

INTERNATIONAL PROTECTION OF INDIVIDUAL HUMAN RIGHTS: IMPLICATIONS OF INDIVIDUAL STATUS

The 1976 election of Jimmy Carter as President of the United States focused the attention of policymakers throughout the world on the broad issue of human rights. An immediate result has been increased interest in the definition and evaluation of these rights. Although the international importance of human rights has long been recognized,¹ the recent attention has contributed to their actual implementation. The viability of these rights for individuals within a state has served as the primary focus. A natural outgrowth of this concern is the application of the human rights issue to the relations between nation-states. Here, an attempt is made to address both of these aspects through a focus on certain issues involved in the protection of individual human rights: the classification of individuals into "types," the basic human rights of these individuals, the international standards used as the measure of individual human rights, and the application of these standards by international policymakers.

I. THE CLASSIFICATION OF INDIVIDUALS INTO "TYPES"

Within a nation-state, the individual's "type" is often determinative of his human rights status. Conversely, depending on which international minimum standard is employed in evaluating the rights of the individual,² his "type" can be relatively unimportant. Thus, the quality of one's rights will vary according to the value assigned to his "type" within any given jurisdiction. For example, Austrian law accords alien status to foreign citizens and to stateless persons.³ Because of the value assignment expressed in this definition, no special disadvantage is accorded a stateless person in Austria — he will be afforded the rights of an alien.⁴

The basic "types" are nationals, dual nationals, aliens, and stateless persons. This order presents the hierarchy through which persons generally enjoy the rights available. For example, nationals of a country are its citizens, entitled to the maximum enjoyments of human rights available within the jurisdiction. While entitled to the highest degree of available protection

1. U.N.G.A. Res. 217A (D. Djonovich ed. 1972). This resolution, passed in 1948, contains an enumeration of thirty rights which are regarded as fundamental rights of all members of the human family.

2. Refer to text accompanying notes 49-57 *supra*.

3. Christol and Bader, *Legal Rights of the Alien in Austria with Special Reference to the United States Citizen*, 7 *INTERNATIONAL LAWYER* 289, 290-91 (1973).

4. For example, a stateless person can experience difficulties in entering a country that are not encountered by an alien who has at least one established national identity. See, e.g., *Re Immigration Act and Hanna*, 21 *W.W.R.* 400 (1957), in which a 23 year-old man who had been born at sea was repeatedly denied entrance into each country to which he sought admission.

and privileges, nationals are subject as well to the greatest number of laws and the highest degree of responsibility to the state.⁵ Currently, a person's nationality is determined within his respective domestic jurisdiction.⁶ In the *Nottebohm Case*⁷ a determination of the plaintiff's "effective nationality" was held to be necessary for international recognition of his naturalization.⁸ There, national status was denied the plaintiff because he lacked a sufficient link or bond with the traditions, interests, and ways of life of Liechtenstein.⁹ Nationals then, at least according to the International Court of Justice in this decision, must exhibit "effective nationality" for international recognition of their "type." However, if the view is taken that each country administers its own human rights standard,¹⁰ it follows that it will determine its own definition of a national.

An interesting conflict arises when one state attempts to assert its claim against another, when both claim jurisdiction via the same individual, a dual national. A dual national has usually acquired his dual citizenship by acts beyond his control, for example, his birthplace or that of his parents. If the individual's rights are the primary concern, it may seem irrelevant to discuss the state's powers. Most often, however, the only realistic means for individuals to pursue claims is via the state. Thus, the two issues of individual lack of control and the ultimate state power over adjudication are most often presented in the dual nationality dilemma. Public international law assumes the sovereign equality of states. Sovereign equality, by its nature, bars the protection of the individual by one state from action by another. The remedy has become a decision by the courts of a third state based upon "effective nationality."¹¹ Dual nationality, therefore, has become reduced to a problem of nationality. Of the two contesting states, the one to which the individual is currently assigned as an "effective national" will be the one to protect his rights.¹²

An alien's human rights are usually governed by the domestic laws of the nation in which he resides.¹³ Since a resident of that state is a foreign national residing in a particular state, and subject to the territorial jurisdiction, it would seem logical that he also be protected by that nation's laws.

5. N. LEECH, C. OLIVER AND J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 519 (1973) (hereinafter cited as LEECH).

6. Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 56 ORE. L. REV. 63, 83 (1977) (hereinafter cited as *A Policy Framework*).

7. Goldschmidt, *Recent Applications of Domestic Nationality Laws by International Tribunals*, 28 FORDHAM L. REV. 689 (1960) (hereinafter cited as *Domestic Nationality Laws*), citing *The Nottebohm Case* at 26.

8. *Id.* at 691 note 14.

9. *Id.*

10. G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 82 (1974).

11. *Merge Case (United States v. Italy)*, Italian-U.S. Conciliation Commission, 14 R. Int'l. Arb. Awards 236 (1955).

12. *Id.*

13. *A Policy Framework supra* note 6 at 83.

