of asylum need be added to the human rights conventions for this obstacle to be removed.

The implicit premise of international human rights law is that governments are limited in their use of their authority. A doctrine of constitutionalism is implied by the rules of international law which define the legitimate use of sovereignty vis-à-vis human beings. Recognition of human rights, a natural law concept, calls for governments to act as if they are parties to a conditional social contract. Something more than maintenance of minimal law and order is necessary for a social contract to be binding. If that low threshold of order were the sole precondition for legitimacy, civilized political communities would be reduced to the anarchy and oppression of warlord ambitions. States must provide for personal felicity in addition to security and order as the conditions for holding power. In this sense, governments must obey a norm other than their own will. They must accept limits to their power, the substance of constitutionalism. In such a world one could expect a reduction in refugee movements.

Another aspect of international law, the law of war, also limits the prerogative of sovereign states in the use of force. Even in war, governments must control their actions out of regard for human life, the same concern underlying recognition of human rights. Again a principle akin to constitutionalism is implicit in the legal regime within which sovereign states act. This law of war reinforces the need to emphasize a state’s obligations to respect those under its authority. Prisoners of war, those who minister to the armed forces (medics and chaplains, for example) and civilians not engaged in the conflict are protected by the law of war. Article 3 of each of the four conventions on warfare adopted at a conference in Geneva in 1949 attempts to protect noncombatant civilians in armed conflicts not of an international character. In particular, acts of violence against and degrading treatment of such persons is prohibited. Efforts have been made to prohibit use of certain weapons by armed forces, which legal limits inhibit their military efficiency. For example, expanding bullets and asphyxiating or poisonous gases have been proscribed.

The Fourth Geneva Convention, interestingly enough, provides some
protection for persons resident in territory seized by a belligerent power. People caught in the vortex of war are rather like refugees in that political community has failed for them. International law attempts to give them protection against the power which rules over their lives and property. Thus the law of war has its own analog to the status of territorial resident.

The status of territorial resident provided by human rights documents is not one of license. The Universal Declaration says in Article 29(1) that everyone has duties to his or her community. The rights and freedoms of others must be respected by individuals, and the just requirements of morality, public order, and the general welfare must be met. There is, then, a reciprocal aspect to being a territorial resident. Refugees and stateless persons are already under such an obligation: Article 2 of the Convention on Refugees and Article 2 of the 1954 Convention on Stateless Persons both prescribe duties of individuals under the protection of those covenants to obey the laws, regulations, and measures taken to maintain the public order of countries of refuge.

The application of human rights standards to all refugees and stateless persons, once they arrive within a sovereign jurisdiction, would give them a status of territorial resident, something less than the status of a national but similar to that now provided for limited classes of refugees and de jure stateless persons. With use of human rights standards, definitions of who is and who is not a refugee or a stateless person fade away in importance. All people on the territory, without regard for nationality, deserve protection and opportunities to support themselves and their children. A state may still refuse entrance under human rights law, but those who become subject to its jurisdiction gain a measure of consideration. Once resident, a person should not be subject to exile or banishment except for legal cause. Under a territorial scheme of sovereignty considered as a public trust, individuals, as Cicero said, "ought to be able to retain or renounce [their] rights of membership of a society." The application of human rights standards to the problem of refugees does require a shift in the conception of the nation-state. It appears in the new perspective less a self-selected community of citizens, sharing a common subjective corporate sentiment, and more a custodian of territory and all the people therein. The United Nations' Convention on the Reduction of Statelessness takes a position that sovereigns must be responsible to all their territorial subjects because it forbids them to deprive anyone of nationality on the grounds of race, ethnicity, religion or political opinion. The conception of the state more as a territorial power and less as a moral community of citizens is most appropriate for international law in any case, because such law has as its concern the effect on other territorial rulers of actions of territorial powers vis-à-vis events occurring in their territory; international law is not concerned with the internal decision-
making structure of the different sovereigns. States were to protect the subjects of other states because injury to such persons was a wrong to the foreign sovereign. Territorial events which caused such injuries were of international legal significance because they had an extraterritorial impact, not because they had implications for the distribution of public authority in the jurisdiction where the injury occurred.

