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# A Right to Leave but Nowhere to Go: Reconciling an Emigrant's Right to Leave with the Sovereign's Right to Exclude

Joy M. Purcell

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# A Right to Leave , but Nowhere to Go: Reconciling an Emigrant's Right to Leave with the Sovereign's Right to Exclude

Joy M. Purcell\*

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## I. INTRODUCTION:

The right to leave one's country and pursue a new life elsewhere has been recognized in various international treaties and is almost universally honored.<sup>1</sup> Countries that restrict the ability of

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1. See Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948). The Declaration does not

their citizens to leave are criticized for human rights violations, and have historically been the subject of trade embargoes or hostile diplomatic relations.<sup>2</sup> However, while most nations are quick to criticize other nations for restrictive emigration policies, there has never been widespread international recognition of a corresponding right to immigrate. Thus, the citizen wishing to leave his country faces quite a conundrum: almost all nations support his right to leave, but virtually no country is willing to accept him. Most countries refuse to recognize such a right on the basis of sovereignty; a government must maintain control over immigration policies because the regulation of a nation's border and its right to restrict who enters it are issues at the very heart of a nation's autonomy.<sup>3</sup> In general, national governments will only acknowledge an obligation to accept individuals into their country if the government is a signatory to an international treaty governing the rights of refugees fleeing their homes in fear of persecution. Therefore, the "universal right to leave" one's country appears to be little more than a political statement; little effort is actually undertaken to bring to fruition a person's right to leave.

This comment will explore how a nation's sovereign right to exclude conflicts with the implied right of immigration as set forth in international documents such as the United Nations Universal Declaration of Human Rights.<sup>4</sup> If a person has a right to emigrate from his country, he must have a right to go somewhere. However, with a few exceptions, virtually no nation openly recognizes

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include a universal right to immigrate, but rather a right to emigrate; however, the right to leave arguably implies a right to immigrate somewhere—a point to be discussed extensively, *infra* pp. 23-32.

2. In addition to open criticism of nations that restrict the right of their citizens to leave, see, e.g. President Reagan's Proclamation of Human Rights Day, *infra* p. 14, note 60, the United States has instituted trade sanctions against countries interfering with the right to emigrate. See Jackson-Vanik Amendment, 19 U.S.C.S. § 2432. There has also been international effort to censure countries that restrict emigration through exposure. The International Covenant on Civil and Political Rights contains a provision that requires signatory countries to periodically submit reports on the observance of the Covenant's human rights provisions. See International Covenant on Civil and Political Rights, G.A. Res., 2200A (XXI) 21st Sess., (Dec. 16, 1966). See also ALAN DOWTY: CLOSED BORDERS, THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 214-221 (Yale University Press, 1987) (discussing the effects of the reporting requirements on nations that had historically restricted the right to emigrate).

which requires countries to submit reports

3. The United States Supreme Court first articulated the constitutionality of restrictions on immigration on the basis of sovereignty in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), better known as *The Chinese Exclusion Case*.

4. Universal Declaration of Human Rights, *supra* note 1, at art. 13.

such a universal right. Rather, most nations defend the right to restrict who may cross over their borders. Yet, the language used in international treaties endorsing the right to emigrate does not restrict it—the citizen's right to leave his home country is not dependent upon another country's accepting him—he has the right to leave by virtue of being human.<sup>5</sup> Of course this does not mean that a future world with “open borders”<sup>6</sup> where citizens are classified not by nationality, but rather viewed as “world citizens,” is very likely. In fact such a view is arguably an idealistic, if not illusory vision. Nevertheless, it is important to note that there have been some open concessions of autonomy by nations. Recognition of a right to asylum or entrance under refugee status represents a voluntary relinquishment of a sovereign's right to exclude; in such instances a nation submits to international law<sup>7</sup>—a body of law whose legitimacy is frequently questioned.

Therefore, international acknowledgment of a right to asylum or refugee status is significant. Whenever a country submits to international law, it admits to the existence of laws (or at the very least norms) created not by a democratic majority or a sovereign head of state within that country, but rather by a number of nations voluntarily limiting their own actions for the benefit of international relations. In the context of immigration, the *right* of asylum comes not from a national government, but from agreement among various nations who agree to honor this right.<sup>8</sup> In sum, international acceptance of a right to emigrate means that

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5. For further explanation of the origin of the rights articulated in the Declaration see the Preamble to the Universal Declaration of Human Rights, *supra*, note 1 at pmbl.

6. For a discussion of the practical application of the “open borders” argument focusing on the right to freedom of movement as a human right, see Joseph H. Carens, *A Reply to Meilaender: Reconsidering Open Borders*, INT'L MIGRATION REVIEW, Vol. 33, No. 4 (Winter 1999) at 1082-1097.

7. Convention Relating to the Status of Refugees, G.A. Res. 429(V), U.N. GAOR, 6th Sess., Supp. No. 19, Part II (July 28, 1951). The Convention was adopted in 1951 by the United Nations as an agreement among signatory parties governing the treatment of refugees from World War II. Article 33 of the Convention, titled “The Prohibition of Expulsion or Return (“Refoulement”)” established a duty for member countries: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” *Id.* By limiting a nation's ability to reject refugees at its borders, the Convention obligated a country to accept the refugee or at least find another nation willing to accept him. Countries which agreed to this provision necessarily relinquished the previously unfettered right to exclude in accordance with international law.

8. See discussion *supra*, note 7.

countries recognize a person's right to freedom of movement irrespective of the laws of his home—in essence, a right granted to him solely because he is human.

This necessarily poses a question: if a person does not gain the right to emigrate as a consequence of his citizenship, but rather from recognition of the human right guaranteeing freedom of movement out of respect for individual autonomy and the right to freely decide where to live, must not a universal right to immigrate arise as a corollary of the right to emigrate for the same reason? The quick answer offered by many, if not all, countries is a resounding “no”: however, such an answer should be qualified—many countries have voluntarily accepted responsibility to care for citizens of other countries pursuant to various international agreements.

If a nation is willing to recognize obligations owed to foreigners as a result of international law governing the treatment of refugees, could a more comprehensive right to immigrate emerge from such voluntary forbearance of the sovereign's right to exclude potential immigrants? Through an analysis of United States immigration law, international support for a human right to emigrate, and current regulation of asylum claims within the United States I will investigate how the right to emigrate could be expanded to include a right to immigrate. Because the large majority of immigrants entering the United States today are coming from points south—the Caribbean, and Central and South America<sup>9</sup>—I believe it is appropriate to focus on the effects of U.S. immigration policy on Latin America. I will thus explore how current U.S. law regulates immigration between the Northern and Southern American hemispheres and how recognition of a right to immigrate might affect Latin Americans seeking to immigrate to the United States.

I will begin with an introduction to the political theory that serves as the foundation for human rights theory and then give a brief history of human rights developments in the twentieth cen-

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9. A recent report from the U.S. Census Bureau dated May 10, 2006 confirmed that Hispanics continue to be the largest minority group. See Press Release, U.S. Census Bureau, Nation's Population One-Third Minority (10 May 2006), available at <http://www.census.gov/Press-Release/www/releases/archives/population/006808.html>; see also Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, BACKGROUNDER (Center for Immigration Studies, Washington, D.C.) Dec. 2005, at 9, available at <http://www.cis.org/articles/2005/back1405.html> (addressing the disproportional amount of immigrants entering the United States from Latin America).

ture. I will demonstrate how the right to emigrate has emerged as a universal human right through efforts in the arena of international law. Section II will address current limitations on the right to immigrate, and section III will show how nations have waived their sovereign right to exclude by accepting refugees in accordance with international norms. Finally, in section IV will explore how a universal right to immigrate could emerge from existing international obligations and the incorporation of human rights norms into national immigration policy.