In *Harisiades v. Shaughnessy*,¹⁴ the dissent contended that because a resident alien is a "person" within the meaning of the 5th and 14th Amendments, the alien plaintiff had been deprived of life and liberty by the government's exercise of implied power to deport him. Deportation is obviously of concern to an alien.¹⁵ If an alien is a "person" with the appropriate protections of due process,¹⁶ habeas corpus,¹⁷ the 5th and 6th Amendments in criminal cases,¹⁸ and the 1st Amendment for free speech,¹⁹ deportation should not be so worrisome. *Harisiades*, as an example of the application of United States domestic laws to a legal resident alien illustrates the danger inherent in guaranteeing rights according *only* to status, while disregarding the alien's existence as a human being.

Status as a human being is often ignored when an individual is given the label "stateless." A stateless person by definition is one who is a citizen of no nation. Without a state identity he automatically loses rights and remedies that most citizens have never questioned. In *The Flegenheimer Case*,²⁰ the plaintiff proved that he had, in the past, possessed a United States "effective nationality," but was held to be stateless at the time of the decision.²¹ Since the only means of enforcing his human rights on an international level is via the state, a stateless individual automatically loses his ultimate recourse. Once more, merely being an individual was not enough to insure the existence of a judicial forum.

II. BASIC HUMAN RIGHTS

What, exactly, are these individuals so concerned with losing? What rights are considered basic to the person? These rights are usually classified into one of two basic subdivisions: civil and political rights, and economic, social, and cultural rights. The United Nations has identified the most widely recognized civil and political rights in the Universal Declaration of Human Rights²² and in the International Covenant on Civil and Political

14. 342 U.S. 580, 598 (1952). The majority held that a Congressional act authorizing the deportation of a legal resident alien on a showing of his membership in the Communist party did not deprive the alien of liberty without due process in violation of the Fifth Amendment.

15. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285-86 (1966).

16. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-51 (1950); *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903).

17. *Eiku v. United States*, 142 U.S. 651, 660 (1892).

18. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-70 (1886).

19. 342 U.S. 580, 599, *citing* *Bridges v. California*, 314 U.S. 252 (1941).

20. *Domestic Nationality Laws supra* note 7 at 702, *citing* *The Flegenheimer Case (United States v. Italy)* (1954).

21. *Flegenheimer*, although born to a naturalized American father, was considered "stateless" because he resided outside of the United States too long to retain his right to elect American citizenship. *Id.* at 704, 729.

22. Refer to text accompanying note 1 *supra*.

Rights.²³ The former lists: the right to a decision by a proper national court, the right to be free from unjust detainment or deportation,²⁴ the right to fair and public trial,²⁵ the right to be considered innocent until proven guilty,²⁶ the right to be free from conviction under ex post facto law,²⁷ the right to be free of illegal search and seizure,²⁸ the right to be free of arbitrary libel and slander by government,²⁹ the right to travel within one's country and abroad,³⁰ the right to a nationality,³¹ the right to marry and be part of a family,³² the right to one's property,³³ the right to freedom of religion and thought,³⁴ speech³⁵ and peaceful assembly,³⁶ and right to government participation.³⁷ The International Covenant lists similar rights in Article 12.³⁸ It also lists some areas restricted by a government's right to protect, namely, national security, public order, public health or morals, and rights and freedoms of others.³⁹ The Covenant further provides that all rights should be "provided by law" and should be designed to protect anyone from being arbitrarily deprived of the right to enter his own country.⁴⁰

The second subdivision of human rights involves economic, social, and cultural guarantees. The Universal Declaration of Human Rights lists: the right to be free of need,⁴¹ right to work and to equal pay for equal work,⁴² right to rest,⁴³ right to a decent standard of living,⁴⁴ right to education,⁴⁵ and the right to enjoy and participate in the arts.⁴⁶ The International Covenant on Economic, Social and Cultural Rights lists many of the same concerns, but puts an additional stress on the importance of the family by granting the widest possible protection and assistance to the family unit and to any children within it.⁴⁷ A consideration of the nature of society

23. AMERICAN INT'L LAW, 6 INTERNATIONAL LEGAL MATERIALS-CURRENT DOCUMENTS 368 (No. 2, ed. 1967) (hereinafter cited as *Current Documents*). The United States has signed the covenant but as of this writing ratification is still pending. See 77 DEP'T. OF STATE BULL. 578 (Oct. 24, 1977).

24. U.N.G.A. RES. 217A, art. 9 (D. Djonovich ed. 1972).

25. *Id.* at art. 10.

26. *Id.* at art. 11.

27. *Id.*

28. *Id.* at art. 12.

29. *Id.*

30. *Id.* at art. 13.

31. *Id.* at art. 15.

32. *Id.* at art. 16.

33. *Id.* at art. 17.

34. *Id.* at art. 18.

35. *Id.* at art. 19.

36. *Id.* at art. 20.

37. *Id.* at art. 21.

38. *Current Documents supra* note 23 at 372.