Under a territorial scheme, within each state there would be two classes of persons—citizens and territorial residents. Such a class division is not objectionable as a denial of equal protection. For example, the immigration laws of the United States provide that immigrants must spend five years as permanent residents before they become citizens. As permanent residents, they are denied certain rights of public employment, jury duty, voting, and other aspects of political life open to citizens. As Aristotle wrote, a citizen is one “who has the power to take part in the deliberative or judicial administration” of the state. The American doctrine of equal protection provides that distinctions among classes of people can be sustained if they reflect rational pursuit of some suitable government objective. The distinction between citizen and resident reflects the objective of motivating citizens to acquire the interest, outlook, and commitment necessary to make the nation’s political process work. A period of residence (one could quibble over whether five years is correct in all cases) before acquiring the status of citizen may well increase the likelihood of more effective political participation by the newcomer. It is not inappropriate to ask that those given political power feel within themselves a commitment to the community around them. That is only another way of increasing their fiduciary sensitivities to the exercise of that power which can indeed have an impact upon the lives of their friends and neighbors. Length of residence may correlate well with the development of such personal involvement in a surrounding community. It is a permissible basis on which to distinguish citizens from other residents.

To treat residents differently from citizens is not necessarily to stigmatize them, the evil to be avoided by the application of the concept of equal protection of the laws. Residents under human rights law should be the equal of citizens in all important respects regarding individual autonomy and dignity. Respect for each individual’s basic humanity is contained in fidelity to human rights norms, not in a concept of nationality or citizenship.

As far as refugees and stateless persons are concerned, the gap between territorial residency and citizenship is properly overcome with time. Second and third generation immigrants, not the new arrivals, most need citizenship. Furthermore, the recently arrived would not need access to the political process once their rights as residents are protected. Opening naturalization procedures to those born in the territory would not subject
nation-states to automatic diminution of their political autonomy under alien influence as would an insistence that all who reach a territory must become its citizens in order to avoid inequalities between citizens and residents. Sudden intrusions of refugees who then immediately acquired citizenship would also frustrate the expectations for their society of those already living in the territory and shaping its communal life, leading to friction and unrest. Resentment of refugees even as temporary residents is already serious in many cases.

The possible relationships between individuals and sovereign authorities already comprise a continuum of reciprocal needs ranging from a seaman in port for a few days to the protected citizen or perhaps a privileged elite. Each circumstance places the individual in a discrete relationship with the ruling authorities. In the middle come tourists, traveling businessmen, refugees, alien residents, and less-favored subjects. Tourists do not need the economic assurances of citizens, for example. Foreign businessmen need not expect to benefit from monopoly protections given to promote domestic industry. (Sometimes it is the foreigners who benefit from special economic legislation—tax holidays—to the detriment of nationals.) In short, the tie between a sovereign and an individual (nationality) should be less important than packages of reciprocal rights and obligations defined for different kinds of relationships. The status of territorial resident under human rights norms is one such package.

Defining a status of territorial resident as one point on the continuum to protect, inter alia, refugees and stateless persons, would not interfere with the current framework of international law regulating intercourse between individuals and governments. The status of territorial resident could even replace the current use of refugee, de jure stateless, and de facto stateless statuses to simplify the rights of persons in flight from their homeland. In making this change with regard to refugees, however, care must be taken to ensure preservation of the refugee’s protection against refoulement—an issue arising as a result of border-crossing which, like asylum, is not directly addressed by human rights standards.

The General Assembly of the United Nations has already recognized the relevance of human rights norms for persons in flight. On December 6, 1968, the General Assembly urged members of the United Nations to improve “the legal status of refugees residing in their territory” by treating refugee situations in accordance with the Universal Declaration of Human Rights.
IMPLEMENTATION OF HUMAN RIGHTS STANDARDS FOR REFUGEES AND STATELESS PERSONS: SUING THE COUNTRY OF ORIGIN

To say that relevant statements of human rights standards under international law define a status of territorial resident which includes persons in flight from their homelands only states a possibility implicit in the law but not yet realized in practice. Human rights standards now bind governments only loosely; individual access to courts for enforcement of such standards is problematic in most nations. Changing the legal argument as to the nature and scope of their obligations will not significantly facilitate a generous response of governments—whether of origin or of refuge—to refugee populations.

The major obstacle preventing acceptance of human rights standards for refugees and stateless persons lies in the same conditions which limit responses to their plight at present. The burden of providing for refugees falls on those who receive them, not on the governments which generate them. There are no sanctions placed on regimes that ostracize large numbers of their would-be nationals or that are so remiss in management of domestic affairs that people leave to seek better lives elsewhere. Those most able to prevent refugee movements are given no incentive to do so.

Here again, human rights standards can play a helpful role. They provide norms which are violated when refugees or stateless persons are created. Violation, either intentional or through negligence, provides justification for the imposition of sanctions on the violators. The principle at work should be analogized more to the law of torts than to criminal prosecutions. The purpose of imposing sanctions would be to place responsibility for avoiding harmful actions on those most capable of preventing the harm. To achieve this end, human rights standards can be seen as setting up a duty of due care, placing governments on notice as to the scope of their responsibility. Failure to meet the standard would lead to sanctions when other states suffer as a consequence.

