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Who Is a Refugee?*

Andrew E. Shacknove

The term “refugee” conjures up a melange of bleak images: a teeming boat adrift on the South China Sea, a bloated child in Bangladesh, a shantytown reduced to rubble in Beirut. Determining conceptually (if not politically) who is, or is not, a refugee would appear to be a relatively simple matter. A refugee, we might say, is a person fleeing life-threatening conditions. In daily parlance and for journalistic purposes this is roughly the meaning of refugeehood. Predictably, in legal and political circles, among those officials who formulate refugee policies for states and international agencies, the meaning is considerably more circumscribed. The predominant, generation-old conception advanced by international instruments, municipal statutes, and scholarly treatises identifies the refugee as, in essence, a person who has crossed an international frontier because of a well-founded fear of persecution.¹ Given such broad agreement, the conceptual problem would appear to be resolved. But these appearances are deceptive.

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1. The three primary international instruments currently in effect are the United Nations Convention relating to the Status of Refugees, *done* July 28, 1951 (189 UNTS 137) (hereafter cited as the Convention); the Statute of the Office of the United Nations High Commissioner for Refugees, *adopted* by the General Assembly December 14, 1950 (Annex to G.A. Res. 428, 5 UN GAOR, supp. [no. 20] 46, UN Doc. a/1775 [1950]) (hereafter cited as the Statute); and the United Nations Protocol relating to the Status of Refugees, *done* January 31, 1967 (19 UST 6223, TIAS no. 6577, 606 UNTS 267) (hereafter cited as the Protocol). For conceptual purposes these instruments are identical. The governing statute in the United States is currently the Refugee Act of 1980 (Pub. L. no. 96-212, 94 Stat. 102), which defines “refugee” in near conformity with the three United Nations instruments. The Refugee Act amended the 1952 Immigration and Nationality Act, which defined “refugee” in ideological and geographic terms, stating that only persons fleeing Communist or Middle Eastern states could qualify. The Refugee Act, unlike the UN instruments, makes provision for internally displaced persons (see n. 20 below). The seminal treatise on the subject is Atle Grahl-Madsen, *The Status of Refugees in International Law*, 2 vols. (Leyden: A. W. Sijthoff, 1966–72). Grahl-Madsen views the refugee as a person who, for “political” reasons, is outside his home country (p. 91). He is joined in this view by Paul Weis, “The Concept of Refugee in International Law,” *Journal du Droit International* 87 (1960): 929-1001.

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A conception of “refugee” is not, strictly speaking, a definition. There are in fact dozens of definitions in effect within various jurisdictions.² Most states have their own municipal definitions, the majority of which follow the construction of the UN Convention. The germane passage of that instrument defines a refugee as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country.”³

Such concrete definitions are predicated on an implicit argument (or conception) that:

- a) a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society;⁴
- b) in the case of the refugee, this bond has been severed;
- c) persecution and alienage are always the physical manifestations of this severed bond;⁵ and
- d) these manifestations are the necessary and sufficient conditions for determining refugeehood.

Thus the conception supplies the theoretical basis for the definition. It stipulates what is essential and universal about refugeehood. It asserts both a moral and an empirical claim. Moral, because it posits the existence of a normal, minimal relation of rights and duties between the citizen and the state, the negation of which engenders refugees. Empirical, because it asserts that the actual consequences of this severed bond are always persecution and alienage.

The definition of “refugee” adopted by the Organization of African Unity (OAU) is the only salient challenge to the proposition that persecution is an essential criterion of refugeehood. That definition, after incorporating the United Nations’ persecution-based phraseology, proceeds to state that: “The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously

2. See Grahl-Madsen, vol. 1, chap. 1, for an elaboration of the meaning of “refugee” in various Western European and North American statutes.