39. *Id.* art. 21 at 374.

40. *Id.* art. 12 at 372.

41. U.N.G.A. RES. 217A, art. 22. (D. Djonovich ed. 1972).

42. *Id.* at art. 23.

43. *Id.* at art. 24.

44. *Id.* at art. 25.

45. *Id.* at art. 26.

46. *Id.* at art. 27.

47. *Current Documents supra* note 23 at 363, art. 10.

as being a social organization of people, indicates the need for protection in two more areas: the right to due process to protect the individual against arbitrary deprivation of his rights and the right of the government to impose restrictions on interference by another state with the life, liberty, and property of an alien.⁴⁸

III. INTERNATIONAL MINIMUM STANDARDS OF HUMAN RIGHTS

Should the "type" into which an individual is classified be determinative of the human rights he will enjoy? The answer, at least under international law, appears to be "no." In the United Nations Covenants on Human Rights, the prevailing view was that no country can discriminate as to race, color, sex, language, religion, birthplace, or on the basis of national or social origin.⁴⁹ Because the definition of each of the "types" of individuals depends on at least one of these proscribed classifications, consideration of "type" should be irrelevant in the granting of human rights. Despite relevant human rights law, this sort of prohibition is not reflected in the rulings of many countries. For example, although the Canadian Court in *Re Immigration Act and Hanna*⁵⁰ recognized that the authority to change statutory policy was not vested in the judiciary, it questioned the wisdom of a legislative mandate that extended fewer rights to the stateless individual than to an alien. The common factor of humanity was proposed as a more equitable concern.⁵¹ If one may judge international policy from expressions contained in the Universal Declaration of Human Rights, the view expressed by the Canadian judge would seem to be the approach favored by the United Nations. As the decision in *Harisiades* indicates, however, deportation is often determined by the individual's "type" and not by his value as a contributing member of society.⁵² Perhaps one of the most controversial, discriminatory practices under this standard was the deprivation of the right of migrants to state benefits.⁵³ Through the exercise of the basic human right to travel,⁵⁴ migrants would often lose their required length of residency for these benefits.⁵⁵ Thus, they were discriminated against by virtue of being the "type" of individual that must travel to work and live.

Because the enforcement of individual human rights is restricted to

48. Friedmann, *Some Impacts of Social Organization on International Law*, 50 AMERICAN J. INT'L LAW 475, 501 (1956).

49. *Current Documents supra* note 23 at 361, 369, art. 2.

50. *Re Immigration Act and Hanna*, [1957] 21 W.W.R. 400.

51. *Id.* at 403, 405.

52. 342 U.S. 580, 591 (1952).

53. Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1138 (1975).

54. *Id.* at 1136.

55. The Supreme Court has recently curtailed the power of states to restrict interstate travel by aliens by assigning "suspect classification" status to statutory restrictions based on alienage. *In re Griffiths*, 413 U.S. 717, 721 (1973); *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971).

claimants represented by a nation-state,⁵⁶ the basic human rights of several "types" of individuals are often unjustly denied. Although many nations and several international organizations promote basic rights for all,⁵⁷ the reality of translating that concept into individual remedies remains the burden of the individual. More often than not, one is rendered helpless by his "type" in seeking state representation to discharge that burden. The effectiveness of the remedy afforded an individual depends upon the standard employed in the particular jurisdiction in which he seeks relief. Basically, three options are most often exercised by nation-states in dealing with human rights concerns: a completely domestic approach, a state-represents-the-individual approach, or a completely individual approach. Although not mutually exclusive, these approaches allow a characterization of the policies of the various nation-states.

A. *The Domestic Approach*

Currently, the domestic approach is that favored by nations that oppose any international interference in sovereign dealings with the people within their borders. These entities prefer to retain absolute control while ignoring questions of international legality.⁵⁸ Significantly, states applying the domestic approach seem to be those whose inhabitants experience the greatest deprivation of those rights previously defined as basic.⁵⁹ When the Universal Declaration of Human Rights was presented to the United Nations members for signing, the Soviet bloc, Saudi Arabia, and South Africa abstained.⁶⁰ The Soviet bloc and South Africa have been repeatedly accused of human rights violations. However, by maintaining their claim to domestic determination of these rights, these states retained control of the identification of "types" of individuals and the enforcement of decisions. In such a nation, maintenance of the closed system precludes the direct and impartial international action that is crucial to the assurance of human rights.⁶¹ Although the current international approach is to accept each state's assertions when evaluating individual decisions,⁶² the purpose which motivates domestic measures should be an important consideration in determining their international legality. Identification of the relevant purpose is hampered by the variety of political and philosophical perspectives embodied in the legislative and judicial practice of nation-states. Attempts

56. Hasset, Book Review, 28 *FORDHAM L. REV.* 570, 572 (1959) (M. Moskowitz, *HUMAN RIGHTS AND WORLD ORDER*).

57. Refer to notes 24-47 *supra*.

58. G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 82-83 (1974).

59. Refer to notes 25-46 *supra*, and accompanying text.

60. *Roll Call Vote*, in *UNITED NATIONS RESOLUTIONS* 31 (D. Djonovich ed. 1972). See G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 80 (1974).

