

The Foundational Blunders of Human Rights and the Naturalisation of Refugees under International Law: A Historical Perspective



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ABSTRACT

This paper traces the historical antecedents of the displacement of rights pertaining to the naturalisation of refugees and the foundational blunders of human rights inherent under international law. With more than 36 million recognised refugees worldwide as of 2024, the vexed question of the naturalisation of refugees is timelier than ever to revisit. Divided into seven parts from introduction to conclusion, this paper analysed why the current human rights architecture is incapable of restoring the humanity of refugees due to statist control of human rights in the guise of citizenship. It argued that despite successive human rights treaties and declarations, universal human rights within the context of naturalising refugees remain almost an empty promise. Using the doctrinal research method, it reconciled the competing conceptions of human rights with the current difficulties in the naturalisation process and makes the case for the realisation of this process as a human rights imperative.

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INTRODUCTION

The number of people seeking protection from man-made catastrophes such as conflicts, droughts, poverty, climate change and the like, has never been this high since World War II. Given the large number of persons who have drowned and counting still from the Mediterranean, and Aegean seas to the Atlantic Ocean, rising discontent and naked reservations for displaced people have worsened. Since states across Europe and elsewhere are fortifying their borders and enacting laws to further displace the rights of those within to stay the tide of those without their borders, a revisit of the refugee situation has never been more germane. With more than 36 million recognised refugees worldwide as of 2024, the vexed question of the naturalisation of refugees is timelier than ever to revisit.¹ This discussion shall look at the naturalisation of refugees under international law. It might perhaps not be an overstatement to note that the trials that refugees face today as they quest for new roots and protection, is itself a trial of international human rights law, and international law in general.

Among the durable solutions to the refugee problem, naturalisation has increasingly remained a very less appealing option to many parties to the Geneva Convention on Refugees. The loss of roots and protection of their native governments is exacerbated by the difficulties of finding the same in countries

¹ UNHCR, "Refugees Statistics," 2024, <https://www.unrefugees.org/refugee-facts/statistics/#:~:text=Global Trends At-a-Glance&text=43.4 million refugees,6.9 million asylum seekers>.

of refuge. This is in contradistinction with the narrative and practical meaning of universal human rights as espoused in endless declarations and contemporary rhetoric chanted by popular governments in the hymns of good governance.

METHODOLOGY

Using the doctrinal legal research method, this paper analyses and evaluates the nature of naturalisation under international refugee law *vis-à-vis* fundamental human rights. First, it considers the extent of the naturalisation of refugees under international law. It tackles the conceptual blunders, application and misapplication of human rights from a refugee perspective and goes beyond the rhetoric of rights into the actual pain of human rights neglect. It concludes with a proposition to reconceptualise human rights from the perspective of the naturalisation of refugees to strengthen the universal culture of human rights. Addressing the deformities in the naturalisation of refugees is relevant in expanding the frontiers of international human rights law because nothing is more debilitating in the continent of rights than denying citizenship and its bundle of rights to those who have no effective one. In this regard, the key methodological approach for this study will be the doctrinal research approach. Data from secondary sources such as articles, literature surveys, the internet and other electronic sources dealing with the naturalisation of refugees will be analysed.

DISCUSSION

The Refugee (An Age-Old Problem)

The refugee, a concept embodying displacement, whether viewed as a legal or sociological concept – is perceived as a mobile entity.² The refugee definition, it has been noted, has an ordinary, natural common sense, even literal meaning ‘signifying someone in flight.’³ The refugee is ‘driven’ from the only home he or she has ever known; a refugee is a victim of causes, including war, famine and drought which have an endemic mobilising force. That is where flight constitutes ‘the only way to escape danger to life or extensive restrictions on human rights’.⁴ Specifically, though, the emphasis has been on victimisation by certain events for which, at least as an individual, the refugee cannot be held responsible.⁵ The refugee in international law, that overarching aesthetic category, demands even greater spatial mobility on the part of the putative refugee – he or she must cross international borders.⁶ This illegal crossing is a matter of necessity because, despite the ostensible legal obligations binding every state-party to the Geneva Convention Relating to the Status of Refugees⁷ and the United Nations Charter, there has never been an acceptable lawful means for an asylum seeker to reach any country of protection. Macklin has contended that whilst *visas* are required from refugee-producing countries, they are seldom knowingly issued to anyone admitting or suspected of an intention to seek asylum.⁸

When a refugee is expelled from his native state, or forcibly dispossessed in one way or the other, there is mostly nowhere to go. Even if they arrive somewhere, they mostly remain in a permanent transit. They may arrive at the borders of receiving states. Although receiving states are compelled under international law to receive them, they are received not as citizens and on condition that they do not belong.⁹

Without a state that takes responsibility for them, that acknowledges, recognises, and reinforces their citizenship rights, refugees lack a political voice which Nyers has argued, risks their status as

² Patricia Tuitt, “Rethinking the Refugee Concept,” *Refugee Rights and Realities: Evolving International Concepts and Regimes*, 1999, 106–18.

³ Guy S Goodwin-Gill, Jane McAdam, and Emma Dunlop, *The Refugee in International Law* (Oxford University Press, 2021), 3-4.

⁴ Goodwin-Gill, McAdam, and Dunlop, *The Refugee in International Law*.

⁵ Aristide R Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, USA, 1989),1.

⁶ Tuitt, “Rethinking the Refugee Concept,” 108.

⁷ Convention Relating to the Status of Refugees, 1951, hereinafter referred to as the Refugee Convention.

⁸ Audrey Macklin, “Who Is the Citizen’s Other? Considering the Heft of Citizenship,” *Theoretical Inquiries in Law* 8, no. 2 (2007): 333–66.