3. Convention, art. 1A(2).

4. Grahl-Madsen uses this language explicitly (see Grahl-Madsen, vol. 1, pp. 73–100).

5. For a discussion of the meaning of “persecution,” see United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), p. 14, which states: “From Article 33 of the 1951 [Refugee] Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.” While Grahl-Madsen asserted in 1966 that persecution applies exclusively to acts perpetrated by states, governments now also consider the violence of nonstate actors as persecution (see vol. 1, p. 82). The term “alienage” refers here to “a person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence” (Convention, art. 1A [2]).

disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality.⁶

Clearly, the OAU and the UN definitions reflect markedly different historical contexts. The latter was a response to the European totalitarian experience when, indeed, refugees were primarily the persecuted victims of highly organized predatory states. Regrettably, similar states still exist, and the OAU definition provides for them. But the OAU definition recognizes, as the UN definition does not, that the normal bond between the citizen and the state can be severed in diverse ways, persecution being but one. Societies periodically disintegrate because of their frailty rather than because of their ferocity, victims of domestic division or foreign intervention. Much of what I say here implicitly supports the OAU conception.

A proper conception of refugeehood is an important matter. The international community's clumsy, ad hoc responses to refugee emergencies are, of course, primarily due to the reluctance of sovereign states to grant political deference and financial support to the relevant international agencies, their hesitancy in assuming the burdens of material relief, asylum, and resettlement, and their concern that assisting refugees could adversely implicate other foreign policy objectives. However, the problem is only partially attributable to political conflicts and resource scarcity, for conceptual confusion—about the meaning of refugeehood, its causes, and its management—also contributes to the misery of both refugee and host and to the inflammation of international tension.

An overly narrow conception of "refugee" will contribute to the denial of international protection to countless people in dire circumstances whose claim to assistance is impeccable.⁷ Ironically, for many persons on the brink of disaster, refugee status is a privileged position. In contrast to other destitute people, the refugee is eligible for many forms of international assistance, including material relief, asylum, and permanent resettlement. Conversely, an overly inclusive conception is also morally suspect and will, in addition, financially exhaust relief programs and impune the credibility of the refugee's privileged position among host populations, whose support is crucial for the viability of international assistance programs.

6. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted* September 10, 1969 (UNTS no. 14691), art. 1(2).

7. Currently, approximately 90,000 persons are fleeing starvation in Mozambique and crossing into Zimbabwe, yet the United Nations High Commission for Refugees (UNHCR) and other agencies are not mobilizing on their behalf. The rationale is that these persons are not victims of persecution and therefore do not come under the mandate of the High Commission's Statute. The reluctance of the international community to offer its assistance not only condemns these persons to yet more suffering but also forces Zimbabwe, whose own population is starving, to offer asylum unilaterally, thus further contributing to the destabilization of Southern Africa.

Whether states and international agencies are obligated to assist refugees is a crucial, but separate, issue from the one at hand. A conception of refugeehood is prior to a theory and policy of entitlements and is, I believe, sufficiently important and controversial to warrant independent analysis. If obligations do exist, then the persons described here have the strongest claim to such assistance. Frequently, states reason in reverse from their fear that they will be forced to shoulder the burden of assisting refugees unilaterally to a narrow conception of refugeehood which limits the number of claimants. In so doing, they are attempting to resolve what is in fact a procedural and institutional problem by a legalistic sleight of hand. I intend to address exclusively the meaning of "refugee," deferring for now a discussion of obligation and management.

My contention is that neither persecution nor alienage captures what is essential about refugeehood. Persecution is a sufficient, but not a necessary, condition for the severing of the normal social bond. It accounts for the absence of state protection under tyrannical conditions where a government is predatory but says nothing about the opposite, chaotic, extreme where a government (or society) has, for all practical purposes, ceased to exist. Persecution is but one manifestation of a broader phenomenon: the absence of state protection of the citizen's basic needs. It is this absence of state protection which constitutes the full and complete negation of society and the basis of refugeehood. The same reasoning which justifies the persecutee's claim to refugeehood justifies the claims of persons deprived of all other basic needs as well.

Similarly, alienage is an unnecessary condition for establishing refugee status. It, too, is a subset of a broader category: the physical access of the international community to the unprotected person.⁸ The refugee need not necessarily cross an international frontier to gain such access. Thus I shall argue that refugees are, in essence, persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible. Because this alternative conception of refugeehood accounts more comprehensively than does the current notion for the dual extremes of tyranny and chaos which threaten the normal, minimal bonds of society, it has a stronger claim to moral validity. Moreover, it accounts more exactly for those persons who are in fact taxing asylum states and furthering the erosion of minimum order in Lebanon, El Salvador, and elsewhere throughout the world.