61. Grunis, *The United Nations and Human Rights in the Israel Occupied Territories*, 7 *INTERNATIONAL LAWYER* 271, 275 (1973).

62. See, e.g., *The Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] *I.C.J.* 4, 20-21.

by international enforcement organizations to interpret the purposes have not been beneficial to the individual. In *Flegenheimer*, for example, the Commission "demonstrates the cumulative effect of a violation of international law principles coupled with a completely untenable appraisal of American domestic nationality law."⁶³ Thus, even in an international forum, from which one could expect an impartial evaluation of the rights of the respective claimants, an individual can lose his human rights due to the juxtaposition of domestic law versus international law. To avoid such situations, the international approach often concedes control of the standard of human rights to each country. Each state, under such an approach, has its definitions of the "types" of individuals, the sets of human rights which correspond to those "types," and rules for enforcement of these two variables.

Under the domestic approach, the status of the individual becomes a matter of national concern. The practical effect of this balkanization could be a migration similar to that which could be expected to develop were each state in the United States to set its own welfare standards; the choice of one's domicile would be influenced by the potential benefits available in that state. The impeding force to this migration on an international scale is the absolute control that sovereigns of would-be emigrants exert over their residents. Each nation is free to classify its inhabitants and develop privileges corresponding to those classifications. In Austria, for example, aliens are denied the privilege of assembly guaranteed to Austrian citizens.⁶⁴ In Latin America, the usual position is to ignore international standards, each country treating aliens in the same manner as citizens.⁶⁵ In *Harisiades*, the majority noted that although the plaintiff aliens had been residents of the United States for thirty years, they had not attempted to seek naturalization. The obvious distaste of the court for what it perceived as purposeful maintenance of dual status aimed at seeking the advantages of American as well as international law reveals that the court regarded the plaintiffs in terms of their "type" and not in terms of their humanity. As indicated in *Shaughnessy v. Mezei*,⁶⁶ the Supreme Court has long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political

63. *Domestic Nationality Laws supra* note 7 at 735 (1960). The Italian-American Commission, recognizing the unusual nature of its challenge of the United States' assertions that Flegenheimer was a citizen, justified its foray into domestic American law on the grounds that he had only been declared to be a citizen in an administrative certificate of nationality and not by judicial decree. The author points out that this distinction is not made in American law. *Id.* at 720-21.

64. Christol and Bader, *Legal Rights of the Alien in Austria with Special Reference to the United States Citizen*, 7 INTERNATIONAL LAWYER 289, 291 (1973).

65. See, e.g., *Cantero Herrera v. Canevaro & Co.*, 149 Ann. Dig. 219 (Peru, 1927).

66. 345 U.S. 206, 210 (1953).

departments, largely immune from judicial control.⁶⁷ The alien by virtue of his "type" can thus be deported without a consideration of his fundamental freedoms, his family, his livelihood, or his happiness. This position seems in direct contradiction to the avowed United States support of human rights for "all" persons.⁶⁸ In spite of such discrepancies in policy, international law substantially retains the position that control of immigration is governed by domestic law.⁶⁹

The internal classification of "types" under the domestic approach creates inconsistency in the enforcement of internationally accepted human rights. The desire of the leaders of domestic—approach nations for independence from international interference leads them to assign to each "type" only those rights which are compatible with the political ambiguities of those nations. Further, the domestic enforcement mechanism is conspicuously absent. For example, in *Kleindienst v. Mandel*,⁷⁰ when the Attorney General affirmed the statutory exclusion of an alien lecturer and journalist, the courts could not look behind the official decision to weigh it against the right to freedom of opinion and expression⁷¹ of the alien seeking entry.⁷² Certainly this lack of court enforcement is not the fairest way for the individual to protect his human rights. In *Hanna*, the Canadian judge laments his inability to aid the stateless plaintiff in his plea for residence, but admits that the decision is up to the whim of an immigration officer.⁷³ Enforcement difficulty is but one more reason the domestic approach to establishing minimum standards of human rights is not in the best interest of the individual.

B. *The State-Represents-the-Individual Approach*

The second approach, characterized by state representation of the individual, attempts to combine concern for the individual with a more practical means of securing his rights. This method is favored by the middle-of-the-road nations that are not basically repressive but do not desire to create an individual rights chaos in their governing process. The Universal Declaration of Human Rights best expresses the purpose of this approach: to secure rights for human beings on an international

67. Instances of judicial intervention by American courts have arisen in several areas, for example, due process, habeas corpus and 5th and 6th amendment rights in criminal cases. Refer to notes 16-18 *supra*.

68. Refer to note 55 *supra*.

The United States is a signatory in support of the Universal Human Rights Declaration. *Roll Call Vote*, in UNITED NATIONS RESOLUTIONS 31 (D. Djonovich ed. 1972). In addition, the Treaty clause of the American Constitution would appear to bind the United States to recognize the Declaration of Human Rights as binding international law. U.S. CONST. art. VI, § 2.