## II. THE CONCEPT OF A RIGHT TO EMIGRATE

### A. *The Origin of a Universal Right to Freedom of Movement*

Human rights theory is founded upon the convergence of two seemingly unrelated fields of law: legal theory and international law. Philosophers such as John Locke and Jean Jacques Rousseau set forth philosophical theories on the rights of man and the organization of governments during the Age of Reason and the Enlightenment.<sup>10</sup> Both Locke and Rousseau believed that each person was endowed with "natural rights" upon birth, and that these rights could only legitimately be restricted through voluntary concession.<sup>11</sup> Their focus on individual worth and autonomy forms the centerpiece of human rights theory, as the basic premise rests upon the principle that all men are born with the same inalienable rights.<sup>12</sup> The theory behind human rights is also rooted in international law in that universal human rights are made possible by individual nations' deference to international standards that may restrict their sovereign powers. Applying this interpretation to immigration, a universal right to emigrate emerges from recognition of a natural right to freedom of movement, followed by

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10. See generally JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* (1690), reprinted in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE* (Paul E. Sigmund ed., W.W. Norton & Co. 2005); JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *ROUSSEAU: THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed. & trans., Cambridge University Press 1997).

11. See LOCKE, *supra* note 10; ROUSSEAU, *supra* note 10.

12. At the heart of The International Bill of Human Rights which consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols is the belief in "the inherent dignity and . . . equal and inalienable rights of all members of the human family." See Universal Declaration of Human Rights, *supra* note 1, at pmb1.

formal declarations by sovereign nations that they will protect their citizens' right to freely exit and re-enter their home country.

The belief that a person is entitled to certain rights exclusively due to his membership in the human race relies on the assumption that an individual is born possessing rights.<sup>13</sup> To clarify, certain rights (call them "natural") predate the formation of society because they are not established by government, or even organized society. This implies that prior to the formation of a sovereign government, each individual had, at the very least, the right of self-determination—the right to govern oneself. The belief that human beings possessed rights upon birth demands recognition that a person is entitled to certain rights as a result of his being alive. That is, an individual enjoys certain rights which are separate and distinct from those distributed by his governments. A further explanation of the political theory behind human rights is necessary to demonstrate the link between natural rights, self-government, and international law.

According to John Locke, prior to the formation of governments all men exist equally in a state of nature: "a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit."<sup>14</sup> The only governing force within the state of nature is self-governance. All men are born with the capacity to reason and through it men are able to teach themselves to respect the rights of others so that their rights will be respected equally.<sup>15</sup> Since all human beings are supposedly born into the same state of nature, they must share these same rights of self-determination at birth; citizens across the globe should enjoy the same liberties until they voluntarily enter into a society which necessarily restricts their right to be free from all laws other than the law of reason.<sup>16</sup> In Locke's own words, "The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to

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13. While human rights theorists agree that everyone is entitled to certain rights simply by virtue of being human, they argue over the source. Does a right arise from human need, for example, the need for food, shelter, and affection? Or, are human rights determined by society—what is necessary to live as a human being? The second question implies that human rights are something more than a right to access basic necessities. Perhaps, human rights define what it is to be human and therefore, what human beings *should be entitled to*. For further discussion, see JACK DONNELLY, *Universal Human Rights in Theory and Practice* 17 (Cornell University Press 1989).

14. LOCKE, *supra* note 10, at 18.

15. *See id.*

16. *See id.*

join and unite into a community.”<sup>17</sup>

In *The Social Contract*, Jean Jacques Rousseau further developed the idea of social contract theory.<sup>18</sup> Rousseau's vision of the state of nature is similar to that of Locke; men live rather solitary lives, accompanied by family members if by anyone, and their main focus is self-preservation. As a result, men owe no duties to anyone other than themselves: “This common freedom is a consequence of man's nature. His first law is to attend to his own preservation, his first cares are those which he owes to himself. . .”<sup>19</sup> Therefore, upon birth, but before the construction of societies, the only law which governed men was the law of self-preservation.

Like Locke, Rousseau believed that contract was the way out of the state of nature.<sup>20</sup> If men wanted an escape from the primitive state of nature, they were free to enter into a society and then form associations to create laws that would protect their own rights and punish wrongdoers who violated the rights of others. However, Rousseau emphasized that legitimate governments could only be created through consent.<sup>21</sup> The would-be citizens had to voluntarily delegate the power to govern themselves to a sovereign. Thus he labeled every “state that is ruled by laws” a Republic.<sup>22</sup> What is most important in Rousseau's theory of social contract, and particularly applicable to the right to emigrate, is his emphasis on the right of rescission:

there is in the State no fundamental law that cannot be revoked, not excluding the social compact itself; for if all the citizens assembled of one accord to break the compact, it is impossible to doubt that it would be very legitimately broken. . . man can renounce his membership of his own State, and recover his natural liberty and his goods on leaving the country. It would be indeed absurd if all the citizens in assembly could not do what each can do by himself.<sup>23</sup>

Because governments are to be based upon the consent of the gov-

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17. *Id.* at 58.

18. ROUSSEAU, *supra* note 10.

19. *Id.* at 42.

20. “Since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men.” *Id.* at 44.

21. Conquest did not create a right for the conqueror to govern. Rather, Rousseau claims that “force does not create right, and that we are obliged to obey only legitimate powers.” *Id.*

22. *Id.* at 67.

23. *Id.* at 120.



erned, the citizens should have a right to rescind the social contract they entered into and seek refuge elsewhere if the government takes action in conflict with the will of the people.

Turning from theory to application, the right of rescission provides support for several aspects of human rights law. First, the idea that individuals only temporarily cede the power of self-regulation to a government implies that certain rights (e.g. the right to self-determination) are inalienable. In Locke's analysis of the right of rescission he directly states that when the sovereign abuses the trust of its citizens, they "have a right to resume their original liberty."<sup>24</sup> Although Locke did not write specifically about immigration, the idea that citizens maintain a right to freedom from abuse can be interpreted as supporting a right to escape that abuse. The right of rescission supports a right to freedom of movement because in reality a group of citizens who feel mistreated by their government cannot simply dissolve the government and return to a state of nature. However under social contract theory they may withdraw from the government's jurisdiction and emigrate from that society.

Finally, the existence of a universal right to emigrate engages international law. When a nation prohibits a citizen from marrying and starting a family or freely practicing his religion (both of which are considered universal human rights), it acts in defiance of international norms embracing the free exercise of these privileges.<sup>25</sup> The nation essentially says to its citizens, "we do not honor your 'human right' to do X in this country because the only laws that must be followed are the ones we create for ourselves." However, international support for a right to remove oneself from the reaches of an exploitative government provides broader protections for individual rights. From the perspective of the international community, even if a nation does not allow its own citizens to emigrate, other nations that do will work to protect it. Therefore, each individual not only enjoys the rights guaranteed to him by his own nation, but also those recognized by international law.