⁹ Judith Butler and Gayatri Chakravorty Spivak, “Who Sings the Nation-State,” *Language, Politics, Belonging*, 2007, 58–61; This article noted that ‘refugees are accepted on condition that they do not belong to the set of juridical obligations and prerogatives that stipulate citizenship or, if at all, only differentially and selectively.’

humans.¹⁰ Refugees have been subjected to conditions that compel them to live as sub-humans in human rights-based societies in a world whose language is one of human rights, dignity and equality. Is it that the architecture of universal human rights was framed in injustice and steeped in inequality despite its endless treaties, declarations, and diplomatic lunches? An answer to this question shall be attempted in the discussion hereunder.

Naturalisation under the Geneva Convention on Refugees

The definition of a refugee in the Refugee Convention starts with the requirement that the refugee must be out of his country of birth, pushed out by circumstances beyond his design.¹¹ The Organisation of African Unity (OAU) Convention on refugees¹² speaks the same language. The Cartagena Declaration¹³ took its cue from the OAU Convention.¹⁴ Kicked out of their native states by circumstances beyond their control, the drafters of the Refugee Convention contemplated, agreed, and enacted a path to citizenship for refugees. This was necessary because without the possibility of full membership in any state of reception, refugees risk losing the very essence of their humanity - dignity. However, the international rule of law governing refugees goes beyond the Geneva Convention on Refugees and the 1967 Refugee Protocol.¹⁵ The focus of this section, however, is a path to citizenship for refugees under international refugee law.

Access to citizenship through naturalisation is contained and addressed by Article 34 of the Geneva Convention on Refugees, an unprecedented provision without legal equality in international refugee law.¹⁶ Art 34 proclaims:

“The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and cost of such proceedings.”¹⁷

The first purpose of the above provision ‘was to bring about the naturalisation of the largest possible number of refugees.’¹⁸ Secondly, with respect to the question of facilitating the process of naturalisation of refugees, Art. 34 enjoined state parties to display flexibility regarding the ‘administrative formalities taking place between the submission of the application and the decision.’¹⁹ On the other hand, contracting states are expected to act in good faith at all times to assist refugees who are willing to acquire the nationality of their host states.²⁰

¹⁰ Peter Nyers, *Rethinking Refugees: Beyond State of Emergency* (Routledge, 2013), 7; Liisa H Malkki, “Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization,” in *Siting Culture* (Routledge, 2005), 227–58; Jane Haggis and Susanne Schech, “Refugees, Settlement Processes and Citizenship Making: An Australian Case Study,” *National Identities* 12, no. 4 (2010): 365–79.

¹¹ 189 UNTS 137 (the Refugee Convention) article 1 A (2).

¹² The Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa (1969) article 1 (2).

¹³ 1984 Cartagena Declaration on Refugees, para. III. 3.

¹⁴ For a comparative perspective and similarity between the Cartagena Declaration and the 1969 OAU Convention on Refugees, see Arboleda “The Cartagena Declaration of 1984 and its similarities to the 1969 OAU Convention- A Comparative Perspective” 1995 Special Issue, 87-102.

¹⁵ Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009); James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2021), Hathaway notes that in addition to the Geneva Convention on Refugees and the Refugee Protocol of 1967, the rights regimes that apply to refugees entitlements include the two fundamental treaties of the international human rights system, namely, the International Covenant on Civil and Political Rights, New York, 16 December 1966, which came into force on 23 March 1976 (UN Doc, A/6316, 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, which came into force on 3 January 1976 (UN Doc, A/6316, 999 UNTS 3 (ICESCR)).

¹⁶ Hathaway, *The Rights of Refugees under International Law*, 445-90. The drafters did not however debate the meaning of naturalisation, it having been asserted simply “[t]hat the word ‘naturalisation’ was well known and bore a distinct meaning.” Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.39, 21 August 1950.

¹⁷ Although regional instruments such as the OAU Convention on Refugees did not adopt a similar language as art 34 of the Geneva Convention on Refugees, they may imply the same thing. Art II (1) of the OAU Convention on Refugees disposed that: ‘Member States of the OAU shall use their best endeavours consistent with their respect legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.’ Countries of asylum should endeavour at best to ‘secure the settlement’ of refugees who are unable or unwilling could be interpreted to have the same meaning as the content of art.34 of the Geneva Convention on Refugees.

¹⁸ Statement of Mr. Juvigny, the French representative to the Ad Hoc Committee, UN Doc, E/AC.32, August 21, 1950, at 25.

¹⁹ Statement of Mr. Ordonneau of France, UN Doc, E/AC. 32/SR.22, February 2, 1950 at 3.

²⁰ A similar duty was recognised outside the context of the Refugee Convention by the Supreme Court of India, which ordered a state government to desist from efforts to prevent Chakma refugees from securing Indian citizenship on the basis of the usual legal requirements. “[B]y refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered

In addition to their acting in good faith, contracting states are expected to ‘expedite’ the processing of naturalisation applications as filed by refugees or their agents, if any. The first part of the second requirement in Art. 34 of the Geneva Convention on Refugees is an appeal for procedural fairness in the acceleration of the application for naturalisation by refugees.²¹

Consequent to this provision, and although more of an economic need, ideological combat and quest for supremacy in the balance of power, some states in the West have naturalised quite several refugees since post-WW II. Prakash Shah intimated that in the post-1945 atmosphere of apparently global bipolarity of ideology, refugee laws throughout the West were geared towards the reception of exiles from the Communist world.²² In the United States, for example, political considerations were made an explicit component of refugee admission policies²³ and Western European states eased the entry of exiles from the Eastern bloc.²⁴ This form of naturalisation was political and had very little to do with the founding purpose of Art. 34 of the Convention.