Refugees are *prima facie* evidence that there has been a failure of human rights protections in their homeland. One thinks of Jews in Germany and, later, Cambodians in Thailand escaping Pol Pot. Wherever there is persecution on the grounds of race, religion, nationality, membership in a social group, or political opinion, there has been a denial of civil and political rights. One could leave the conclusion as to violation of human rights by home governments in refugee situations to a case-by-case determination. Persons seeking refuge could allege that the reason for abandonment of their homeland was denial of specific human rights there. A finding that they had been so denied would lay the proper jurisprudential
foundation for seeking sanctions against that sovereign power once a proper forum is found.

The situation with respect to violation of economic and social rights in the country of origin is less obvious. Rights enunciated in the International Covenant on Economic, Social and Cultural Rights are to be provided by states without discrimination as to "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." But if people leave their homeland, not from concern over discriminatory exclusion from social and economic advantages, but from a perception that the government's and the society's incompetence, lassitude, or corruption foreclose opportunity for personal advancement, the government's breach of its international obligations is less clear. Article 2 commits states to the maximum use of their available resources for the full realization in progressive stages of the rights recognized by the Convention. A judicial test of this commitment would involve an objective determination of whether a state provides economic rights to everyone within its jurisdiction—including displaced persons—to the maximum use of available resources. The province of judges is peculiarly that of categorizing government actions as falling within or without certain established conceptual parameters. In a proper forum, the actions of a government generating economic refugees could be examined and evaluated for compliance with the standard of Article 2. Should the government be found wanting, a violation of economic or social human rights would have been found.

Violations of human rights standards when refugees or stateless persons are generated produce two kinds of injuries. First, individuals forced from their homelands suffer economic and moral damage. Second, economic and political burdens fall on the state of refuge and resettlement. It would not seem out of course to permit states aggrieved by refugee influxes to seek recovery of the unsolicited budgetary expenses that they have incurred in responding to such incursions from the state that gave rise to the exodus. The aggrieved state of refuge could simply proceed against the assets of the offending state wherever suits may be brought before a court competent to adjudicate interstate claims. Less possible under current international practice but no less just would be an individual right of action by refugees against their former sovereigns for intentional or negligent infliction of injury done in the acts driving them to find refuge in an alien land. This right would arise under the domestic law of the sovereign of refuge or under international law, either of which courts could recognize. Damages awarded to the individual plaintiff would come most easily out of assets belonging to commercial activities of the offending sovereign.

The suggestion that foreign sovereigns be brought before the bar of justice in a jurisdiction of refugee resettlement seems to run counter to the
doctrines of sovereign immunity and of deference to acts of state. These
doctrines were derived by courts, at least in the United States, as self-
imposed limitations on their adjudicatory competence. Under sovereign
immunity, a foreign sovereign acting as such is considered beyond the
reach of a court's jurisdiction. Under the act of state doctrine, a court
refrains from examining the validity of a dispositive action of a foreign
government carried out within its own territory, when the act is an issue
in a suit in a U.S. court. On close analysis, neither doctrine presents
insurmountable obstacles to the course here proposed. The dangers that
each doctrine seeks to avoid are not necessarily present in the refugee
situation; in those circumstances in which the dangers exist, the doctrines
would apply as usual.

Justice Frankfurter, in *National Bank v. Republic of China*, pointed to the
policy behind both doctrines when he spoke of judicial restraint arising out
of a desire for fair dealing, a recognition of reciprocal self-interest, and the
good will to respect the power and dignity of another sovereign. If the
foreign sovereign itself ignores the restraints of fair dealing, imposes undue
burdens on its peers and has no respect for the position of its neighbor,
it should no longer benefit from the doctrine of sovereign immunity in the
courts of a nation which it has aggrieved: the reason for the rule having
ceased to apply, the rule itself should be of no effect. Nations that do
not deal fairly with the United States—or any other country of refuge—
should lose their claim to judicial solicitude.

One might object that when relations between sovereigns become testy,
the courts should not interfere in such matters and should leave the resolu-
tion of international disputes to the executive power. This principle of
judicial self-restraint has been prominently articulated in the cases apply-
ing the act of state doctrine. In *Banco Nacional de Cuba v. Sabbatino*, Justice
Harlan feared that amicable relations between states would be imperiled
if courts passed on the validity of actions taken by foreign govern-
ments. Yet as the earlier case of *Bernstein v. N.V. Nederlandsche-Amerikaans-
che Stoomvaart Naatschappij* suggests, there is an alternative to judicial
quiescence. The executive can exercise its own restraint in foreign
affairs, deferring consideration of rights to judicial resolution. This would
embolden the courts to tread in international waters. Regarding refugees,
governments could announce their intention to leave the matter of viola-
tion of human rights and the seeking of damages therefore to their domes-
tic courts. Foreign sovereigns would then be on notice that they would
have no shield of sovereign immunity or deference to acts of state to
protect them from the consequences of internationally unlawful behavior
which generates refugees.