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24. LOCKE, *supra* note 10, at 114.

25. See Universal Declaration of Human Rights, *supra*, note 1, at art. 16 ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."): see also Universal Declaration of Human Rights, *supra* note 1, at art. 18 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

Indeed, international cooperation is the bedrock of human rights theory.

While some nations have independently recognized certain "inalienable" rights within their borders and constructed governments based on the political theories of social contract<sup>26</sup> or natural law,<sup>27</sup> progress in the universal human rights movement has historically depended upon the creation of binding international agreements. Prior to World War II and the subsequent creation of the United Nations, individuals were subject to and protected by the national law of their home country.<sup>28</sup> There were some attempts at international cooperation towards achieving long-term peace prior to 1945, including the International Peace Conference in 1899 and the failed attempt of the League of Nations established in 1919.<sup>29</sup> However, prior to the creation of a permanent international regulatory body with the establishment of the U.N. in 1945, there had been very little collective effort in the realm of human rights. World War II was a turning point in the development of international law, specifically in the human rights movement. After witnessing the atrocities of World War II, many formerly isolationist nations began to recognize the need for a more integrated approach to international law.<sup>30</sup> Even the United States, which had been so strongly isolationist for the first half of the 20th century, "appeared to have resolved that it had no intention of reverting back to its isolationism and now intended to play an active role in global affairs."<sup>31</sup>

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26. See generally ROUSSEAU, *supra* note 10.

27. See generally LOCKE, *supra* note 10.

28. Of course there were some exceptions when a person would be subject to the laws of more than one nation: individuals temporarily residing in foreign nations subjected themselves to the laws of the nation in which they were located and could be punished for crimes committed while abroad by the laws of that nation. However, prior to the creation of international bodies regulating interaction between independent sovereigns, "the only protection individuals had at an international level, was through their State of nationality." CARMEN TIBURCIO, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* 67 (Kluwer Law International 2001).

29. History of the United Nations. <http://www.un.org/aboutun/unhistory> (last visited Oct. 27, 2007).

30. Most Allied governments began to institute changes in their relations with foreign states and created new governmental agencies, committees, and departments to implement the new policies that would address international relations. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* 156 (University of Pennsylvania 2003). Fifty-one nations then signed the United Nations Charter on June 26, 1945. Growth in United Nations Membership, <http://www.un.org/Overview/growth.htm> (last visited Oct. 27, 2007).

31. LAUREN, *supra* note 30, at 156. The United States made a dramatic departure

With the formation of the United Nations and the emergence of international cooperation through international law, "individuals became themselves subjects of international law, instead of mere objects."<sup>32</sup> International law became more than simply the political relations between consenting countries; a "remedy to protect [individuals from all nations] was created: the law of human rights."<sup>33</sup> However, the progress made thus far proved to be only a minor accomplishment: the Universal Nations Charter was signed in 1945, but it still "lacked the teeth" necessary to enter binding judgments and enforce compliance. Indeed, many nations who had participated in the development of the U.N. had begun to think twice about the idea of submitting to an international organization charged with implementing international law; even those charged with the drafting of the Charter at the United Nations Conference in Dumbarton Oaks refused to include language in the U.N. Charter that would give the organization the ability to enforce its provisions.<sup>34</sup> Further developments would be necessary to realize the promises contained with the Declaration.<sup>35</sup>

### *B. The Current Status of the Right to Emigrate*

As mentioned above, the right to freedom of movement has been openly recognized in international law. Through the collective effort of its member countries, the United Nations codified this right in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>36</sup> Following in the footsteps of the U.N., as other international organizations have formed they too have included language in their charters referencing a right to freedom of movement.<sup>37</sup>

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from its isolationist ways prior to WWII and even began to create organizations dedicated to overseeing the new foreign policy approach. Those appointed to the Advisory Committee on Post-War Foreign Policy included Sumner Welles and Cordell Hull.

32. TIBURCIO, *supra* note 28, at 67.

33. *Id.*

34. LAUREN, *supra* note 30, at 161.

35. See RICHARD B. LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 41-42 (Manchester University Press 1984).

36. See Universal Declaration of Human Rights, *supra* note 1; International Covenant on Civil and Political Rights, *supra* note 2.

37. See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Charter of Fundamental Rights of the European Union, art. 45, *Official Journal of the European Community*, (Dec. 7 2000).

The subject of emigration has even come up in bilateral treaties recognizing the rights of citizens to relinquish citizenship upon emigration to another nation.<sup>38</sup> In general, most nations currently respect the right of their citizens to leave voluntarily. Since the dissolution of the Soviet Union, which allegedly believed that "exit permits [were] not a right but a *concession* by the state,"<sup>39</sup> restrictions on emigration common to the Communist bloc countries for most of the twentieth century crumbled along with the Berlin Wall.<sup>40</sup> This trend has continued with most countries granting their citizens rights of emigration that mirror the virtually unfettered right to freedom of movement contained in the U.N. covenants.<sup>41</sup>

The Universal Declaration of Human Rights contains several provisions addressing an individual's right to freedom of movement. For example, Article 13 provides a right to move freely within the borders of a nation, and also includes a right to exit one's home country, a privilege more commonly known as a right to emigrate.<sup>42</sup> The International Covenant on Civil and Political Rights also includes similar provisions.<sup>43</sup> Therefore, all the signatories to the United Nations are theoretically obliged to refrain from limiting their citizens' rights to freedom of movement. However, the extent of the Declaration's binding effect has been the subject of debate as nations have been resistant to abrogate their sovereignty to international norms.<sup>44</sup> Although the United Nations Charter *does* contain an affirmative duty for members to "take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55" which includes promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," the language of the Declaration has been interpreted as suggestive rather than

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38. See generally *Immigration*, U.S.-Cuba, December 14, 1984, 1984 U.S.T. LEXIS 141; *Naturalization*, U.S.-Portugal, May 7, 1908, 1908 U.S.T. LEXIS 97;

39. Dowty, *supra* note 2, at 76 (emphasis in original).

40. See Thomas Kleven, *Why International Law Favors Emigration over Immigration*, 33 U. MIAMI INTER-AM. L. REV. 69, 70; see also *id.* at 73 n.15.

41. There is some evidence to suggest that nations entering into international conventions reformulated their laws regarding the right to emigrate so that they would comport with international standards. See, e.g., VED P. NANDA, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, 1 DENV. J. INT'L L. & POL'Y 109, 119-20 (1971); see also LAUREN, *supra* note 30, at 234.