The prevailing practice of the West in the ‘50s’ and ‘60s’ fed the narrative that no one thought even remotely that someone fleeing from Eastern Europe might by any chance return to their country of origin. Once they were recognised by any process as refugees’ that was enough for them to be granted permanent residence and eventually accorded citizenship. Return was therefore not part of the matrix of discourse in this era. Expanding on this perception during this era, Monica Toft elaborated:

“During the Cold War, these refugees were valuable to the U.S. and its allies in three ways. First, the difficulties involved in escaping the authoritarian Eastern Bloc acted as a powerful selection bias: those escaping tended to represent the most enterprising, skilled, and well-educated of the persecuted groups. Second, and partly as an artefact (sic) of their positions within Soviet-bloc societies, these refugees often held valuable information about economic, technological, and social conditions within the U.S.S.R.-led bloc. Third, to the U.S.-led side, the stories of persecution and repression told by many of these refugees were of great value in the propaganda war fought by both sides during this period.”²⁵

It is perhaps a distant memory now to remember that refugees to the West were commonly presented as political she/heroes and courageous defenders of freedom. They were celebrated as political dissidents and champions of justice. Alexander Solzhenitsyn²⁶ was perhaps the archetypal

as citizens of India. If a person satisfies the requirements of Section 5 of the Citizenship Act, he/she can be registered as a citizen of India’’: *National Human Rights Commission v State of Arunachal Pradesh* 1996 83 AIR 1234 (SC, Jan. 9, 1996). See Hathaway 980-990.

²¹ Statement of Mr. Cuvelier of Belgium, UN Doc, E/AC. 32/SR.22, Feb. 2, 1950, at 3. Whilst the British representative initially opposed this duty on the grounds that it would ‘entail giving priority to the application of refugees over those of other foreigners,’ he was persuaded to drop his objections to this clause: Statement of Sir Leslie Brass of the United Kingdom, UN Doc, E/AC.32, Feb 2, 1950, at 3. Blay and Tsamenyi are therefore justified in their conclusion that Art. 34 ‘effectively requires the States to give the refugees more favourable treatment than the States would normally give to other aliens’: Samuel K N Blay and B Martin Tsamenyi, “Reservations and Declarations under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,” *International Journal of Refugee Law* 2, no. 4 (1990): 542. See generally Hathaway 980-990.

²² James C Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law,” in *International Refugee Law* (Routledge, 2017), 65–119.

²³ G. Loescher and J. Scanlan, *Calculated Kindness: Refugees and America’s Half Open Door* (New York: Free Press, 1986).

²⁴ Heinz Fassmann and Rainer Münz, “European East-West Migration, 1945–1992,” *International Migration Review* 28, no. 3 (1994): 520–38; Prakash Shah, “Taking the ‘political’ out of Asylum: The Legal Containment of Refugees’ Political Activism,” in *Refugee Rights and Realities: Evolving International Concepts and Regimes.*, ed. Frances Nicholson and Patrick M. Twomey (Cambridge: Cambridge University Press, 1999), 119–35.

²⁵ Monica Duffy Toft, “The Myth of the Borderless World: Refugees and Repatriation Policy,” *Conflict Management and Peace Science* 24, no. 2 (2007): 143; Chatham House, “The Refugees Convention: Why Not Scrap It?,” 2005, [https://www.chathamhouse.org/sites/default/files/public/Research/International Law/ilp201005.pdf](https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilp201005.pdf).

²⁶ Aleksandr Solzhenitsyn, *One Day in the Life of Ivan Denisovich*, 1974. His work, *One Day in the Life of Ivan Denisovich* (1974) portrayed the terrible suffering and despicable hardship of prisoners in the Soviet Camps, but of note, is the fact that the hardship of the prisoners lives were never viewed from the perspective of trauma but via the paradigm of politics.

figure commonly associated with political exiles alongside others of his era.²⁷ The image that refugees from the Communist bloc into the West enjoyed during this time and which facilitated their naturalisation was one of heroism, of intellectual and political freedom fighters. For example, during the Hungarian crisis of 1956, France and the UK announced that they were prepared to accept an unlimited number of refugees. It is trite that upwards of 20,000 Hungarians sought and were granted asylum in the UK alone within a few days, the highest number of any European power at the time.²⁹ In effect, those escaping violence during the '50s' and '60s' of global ideological bipolarity of the Cold War era found ready-made reception in an extraordinary fashion which paved and hastened their path to naturalisation.³⁰

Elsewhere in the African continent, the naturalisation of refugees has taken place and to an extent, on an unprecedented scale, however rare. Tanzania carries the flag of naturalisation of refugees in Africa. It has been lauded as home to one of the largest number of refugees in the continent. In 1980, during the presidency of that country's founding president, Mwalimu Julius Nyerere, the government of Tanzania naturalised 30,000 Rwandan refugees.³¹ In 2005, Tanzania naturalized 182 Somalian refugees from the Chogo settlement in the northeast part of the country.³² Add to this, and in the same 2005, it announced the naturalisation of close to 200,000 Burundian refugees who have lived in Tanzania since 1972 in what the EU later hailed in 2008 as 'a unique and unprecedented act of generosity and humanity.'³³

Although the above balance sheet of naturalisation efforts as presented bespeaks more of a reception based on ideological showdown, the triumph of Western philosophy in the Cold War era and ultra-humanitarianism in the case of Tanzania, neither kindness, however, calculated, bordered on article 34 of the Geneva Convention on Refugees. The West went all out to receive and naturalise refugees from the communist bloc to decidedly prevail ideologically against the Communist East. Tanzania left no room for an alternative motive as to why that country naturalised so many refugees. As former president Kikwete commented on the situation, 'Some don't know where to go if asked to go back to Burundi. We are doing this on humanitarian grounds.'³⁴ Neither the West nor Tanzania granted these naturalisations as an obligation under the Geneva Convention on Refugees. They did not do so as well as a religious observation of the inalienability of human dignity or fundamental rights or due to respect and observation of international case law. It was premised on ideological combat and triumph, and also humanitarianism.