Some courts have characterized the act of state doctrine as an aspect of
choice of law, the foreign law being held dispositive in the case at issue.
Under this view, whatever rights may be asserted in the proceeding are
determined by the foreign state’s law; judicial scrutiny is thus inappropri-
ate, the sovereign being presumed to have acted in accordance with—or to
have made—its own law. The suggestion that human rights standards be
used in refugee situations poses a different choice of law problem, elimin-
ating this use of the act of state doctrine. The relevant law for such cases
can be considered either international law or the domestic law of the forum
which adopts human rights standards. In *Sabbatino,* while the court did not
apply international law to the nationalization of property in dispute, it did
not forbid application of such law in the future. The court noted rather that
international law on the subject of nationalization of property was unclear,
or worse, was in a state of flux. There was no rule to be applied. Much
earlier, in *Rose v. Himely* where Justice Marshall found a clear rule of interna-
tional law, he had no difficulty applying it to invalidate the authority of
a foreign tribunal. Today in the normal case, U.S. courts are bound by
the law of nations which is part of the law of the land.

Where human rights are concerned, standards of sufficient precision
have won widespread approval. They can serve as rules of law cognizable
in domestic courts. The concern in *Sabbatino* that the law is unclear does not
arise where human rights standards are presented. The Second Circuit, for
example, recently found that “deliberate torture perpetrated under color
of official authority violates universally accepted norms of the interna-
tional law of human rights.” And in an even more recent case, Judge Rogers
of the United States District Court for the District of Kansas held that the
international law of human rights obligated the United States to release
from detention in Leavenworth Prison a Cuban national being held pend-
ing deportation. Pedro Fernandez had been allowed into the United
States on a temporary basis so his claim for admission could be considered
at greater leisure. Subsequently, on the basis of his record of criminal
convictions in Cuba, he was denied permission to enter the country perma-
nently. He was remanded to Leavenworth Prison to be held in custody
until his departure could be arranged. In the eyes of the law, he had never
entered the United States: his status was still that of an alien seeking
admission to our territory. In legal theory Fernandez was outside the juris-
diction of the United States and neither the Constitution nor congressional
statutes protected him from incarceration *sine die* by the federal authorities.
However, under international law he had a right to be free of arbitrary
detention. Since no limit had been set for his detention, the court found
that the federal government had denied his freedom arbitrarily, in viola-
tion of international law.

International human rights standards are widely known, even if not
universally applied. Foreign governments cannot plead unfairness because
of inadequate notice when subjected to such standards. While ideological
goals may be at stake in the creation of refugee populations, the validity of these goals ceases when human rights are violated. Such wrongs are fit subjects for the application of judicial power.

Suits against sovereigns for human rights violations which injure the forum state differ in another way from most previous cases applying either the doctrine of sovereign immunity or the doctrine of deference to acts of state. Those cases frequently considered the effect of a foreign act consummated within the foreign sovereign's own territory, such as a decision as to title made and perfected within the foreign jurisdiction. The foreign sovereign in such cases acts without intending to disturb the public life of the forum. But where the change in rights has not been perfected within the jurisdiction of the foreign state because, for example, the purportedly affected property was in the United States, then U.S. courts have denied the effect of the foreign decision. When citizens are denied the benefits of nationality and forced to flee, complications for other states are to be expected. The effects of refugee generation cannot be contained within the jurisdiction of the state whose actions gave rise to the problem. Since the direct and immediate consequences set in motion by the policy creating refugees (once again a tort concept is relevant) do not end within the originating jurisdiction, that jurisdiction has no claim to special deference by the courts of the countries of refuge. Those injured by the "pushing" state may obtain justice through the use of any law at their disposal.

Finally, for a forum court in a country of refuge to recognize as valid the laws and policies which drove refugees from their homes would be to give effect to punitive public laws of another state—a recognition due to no state. Allowing foreign states to escape the consequences of their detrimental policies in a domestic forum would vindicate unnecessarily their public law.

CONCLUSION

The preceding discussion is not by any means offered as an exhaustive treatment of the problems of nations and refugees, or the claims and forums involved in the application of international human rights law. What is clear is that traditional doctrines of sovereign immunity and deference to acts of state do not preclude immediate judicial application of human rights standards to refugees; the complicated issues raised above may be addressed within the context of current rules of international law. While undoubtedly crucial in bringing about the implementation of policies yet dormant in international law, these issues are, nevertheless, details, and the focus of all of the foregoing has been on the broader policies and principles. The main points are these: (1) principles exist within interna-
tional law that justify the application of human rights standards to refugees and stateless persons and (2) rights of action and forums can be found to permit application of those standards in individual cases. It is in the self-interest of the more decent and compassionate nations of the world to see that the possibilities suggested here become living components of international practice.