69. *A Policy Framework supra* note 6 at 83.

70. 408 U.S. 753 (1972).

71. U.N.G.A. RES. 217A, art. 19 (D. Djonovich ed. 1972).

72. 408 U.S. 753, 770 (1972).

73. [1957] 21 W.W.R. 400, 401.

scale.⁷⁴ Although once more, enforcement is problematical, participants in the signing of this Declaration are presumed to be bound by this purpose. As a clarification of the United Nations Charter, the Declaration is assumed to be equally binding. Or, another possibility is its becoming binding as a new rule of customary international law.⁷⁵ Whether presumed to be binding or not, the purpose emphasizes the issues which confront the individual: "type" and enforcement.

Under the state-represents-the-individual approach, the "type" of individual is the focus of controversies between states. Unlike the "type" decisions made by "domestic approach" states, which are dealt with internally, these domestic decisions are to be confronted with a similar determination by another nation. Before an international decision-making body,⁷⁶ each state will attempt to uphold the disposition by its courts. In *Nottebohm*, the court admitted that each state is permitted its own rules for the granting of nationality, but no state has the right to demand recognition of these rules by other states unless "effective nationality" applies.⁷⁷ Further, the court noted that nationality is subject to investigation on an international level, and held that the determination should be decided there as well.⁷⁸ The acceptance of a claimant state's determination can jeopardize the rights of the individual as his standing is intimately involved with the purpose of bringing the claim. In this manner, a state hostile to the individual's claim can prevent its presentation by denying the individual standing because of his "type." For example, a dual national can be prevented from asserting his claim if neither state claims nationality, thrusting him into the position of a stateless person. He can be similarly deprived if the state through which he claims denies him nationality. The nationality of the claimant must be that of the challenging state, not of the state being challenged.⁷⁹ The alien faces a similar restriction. The United States maintains that the "presence of an alien within this country is not his right, but is a matter of permission and tolerance."⁸⁰ Certainly, if the United States contests the merits of the claim, it will refuse to represent such a "tolerated" individual on an international basis. At this point, the only remedy available to the alien is his ability to use international law to claim protection against our government while attempting to consolidate a claim

74. Preamble to U.N.G.A. RES. 217A (D. Djonovich ed. 1972).

75. The United Nations Conference on Human Rights held at Teheran in 1968 expressed the belief that the Declaration constituted an obligation for members of the international committee. Sohn, *The Human Rights Law of the Charter*, 12 TEXAS INT'L LAW JOURNAL 129, 133-34 (1977).

76. The best established of these tribunals is, of course, the International Court of Justice (ICJ), established in February, 1946 at The Hague, Netherlands, O. LISSITZYN, *THE INTERNATIONAL COURT OF JUSTICE* 1, 14 (1951).

77. *Domestic Nationality Laws supra* note 7 at 691, citing *The Nottebohm Case*, at 26.

78. *Id.* at n. 13.

79. *See, e.g., Id.*

80. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952).

upon citizenship for possibly diplomatic intervention on his behalf.⁸¹ The basic international policy that rightly seeks to eliminate the existence of stateless persons dependent upon state representation seem to be contravened by the current requirement of state representation. This brings us to the problem of enforcement of state-represented individual interests.

Although Article 14 of the International Covenant on Civil and Political Rights⁸² states that "all persons shall be equal before the courts and tribunals," under the state-represents-the-individual approach, enforcement remains difficult. The requirement of state representation places an insurmountable obstacle before international tribunals that must attempt to reconcile individual human rights with the procedures required for their presentation. The only way in which the individual may bring a human rights violation before the International Court of Justice or most international commissions⁸³ is through the diplomatic protection of his state. In this Hobson's choice situation, it is apparent that no state will represent one of its residents in a claim against the interest of that state. Because of the doctrine of sovereign immunity, the individual will probably find no other vehicle for his claim.

The broad standard adopted by the International Court of Justice, which refers to legal principles common to civilized nations, serves to encourage states to invoke sovereign immunity.⁸⁴ The Court in the *Nottebohm Case* notes that since an international tribunal is a court of last resort, jurisdictional proof should not be as strict as "beyond a doubt" in view of the discrimination by domestic courts against foreign plaintiffs.⁸⁵ Enforcement, then, as well as the status of the individual, invariably surfaces when one attempts to assert his rights under the state-represents-the-individual approach. If the state is to continue as the only vehicle for the representation of the individual, international law must devise and implement an effective system for monitoring the internal selection by the state of the individual it will represent. Any such system must include a means by which the international tribunals may sanction states refusing to follow its decisions.

81. Even if the alien is successful in this attempt, a United States citizen cannot force his government to press a claim internationally on his behalf. *Neely v. Hendel*, 180 U.S. 109, 123 (1901).

82. *Current Documents supra* note 23, at 372.