If human rights were what they are misunderstood to be, no refugee who seeks naturalisation would be denied one. In fact, some have even argued from a different perspective that because human

²⁷ Hungarian-born writer Arthur Koestler, author of *Darkness at Noon* was celebrated as a political and intellectual combatant in the twentieth century. Even the Russian writer Irina Ratushinskaya, author of *No, I am not Afraid or Grey is the Colour of Hope* (1989) was embraced by the West as a demonstration of the superiority of the Free World against the Communist World. Refugee status was immediate for these ideological defectors and permanent residence and citizenship was a non-debatable issue. On the perception of the images of refugees during in the era of the Cold War, see generally Pupavac "Refugees in the 'sick role': stereotyping refugees and eroding refugee rights" 2006 *Research Paper No. 128 in New Issue in Refugee Research* 1-14.

²⁸ Arthur Koestler, *Darkness at Noon: A Novel* (Simon and Schuster, 2019), Hungarian-born writer Arthur Koestler, author of *Darkness at Noon* was celebrated as a political and intellectual combatant in the twentieth century; Irina Ratushinskaya, *Grey Is the Colour of Hope* (1989), Even the Russian writer Irina Ratushinskaya, was embraced by the West as a demonstration of the superiority of the Free World against the Communist World. Refugee status was immediate for these ideological defectors and permanent residence and citizenship was a non-debatable issue. On the perception of the images of refugees during in the era of the Cold War, see generally Vanessa Pupavac, *Refugees in the 'sick Role': Stereotyping Refugees and Eroding Refugee Rights* (UNHCR, Evaluation and Policy Analysis Unit, 2006).

²⁹ Loescher and Scanlan, *Calculated Kindness: Refugees and America's Half Open Door*, at 52 put the figure at 21, 100 for the UK and 38, 121 for the USA; Paul Tabori, *The Anatomy of Exile: A Semantic and Historical Study* (Harrap, 1972), 339, puts the figure higher to 30, 000. Tabori would note further that, had the UK government not been that generous, 'there would have been something of a revolution, for there was a tidal wave of sympathy and compassion for the men, women and children who were stumbling across the minefields and barbed wire into Austria.

³⁰ Tabori *supra* at 340. See also Patterson in *The Poles: An Exile Community in Britain* in Watson (ed.) *Between Two Cultures: Migrants and Minorities in Britain* (1978) 216. See especially Dummett & Nicol *Subjects, Citizens, Aliens, and Others: Nationality and Immigration Law* (1990) 187-90.

³¹ A. Chol, "The Legal Dimensions of the Refugee Problem in Africa," *Migration* 14, no. 5 (1992): 23.

³² UN High Commissioner for Refugees, 'United Republic of Tanzania' *UNHCR Global Appeal*, 2005; 'Somalia-Tanzania: Somali Bantus to get citizenship' *IRIN*, 22 June 2005; UN High Commissioner for Refugees (UNHCR), "The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis," 1990, <https://www.refworld.org/reference/research/unhcr/1990/en/100962..>

³³ 'EU funds naturalisation of Burundians', *Daily News* (Dar es salaam) 19 August 2008: *UNHCR Global Report* 2007.

³⁴ ENCA 'Tanzania to grant citizenship to 200, 000 Burundi Refugees' 14 October 2014, available at www.enca.com/africa/tanzania-grant-citizenship-200000-burundi-refugees (Accessed 29 April 2023).

rights are now recognised and everyone is entitled to the protection of their human rights, deciding whether someone is a refugee is redundant. It is necessary to ask only whether such person, if returned, will face prosecution or violation of their fundamental rights.³⁵ Nothing could be further from the truth. If this was even remotely so, Art. 34 would have been a redundant provision, sadly, it is not so.

Naturalising refugees is a measure of unquantified significance because it restores the fundamental human rights of refugees. It protects the content of their dignity, paves the way for new roots and enables their participation in public life in their countries of reception – the very essence of humanity depends on this. Hathaway noted that:

“[B]y granting the refugee the right to participate in the public life of the state, naturalisation eliminates the most profound gap in the rights otherwise available to refugees, since full political rights are not guaranteed to refugees under the Refugee Convention, nor to non-citizens under general principles of international human rights law.”³⁶

Although it was designed to naturalise refugees to roll back the human rights deficit that comes with not having the status of citizenship, the drafters were reluctant to make Art. 34 a binding obligation in favour of refugees who aspire to such status. Despite arguments that naturalisation will help combat statelessness, no state party advocated mandatory enfranchisement during the drafting of the convention.³⁷ Whilst compulsory naturalisation would have been a mistake because of certain political figures in exile who represent a cause or a party, denying refugees the possibility to naturalise if they wish, amounts to a defeat for human rights. Consequent to the reluctance of state parties during the drafting history of the Geneva Convention on refugees to make Art. 34 a binding obligation, this particular provision is not binding. This provision does not require State parties to eventually grant their citizenship to refugees or compel refugees to accept the same if extended to them.³⁸ This spelled doom for the human rights of refugees.

Notwithstanding the non-discriminatory clause under Art. 3 of the Geneva Convention on Refugees,³⁹ some member states⁴⁰ have adopted xenophobic legislation regarding refugees. Such states have constrained the path of naturalisation, imbibing policies of ‘exclusionary inclusion’ and by implication condemned refugees as dangerous and distasteful outsiders.⁴¹ Instead of viewing the refugees’ quest for naturalisation as an expressive desire to join the family of humanity, state parties have elected to see such desire as an encroachment on their sovereignty.

The question of rights that begs answer or clarity is therefore, if international human rights instruments were truthful to their narrative of the inalienability of human rights, why is naturalising willing refugees such a difficulty to many states today? Why did the drafters see human rights from the perspective of sovereignty? Why is international human rights law incapable to emplace the refugee with the full rights that their humanity impels after displacement? The remainder of this paper will discuss the reason for this human rights disability from the perspective of the naturalisation of refugees.