42. Universal Declaration of Human Rights, *supra* note 1, at art. 13.

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

44. For a historical discussion of the debate surrounding the adoption of the Universal Declaration of Human Rights see LAUREN, *supra* note 30, at 238.

compulsory.<sup>45</sup> The United Nations responded to this problem with the construction of subsequent documents that impose direct obligations to take affirmative action. For example, the International Covenant on Civil and Political Rights follows the language and structure of the Universal Declaration, but it also includes a provision requiring that "each State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."<sup>46</sup>

Yet there continues to be international regulation even without official U.N. regulation and enforcement. Regional organizations monitor member nations to ensure compliance with multinational treaties addressing human rights. The Organization of American States (OAS) is an excellent example of international collaboration. Within the Americas, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights work together to investigate human rights violations and punish violators pursuant to the Charter of the Organization of American States.<sup>47</sup> Furthermore, the OAS has produced the American Convention on Human Rights (ACHR) which serves as the American equivalent to the U.N.'s Declaration of Human Rights.<sup>48</sup> The ACHR sets forth a list of "State Obligations and Rights Protected" which correspond to those included in the U.N. document. For example, Article 22, titled "Freedom of Movement and Residence," recognizes a "right to leave any country freely, including his own."<sup>49</sup> This provision closely resembles Article 13 of the Universal Declaration of Human Rights.<sup>50</sup>

Additionally, individual nations may speak out against human rights violators themselves. Although the United States has been criticized for violating some terms of the Universal Dec-

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45. U.N. Charter art. 56, available at <http://www.un.org/aboutun/charter/index.html>. See also Kleven, *supra* note 37, at 72 n.9 ("Whether standing alone the UDHR has the force of law is a complex question that depends on what it takes for something to acquire the status of international law. The UDHR states that it is 'a common standard of achievement for all peoples and all nations,' and does not expressly require states to observe it."). Article 4 of the Charter also includes a reference to obligations imposed on member states. U.N. Charter art. 4, available at <http://www.un.org/aboutun/charter/index.html>.

46. International Covenant on Civil and Political Rights, *supra* note 2, at art. 2.

47. See DONNELLY, *supra* note 12, at 141-142.

48. American Convention on Human Rights, *supra* note 37.

49. *Id.* at art. 22.

50. See Universal Declaration of Human Rights, *supra* note 1, at art. 13.

laration of Human Rights,<sup>51</sup> it has almost without exception<sup>52</sup> honored the right to freedom of movement for those within the U.S. and spoken out against countries which have tried to limit their citizens' right to emigrate. The Judicial Branch of the United States has found the right to freedom of movement within the United States implicit in the Interstate Commerce Clause and arguably derived from the Privileges and Immunities Clause.<sup>53</sup> Furthermore, the Court has recognized that this right extends outside of the U.S. borders. In reference to the historical development of the United States and its dependence upon immigration and westward expansion, the Court declared:

Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.<sup>54</sup>

Because the right to freedom of movement is considered closely linked with the rights of free speech and association, the Court has rejected governmental attempts to limit the free exercise of that right when regulation "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."<sup>55</sup> Therefore, absent a showing of rational purpose for the restriction, the Court has rejected legislation interfering with the right to emigrate.<sup>56</sup>

Notably, in the latter half of the twentieth century there has been unwavering support within the executive branch for a right

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51. See AMNESTY INTERNATIONAL, USA(TEXAS): DEATH PENALTY/LEGAL CONCERN, WILLIE MARCEL SHANNON, (Nov. 2, 2006), <http://web.amnesty.org/library/Index/ENGAMR511672006?open&of=ENG-2AM> (last visited Oct. 27, 2007).

52. For examples of U.S. restriction of the right to travel see *supra* p. 13 and *infra* note 55.

53. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941); see also Justice Douglas' and Justice Jackson's concurrences for a full explanation of how the right to freely move within the United States is protected by the Privileges and Immunities Clause of the Constitution.

54. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

55. See *Aptheker v. Sec'y of State*, 378 U.S. 500, 514 (1965).

56. Cf. *Zemel v. Rusk*, Secretary of State, 381 U.S. 1 (1965); *Califano v. Aznavorian*, 439 U.S. 170 (1978). Both cases demonstrate the Supreme Court's willingness to endorse legislation restricting the right to freely exit the United States when presented with a rational basis for the limitation. In both cases the Court was able to distinguish between previous cases that represented an unconstitutional burden on the right to travel and these two cases in which the government was able to demonstrate a reasonable justification for the interference.

to emigrate. Since 1977 the State Department has published annual Country Reports which detail the human rights situation in every country of the world.<sup>57</sup> The reports are used to expose human rights violators and also to track the progress towards achieving the protections promised in the United Nations Declaration of Human Rights. In the reports released in March 2006, the State Department cited various violations of the right to emigrate in many countries, including Cuba and Venezuela.<sup>58</sup> The State Department mentioned numerous travel limitations imposed by the Cuban government among the many alleged human rights violations cited in the 2006 country report for Cuba. Specifically, the Department expressed concern that "[Cuban] law qualifies these rights, and the government severely restricted foreign travel and emigration."<sup>59</sup> It reported that the Venezuelan government had similarly restricted its citizens' right to travel by denying applications for passports and other travel documents.<sup>60</sup> U.S. Presidents have even openly acknowledged the right to emigrate. On December 10, 1985 President Ronald Reagan formally declared December 10th to be "Human Rights Day."<sup>61</sup> In this proclamation, President Reagan referred to several human rights in particular which the United States recognized including the right to freedom of movement.<sup>62</sup>

Individual support for the right to emigrate is echoed elsewhere as well. In many parts of the world, especially in developing countries, emigration acts as a "safety valve." So long as impoverished citizens are able to wander elsewhere in hopes of finding a better life, the threat of internal revolt is diminished.<sup>63</sup> Interestingly, out of the 34 nations in the Western Hemisphere listed in the State Department country reports only two were

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57. See U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005 (March 8, 2006), <http://usinfo.state.gov/dhr/Archive/2006/Mar/08-930887.html> (last visited Oct. 27, 2007).

58. U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005: CUBA (March 8, 2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61723.htm> (last visited Oct. 27, 2007); U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005: VENEZUELA (March 8, 2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61745.htm> (last visited Oct. 27, 2007).

59. U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005: CUBA (March 8, 2006), *supra* note 58.

60. U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005: VENEZUELA (March 8, 2006), *supra*, note 58.

61. Proclamation No. 5287, 49 Fed. Reg. 48261 (Dec. 11, 1984).

62. See *Id.*

63. Kleven, *supra* note 40, at 90-91.

reported as interfering with their citizens' right to freely emigrate.<sup>64</sup> This seems to support the argument that developing nations are less likely to limit freedom of movement given that many of the 34 nations on this list that do not restrict their citizens from leaving would likely be categorized as developing countries.

A brief analysis of the emigration policies of the European Union reveals that since the end of the Cold War nearly all European nations have fully endorsed the right to leave one's country, more so in fact than they have come to a consensus on policies of immigration.<sup>65</sup> As the European Union has developed since the Single European Act of 1986 and the subsequent Treaty of Maastricht, "the elimination of internal frontiers to freedom of movement [has been] the lynchpin of the evolving union within Europe."<sup>66</sup> However, it should be noted that encouragement for free movement between borders has not historically been a two-way street. Despite support for policies of free emigration reiterated throughout the Cold War, and the subsequent integration of Eastern Europeans into Western European nations in late 1989 and thereon, member nations of the EU have been "reluctant to cede sovereignty over immigration to the European Community."<sup>67</sup> The European Union represents the perfect example of the emigration dilemma: there is widespread support for the right to emigrate, but no country wants to undertake the effort necessary to provide a home to the potential emigrant.

A comparison to U.S.-Latin American relations suggests the same result. The United States has openly criticized restrictive emigration policies of its southern neighbors, most notably Cuba.<sup>68</sup> However the United States has firmly reiterated its right to prevent unrestricted immigration through the symbolic measure of constructing a wall between the U.S.-Mexican border.<sup>69</sup> Furthermore, in recent years, the subject of immigration in general has become a polarizing force in the United States with calls for immi-

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64. See U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005, *supra* note 57.