REFUGEES AND THE MINIMAL SOCIAL BOND

With the proponents of the current conception of refugeehood, I take as my point of departure the assumption that morally (if not in fact) a

8. By "access" I mean, literally, the ability of states or international agencies to supply the requisite material or diplomatic assistance unimpeded by the government of the country of origin, insurrectionists, invading nation, or other powers.

normal, minimal bond of trust, loyalty, protection, and assistance has always existed between virtually every human being and some larger collectivity—be it clan, feudal manor, or modern state—and that the refugee is spawned when these minimal bonds are ruptured. What I object to is the conclusion that persecution and alienage are the necessary and sufficient indices of this dissolved union. The negation of society takes many forms and is frequently altogether unrelated to persecution and alienage.

In order to view the negation of society in all of its manifestations, we must first identify the normal, positive relation between the citizen and the state. A political commonwealth is formed on the premise that people experience a generalized condition of insecurity when outside the protective confines of society.⁹ People wish to reduce their vulnerability to a variety of threats, including the violent acts of others, resource scarcity, and natural disasters. However, it is only reasonable of them to join in common to fend against man-made threats, for it would be incongruently illogical to expect social institutions to contend with sources of vulnerability beyond human control. Even in a well-ordered society, insecurity will persist. Only because human beings, taken all around, are roughly equal in strength and cunning is it sensible for them voluntarily to forbear aggressive acts against each other in return for a cooperative effort against transgressors. Thus the primary purpose of civil society is to reduce each person's vulnerability to every other.

In refugee policy circles, basic threats to the individual are usually divided into three categories: persecution, vital (economic) subsistence, and natural calamities.¹⁰ Refugeehood is said to result only from acts of persecution. I shall look in turn at each of these three categories of deprivation and argue that, for purposes of defining "refugee," the distinction between them is neither bright nor clear, that all of them can equally violate the citizen's irreducible rationale for entering society, and that each may constitute a sufficient condition for refugeehood.

The sine qua non of the political commonwealth is to defend the citizen "from the invasion of foreigners and the injuries of one another."¹¹ When a citizen becomes a victim of a predatory sovereign, society is undermined by the very institution created to guarantee its survival. However, it is not enough that sovereigns refrain from aggressive actions

9. Thomas Hobbes, *Leviathan* (Indianapolis: Bobbs-Merrill Co., 1958), p. 105. Hobbes and, to a lesser extent, Locke and Rousseau all address the problem of the minimally legitimate state, crucial to an understanding of refugees. They identified that point at which anyone in their senses would quit society, if, indeed, society can any longer be meaningfully said to exist. Unlike Marx and many modern liberals, the classical contractarians were constructing the groundwork of society rather than the spires. Though he never knew the word, I suspect that Hobbes, himself an exiled victim of the English Revolution, in his worst nightmares dreaded the chaos of the refugee.

10. See Grahl-Madsen, vol. 1, pp. 75–76.

11. Hobbes, p. 142.

against their own populations. Were such restraint sufficient, citizens would have gained nothing by the act of union. To be minimally legitimate and tolerable, the commonwealth must reduce the citizen's vulnerability to others, all others. The sovereign is thus required to provide a minimally mild environment free from the dual extremes of tyranny and chaos, both of which are rife with violence.

Persecution is, therefore, just one manifestation of the absence of physical security. The sovereign must, at least, protect the citizen from foreign invasion and the "injuries of one another," which include civil war, genocide, terrorism, torture, and kidnapping, whether perpetrated by state agents or others. Beneath this threshold there is no state, and the bonds which constitute the normal basis of citizenship dissolve. Hence, persecution is a sufficient, but not a necessary, basis for a justified claim to refugeehood. If persecution establishes a valid claim to refugee status, then other threats to physical security do as well.¹²