Human Rights Incapacity to Solve the Refugee Problem of Naturalisation Foundational Blunders of Human Rights

Since naturalisation is a question of citizenship and citizenship is a status, a lot of emphasis will be placed on it. As far back as the concord at Westphalia in 1648, sovereignty allows full rights only to the territorial occupants of a state under a sovereign. The ‘Rights of Man’ as they were then, was turned into the rights of citizens. The struggle that must concern human rights experts, defenders, scholars, and fair institutions should be how to wrestle or free human rights from the overreaching clutches of

³⁵ Chatham House, “The Refugees Convention: Why Not Scrap It?”

³⁶ Hathaway, *The Rights of Refugees under International Law*, 980.

³⁷ Hathaway, *The Rights of Refugees under International Law*, 982.

³⁸ UN High Commissioner for Refugees (UNHCR), “The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis,” 166; Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation; a Commentary* (Inst. of Jewish Affairs, 1953).

³⁹ Art. 3 provides that ‘The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

⁴⁰ East African states like Uganda and Kenya for example have adopted refugee legislation without a path to citizenship.

⁴¹ Susan Kneebone, “Strangers at the Gate: Refugees, Citizenship and Nationality” (2004), *Australian Journal of Human Rights* 10 (2014): 33.

citizenship. The territorially bounded placement of full rights is where the error of human rights began. Forcefully rooted out of their native territorially bounded space in a world of states, wherein human rights are misconceived and misapplied as geographically bounded is the original human rights sin of the refugee the world over.

The era of the Treaty of Westphalia which ended a century of religious war in Europe and established a framework of international law for the resolution of conflicts between territorial sovereign states, laid the foundations that made it possible for the construction of the territorial basis of human rights.⁴² The territoriality of human rights in contemporary times has bowed to commercial and other forces except human needs for belonging. In the current post-Westphalian world with high-power globalising forces, there are increasingly high levels of non-statist demands for rights from corporations and other diverse groups. As much as it challenges the fundamentals of the Westphalian establishment of territorially bounded rights, it has not completely disaggregated the core status of citizenship as one predicated on human rights. Let's briefly test a few origins of rights from those professing their constitutional foundations.

Arendt noted that in keeping with the Westphalian model of rights in the sphere of international law, 'theoretically, sovereignty is nowhere more absolute than in matters of emigration, naturalisation, nationality and expulsion.'⁴³ Nonetheless, the configuration in Westphalia disguised the underlying implication of human rights in the event of forceful displacements which only came to the fore in the wake of massive human suffering post-World War I. However, since the emergence of nation-states coincided historically with the development of constitutional governments, as well as with the formation of an international community that would constrain the exercise by governments of their full sovereign power, 'the inherent dangers of linking rights with nationality remained hidden from view until World War I. Its consequences sufficiently shattered the façade of Europe's political system and lay bare its hidden frame.'⁴⁴ As Arendt would put it, 'such visible exposures were the sufferings of more and more groups of people to whom suddenly the rules of the world around them had ceased to apply.'⁴⁵

Ever since the emergence of the state system in its modern form, the state has retained the right to regulate and control entry to its territory as a fundamental concomitant of sovereignty.⁴⁶ The nation-state would become at the same time the sole positive or institutional horizon for the recognition of human rights and an impossible one producing, as Balibar maintains, 'the destruction of the universal values it had supported.'⁴⁷

Early modern statements and declarations present human rights as a series of individual entitlements and claims that belong to human beings on account of their basic humanity rather than as a result of grants by public power.⁴⁸ If refugees are constrained from citizenship in their various countries of reception, it naturally begs the question if they are human enough or, better still, one wonders who is the "man" in the "rights of man"? What humanity and which nature is promised in the classical declarations of human rights from the perspective of refugees?

The very language of the American Declaration of Independence⁴⁹ as well as of the French Declaration of the Rights of Man and Citizen⁵⁰ which are actually the legal backbone of the Universal

⁴² For an elaboration of the links between territory and the status of citizenship, Ricard Zapata-Barrero, "Borders in Motion: Concept and Policy Nexus," *Refugee Survey Quarterly* 32, no. 1 (2013): 1–23; Patricia Tuit, "Transitions: Refugees and Natives," *International Journal on Minority and Group Rights* 20, no. 2 (2013): 179–97; Liisa Malkki, "National Geographic: The Rooting of Peoples and the Territorialization of National Identity among Scholars and Refugees," in *The Cultural Geography Reader* (Routledge, 2008), 287–94.

⁴³ Hannah Arendt and Nadia May, "The Origins of Totalitarianism," 1958; For deportation as a crime under international law, see Vincent Chetail, "Is There Any Blood on My Hands? Deportation as a Crime of International Law," *Leiden Journal of International Law* 29, no. 3 (2016): 917–43.

⁴⁴ Aristide R. Zolberg, "The Formation of New States as a Refugee-Generating Process," *The Annals of the American Academy of Political and Social Science* 467, no. 1 (1983): 24–38.

⁴⁵ Arendt and May, "The Origins of Totalitarianism," 267.

⁴⁶ Zolberg, "The Formation of New States as a Refugee-Generating Process"; Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford University Press, 1995).

⁴⁷ Etienne Balibar, "Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence.," *Constellations: An International Journal of Critical & Democratic Theory* 8, no. 1 (2001), 15–29.

⁴⁸ Costas Douzinas, "Human Rights at the End of History," *Angelaki: Journal of the Theoretical Humanities* 4, no. 1 (1999): 99–114, 101–103.

⁴⁹ 4 July 1776.

⁵⁰ 26 August 1789.

