

## The Decline of the Nation-State and the End of the Rights of Man

**I**T IS ALMOST impossible even now to describe what actually happened in Europe on August 4, 1914. The days before and the days after the first World War are separated not like the end of an old and the beginning of a new period, but like the day before and the day after an explosion. Yet this figure of speech is as inaccurate as are all others, because the quiet of sorrow which settles down after a catastrophe has never come to pass. The first explosion seems to have touched off a chain reaction in which we have been caught ever since and which nobody seems to be able to stop. The first World War exploded the European comity of nations beyond repair, something which no other war had ever done. Inflation destroyed the whole class of small property owners beyond hope for recovery or new formation, something which no monetary crisis had ever done so radically before. Unemployment, when it came, reached fabulous proportions, was no longer restricted to the working class but seized with insignificant exceptions whole nations. Civil wars which ushered in and spread over the twenty years of uneasy peace were not only bloodier and more cruel than all their predecessors; they were followed by migrations of groups who, unlike their happier predecessors in the religious wars, were welcomed nowhere and could be assimilated nowhere. Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth. Nothing which was being done, no matter how stupid, no matter how many people knew and foretold the consequences, could be undone or prevented. Every event had the finality of a last judgment, a judgment that was passed neither by God nor by the devil, but looked rather like the expression of some unredeemably stupid fatality.

Before totalitarian politics consciously attacked and partially destroyed the very structure of European civilization, the explosion of 1914 and its severe consequences of instability had sufficiently shattered the façade of Europe's political system to lay bare its hidden frame. Such visible exposures were the sufferings of more and more groups of people to whom suddenly the rules of the world around them had ceased to apply. It was precisely the seeming stability of the surrounding world that made each group forced out of its protective boundaries look like an unfortunate exception to

an otherwise sane and normal rule, and which filled with equal cynicism victims and observers of an apparently unjust and abnormal fate. Both mistook this cynicism for growing wisdom in the ways of the world, while actually they were more baffled and therefore became more stupid than they ever had been before. Hatred, certainly not lacking in the pre-war world, began to play a central role in public affairs everywhere, so that the political scene in the deceptively quiet years of the twenties assumed the sordid and weird atmosphere of a Strindbergian family quarrel. Nothing perhaps illustrates the general disintegration of political life better than this vague, pervasive hatred of everybody and everything, without a focus for its passionate attention, with nobody to make responsible for the state of affairs—neither the government nor the bourgeoisie nor an outside power. It consequently turned in all directions, haphazardly and unpredictably, incapable of assuming an air of healthy indifference toward anything under the sun.

This atmosphere of disintegration, though characteristic of the whole of Europe between the two wars, was more visible in the defeated than in the victorious countries, and it developed fully in the states newly established after the liquidation of the Dual Monarchy and the Czarist Empire. The last remnants of solidarity between the nonemancipated nationalities in the "belt of mixed populations" evaporated with the disappearance of a central despotic bureaucracy which had also served to gather together and divert from each other the diffuse hatreds and conflicting national claims. Now everybody was against everybody else, and most of all against his closest neighbors—the Slovaks against the Czechs, the Croats against the Serbs, the Ukrainians against the Poles. And this was not the result of the conflict between nationalities and the state peoples (or minorities and majorities); the Slovaks not only constantly sabotaged the democratic Czech government in Prague, but at the same time persecuted the Hungarian minority on their own soil, while a similar hostility against the state people on one hand, and among themselves on the other, existed among the dissatisfied minorities in Poland.

At first glance these troubles in the old European trouble spot looked like petty nationalist quarrels without any consequence for the political destinies of Europe. Yet in these regions and out of the liquidation of the two multinational states of pre-war Europe, Russia and Austria-Hungary, two victim groups emerged whose sufferings were different from those of all others in the era between the wars; they were worse off than the dispossessed middle classes, the unemployed, the small *rentiers*, the pensioners whom events had deprived of social status, the possibility to work, and the right to hold property: they had lost those rights which had been thought of and even defined as inalienable, namely the Rights of Man. The stateless and the minorities, rightly termed "cousins-germane,"<sup>1</sup> had no

<sup>1</sup> By S. Lawford Childs, "Refugees—a Permanent Problem in International Organization" in *War is not Inevitable. Problems of Peace*. 13th Series, London, 1938, published by the International Labor Office.

governments to represent and to protect them and therefore were forced to live either under the law of exception of the Minority Treaties, which all governments (except Czechoslovakia) had signed under protest and never recognized as law, or under conditions of absolute lawlessness.