65. See generally Satvinder S. Juss, *Sovereignty, Culture, and Community: Refugee Policy and Human Rights in Europe*, 3 UCLA J. INT'L L. & FOR. AFF. 463 (1998).

66. *Id.* at 477.

67. *Id.*

68. See U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005, *supra* notes 57.

69. See generally Victor Landa, *Wall Along Border a Monument to Politics*, SAN ANTONIO EXPRESS-NEWS, Jan. 9, 2006, at 5B.



gration reform and growing intolerance for illegal migrants.<sup>70</sup> Therefore, although the U.S. has called for open borders to allow emigrants the opportunity to leave, it is not ready to open its own borders and welcome them in.

### III. LIMITS ON EMIGRATION: SOVEREIGNTY AND REGULATION OF IMMIGRATION

#### A. *The U.S. Interpretation of Sovereignty*

That Congress has the authority to create legislation regulating the admission of aliens is currently undisputed. Since 1889, when the Supreme Court declared “[t]he power of exclusion of foreigners [to be] an incident of sovereignty belonging to the government of the United States”<sup>71</sup> there have been few successful challenges to the government’s ability to control admission. The holding in *Chae Chan Ping* established the plenary power doctrine: “constitutional immunity from judicial scrutiny of substantive immigration judgments of Congress and the Executive Branch.”<sup>72</sup> The Court concluded that the people of the United States had delegated to Congress the power to control immigration.<sup>73</sup> Therefore, so long as the exercise of power conforms to the Constitution, it may create provisions restricting, or completely excluding altogether, the entrance of any aliens.<sup>74</sup> In addition, Article I §8 of the U.S. Constitution explicitly authorizes Congress to “establish a uniform Rule of naturalization.”<sup>75</sup> Furthermore, in a long line of cases since *Chae Chan Ping* the Court has taken a deferential approach when reviewing immigration statutes.<sup>76</sup> In *Nishimura Ekiu v. United States* and *Fong Yue Ting v. United States* the Court reiterated its previous holding from *Chae Chan Ping*: Congress and the Executive (acting through Congress’s constitutional delegation of power) have exclusive control over the

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70. See generally Robert Kuttner, *Bad Times for Immigrants*, BOSTON GLOBE, March 18, 2006, at A13; see also, Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (discussing the aftermath of the September 11th terrorist attacks and the subsequent application of exclusion provisions of the INA on noncitizens Arabs and Muslims).

71. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

72. Akran & Johnson, *supra* note 70, at 329.

73. See *Chae Chan Ping*, 130 U.S. at 609.

74. See *id.*

75. U.S. CONST. art. I, § 8, cl. 4.

76. See discussion *infra*, pp. 17-18. See generally *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977).

admission of aliens to the United States.<sup>77</sup>

### *B. Sovereignty and Regulation*

The plenary power doctrine has afforded Congress and the Executive branch tremendous power to regulate the admission of aliens, and to enact far-reaching legislation affecting the rights of citizens already inside the U.S. In *Kleindienst v. Mandel*, the Supreme Court upheld provisions of the Immigration and Nationality Act which provided for the exclusion of certain aliens who were members of the Communist Party or adherents of subversive ideologies.<sup>78</sup> The Court rejected challenges of U.S. citizens that exclusion of political speakers would violate their First Amendment rights without even resorting to a "balancing approach." The Court need not consider the effects of failing to grant a waiver to Mandel so long as the Executive provides a "facially legitimate and bona fide" reason because the plenary power doctrine provides the Executive with the authority to make the determination of whom to admit into the country.<sup>79</sup>

The Court further expressed its deference to the legislative and executive branch when it allowed a seemingly arbitrary provision of the Immigration and Nationality Act (INA) that discriminated on the basis of sex against both permanent resident aliens and U.S. citizens to stand in *Fiallo v. Bell*.<sup>80</sup> At issue in the case was whether INA §§ 101(b)(1)(D) and 101(b)(2), which contained provisions relating to the admission of immigrants under family preferences, was unconstitutional because it unfairly discriminated against illegitimate fathers.<sup>81</sup> Holding that the statute did not violate the Constitution, the Court once again deferred to the wisdom of Congress.<sup>82</sup> The Court found that it was not in the position to question the legislature on this matter and assumed that Congress "may well have given substantial weight, in adopting the classification here challenged, to these problems of proof and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line."<sup>83</sup> Although Congress later amended INA § 101(b)(1)(D) with a clause that

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77. See *Nishimura Eiu v. United States*, 142 U.S. 651, 660 (1891); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

78. See *Kleindienst*, 408 U.S. at 753.

79. *Id.* at 769-770.

80. See *Fiallo*, 430 U.S. at 787.

81. *Id.*

82. See *id.*

83. *Id.* at 799.

allowed illegitimate children to be claimed by their fathers providing showing of a "bona fide parent-child relationship,"<sup>84</sup> *Fiallo* has not been overturned. It stands for the continued deference that the court gives both Congress and the Executive in matters relating to the admission of immigrants.

#### IV. EXCEPTIONS TO NATIONAL SOVEREIGNTY: REFUGEES AND ASYLEES

##### A. *International Recognition of a Duty to Accept Refugees*

The United States joined the international community in a multinational effort to achieve peace when it became a signatory to the United Nations Charter in 1945.<sup>85</sup> However, it was not until the United States ratified the Protocol Relating to the Status of Refugees in 1967 that it undertook an international obligation compromising its sovereign right to exclude.<sup>86</sup> Article 1 of the Protocol states "The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." Article 33 of the Convention on Refugees, which the Protocol references, includes a duty of *non-refoulment* imposing an obligation on the signatories of the Convention not to return refugees to a nation where they may be persecuted.<sup>87</sup>

The duty of *non-refoulment*, or "no return", arose during the aftermath of World War II. The Holocaust represented the ultimate failure in humanitarian effort as millions of Jews seeking refuge from the threat of Nazi Germany were turned away and ultimately murdered in Nazi concentration camps.<sup>88</sup> Therefore, the adoption of an agreement that sought to ensure that international apathy would never again result in the same atrocities was an enormous success for the development of human rights. In truth, the only duty the Convention actually imposed on signatories as to the acceptance of refugees was contained in Article 33.

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84. Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(b)(1)(D) (2006).

85. See *supra*, note 29; see also, U.N. Charter, *supra*, note 45.

86. See Anthony Asuncion, *INS v. Cardoza-Fonseca: Establishment of a More Liberal Asylum Standard*, 37 AM. U. L. REV. 915 (1988); see also Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

87. See Convention Relating to the Status of Refugees, *supra* note 7, at art. 33.

88. For a historical account of how the events of World War II led to the creation of the Convention Relating to the Status of Refugees, see Rebecca H. Gutner, *A Neglected Alternative: Toward a Workable Standard for Implementing Humanitarian Asylum*, 39 Colum. J.L. & Soc. Probs. 413, 413-418 (2006).

However, the Convention also granted refugees who were welcomed into a country many rights that would allow them to normalize to life in their new home.<sup>89</sup> Therefore, the Convention created a full scale plan for the long term resettlement of refugees committed to assisting the victims of the war reestablish their lives. Together the duty of *non-refoulment* and the obligation to respect the rights of refugees settled within a sovereign territory represented tremendous achievements in the development of human rights in less than ten years since the end of the Second World War.