NOTES

1 In his Treatise of 1758, Emerich de Vattel asserted that the state has such an obligation to its members, for "a civil society must be able to provide its members with the means of procuring by their labor and industry whatever they stand in need of; otherwise it has not the right to require an absolute loyalty from them." 3 E. de Vattel, The Law of Nations or the Principles of Natural Law 89-90 (Fenwick. trans. 916).


3 After the Russian Revolution, the Soviet Government called upon White Russian emigres in Europe to register with Soviet consuls to maintain a claim to Russian nationality. See Espiritu, supra note 2, at 49.

4 Cf. P. Weis, Nationality and Statelessness in International Law 29-32 (1979). See also 3 E. Vattel, supra note 1, at 87 (citizens or "natives" of a country owe it duties and are subject to its authority in exchange for an equal share of the advantages it offers).


6 Whether persons who flee not out of fear but for so-called "economic" reasons alone should also be considered refugees is discussed infra in text at note 63.

7 See, e.g., The Panevezys-Saldutiskis Railway Case, [1939] P.C.I.J., series A/B, No. 76, at 16:

[I]n taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law . . . . Where the injury was done to the national of some other state, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a state is entitled to afford nor can it give rise to a claim which that state is entitled to espouse.

8 See 1 L. Oppenheim, International Law 19-22 (8th ed. 1955). Cf. J. Brierly, The Law of Nations 41-49 (4th ed. 1963). See also H. van Panhuys, The Role of Nationality in International Law 24-26 (1959). If one accepts the traditional view that international law addresses the state, not the individual, then it follows that "if the individual human being does not have some state as a protector, the larger community aspiration for human rights is meaningless." McDougal, Lasswell & Chen, supra note 2, at 902.

9 See generally J. Austin, Lectures on Jurisprudence (5th ed. Campbell 1885); A. Morse, A Treatise on Citizenship (1881).

10 See Brierly, supra note 8, at 276; cf. 1 L. Oppenheim, supra note 8, at 680.


13 See WEIS, supra note 4, at 65–70.


16 Id. at 439.

17 McDougal, Lasswell & Chen, supra note 2, at 901 n.2.

18 Lonschien, Statelessness or the Men without a Country (1951) (student paper in the International Law Library, Harvard Law School).

19 T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 385, 430–31 (5th ed. 1956), describes how an outlaw suffered from corruption of the blood, forfeiture of chattels, or escheat of lands and could be killed on sight by anyone.

20 Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); see also the Cherokee cases where Justice Marshall defined the status of Native Americans as members of domestic dependent nations, something more than slave but less than foreigner. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Cherokees lived under a separate sovereignty, but not a totally foreign one. Their territory was still part of the United States under international law so they had to be in a state of pupilage under the dominant might of the United States. The Cherokees were driven from Georgia to seek refuge in the Indian Territory which later became the state of Oklahoma. The historical status of native Americans as noncitizens is discussed in J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870 287–300 (1978).

21 McDougal, Lasswell & Chen, supra note 2, at 902.

22 Espiritu, supra note 2, at 49. Denial of nationality is often a measure of political repression. Under current Soviet law, a decision of the Presidium of the Supreme Soviet can deprive a resident of citizenship in the USSR for actions which discredit the “high name” of a Soviet citizen or damage the prestige or the security of the USSR. In March 1978, the citizenship of General Pyotr Grigorenko was revoked and he was forbidden to return to his homeland. N.Y. Times, March 11, 1978, § A, at 3, col. 1. Previously, Soviet citizenship had been stripped from Aleksandr Solzhenitsyn, Valery Chalidze, and Zhores Medvedev, each an important Soviet dissident. In October 1979, the Czechoslovak Government revoked the Czech citizenship of the writer Pavel Kohout and barred his return home from Austria. N.Y. Times, Oct. 9, 1978, § A, at 5, col. 4. In Argentina that year the ruling military junta revoked the Argentine citizenship of Jacobo Timmerman, publisher of a newspaper which apparently angered Argentine intelligence officials with its reporting of persons who had disappeared in the government’s efforts to contain left-wing organizations and terrorists. N.Y. Times, Jan. 3, 1979, § A, at 4, col. 3.