When determining who is, or is not, entitled to refugee status, natural disasters, such as floods and droughts, are usually dismissed as the bases for justified claims. Unlike the violent acts one person perpetrates against another, such disasters are not considered "political" events. They are, supposedly, sources of vulnerability beyond social control which therefore impose no obligation on a government to secure a remedy. The bonds uniting citizen and state are said to endure even when the infrastructure or harvest of a region is obliterated. For even an ideally just state cannot save us from earthquakes, hurricanes, or eventual death. The legitimacy of the state rests exclusively on its control of human actions rather than on its control of natural forces, and the obligation of a government extends no further than the realm of human capabilities. But as writers such as Lofchie, Sen, and Shue have demonstrated, "natural disasters" are frequently complicated by human actions.¹³ The devastation of a flood or a supposedly natural famine can be minimized or exacerbated by social policies and institutions. As Lofchie says: "The point of departure for a political understanding of African hunger is so obvious it is almost always overlooked: the distinction between drought and famine. . . . To the extent that there is a connection between drought and famine, it is mediated by the political and economic arrangements of society. These can either minimize the human consequences of drought or accentuate its effects."¹⁴

12. The argument for a right to revolution that Locke develops in his *Second Treatise* also justifies a right to refugeehood. Citizens are at liberty either to prevent tyranny or to escape it. Whether the citizen mobilizes opposition to an unjust regime or simply quits society is strictly a prudential calculation. See John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill Co., 1952), pp. 119-39.

13. Michael F. Lofchie, "Political and Economic Origins of African Hunger," *Journal of Modern African Studies* 13 (1975): 551-67; Amartya Sen, *Poverty and Famines* (Oxford: Clarendon Press, 1981); Henry Shue, *Basic Rights* (Princeton, N.J.: Princeton University Press, 1980), p. 45.

14. Lofchie, p. 553 (quoted in Shue, p. 189).

Similarly, Sen has demonstrated that the weather and other natural factors actually played fairly minor roles in the Great Bengal Famine. When starvation occurs not because of drought or flood but because of the hoarding of grain or the corrupt distribution of material aid, deprivation is no longer the result of natural conditions. To the extent that a life-threatening situation occurs because of human actions rather than natural causes, the state has left unfulfilled its basic duty to protect the citizen from the actions of others. All other human rights are meaningless when starvation results from the neglect or malice of the local regime. Thus, in some dire circumstances, what appears on the surface to be the result of natural forces may, on closer scrutiny, reveal state negligence or indifference. As with threats to physical security, when the state is unwilling or unable to protect a citizen from the life-threatening actions of others, the basis for a legitimate claim to refugeehood is generated.

Threats to vital subsistence are subject to the same logic.¹⁵ To the extent that such threats to the survival of the citizen are due to human actions, they, like security threats and supposed “natural” calamities, create legitimate claims for state protection. It is often asserted that the state cannot be obligated to provide for the minimal subsistence of its citizens because doing so may require access to resources beyond the state’s control. Indeed, where subsistence is threatened because of a genuine resource scarcity (like the absence of adequate arable land), the citizen cannot legitimately demand basic sustenance from the state. However, the satisfaction of subsistence needs is only in part a function of resource availability. There are at least three other necessary conditions for the fulfillment of subsistence needs:

- a) a technology for processing resources,
- b) an infrastructure for facilitating commerce, and
- c) a method of distribution.

All three of these conditions are subject to human control and often threaten subsistence more acutely than a genuine scarcity of resources. None necessarily requires extensive capital investment, specialized knowledge, heroic governmental efforts, or saintly sacrifices by the local affluent in order to sustain a minimal level of subsistence. A hoe may be an altogether satisfactory tool for processing a resource, and a footpath may suffice as a conduit for commerce. Similarly, a minimally satisfactory method of distribution (where no one suffers from a severe protein/caloric deficiency) is consistent with extensive inequalities of wealth. In situations where subsistence is threatened because of inadequacies in technology, infrastructure, or distribution—all factors within human control—the state has failed to perform its basic duty to protect its citizens

15. For a thorough and penetrating treatment of the similarities between the rights to security and to subsistence, see Shue, pp. 13–34.

from the actions of others.¹⁶ When subsistence is in fact threatened by one or another of these conditions, a justifiable claim to refugeehood results.¹⁷

REFUGEES AND BASIC NEEDS

In exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement.¹⁸ No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning. Thus, refugees must be persons whose home state has failed to secure their basic needs. There is no justification for granting refugee status to individuals who do not suffer from the absence of one or more of these needs. Nor is there reason for denying refugee status to those who do. Moreover, because all of these needs are equally essential for survival, the violation of each constitutes an equally valid claim to refugeehood.