Declaration of Human Rights⁵¹ speaks of human rights as “inalienable”, “birth right”, “self-evident truths”, implying the belief in a kind of human “nature” which would be subject to the same laws of growth as that of the individual and from which rights and laws could be deduced. This new situation, in which “humanity” has in effect assumed the role formerly ascribed to nature or history, would mean in this context, according to Arendt, ‘that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself.’⁵²

The conception of human rights as it were, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost everything, lost all other qualities and specific relations except that they were still just humans.⁵³ Indeed, given the objective conditions and rootlessness of the refugees, it is hard to say how the concepts of ‘Man’ upon which human rights are based – that he is created in the image of God (the American formula), or that he is the representative of mankind, or that he harbours within himself the sacred demands of natural law (the French model) could help find a solution to the problem.⁵⁴ Human rights became empty promises for those who needed it the most. This is so because implied in the working system of the nation-state from Westphalia was the misleading notion that ‘only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions and that persons of different nationalities needed some law of exception until or unless they were completely assimilated and divorced from their origin.’⁵⁵

On this basis therefore, talking of refugees, Soguk would note that we tend to presuppose a territorial basis to political life.⁵⁶ The refusal or granting of nationality has therefore long been regarded even in classical international law to be the exclusive preserve of the state concerned, a position confirmed in 1923 by the Permanent Court of International Justice.⁵⁷ In 1930, the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws reaffirmed in its preamble that it is in the interest of the international community to ensure that ‘every person should have a nationality’.⁵⁸

In view of the confinement of rights into territorial spaces since Westphalia, as part of disapproved logic-based effects, it is a characteristic of sovereignty that the attempt to place all individuals within (homogenous) territorial spaces, will *ipso facto*, force some between the borders, into the gaps and spaces between states and thus outside the normal citizen-state-territory hierarchy.⁵⁹ Consequently, refugees are victims of an international system that brings them into being, and woefully, fails to take responsibility for them. Since natural borders are simply a political myth,⁶⁰ by erecting artificial borders and bracketing rights within, the universality of rights survived as a farce. As much as the historical thesis would agree that only artificial borders exist, it has become an institution on its own whose semantic family now includes limit, separation, demarcation, edge, barrier, margin, and the like.⁶¹

From a human rights perspective, the border is always seen from within as protection, from without, as an obstacle as it seeks to always invoke something that is to be extended. Newman would

⁵¹ 10 December 1948. Though it is not a treaty, it has a moral and political authority internationally as a minimum standard of states human rights obligations as parties to the UN as enshrined in articles 55 & 56 of the UN Charter of 26 June 1945 and binds every member state of the UN.

⁵² Arendt, *The Origins of Totalitarianism*, 298.

⁵³ Arendt, *The Origins of Totalitarianism*, 298.

⁵⁴ Arendt, *The Origins of Totalitarianism*, 295-300.

⁵⁵ Zolberg, “The Formation of New States as a Refugee-Generating Process,” 27-29.

⁵⁶ Nevzat Soguk, *States and Strangers: Refugees and Displacements of Statecraft*, vol. 11 (U of Minnesota Press, 1999), 18; Emma Haddad, “The Refugee: The Individual between Sovereigns,” *Global Society* 17, no. 3 (2003): 297–322; Richard Devetak, “In Fear of Refugees: The Politics of Border Protection in Australia,” *The International Journal of Human Rights* 8, no. 1 (2004): 101–9.

⁵⁷ National Decrees issued in Tunisia and Morocco on 8 November 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) para. 8. See also Weis *Nationality and Statelessness under International Law* (1979) when he wrote on p.26 that ‘the right to state to make rules governing the loss of nationality is, in principle – with the possible exception of clearly discriminatory deprivation – not restricted by international law, unless the state has by treaty undertaken specific obligations imposing such restrictions.’

⁵⁸ “It is for each State to determine under its own rules who are its nationals. This law shall be recognised by other States insofar as it is consistent with international conventions, international customs, and the principles of law generally recognised regarding nationality.” Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930 (entered into force 1937) Art. 1.

⁵⁹ Haddad, “The Refugee: The Individual between Sovereigns,” 297-322.

⁶⁰ Zapata-Barrero, “Borders in Motion: Concept and Policy Nexus,” 1-23.

⁶¹ Zapata-Barrero, “Borders in Motion: Concept and Policy Nexus,” 11-23.

correctly note that ‘the bordering process creates order through the construction of difference.’⁶² As naturalising refugees go, it is not only by closing their borders that states shield their territories and their nationals against refugees, but also by adopting reception strategies and laws calculated to deny those who are already present from being incorporated into host societies.⁶³

Tying the right to nationality within artificially established boundaries is inconsistent with the very notion of fundamental human rights, and there cannot be concrete universal rights in a territorially divided world. Consequent to the depletion of a right to nationality for refugees exclusively contingent on the fault lines of the territoriality of rights, the international protection created in 1951 was erroneously adopted along the nation-state’s lines of Westphalia.

The Blunders of Human Rights Versus Naturalisation: Perceptions, Realities, and the Citizenship Impact

As a concept, the refugee could not exist in the universe because this was only possible once boundaries were erected. When European politics were transformed from the solidaristic norms of the *universitas*⁶⁴ of Latin Christendom to the pluralist norms of modern societies, and the principle of sovereignty passed from being the individual sovereignty of the prince to that of the nation he ruled, the internal-external dichotomy became evident.⁶⁵ This notion of internal-external dichotomy inevitably forced others to be without roots once uprooted elsewhere. Thus, the problem of refugees was avoided in a solidarist world.