24 In 1913 some 8 percent of the land in South Africa was reserved for African tribes (“Bantus”). Natives Land Act, 1913, Statute of the Union of South Africa, No. 27 at 436 (S.Afr.), Later the 264 native reserves were consolidated into a few Bantustans. Native (Urban Areas) Consolidation Act, 1945, Statutes of the Union of South Africa, No. 25 at 108 (S.Afr.), as amended by Bantu Laws Amendment Act, 1964, Statutes of the Republic of South Africa, No. 42 at 327 (S.Afr.). Under the policy of separate development or apartheid, Bantustans

27 See Lonschein, supra note 18.
29 Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague, April 12, 1930, 179 L.N.T.S. 89. Article 1 says, "it is for each State to determine under its own law who are its nationals." Id. at 99. See also 3 G. Hackworth, Digest of International Law 1 (1942).
30 R. Frost, Death of the Hired Man, in Selected Poems of Robert Frost 25 (1965). But rights to such shelter should turn on more than the whims of municipal laws. Frost preferred to think of a home as "Something you somehow haven't to deserve."
34 See, e.g. Provisional Arrangement Concerning the Status of Refugees coming from Germany, done July 14, 1936, 171 L.N.T.S. No. 75; Convention Relating to the Status of Refugees coming from Germany, done Feb. 10, 1938, 192 L.N.T.S. No. 59 (replacing the Provisional Arrangement).
36 Convention relating to the Status of Refugees, supra note 5, art. 1(2).
37 Convention relating to the Status of Refugees, supra note 5.
38 Protocol relating to the Status of Refugees, supra note 5.
39 Singapore has adopted a closed-door policy towards the Vietnamese "boat people" who are only admitted if a third country has agreed to resettle them within a short time. N.Y. Times, Nov. 12, 1978, at 6, col. 1.
40 Convention relating to the Status of Refugees, supra note 5, art. 4.
41 Id., art. 16.
42 Id.
43 Id., arts. 26, 29.
44 Id., arts. 17-21, 23, 24, 30.
45 Id., art. 34.
46 Id., art. 32.
47 Id., art. 33.
48 Id.
49 Convention relating to the Status of Stateless Persons, supra note 31. This convention borrowed 25 of its 28 major provisions on the treatment of de jure stateless persons from the 1951 Refugee Convention. On the other hand, in the Convention relating to Stateless Persons, there are no provisions regularizing the illegal entry of stateless persons or preventing the refoulement of such persons, as are found protecting refugees in Articles 31 and 33 of the Convention relating to the Status of Refugees. Further, the Convention on Stateless Persons does not give stateless persons the opportunity for wage-earning employment provided by the territory of residence for the most favored foreign national but only that provided for alien nationals in general. The same difference in treatment appears in Article 15 of the Convention relating to the Status of Stateless Persons on the right of association. See generally N. Robinson, Convention Relating to the Status of Stateless Persons, Its History & Interpretation (1955).
50 In the 18th century, Emerich de Vattel described the status of permanent residents as "a sort of citizens of a less privileged character" bound to society only by reason of residence, protected by it, and entitled to some, but not all, of its benefits. 3 E. Vattel, supra note 1, at 87.
51 E.g., N.Y. Times, Nov. 12, 1978, at 6, col. 1.
52 While states in ever-increasing numbers have in fact accepted refugees seeking asylum from persecution, they have refused to admit that they have a duty to do so. And their refusal has taken the form of rejecting the inclusion of any provision that might establish such a duty in any international agreement that would be binding upon its signatories.
54 N.Y. Times, Jan. 18, 1981, at 8, col. 3.
55 Universal Declaration of Human Rights, supra note 11, art. 14.
57 See note 13 supra.
58 Convention relating to the Status of Refugees, supra note 5, art. 34.
59 To require states to confer their nationality on refugees upon request would complicate their foreign relations. States would then have imposed upon them a close political connection with persons who frequently are resented by or who pose some threat to a neighboring state. For such reasons, most states desire some control over the degree to which they will identify with an emigré community having a continued interest in affecting political developments in its former homeland.
60 N.Y. Times, July 24, 1979, § A, at 1, col. 5.
61 Lonscheim, supra note 18, at 51-3.
62 See Brierly, supra note 8, at 41.
63 Teitelbaum, Right vs. Right: Immigration and Refugee Policy in the United States, 59 For. Aff. 21 (Fall 1980).
65 Samuel Pufendorf wrote in 1688 that "in refusing any longer to recognize a man as a member of its body, and in driving him from its territory, a state remits to him the obligation which formerly lay upon him as a citizen, and by the same act he is given the power to found for himself a new home wherever he can, while there remains to the state no jurisdiction over
such exiles."


68 Id., art. II (2).


70 See generally 2 S. Pufendorf, supra note 65, at 595.


73 Universal Declaration, supra note 11, preamble.

74 For a discussion of the meaning and historical development of the Rule of Law, see F. Hayek, The Constitution of Liberty 162–75 (1960).