83. Individual petitions are accepted by the European Commission on Human Rights under Article 25 of the European Convention on Human Rights. Boyle and Hannum, *Individual Applications Under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case*, 68 AMERICAN J. INT'L LAW 440 (1974).

Nevertheless, the individual claimant is not directly represented, since the Commission itself must intercede on his behalf. *Id.* at 441.

84. Friedmann, *Some Impacts of Social Organization on International Law*, 50 AMERICAN J. INT'L LAW 475, 502 (1956). See *Domestic Nationality Laws supra* note 7 at 692.

85. *Domestic Nationality Laws supra* note 7 at 700.

C. *The Individual Approach*

The third approach, which contemplates dealing with the individual as the primary focus, presents its own considerations. Placing the greatest emphasis on each individual as a human being, this approach eschews practical considerations, most notably with regard to enforcement. If the Universal Declaration of Human Rights is given its plain meaning, the individual's type should be irrelevant. That document declares that the law does not favor one person over another and that all are equal in the eyes of the law.⁸⁶ Ideally this is the case; however, numerous examples of contrary practice have been given.⁸⁷ There is hope for the future, as expressed by the International Institute of Humanitarian Law:

In examining the development of humanitarian law, in particular during the last thirty years, we discern a very specific feature: the individual, the human being, becomes more and more the central point of the editors of the instruments of protection already dedicated by texts in force or contemplated by projects submitted to governments.⁸⁸

But, that is the way it should be. The importance of international humanitarian law lies not only in the protection of individuals, but in its ability to maintain peace between human beings. If this approach were in fact implemented, and first priority given to the rights of the individual, his only concern would be the enforcement of his rights, rather than the securing of an opportunity to assert them.

Article 16 of the International Covenant on Civil and Political Rights states the individualist approach to the issue of "type" or status: "Everyone shall have the right to recognition everywhere as a person before the law."⁸⁹ Nonconformity by a nation to its minimum standard of treatment of aliens is an international delinquency.⁹⁰ Under international law, it is permissible for an alien to enjoy at least the rights and remedies a nation accords to its citizens.⁹¹ Administrative decisions have held that although a claim is that of a state in which the alien is a national, the ultimate objective is reparation for the individual.⁹² As indicated by the General Claims Commission as early as 1926, the ultimate international standard is not "equality of treatment of aliens and nationals," but rather "treat-

86. U.N.G.A. RES. 217A, art. 1 (D. Djonovich ed. 1972).

87. Refer to notes 4, 14, 21, and to text accompanying note 53 *supra*.

88. Patnogie, *International Institute of Humanitarian Law*, 10 INTERNATIONAL LAWYER 551 (1976).

89. *Current Documents supra* note 23 at 373.

90. See Friedmann, *Some Impacts of Social Organization on International Law*, 50 AMERICAN J. INT'L LAW 475, 501 (1956).

Thus, even though the standard employed discriminates according to "type," the result is still in favor of the individual.

91. *Current Documents supra* note 23 at 368-69.

92. Administrative Decision No. V (U.S. v. Germany), 7 R. Int'l Arb. Awards 119 (1924) *reprinted in* LEECH, *supra* note 5 at 573-75.

ment in accordance with ordinary standards of civilization."⁹³

The means to ensure the implementation of this standard is of major concern in the global community. Earlier, it was mentioned that ultimately the individual has the burden in presenting his human rights violations.⁹⁴ Even under the individual approach, the individual is prevented from discharging that burden. There is no international or world court where the individual *qua* individual has the requisite standing to allege a violation of human rights—he must have state or commission representation.⁹⁵ For example, as no individual is allowed access to the European Court of Human Rights, one must request representation by the European Commission of Human Rights.⁹⁶ The claimant has but a slight chance of finding a commission that will listen, and an even slighter chance of finding a court with power to enforce its finding. Usually an international commission does not reach the existence of the crime, but confines itself to the issue of whether the government had just cause to arrest and detain.⁹⁷ What international court is going to risk its continuance by striking down the law of one of the very states upon which it is dependent for its existence? "It is clear that in the present state of international law and international relations, there is little chance that an investigation into alleged violations of human rights . . . will lead to enforcement measures and sanctions against the offending state."⁹⁸ The most effective way to cause enforcement is pressure from world opinion and mass media as exerted by states associated with the offender.⁹⁹

As the Western Europeans have endeavored to convince us, there is cause to hope for change. Their efforts have been most successful at meeting the need of the individual while avoiding violations of the states' interests. At the European Convention for the Protection of Human Rights and Fundamental Freedom in 1950, Western Europe set up its version of coping with protection of individual rights.¹⁰⁰ It adopted the view that everyone has a right to liberty and security of the person, regardless of his "type."¹⁰¹ Sharing their domain, these nations have created a viable alternative in which the individual can allege violations of his human

93. LEECH *supra* note 5 at 583.

94. Refer to text accompanying note 56 *supra*.

95. Refer to text accompanying notes 100-105 *infra*.

96. Boyle and Hannum, *Individual Application Under the European Convention on Human Rights and the Concept of Administrative Convention*, 68 AMERICAN J. INT'L LAW 440 (1974).