### B. U.S. Refugee & Asylum Policy

By signing the Protocol the United States bound itself to the obligations contained in the Convention. Yet, the United States did not fully implement Article 33 of the Convention until Congress passed the 1980 Refugee Act which brought U.S. refugee policy into conformity with the U.N. Convention.<sup>90</sup> The Act provided a broader definition of "refugee" and arguably relaxed the burden the applicant carried in proving the threat of persecution. While previously aliens had to demonstrate either "good reason" to fear persecution if returned to their native lands, [or a] 'clear probability' of persecution," the 1980 Act introduced the "well founded fear" standard used in the U.N. Convention and codified the duty of *non-refoulment*.<sup>91</sup>

The 1980 Act also included a specific provision giving the Attorney General discretion to grant asylum to eligible applicants under what became § 208 of the Immigration and Nationality Act.<sup>92</sup> Conflicting interpretations within the Circuit Courts of Appeals as to whether the 1980 Refugee Act created one standard for both refugee status and asylum, led to the Board of Immigration Appeals determination in *Matter of Salim* that the two forms of relief were distinguishable.<sup>93</sup> The Supreme Court further elaborated on the Board of Immigration Appeals' conclusion in *INS v.*

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89. See Convention Relating to the Status of Refugees, *supra* note 7, at arts. 4, 13-28.

90. Compare Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) with Convention Relating the Status of Refugees, *supra* note 7.

91. See Immigration and Nationality Act of 1952 § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2007); see also *Developments in the Law of Immigration*, 96 HARV. L. REV. 1286, 1353-1355 (1983).

92. See Immigration and Nationality Act of 1952 § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2007).

93. See *Matter of Salim*, 18 I & N Dec. 311, 314-315 (BIA 1982).

*Stevic*.<sup>94</sup> The Court declared that “[m]eeting the definition of ‘refugee,’ however, does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a).”<sup>95</sup> Therefore, the 1980 Act had essentially created two forms of relief for those qualifying for refugee status as defined by the U.N. Convention. This was again affirmed in *INS v. Cardoza-Fonseca*.<sup>96</sup> Ultimately, the provisions of the 1980 Refugee Act represented the advancement of human rights law in the United States. By revising the definition of refugee to that used in the Convention Relating to the Status of Refugees, the United States made refugee status available for a broader group of people. Furthermore, the inclusion of a specific provision granting asylum with the opportunity of adjustment to permanent resident status offered greater relief than the duty of *non-refoulement*.<sup>97</sup>

Since the institution of the aforementioned provisions, asylum statistics suggest that the United States has been the primary country accepting refugees from Latin America and the Caribbean. Statistics from November 2004 made available by the United Nations High Commissioner for Refugees state that from 1980 to 2003 the United States has been responsible for the resettlement of 57 percent of the 105,000 refugees from Latin America and the Caribbean.<sup>98</sup>

## V. THE POTENTIAL FOR A UNIVERSAL RIGHT TO IMMIGRATE

### A. *A Right to Immigrate From the Right to Emigrate*

As I have demonstrated in the preceding sections of this paper, there is a direct conflict between the right to emigrate and a sovereign nation’s right to exclude, both of which have been recognized under international law.<sup>99</sup> Despite the fact that the right to emigrate is considered a universal human right,<sup>100</sup> most emigrants who attempt to exercise their right to leave find few, if any, open doors awaiting them. Instead nations quickly assert

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94. *INS v. Stevic*, 467 U.S. 407, 423-24 (1983).

95. *Id.* at 423 (emphasis added).

96. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

97. See Immigration and Nationality Act of 1952 §§ 208-209, 8 U.S.C. §§ 1158-1159 (2007).

98. U.N. HIGH COMM’R FOR REFUGEES, REFUGEES AND ASYLUM SEEKERS IN LATIN-AMERICA AND THE CARIBBEAN 2 (2004), <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=4198c2594> (last visited Oct. 27, 2007).

99. See Universal Declaration of Human Rights, *supra*, note 1, at art. 13.

100. See Universal Declaration of Human Rights *supra*, note 1.

their sovereign right to exclude by denying that the right to emigrate implies a right to immigrate.<sup>101</sup> Therefore, the dilemma represents the archetypal conflict between the rights of the individual versus the powers of the state. In this instance should an individual's right to freedom of movement take precedence over national laws regulating the admission of aliens?

Current law suggests a negative response to this question. The binding effect of human rights law is frequently debated and agreements that interfere with a sovereign's ability to control the entry of immigrants are even more likely to be viewed with skepticism.<sup>102</sup> Thus, so long as the right to exclude is held paramount to the human right to emigrate, the potential immigrant has little hope. However, those seeking to leave their homes and establish a new life elsewhere should not be entirely discouraged. Because countries have previously relinquished the right to exclude by accepting duties under international law<sup>103</sup> there has been some progress in the direction of acknowledging a right to immigrate. It may be possible to give full meaning to the right to emigrate with further cooperation in the name of human rights.

As previously stated, human rights law is founded on liberal political theory which accepts that all men are entitled to certain rights by virtue of their very humanity.<sup>104</sup> Because human rights law presupposes that certain rights are inalienable despite restrictions on the free exercise of those rights, it suggests that human rights are protected by an alternate legal regime. This regulatory regime is international law.<sup>105</sup> Human rights law is dependent upon international law because it provides the mechanism to ensure that individual nations do not violate the human rights of their citizens. Through multinational treaties countries may enter into binding agreements that allow signatories to supervise their neighbor's conduct and enforce compliance.<sup>106</sup> As nations have accepted the right of their citizens to freely emigrate via such agreements, they have submitted to international regulation.

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101. See discussion *supra* note 1.

102. See LAUREN, *supra* note 30, at 156.

103. See Convention Relating to the Status of Refugees, *supra* note 7; see also *infra* Section III. The duty of *non refoulment* as articulated in art. 33 of the Convention is an example of such a duty.

104. See Locke, *supra* note 10.

105. For the link between international law and human rights law see discussion *supra* Section 1. See generally LAUREN, *supra* note 30.

106. See generally International Covenant on Civil and Political Rights, *supra* note 2, at art. 40.

The simple fact that nations have voluntarily taken on affirmative duties in compliance with international law is of tremendous significance. Acceptance of the duties under the United Nations Convention Relating to the Status of Refugees for example, demonstrates that consenting nations have essentially waived their right to exclude pursuant to international obligations.<sup>107</sup> In effect, a human right has taken precedence over a nation's right to exclude. Thus, perhaps through further development of international law and respect for human rights, the right to emigrate can be expanded. There are many means by which a universal human right to immigrate could be established; here, I will address only two.

### 1. Redefining the Refugee

The most straightforward manner of resolving the immigration dilemma is to expand the right to refugee status. This could be accomplished by expanding the definitions currently used by immigration officials when evaluating claims from individuals for admission as refugees. For example, under current law in the United States an individual must demonstrate a "well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" to qualify for refugee or asylee status.<sup>108</sup> One suggestion to dramatically broaden the classification of refugee has been to rephrase the definition and incorporate the rights set forth in the Universal Declaration of Human Rights.<sup>109</sup> Accordingly, "a violation of the standards for individual rights embodied in the UDHR would result in refugee recognition."<sup>110</sup> While, this would undoubtedly represent a major victory for human rights, not only would such a proposal likely be swiftly defeated, but the result of such a definition would be overly expansive. Given the extensive provisions included in the Declaration and the fact that it has largely proven

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107. Convention Relating to the Status of Refugees, *supra* note 7.

108. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101 (1952); *see also* Immigration and Nationality Act of 1952 § 208(b)(1)(B)(i), 8 U.S.C. § 1158 (1980); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1253-66 (1990) (analyzing U.S. refugee policy since passage of the 1980 Refugee Act).

109. Michael J. Parrish, Note, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO L. REV. 223, 257-62 (2000).

110. *Id.* at 258.

to be more than the nations of the world can live up to,<sup>111</sup> reformation of the definition is arguably a more successful strategy.

A more modest proposal is expanding the definition of *persecution* itself. Historically, asylum was considered a remedy for persecution of political rights.<sup>112</sup> The current definition reflects that history with its emphasis on persecution. Therefore, it is not applied to victims of widespread violence generally<sup>113</sup> or economic suffering.<sup>114</sup> As the U.S. Court of Appeals for the Seventh District recently reiterated in *Ahmed v. Gonzalez*, “[p]ersecution is not so broad a concept as to encompass all that we regard as ‘unfair, unjust, or even unlawful or unconstitutional.’ Persecution involves harms that go beyond mere harassment; it results from more than simply ‘unpleasant or even dangerous conditions in [the applicant’s] home country.’”<sup>115</sup> Thus, while asylum applicants fleeing such conditions may gain the sympathy of the United States, they will not gain admission. Rather, individuals seeking to emigrate in order to find a better life are labeled “economic migrants” and quickly denied refugee status.<sup>116</sup> Therefore, the millions living in countries stricken by famine or civil war<sup>117</sup> would not qualify as refugees under the standard used by the majority of countries today.<sup>118</sup>

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111. A brief look at the Amnesty International website shows that virtually no nation is immune from human rights violations. See Amnesty International, News, <http://news.amnesty.org/mavp/news.nsf/regions> (last visited Oct. 27, 2007). Nearly every nation has been cited as a human rights violator in the recent past. *Id.*

112. See generally Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 477-478 (1998).

113. See *Alyas v. Gonzales*, 419 F.3d 756 (8th Cir. 2005) (holding that because the defendant failed to demonstrate that the Pakistani government was responsible for the physical violence to his person and property, the denial of his petition for asylum by the Board of Immigration Appeals was proper); see also *Zhu v. U.S. Attorney General*, 159 Fed. Appx. 959 (2005) (holding that acts of violence committed against an individual without specific evidence of a connection between the violence and the exercise of a political opinion did not amount to persecution).

114. See *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982) (holding that generalized anarchy and economic deprivation in the non-citizen’s home country does not provide a sufficient basis for asylum.); see also *Zhu*, 159 Fed. Appx. at 959.

115. *Ahmed v. Gonzalez*, 467 F.3d 669, 673 (7th Cir. 2006) (citations omitted).

116. For a discussion on the problems associated with asylum adjudication, specifically the superficial determinations as to whether an applicant is a true asylee or mere economic migrant, see Martin, *supra* note 108, at 1275-89; see also Dowry, *supra* note 38, at 189 (explaining U.S. policies on the resettlement of refugees of certain nationalities).

117. See *Sharif v. INS*, 87 F.3d 932, 935 (7th Cir. 1996) (“Harsh conditions shared by an entire population do not amount to persecution.”).

118. The current definition of refugee set forth in the Refugee Act of 1980 implemented the provisions of the United Nations Convention Relating to the Status of Refugees and brought U.S. refugee policy in line with the current consensus on



Such a policy seems ill-founded and deserves criticism for two reasons. First, the development of human rights law suggests that concern for those suffering around the world has increased since the definition of refugee was first coined in the 1951 Convention Relating to the Status of Refugees.<sup>119</sup> The world-wide emergence of non-governmental organizations focusing on human rights supports the validity of this statement: the fact that individuals have come together to form such watchdog organizations is itself evidence of genuine concern. The tremendous effort undertaken by such groups to give a face to human suffering indicates that there is an audience to their work composed of people interested in human rights practices.<sup>120</sup> Therefore, a policy that rejects asylum and refugee applicants who seek to escape abject poverty or anarchy in their home country seems antiquated.

As human rights law has grown to encompass non-political rights,<sup>121</sup> so should the definition of persecution.<sup>122</sup> Perhaps it would be appropriate to expand the definition of refugee not to include all rights set forth in the Universal Declaration, but to facilitate refuge for those who find themselves in civil war or economic chaos—genuine conditions of human suffering. While such a broad expansion of asylum policy would still not provide for an unrestricted right to immigrate, it would be a step in the right direction, and would give those most likely to want to immigrate that opportunity.

The current definition of persecution is also problematic because of inconsistencies in application. As the Convention on the Status of Refugees does not define persecution, it allows for differing interpretations among nations and for the state analyzing the refugee or asylum claim to incorporate nationally held values when making the determination.<sup>123</sup> Inconsistency in interpretation of the classifications (race, religion, nationality,

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refugee determination. See Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1952).

119. See Convention Relating to the Status of Refugees, *supra* note 7, at art. 1.

120. See generally LAUREN, *supra* note 30, at 275-79.

121. See Universal Declaration of Human Rights, *supra* note 1; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/16316, 993 (Dec. 16, 1966) (entered into force Jan. 3, 1976). For an analysis of U.S. policy regarding socioeconomic human rights such as those in the Covenant, see Philip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417 (2006).

122. See generally Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, *supra* note 112, at 477-81.

123. See *id.* at 472-73.

membership in a social group, and political opinion)<sup>124</sup> themselves has allowed for differing decisions as to what qualifies as persecution, even within the United States.<sup>125</sup> An arbitrary determination based on a misinterpretation of the law deprives a suffering individual of the right to refuge. A more expansive definition would likely reduce the likelihood that deserving applicants are denied admission.

Furthermore, such an approach could reduce the effect of political bias when evaluating an applicant's claim. The current practice very frequently involves analyzing the political conditions in the applicant's home country to determine whether an individual has a well founded fear of persecution on account of race, religion, social group, or political opinion.<sup>126</sup> Political relationships with the country alleged to have committed the human rights violations may affect the determination of the applicant's claim. Tension between the two nations may work to the advantage of the individual seeking refuge, whereas longstanding diplomatic relationships could make a nation hesitant to express disapproval of its ally.

The situation faced by Haitians seeking entrance under refugee status is an excellent example of political bias. The holding in *Sale v. Haitian Ctrs. Council* represented a devastating blow for Haitians fleeing the political chaos of the early 1990s.<sup>127</sup> Despite those who advanced claims of persecution on the basis of one of the five accepted categories mentioned above, they were returned to Haiti.<sup>128</sup> In contrast, their Caribbean neighbors have enjoyed

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124. See Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2007).

125. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on PERSECUTION Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 541-62 (1993).

126. See *INS v. Ventura*, 537 U.S. 12 (2002) (holding that factual determinations as to the severity of political conditions within the home country of the applicant are a matter to be decided by the Board of Immigration Appeals). Furthermore, *Ventura* offers insight into some of the evidence used by the BIA in evaluating the potential for persecution. Additionally, asylum status may be terminated based on "changed circumstances" in the asylee's country so that asylum is no longer warranted. Immigration and Nationality Act of 1952 § 208(c)(2)(A), 8 U.S.C. § 1158(c)(2)(A) (2007).