The refugee movements marked not only key moments in the production of the cultural identity of the refugee but clearly, can be viewed as part of a larger phenomenon. It constitutes in its own fashion, the social production of space which Foucault was to describe as “a set of relations that delineate sites and that, movement towards exile claim a ‘site’ which, in the claiming, excludes the claims of others.”⁶⁶

In accordance with the international legal aspects of state sovereignty, neither the rights regime instituted within the United Nations (UN) nor any other international organisation nor regional institution promotes effective protection of practical human rights outside the territorial jurisdiction of member states. Even when the Universal Declaration of Human Rights (UDHR) proclaims individual freedom from persecution and the right to freely leave one’s territory and enjoy asylum in other countries free from persecution, there is no correlative duty to any state to receive the asylum seeker.⁶⁷ The lack of concrete rights for refugees never eased even after the coming into force of the Geneva Convention on Refugees. Chatham House commented that:

“When evaluating the 1951 Convention or the refugee regime, it helps to recall that that right has never been developed and was not incorporated in later universal or (with some exception) even regional regimes to any great extent. But states have clearly indicated their uneasiness with recognising a right on the part of the individual in flight from persecution to be granted asylum. That may explain the malaise with which some commentators at the political level view the way in which the 1951 Convention impacts on what they perhaps would like to think of as their sovereign and unfettered right to decide who enters, leaves, or stays in the country.”⁶⁸

Those who do not enjoy emplacement, such as refugees within the maps of the international society, are in the words of Franke ‘doubly displaced, from both the determined places of humanity and grounds from which respect as a human being may be leveraged.’⁶⁹ Whilst human rights entered the world scene only after World War II, exclusive sovereign claims of states continue to impede the

⁶² David Newman, “On Borders and Power: A Theoretical Framework,” *Journal of Borderlands Studies* 18, no. 1 (2003): 13–25; Hastings Donnan and Thomas M Wilson, *Borders: Frontiers of Identity, Nation and State* (Routledge, 2021).

⁶³ G. Kibreab, “Revisiting the Debate on People, Place, Identity and Displacement,” *Journal of Refugee Studies* 12, no. 4 (January 1, 1999): 384–410, <https://doi.org/10.1093/jrs/12.4.384>.

⁶⁴ *Universitas/Societas* is Latin for international societies as used interchangeably in the medieval and post-medieval times. For an understanding of the evolution and impact of the *universitas* of Latin Christendom from Westphalia to the current system of states, Susanna Hast, *Spheres of Influence in International Relations: History, Theory and Politics* (Routledge, 2016), chpt 2.

⁶⁵ M. Wight, *Systems of States* (Leicester: Leicester University Press, 1977), 153.

⁶⁶ Michel Foucault and Jay Miskowic, “Of Other Spaces,” *Diacritics* 16, no. 1 (1986): 22–27.

⁶⁷ Articles 13 & 14, UDHR, 1948.

⁶⁸ Chatham House, “The Refugees Convention: Why Not Scrap It?”

⁶⁹ Mark F N Franke, “The Unbearable Rightfulness of Being Human: Citizenship, Displacement, and the Right to Not Have Rights,” *Citizenship Studies* 15, no. 01 (2011): 39–56.

implementation of any successful policy geared towards the naturalisation of refugees. As Soguk wrote: '[m]aintaining the *status quo* of the States system takes the upper hand even in the face of massive human suffering.'⁷⁰ The flight of refugees highlights a failure both of individual governments to protect their citizens and of the international state system as a whole, the failure to assign every individual to a state and protect them as citizens.⁷¹ Consequently, refugees are misfits whose identity contradicts any established nation-state,⁷² having been 'ejected from the old trinity of state-people-territory'⁷³ and pushed into the gaps of purportedly organised state systems.

How the notion of the refugee has been qualified with the notion of displacement of both the human and the bundle of rights that comes with citizenship is itself a social construct of modernism underpinning the nation-state, an invention of international law having its roots from Westphalia. This is so because it is the law of nation-states which defines a refugee as a refugee or which determines who a refugee is. Although it might be difficult to call on international law to dismantle its own creation, the appeal can perhaps be found in the pains of humanity. In the current system of territorially bracketed rights disguised as a human rights world, the refugee is not a citizen. The refugee does not have public rights because he or she is not part of the state, and the refugee is a lesser human being because they are not citizens. According to Douzinas, the French Declaration of Human Rights puts it more succinctly that 'the alien is the gap between man and citizen, between human nature and political community lies the moving refugee.'⁷⁴

The contradiction therefore between the human rights enjoyed by persons as citizens *vis-à-vis* the dehumanised suffering of the putative refugee consequent on the lack of the same status has its origins from the errors of Westphalia. The territorialisation of rights as opposed to the naked rhetoric of international human rights, especially where it is needed the most, can be solved on this front by easing naturalisation laws for willing refugees the world over.

Traversing Rights Rhetoric: Naturalisation of Refugees and Beyond

It is not an overstatement to mention that the architecture of international human rights law is rooted in the premise that all persons, by virtue of their essential humanity, should enjoy all human rights. Quite naturally, humans preceded laws. Rights are a byproduct of mankind and any attempt to reverse this, risks humanity itself. To this end, one may say there is no law necessary to justify if a human is human because the law itself rests on humans and is established by humans. In the case of refugees, though a social and legal creation of modernism, being human has never been enough to exercise every right a situated citizen exercises, and in so doing, law disaggregated humanity and aggregated humans into humans and sub-humans.

The higher status of human rights as perceived in contemporary international law is seen because of their legal universalism, however inaccurate and to an extent, of the triumph of the universality of humanity. This statement may survive justice until the refugee is factored into the legal equation. The human right not to be stateless or the right to a nationality⁷⁵ – which most refugees need to reaffirm their humanity, is important because 'many states only allow their own nationals to exercise full civil, political, economic and social rights.'⁷⁶ It is precisely for these reasons that 'the right to be a citizen of a state has been called Man's (*sic*) basic right for it is nothing less than the right to have rights.'⁷⁷ Whilst scholars of international law might argue that the right to a nationality is the right to have rights, a fertile understanding of human rights law would maintain that being human is the right to have rights.⁷⁸ From this point of view, therefore, denying willing refugees a path to naturalisation or enacting dubious laws

⁷⁰ Soguk, *States and Strangers: Refugees and Displacements of Statecraft*, 150.

⁷¹ Haddad, "The Refugee: The Individual between Sovereigns."

⁷² Zolberg, "The Formation of New States as a Refugee-generating Process," 24-38.

⁷³ Arendt, *The Origins of Totalitarianism*, 282.

⁷⁴ Douzinas, *The End of Human Rights*, 142.

⁷⁵ Article 15 of the Universal Declaration of Human Rights, 10 December 1948.