97. Roberts Case, (United States v. United Mexican States) 4 R. Int'l Arb. Awards 77 (1926), reprinted in LEECH *supra* note 5 at 573-583.

98. Grunis, *The United Nations and Human Rights in the Israel Occupied Territories*, 7 INTERNATIONAL LAWYER 271, 275 (1973).

99. J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS, ch. 13, 154-58 (1971); Paust, *Responses To Terrorism: A Prologue To Decision Concerning Private Measures of Sanction*, 12 STANFORD INT'L STUDIES 79, 94-99 (1977).

100. F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 4 (1974).

101. *Id.* at 6, citing arts. 2-5, 7-11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Nov. 4, 1950).

rights. The European Commission on Human Rights was equipped with the means to enforce its protections, the European Court of Human Rights.¹⁰² For the first time, sovereign governments agreed to be held accountable for the treatment of their citizens and inhabitants.¹⁰³ By 1971, over 6,000 civil and political complaints had been received.¹⁰⁴ These statistics helped provoke the establishment in 1965 of the European Social Charter, designed to protect the social and economic rights of the individual in Western Europe.¹⁰⁵ Western Europe is providing the international community with an enlightened example of how the individual and the state need not be in constant conflict. This emphasis on the individual, aided by the respect of the states with regard to enforcement, lends credibility to the completely individual approach as a minimum standard for human rights.

The basic premise of each of the three international standards of human rights should be the protection of the individual. The domestic approach achieves this only if the nation dealing with its nationals is politically liberal. The state-represents-the-individual approach has the potential of reaching this objective when the individual's claim is not in conflict with the interests of the state. Although the completely individual approach has proven its viability in Western Europe, it has yet a long period of testing before it will exert a truly international sphere of influence. An attempt will now be made to illustrate the actual effect of the components identified in these approaches on international policy directions.

IV. THE APPLICATION OF MINIMUM STANDARDS OF HUMAN RIGHTS BY INTERNATIONAL POLICYMAKERS

The United Nations is the major policy forming body for the global community. It sets certain minimum human rights standards that states should strive to meet within their boundaries and in their confrontations before international decision-making bodies. The right of self-determination is guaranteed, for example, by both the United Nations Charter¹⁰⁶ and by the United Nations International Covenant on Economic, Social, and Cultural Rights.¹⁰⁷ However, the United Nations recognizes that the un-

102. The procedural framework established by the Convention, comprised of three entities (the European Commission of Human Rights, the Committee of Ministers of the Council of Europe, and the European Court of Human Rights), is described in Boyle and Hannum, *Individual Applications Under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case*, 68 AMERICAN J. INT'L LAW 440, 441-43 (1974).

The Convention now binds all but two of the 18 member states of the Council of Europe. J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 38 (1971).

103. A. TANKARD, THE HUMAN FAMILY, HUMAN RIGHTS AND PEACE 12 (1973), citing E. PHILLIPS, YOU IN HUMAN RIGHTS 7 (1968).

104. F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (1973).

105. A. TANKARD, THE HUMAN FAMILY, HUMAN RIGHTS AND PEACE 12 (1973).

106. L. GOODRICH AND E. HAMBRO, CHARTER OF THE UNITED NATIONS 95 (1949).

107. *Current Documents supra* note 23 at 360.

popularity of the individual as the focus of international law is attributable to the fear of states that their sovereignty will be invaded.¹⁰⁸ Thus, the right of the individual to intervention on his behalf is negated by the lack of monitoring of domestic policies by the United Nations. One must rely on a member nation to press claims before the international tribunal of the United Nations, the International Court of Justice.¹⁰⁹ Even then, the International Court of Justice has no compulsory jurisdiction over legal disputes of member nations.¹¹⁰ The United Nations recommends that the International Court of Justice draw upon international conventions, customs, and general principles of law in applying a "positive" international law.¹¹¹ Through this application of the law as it is, and not as it might be, the individual should eventually receive the benefit of the slow turn in international opinion toward ensuring protection of individual human rights. The United Nations General Assembly has even asked that all nations respect the basic human rights of migrant workers¹¹²—who are certainly the "low men on the individual totem pole." Thus, it appears that the United Nations is attempting to lead world policy toward humane considerations. Its major obstacles are to win universal acceptance of these standards and to institute proper sanctioning measures for nations that refuse to comply.

If pressure from complying states is an acceptable sanction,¹¹³ the United States is contributing to the protection of individual human rights. The United States position in dealing with other nations on the issue of human rights is stated in Title 22 of the United States Code: "To this end, a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries."¹¹⁴ Further provisions indicate the actions that may be taken to enforce this purpose: (1) no United States government participation with a country that denies internationally recognized human rights, for example, the right of emigration of a citizen desiring to join a close relation in the United States,¹¹⁵ and, (2) no financial assistance from the United States government to countries that consistently commit gross violations of human rights, as determined by investigation of alleged violations by international organizations.¹¹⁶ This legislation illustrates that the United

108. Article 2(7) of the United Nations Charter provides that its provisions do not authorize intervention into matters purely within the domestic jurisdiction of member states. U.N. CHARTER art. 2, para. 7.