75 Universal Declaration of Human Rights, supra note 11, art. 2.


77 See 3 E. Vattel, supra note 1, at 91, where Vattel describes "banishment" as a punishment in the penal sense, and "exile" as potentially penal in nature. Neither measure destroys a person's humanity to the extent of justifying slavery or requiring exclusion from other states.


79 American Convention on Human Rights, supra note 78.

80 Universal Declaration of Human Rights, supra note 11, arts. 3–11.

81 Id., arts. 12, 16, 18, 19.

82 Id., arts. 17, 22–26, 27(2).

83 International Covenant on Civil and Political Rights, supra note 12, art. 2(1).

84 Id., art. 4(2).


86 Except for a right to the rewards of scientific, literary, or artistic productions, the Covenant does not provide an explicit right to the ownership of private property.

87 1 L. Holborn, supra note 2, at 163.

88 See generally 3 E. Vattel, supra note 1; 2 S. Pufendorf, supra note 65. Vattel also argued that since a sovereign was nothing more than a trustee holding the governing power for the common good of all citizens, only a bad ruler would look to the state as if it were his private dominion. 3 E. Vattel, supra, at 20–27.


92 Under Article 27 of the Fourth Geneva Convention of 1949, the persons, honor, family rights, religious convictions and practices, and manners and customs of nonnationals in the hands of a belligerent power must be respected by that power. In addition, physical violence
against protected persons is prohibited, arts. 31, 32, 33. Protected persons have a right to find paid employment during the war on an equal basis as the nationals of the state in whose territory they are located, art. 39. Compulsory employment is to be imposed on protected persons only to the same degree that it is imposed on nationals, art. 40. An occupying power may not forcibly transfer people from the occupied territory, and must provide for the education of children in such territory, arts. 49, 50. Destruction of private property is prohibited except where absolutely necessary, and protected persons may not be conscripted for military duty or forced to work ancillary to military operations, arts. 53, 51. The occupying power must ensure medicines, public health, and hygiene in the occupied territory, art. 56. It must not alter the status of public offices or judges, or change the penal laws; nor may it impose ex post facto laws of its own, arts. 54, 64, 65. The penal procedure applied by the occupying power must provide for regular trials on specific accusations, and the accused must be allowed to present evidence, call witnesses, and be assisted by counsel of his or her choice, arts. 71, 72.

In sum, the Convention recognizes that governments must be limited in their treatment of human beings who are not their nationals but who are subject to their power because of their successful military operations. Geneva Convention Relative to the Protection of Civilian Persons in time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

The notion of rulership as an office, a public trust, was the focal point of medieval political theory. Under theories of natural law territorial monarchs were limited in their prerogatives. Cf. J. Salisbury, The Statesmen’s Book of John of Salisbury (J. Dickinson trans. 1963); O. Gierke, Political Theories of the Middle Age (1958). Magna Carta made it clear that the king did not hold an absolute dominion over the realm but was limited by obedience to a concept of the law of the land. Later both Pufendorf and Vattel adopted this public trust theory of sovereignty. See supra note 88. Vattel in particular stated that public authority was established for the common good of all the citizens and that rulers may be checked in their abuse of power. See 3 E. Vattel, supra note 1, at 17, 20–23.

An emphasis on the fiduciary aspect of rule comes most easily when the territorial responsibilities of a sovereign are emphasized. Vattel had a territorial concept of the state. For him it was more a geographical jurisdiction than an exclusive membership association. Though he valued the spirit of patriotism, one of his definitions of “fatherland” was the state, town, or place where one’s parents had their domicile at the time of one’s birth; on the other hand, he also acknowledged a different and stronger sense of fatherland, and said that one’s duty to a state ran to the polity of which one was an actual member. Similarly, Pufendorf saw the state as a territorial power. To renounce a sovereign one had physically to leave the territory of the objectionable state. Disaffected groups could not legally set themselves up as a rival authority within the territory of an established sovereignty. See 2 S. Pufendorf, supra note 58, at 1351–52. The Nottebohm case held that for nationality to be real and effective under international law, it must reflect strong factual ties between an individual and a state. Nottebohm Case, supra note 14. In that case, Nottebohm was found more attached to Guatemala than to Liechtenstein as far as his tradition (34 years), establishment, interests, business activities, and intentions for the future were concerned. Liechtenstein was therefore denied a right to claim him as its national. This reflects a territorial conception of the state where actual residence is more important than a putative group consciousness.