For many concerned with refugee affairs, raising the standard of basic needs is a frightening specter. Perhaps the criterion of persecution is too narrow, but, they would argue, a conception of refugeehood tied to basic needs is surely too broad. Half the world will become bona fide refugees overnight, refugee programs will be indistinguishable from development programs, and the international machinery which now protects thousands of people will become so overburdened that all stand to lose. These arguments must be taken seriously because the international regime for attending to the needs of refugees is fragile and can be shattered as much by premature cosmopolitanism as by enduring primordial sentiments. A broader conception of refugeehood has utility only if strategies of response to refugee emergencies are similarly broad, where transnational procedures and institutions replace the current, predominantly unilateral ones. Notice, however, that none of these objections contests the conceptual validity of the claim that refugees are victims of states which have failed

16. In most societies, including most developing ones, the state increasingly controls infrastructure, technology, and distribution. This assumption of responsibility often directly implicates the state in creating conditions which foster refugees. For a discussion of the growing role of the state in developing societies, see Alfred C. Stepan, *The State and Society* (Princeton, N.J.: Princeton University Press, 1978).

17. The assurance of the citizen's minimal preservation and thus the minimal legitimacy of the state require an environment conducive to subsistence. Often, if left to their own devices and free from external impediments, people will, indeed, sustain themselves. By logical implication, when they are not left to their own devices, or when the environment, because of human causes, is insufficiently mild to allow them by their own industry to secure subsistence, the state has failed to meet its minimal responsibilities, and the social bond has been broken.

18. By "vital subsistence" is meant unpolluted air and water, adequate food, clothing, and shelter, and minimal preventative health care (see Shue, p. 19). The reason for accepting political participation and liberty of movement as basic needs is that both are necessary if effective institutions for self-protection, the ultimate barrier against the deprivation of security and subsistence, are to be built and maintained (*ibid.*, p. 23).

to protect their basic needs. The conceptual problem at hand is logically and politically antecedent to the procedural and institutional issues raised by these arguments. Yet one conceptual issue remains: Are all persons deprived of their basic needs refugees?

The answer, in short, is no. An unmet basic need is a necessary, but insufficient, condition for refugeehood: all refugees have been deprived of one or more of their basic needs, though not all persons so deprived are refugees. What separates these two groups of equally destitute persons is their differing positions vis-à-vis the international community. Most individuals deprived of their basic needs are prevented by their government (or other forces) from seeking international assistance. To the contrary, a refugee is, in essence, a person whose government fails to protect his basic needs, who has no remaining recourse than to seek international restitution of these needs, and who is so situated that international assistance is possible.

Thus it is not a matter of entitlements that distinguishes refugees from all other persons whose basic needs are unmet by their home government but a matter of dissimilar objective conditions. Refugees, unlike all others deprived of their basic needs, have a well-founded fear that recourse to their own government is futile and are, in addition, within reach of the international community (see fig. 1).

At this point, the time-honored criterion of alienage falters. For centuries, the migratory crossing of an international frontier has been considered an essential characteristic of the refugee. The origins of this criterion stem from the positivistic legal norm which asserts that states have equal, inviolable sovereign integrity and that the intervention in the internal affairs of one state will reduce stability for all. The corollary of this proposition in the context of refugee affairs is that a victim could only become an international ward when beyond the reach of the oppressive home government. Moreover, the taking leave of one's country is said to be a clear indication that the normal bond between the citizen and