109. LEECH *supra* note 5 at 630.

110. A. TANKARD, *THE HUMAN FAMILY, HUMAN RIGHTS AND PEACE* 22 (1972).

111. In addition, the Court may look to judicial decisions and teachings of the various nations. *Domestic Nationality Laws supra* note 7 at 692 n.21.

112. *A Policy Framework supra* note 6 at 85, citing G. A. Res. 3449, 30 U.N. GAOR, Supp. (No. 34) 90, U.N. Doc. A/10034 (1976).

113. Refer to note 99 *supra* and accompanying text.

114. 22 U.S.C.A. § 2304(a)(1) (West Supp. 1977).

115. 22 U.S.C.A. § 2304(a)(3) (West Supp. 1977).

116. 22 U.S.C.A. § 2304(a)(2)(b) (West Supp. 1977).

States considers discrimination a violation of human rights. The United States government implements this policy through the office of Coordinator for Human Rights and Humanitarian Affairs in the Department of State.¹¹⁷ The Coordinator is responsible to the Secretary of State for matters pertaining to human rights in the conduct of foreign policy. By all these measures, the United States expresses its concern for the international condition of human rights and its desire to help in remedying the situation.

As one of the libertarian nations, the United States can afford to take a strong individual approach. However, its condescending attitude is not appreciated by some of its fellow nations.¹¹⁸ In light of the existing resentment, the United States, while often cutting off non-military aid due to human rights violations, usually refrains from cutting off military aid.¹¹⁹ Thus, it appears that the United States recognizes the difficulties inherent in implementing a completely individual approach to human rights standards. The establishment of such a single standard could dangerously isolate the United States because of the resulting alienation of other countries.¹²⁰ Although a nation may set its standards with humanitarian intent, a certain yielding to other legitimate national concerns seems inevitable.¹²¹ Perhaps the United States, while making great strides in setting a progressive international human rights standard, could use some inward direction of its efforts. In order to still the calls of "Yankee interference" from the dependent nations within its sphere of influence, the United States needs to offer a positive example of humanitarian intent within its own borders.¹²²

Many Latin American nations have taken a more than vocal approach in dealing with United States sanctions. Five have rejected military aid, claiming that the international human rights investigation constitutes intolerable interference with internal affairs.¹²³ These states favor the domestic approach in establishing human rights standards.

V. CONCLUSION

The lack of world opinion pressure and, in particular, the United Nations' lack of performance, has encouraged nations to maintain domestic

117. 22 U.S.C.A. § 2304(b) (West Supp. 1977).

118. See, e.g., N.Y. Times, March 18, 1977, § 1, at 7, col. 1.; N.Y. Times, March 12, 1977, § 1, at 1, col. 2.

119. See, e.g., N.Y. Times, January 2, 1977, § 1, at 1, col. 2.

120. N.Y. Times, January 11, 1977, § 1, at 32, col. 1, quoting Sen. Daniel P. Moynihan.

121. Consider the undocumented Mexican aliens and the speed with which their human rights are forgotten when economic concerns threaten traditional working domains. Deportation occurs without thought as to family, livelihood or other basic human concerns. See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 355-57 (1976); *A Policy Framework supra* note 6.

122. See, e.g., *DeCanas v. Bica*, 424 U.S. 351 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). These cases are illustrative of typical infringement of the human rights of aliens by the United States.

123. N.Y. Times, March 18, 1977, § 1, at 7, col. 1.

approach standards. For example, although espousing humanitarian standards, Israel has consistently defined "types" of individuals according to its internal political philosophy. "The United Nations actions in this matter are an important and abortive exercise in political polemics, instead of genuine interest in human rights."¹²⁴ Too many collateral issues are linked to the very existence of Israel to allow consideration of "mere" human rights violations to create new Israeli policy. The international community has slowly extended international law to those who further humanitarian tendencies.¹²⁵ The problem now is to get the "Israels" of the world to view that extension as desirable. Each nation must take the initiative in protecting the individual. The approach to a standard and "type" of individual could become joyfully meaningless if, within each domestic jurisdiction, the same basic human rights were extended to all. In the interim, such international organizations as the United Nations and such leaders in humanitarian principles as the United States must continue to advocate an international standard which has as its ultimate goal the protection of the individual's human rights. Equal and just application by each nation of basic human rights should thus become the outcome-determinative factor—the one most advantageous to the individual.

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124. Grunis, *The United Nations and Human Rights in the Israel Occupied Territories*, 7 INTERNATIONAL LAWYER 271, 278 (1973).

125. Patinoic, *International Institute of Humanitarian Law*, 10 INTERNATIONAL LAWYER 551, 551-52 (1976).