⁷⁶ David S Weissbrodt, *The Human Rights of Non-Citizens*, vol. 1 (Oxford University Press Oxford, 2008).

⁷⁷ Warren J in *Perez v Brownell* (1958) 356, US 44, 64.

⁷⁸ As Donnelly pointed out, 'human rights are literally, the rights that one has simply because one is human'. See generally Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013).

to constrain such a path, is erecting institutional discrimination and advancing the notion that some humans are not just humans enough.

The human rights subject, as opposed to the rights-bearing citizen, is by definition an individual who is void of capacity, unable to assert their interest in the political community they find themselves and every law is imposed on them without their participation in any way or form in their framing. It is for these reasons and more that blunting the path to the naturalisation of refugees is itself a defeat for humanity.

If the re-territorialisation of the refugee was possible under positive international law, the refugee would be integrated into the nation-state system and cease to be such. In the context of human rights law naturalisation, to an extent, answers the singular demand of the putative refugee. States have actually been enjoined, though in a different forum to take effective measures to ensure that all non-citizens enjoy the right to acquire citizenship without discrimination.⁷⁹

As far as the re-territorialisation or naturalisation of refugees is concerned, non-statist possibilities of solving the refugee problem in this regard are perhaps inconceivable in a world of states, just as it is inconceivable to have refugees outside a world of sovereign states. For most legal scholars (as well as most political philosophers), the question of which state would guarantee membership to a particular individual or group is largely irrelevant. In this respect, Benedict Kingsbury for example, notes that '[t]he system of state sovereignty has hitherto had the effect of fragmenting and diverting demands that international law should address inequality.'⁸⁰

The territorial conception of rights presupposes that the presence of anyone anywhere itself triggers several rights and, rather than be treated as partly in, should be treated as fully in – 'hereness' unleashes the extension of extensive rights and recognition.⁸¹ To the extent that individuals who inhabit a national community are not recognised as members, they are subject to nothing short of tyranny. Such individuals stay without political and welfare rights and in most cases, without the prospect of acquiring citizenship – they are the subject of a band of citizen tyranny, governed without consent.⁸² This is the typical refugee and all of the above depletion of rights consequent on a lack of citizenship status calls for an unhindered path to the naturalisation of refugees if human rights must have any substantive meaning under international refugee law and general international law.

The nation-state was the sole positive or institutional horizon for the recognition of human rights and an impossible one, producing the destruction of the universal values it had supported. It was established to protect the rights of humans. Its territoriality of rights has left a destitute set of other humans without rights. As far as the naturalisation of refugees is concerned, the fallacy of human rights comes to the fore when those seeking membership are declined or constrained to do so. Carens would note that:

“[R]especting the particular choices and commitments that individuals make flows naturally from a commitment to the idea of equal moral worth. What is not readily compatible with the idea of equal moral worth is the exclusion of those who want to join. If people want to sign the social contract, they should be permitted to do so.”⁸³

In a twist of humanity, corporations, rhinos and even environments have secured citizen rights except for refugees. Environmentalists have succeeded in giving animals such as rhinos and others rights and legal protection even though they are not socially born into the symbolic order to have a developed language. In New Zealand, a Māori tribe's river has been granted the same legal rights as a citizen⁸⁴ and similarly, a high court in India granted the rivers Ganges and Yamuna human status with

⁷⁹ See concluding 'Observations of the Committee on the Elimination of Racial Discrimination: Yemen' (2002) UN Doc CERD/C/61/CO/10 para. 14.

⁸⁰ Benedict Kingsbury, "Sovereignty and Inequality," *European Journal of International Law* 9, no. 4 (1998): 599–625.

⁸¹ Linda Bosnia, "Being Here: Ethical Territoriality and the Rights of Immigrants," in *Migrants and Rights* (Routledge, 2017), 53–74.

⁸² Michael Walzer, "A Defense of Pluralism and Equality," in *The New Social Theory Reader* (Routledge, 2020), 112–22.

⁸³ Joseph H Carens, "Aliens and Citizens: The Case for Open Borders," *The Review of Politics* 49, no. 2 (1987): 251–73; Bosnia, "Being Here: Ethical Territoriality and the Rights of Immigrants."

⁸⁴ Roy "New Zealand River granted same legal rights as human beings" *The Guardian* UK 16 March 2017. Roy was referring to a decision by the New Zealand government granting the Whanganui River of the Māori's all corresponding rights, duties, and liabilities of a legal person. This decision is the first of its kind the world over.

full rights.⁸⁵ On the part of refugees as humans, humanity is never fully guaranteed. Douzinas' insistence that it is not so much that humans have rights but that rights make humans⁸⁶ might help justify, among other rights deficits highlighted here, the necessity to naturalise willing refugees as a human rights imperative. International human rights law has no greater embarrassment than a roving refugee's quest for new roots with states closing their doors of belonging at every attempt.

CONCLUSION

Whilst the blunders of human rights can be traced back to the errors of Westphalia, modern international law has failed to address the rights misfortunes conceived in 1648, and by bracketing rights territorially, the modern system of rights has forced refugees seeking naturalisation into the cracks of rightlessness. International human rights would make much sense if those in need of protection could easily secure belonging wherever they find security even if it means facilitating negotiated pathways to new roots through citizenship, especially for those desperate for it.

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⁸⁵ See *Mohd. Salim v State of Uttarakhand* Writ Petition (PIL) NO. 126/2014 decided on 20 March 2017 where Sharma J granted the rivers Ganges and Yamuna same legal rights as any Indian citizen. Despite certain ethical concerns of granting legal personhood to a non-human entity such as, as much as these rivers have rights, how would they meet their responsibilities? Can the rivers equally be held responsible for example, misconduct in the event for example of floods? India and New Zealand granted the river full citizen status and every right implicit in such status irrespective of ethical implications.

⁸⁶ Douzinas, *The End of Human Rights*, 372.

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