127. See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (holding that neither the INA nor the Convention Relating to the Status of Refugees afforded Haitians intercepted in the Caribbean Sea any protection against refoulement to Haiti).

128. See Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1995) (discussing the discriminatory adjudication of asylum claims by Haitians and how their applications were often times dismissed despite evidence of persecution).

almost immediate determination of refugee status since the 1995 introduction of the Cuban Adjustment Act of 1966.<sup>129</sup> It is important to note that Cubans who fail to make it to land are not automatically eligible for admission either, and in some ways, this provision therefore mirrors the decision in *Sales*.<sup>130</sup> However, unlike their Haitian counterparts, Cubans do not have the burden of establishing a claim for asylum once on dry land.<sup>131</sup>

Such an arbitrary determination based solely on the nationality of the applicant inspires doubt as to the legitimacy of the policy. Do all arriving Cubans really have claims of persecution, or is the policy really just a reflection of U.S. discontent with Cuban politics? While Cuba has a lengthy wrap sheet of human rights abuses,<sup>132</sup> it would be naïve to believe that political relations with adversaries do not enter into the refugee determination equation. Consequently, a less politically charged approach appears warranted. The United Nations Convention against Torture represents a good starting place because it provides much broader protections than previous international agreements governing the treatment of refugees.<sup>133</sup> A policy that recognizes forms of suffering not linked to civil rights could potentially afford a much larger group of applicants refugee status and therefore advance an international right to immigrate.

## 2. Integration of International Norms into National Policy

Even though advances in human rights have taken place in the international arena these norms have frequently been neglected in national legislation. Countries advocating on behalf of those suffering from human rights abuses thus put forth a dual persona: under international scrutiny they are willing to commit to the protection of human rights, but in the *national* arena they

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129. See Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966); see also U.S.-Cuba Joint Statement on Migration, May 2, 1995, 6 Dep't St. Dis. 397 (1995), available at <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6no19.html> (last visited Oct. 27, 2007).

130. See *Sale*, 509 U.S. at 187-88.

131. See Alberto J. Perez, Comment, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 443-444 (2004).

132. See U.S. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005: CUBA, *supra* note 58.

133. Compare Convention Against Torture and Other Cruel, Inhuman, or Degrating Treatment or Punishment, G.A. Res. 46, at art. I-III, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) art. I-III with Convention Relating to the Status of Refugees, *supra* note 7, at art. 1, 33.

are unwilling to undertake the reforms necessary to integrate these norms into national policy. Support for the right to emigrate and assertion of the sovereign right to exclude exemplifies this state of affairs.

In order to give full meaning to the right to emigrate, nations must surrender the sword of the sovereign—that being the right to restrict immigration—and move away from restrictive immigration policies in favor of freedom of movement. Because there has been significant international cooperation with respect to human rights since the end of the Second World War, I do believe that more human rights oriented immigration policies are also possible.<sup>134</sup> However, as previously discussed, a world without borders is still very far off. There are examples of individual nations demonstrating national commitment towards respect for human rights. After the dissolution of the Soviet Union, emerging nations began to incorporate international norms into their national constitutions.<sup>135</sup>

### 3. Regional Opportunities

The construction of the European Union represents a major multinational effort towards cooperation under international law. European countries have individually waived sovereign rights in favor of the development of the European Union.<sup>136</sup> Although each member is still an independent nation, the provision allowing free immigration between EU countries runs contrary to traditional notions of sovereignty where “border controls have always been the essence of statehood.”<sup>137</sup> Respect for human rights was certainly not the only motivating factor in the creation of the European Union, indeed the European Community’s founding document—the Treaty of Rome—was created largely to facilitate the migration of laborers throughout Europe.<sup>138</sup> Since the creation of the European Union, it has become evident that the goal “was not only to remove barriers to free trade and commerce and strengthen Europe as a trading bloc in a competitive world economy. In addition, there was also a broader social and political vision. This was the creation of an interconnected and interdepen-

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134. See LAUREN, *supra* note 30, at 156.

135. See Wiktor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111 (1994).

136. See generally Juss, *supra* note 65.

137. *Id.* at 480.

138. See *id.* at 477.

dent European social community."<sup>139</sup>

In some ways the North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico resembles the original goals of the European Community.<sup>140</sup> Like the Europeans, the U.S., Canada, and Mexico have entered into an agreement to protect local economic interests through international cooperation. Rather than advancing singular national interests through protective tariffs, each nation has agreed to "progressively eliminate its customs duties."<sup>141</sup> Could further political cooperation in the Western Hemisphere emerge from multinational economic agreements such as NAFTA as it did across the Atlantic?

The Organization of American States already provides a vehicle to advance international human rights in the United States and Latin America. Treaties already exist that provide for the protection of human rights in member countries.<sup>142</sup> Thus, the means are already available for the United States and Latin America to work towards achieving a more open immigration policy similar to the one currently used by the European Union.<sup>143</sup> Therefore, the most significant impediment to achieving a more cooperative international community is the resistance of individual nations to embrace human rights norms in their own national immigration policies. The United States has already made immigration arrangements between Cuba and Nicaragua that include relaxed immigration restrictions on Cuban and Nicaraguan nationals.<sup>144</sup> Why not extend agreements such as these to other Latin American and Caribbean nations? Rather than using immigration policies as political statements, the United States should work towards giving real meaning to the right to emigrate by extending less restrictive immigration policies to all its neighbors.

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139. *Id.* at 478-79.

140. Compare North American Free Trade Agreement, U.S.-Can.-Mex., pmbl., Dec. 17, 1992, 32 I.L.M. 289 (1993) with Treaty Establishing the European Economic Community, pmbl., *opened for signature* Nov. 23, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958).

141. See NAFTA, *supra* note 140, at art. 302.

142. See generally American Convention on Human Rights, *supra* note 37.

143. See Juss, *supra* note 65.

144. See Cuban Adjustment Act, *supra* note 129; see also Nicaragua Adjustment and Central American Relief Act, 63 Fed. Reg. 27, 823 (1998) (codified at 8 C.F.R. pts. 3, 240, 245, 274a, 299).

## VI. CONCLUSION

Does a universal right to immigrate currently exist under international law? The restrictive immigration policies so prevalent today suggest otherwise. Most countries are certainly unwilling to open their borders and instead continue to assert the right to exclude. Despite the accomplishments in human rights law in the twentieth century, including recognition of a right to freedom of movement, no nation has yet acknowledged a human right to immigrate to a destination of one's choice. The right to immigrate, however, is arguably implied from the right to emigrate—after all, an emigrant must be headed somewhere.

The philosophy behind international law and human rights law supports a right to freedom of movement as derived from the right to self-determination. Nations have already made significant concessions of state sovereignty by adopting international agreements that regulate the treatment of refugees. Therefore, the international community is moving in the right direction towards expansion of the right to immigrate. Now it is simply a matter of putting theory into practice. The main obstacle that must be overcome is national resistance to free movement on the basis of sovereignty. Even practical suggestions such as expanding eligibility for refugee status depend on international cooperation and respect for human rights over the right to exclude. Until human rights receive the same amount of respect as the rights of the sovereign, emigrants will be caught in the same dilemma with a right to leave their country, but nowhere to go.