To the contrary, McDougal, Lasswell, & Chen prefer a participatory model of the nation. They object to the reasoning of the Nottebohm case. See McDougal, Lasswell, & Chen, supra note 2, at 910–12. But they simultaneously deny the community any power to define its membership to the exclusion of categories of people. Thus they too provide for state protection of individuals on a territorial basis. The great abuses of the state’s police power seem to occur where communitarian theories of the state are combined with a positive law jurisprudence. See also Weis, supra note 4, at 5, 30.
Covention on the Reduction of Statelessness, supra note 14.

Emerich de Vattel wrote that all disputes over a state's fundamental laws and as to who would share in its public administration were for that nation alone to decide. 3 E. VATTET, supra note 1, at 17–19. More recently, Hans Kelsen concluded that "international law obligates and authorizes states by obligating and authorizing individuals as organs of the states, leaving the determination of the individuals to the national legal codes." H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 205 (1952).

Cf. E. VATTET, supra note 1, at 87–93.

See generally Rosberg, The protection of aliens from discriminatory treatment by the national government, 1977 SUP. CT. REV. 275.

ARISTOTLE, ARISTOTLE'S POLITICS 127 (B. Jowett trans. 1943).

See, e.g., Railway Express Agency Inc. v. New York, 336 U.S. 106 (1949); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that a statutory prohibition of benefits to residents of less than one year was unconstitutional because the classification was not supported by any compelling governmental interest); see generally Note, Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969); Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969).

In finding that noncitizens could be excluded from juries, a three judge district court has said that "the states logically can anticipate that native-born citizens would be conversant with the social and political institutions of our society, the customs of the locality, the nuances of local tradition and language." Perkins v. Smith, 370 F. Supp. 134, 138 (D. Md. 1974), aff'd on appeal, 426 U.S. 913 (1976).


For a discussion of a different position, which makes a case for giving aliens the right to vote, see Rosberg, Aliens and Equal Protection: Why Not the Right to Vote? 75 MICH. L. REV. 1092 (1977).

1 A. GRAHL-MADSSEN, supra note 69, at 97–98.


Ambassador Jean Kirkpatrick caught the precise connection between most modern refugees flows and revolutionary autocracies when she wrote that traditional rulers, though favoring a wealthy few, do not disturb the habitual rhythms of work and leisure, habitual places of residence, habitual patterns of family and personal relations. Because the miseries of traditional life are familiar, they are bearable to ordinary people who, growing up in the society, learn to cope. Such societies create no refugees.

Precisely the opposite is true of revolutionary Communist regimes. They create refugees by the millions because they claim jurisdiction over the whole life of the society and make demands for change that so violate internalized values and habits that inhabitants flee by the tens of thousands in the remarkable expectation that their attitudes, values, and goals will "fit" better in a foreign country than in their native land.

COMMENTARY, November 1979, at 44.

International Covenant on Civil and Political Rights, supra note 12, art. 2.

International Covenant on Economic, Social and Cultural Rights, supra note 12, art. 2.

The right to bring a claim of injury against an official of one's former homeland was sustained in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (grounding federal jurisdiction on the Alien Tort Statute, 28 U.S.C. § 1350).
Cf. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) (Chief Justice Marshall held that a sovereign would relax its claim to absolute and complete jurisdiction within its territory and grant immunity from private suit to foreign sovereigns only in cases in which the latter acted in a sovereign capacity). This position of restrictive sovereign immunity was effectively codified in the Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602–11, and amending 28 U.S.C. §§ 1391, 1441 (1976)).


Id. at 362–65.

Id. at 364–65.

A lower federal court has held that immunity in U.S. courts is not a right of foreign sovereigns. In that case, President Carter’s executive order freezing Iranian assets in this country nullified and made void that nation’s rights to property in our jurisdiction. The judge felt that this executive action suspended Iran’s sovereign immunity against the claims brought before his court. New England Merchants National Bank v. Iran Power Generation and Transmission Company, 79 Civ. 6380 (S.D.N.Y., Sept. 26, 1980).

Sabbatino, 376 U.S. at 423.

Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Naatschappij, 173 F.2d 71 (2d Cir. 1949), mandate amended per curiam, 210 F.2d 375 (2d Cir. 1954); see also Banco Nacional de Cuba v. First National City Bank, 406 U.S. 759 (1972).


Sabbatino, 376 U.S. at 427–37.

Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808).

Cf. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (where the law of nations prescribes no fixed rule, Congress has the authority to say whether a rule of a foreign nation should be applied); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

Filartiga, 630 F.2d at 878. See Schneebaum, Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy, this volume.


Although Fernandez applied international human rights standards to actions of a country of refuge, its relevance to this discussion—redress of wrongs perpetrated by countries of origin—stems from the implications of the case for the development and establishment of certain human rights norms.


See Republic of Iraq v. First National City Bank, 353 F.2d at 51.