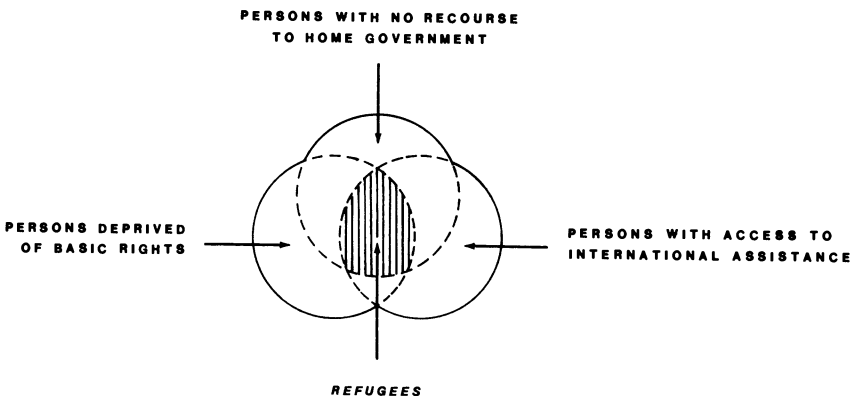


FIG. 1.—The necessary conditions for refugeehood

the state has been severed. Where a strong, predatory state in fact exists, this characterization is appropriate. Actual circumstances, however, often fail to conform to this migratory model. Periodically, a regime voluntarily invites international assistance when the basic needs of its own citizens are unprotected.¹⁹ More commonly, the regime will itself confront invasion, civil war, or some other threat to public order, and international access to the victim will result by default. Twentieth-century examples of international access to internally displaced persons include the Ottoman Greeks in the interwar period, the German Jews during the early Nazi years, and the South Vietnamese stranded after the American withdrawal.²⁰ Neither the criterion of alienage nor the archaic positivistic theory of international law from which it derives can account for such conditions. Whether a person travels ten miles across an international border or the same distance down the road into a neighboring province may be crucial for determining logistical and diplomatic action. Conceptually, however, refugeehood is unrelated to migration. It is exclusively a political relation between the citizen and the state, not a territorial relation between a countryman and his homeland. Refugeehood is one form of unprotected statelessness. Under normal conditions, state protection appends to the citizen, following him into foreign jurisdictions. For the refugee, state protection of basic needs is absent, even at home. Alienage should be considered one manifestation of a broader phenomenon: the access of the international community to persons deprived of their basic needs. Thus, what is essential for refugees status, distinguishing refugees from all other similarly deprived persons, is either the willingness of the home state to allow them access to international assistance or its inability to prevent such aid from being administered.

19. The first formal request by a state for international assistance with "internally displaced" persons came in 1972 from the Sudan, which solicited UNHCR coordination of a large-scale repatriation program. The competence of the high commissioner to provide such assistance was granted by the General Assembly in Res. 2958 (27), December 12, 1982. UNHCR has been assisting home countries with refugees and displaced persons on an unofficial basis since the Algerian War of Independence. Similar requests have been regularly issued since 1972. See G.A. Res. 32/67, December 8, 1977, where the General Assembly referred to "the additional responsibilities assumed by the High Commissioner in different parts of the world for the benefit of an increasing number of refugees and displaced persons" (UNGAOR 32 [1977], supp. 45, p. 139). In this resolution, as well as in Res. 33/26, November 29, 1978, the General Assembly "requests the High Commissioner to intensify his efforts to assist refugees and displaced persons of concern to his office" (UNGAOR 33 [1978], supp. 45, p. 139). For a discussion of displaced persons and their relation to refugees, see Poul Hartling, "The Concept and Definition of 'Refugee'—Legal and Humanitarian Aspects," in *Nordisk Tidsskrift for International Ret*, ed. Per Federspiel (Oslo, 1979), 48, fasc. 34:125–38; and Sadruddin Aga Khan, "Legal Problems relating to Refugees and Displaced Persons," in *Recueil des Cours* (The Hague: Academie du Droit International, 1976), vol. 1, pp. 287–352.

20. In the 1980 Refugee Act, the Congress made provision for such internally displaced persons, who were clearly refugees in all but name. The Immigration and Nationality Act,

Refugee status should only be granted to persons whose government fails to protect their basic needs, who have no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible. To the extent that refugee status is refused to these worthy claimants, or granted to others whose basic needs are not in jeopardy, the legitimacy of the policy is compromised.

sec. 101(a)(42)(B), 8 USAC 1101(a)(42)(B), June 1980, Supp., declares a refugee to be "any person who, in such special circumstances as the president after appropriate consultation may specify" (p. 956), is still in his or her country of origin and is persecuted or has a well-founded fear of being persecuted. This provision was introduced in order to resettle members of the opposition from Argentina and Chile as well as Soviet Jews. These examples, along with the Algerian and Sudanese cases cited above, indicate that the criterion of alienage inadequately accounts for the actual circumstances confronting states and international agencies.