With the emergence of the minorities in Eastern and Southern Europe and with the stateless people driven into Central and Western Europe, a completely new element of disintegration was introduced into postwar Europe. Denationalization became a powerful weapon of totalitarian politics, and the constitutional inability of European nation-states to guarantee human rights to those who had lost nationally guaranteed rights, made it possible for the persecuting governments to impose their standard of values even upon their opponents. Those whom the persecutor had singled out as scum of the earth—Jews, Trotskyites, etc.—actually were received as scum of the earth everywhere; those whom persecution had called undesirable became the *indésirables* of Europe. The official SS newspaper, the *Schwarze Korps*, stated explicitly in 1938 that if the world was not yet convinced that the Jews were the scum of the earth, it soon would be when unidentifiable beggars, without nationality, without money, and without passports crossed their frontiers.<sup>2</sup> And it is true that this kind of factual propaganda worked better than Goebbels' rhetoric, not only because it established the Jews as scum of the earth, but also because the incredible plight of an ever-growing group of innocent people was like a practical demonstration of the totalitarian movements' cynical claims that no such thing as inalienable human rights existed and that the affirmations of the democracies to the contrary were mere prejudice, hypocrisy, and cowardice in the face of the cruel majesty of a new world. The very phrase "human rights" became for all concerned—victims, persecutors, and onlookers alike—the evidence of hopeless idealism or fumbling feeble-minded hypocrisy.

### 1: *The "Nation of Minorities" and the Stateless People*

MODERN POWER CONDITIONS which make national sovereignty a mockery except for giant states, the rise of imperialism, and the pan-movements un-

<sup>2</sup> The early persecution of German Jews by the Nazis must be considered as an attempt to spread antisemitism among "those peoples who are friendly disposed to Jews, above all the Western democracies" rather than as an effort to get rid of the Jews. A circular letter from the Ministry of Foreign Affairs to all German authorities abroad shortly after the November pogroms of 1938, stated: "The emigration movement of only about 100,000 Jews has already sufficed to awaken the interest of many countries in the Jewish danger. . . . Germany is very interested in maintaining the dispersal of Jewry . . . the influx of Jews in all parts of the world invokes the opposition of the native population and thereby forms the best propaganda for the German Jewish policy. . . . The poorer and therefore more burdensome the immigrating Jew is to the country absorbing him, the stronger the country will react." See *Nazi Conspiracy and Aggression*, Washington, 1946, published by the U. S. Government, VI, 87 ff.

determined the stability of Europe's nation-state system from the outside. None of these factors, however, had sprung directly from the tradition and the institutions of nation-states themselves. Their internal disintegration began only after the first World War, with the appearance of minorities created by the Peace Treaties and of a constantly growing refugee movement, the consequence of revolutions.

The inadequacy of the Peace Treaties has often been explained by the fact that the peacemakers belonged to a generation formed by experiences in the pre-war era, so that they never quite realized the full impact of the war whose peace they had to conclude. There is no better proof of this than their attempt to regulate the nationality problem in Eastern and Southern Europe through the establishment of nation-states and the introduction of minority treaties. If the wisdom of the extension of a form of government which even in countries with old and settled national tradition could not handle the new problems of world politics had become questionable, it was even more doubtful whether it could be imported into an area which lacked the very conditions for the rise of nation-states: homogeneity of population and rootedness in the soil. But to assume that nation-states could be established by the methods of the Peace Treaties was simply preposterous. Indeed: "One glance at the demographic map of Europe should be sufficient to show that the nation-state principle cannot be introduced into Eastern Europe."<sup>3</sup> The Treaties lumped together many peoples in single states, called some of them "state people" and entrusted them with the government, silently assumed that others (such as the Slovaks in Czechoslovakia, or the Croats and Slovenes in Yugoslavia) were equal partners in the government, which of course they were not,<sup>4</sup> and with equal arbitrariness created out of the remnant a third group of nationalities called "minorities," thereby adding to the many burdens of the new states the trouble of observing special regulations for part of the population.<sup>5</sup> The result was that those peoples to whom states were not conceded, no matter whether they were official minorities or only nationalities, considered the Treaties an arbitrary game which handed out rule to some and servitude to others. The newly created states, on the other hand, which were promised equal status in national sovereignty with the Western nations, regarded the Minority Treaties as an open breach of promise and discrimination

<sup>3</sup> Kurt Tramples, "Völkerbund und Völkerfreiheit," in *Süddeutsche Monatshefte*, 26. Jahrgang, Juli 1929.

<sup>4</sup> The struggle of the Slovaks against the "Czech" government in Prague ended with the Hitler-supported independence of Slovakia; the Yugoslav constitution of 1921 was "accepted" in Parliament against the votes of all Croat and Slovene representatives. For a good summary of Yugoslav history between the two wars, see *Propyläen Weltgeschichte. Das Zeitalter des Imperialismus*, 1933, Band 10, 471 ff.

<sup>5</sup> Mussolini was quite right when he wrote after the Munich crisis: "If Czechoslovakia finds herself today in what might be called a 'delicate situation,' it is because she was not just Czechoslovakia, but Czech-Germano-Polono-Magyar-Rutheno-Rumano-Slovakia. . . ." (Quoted from Hubert Ripka, *Munich: Before and After*, London, 1939, p. 117.)

because only new states, and not even defeated Germany, were bound to them.

The perplexing power vacuum resulting from the dissolution of the Dual Monarchy and the liberation of Poland and the Baltic countries from Czarist despotism was not the only factor that had tempted the statesmen into this disastrous experiment. Much stronger was the impossibility of arguing away any longer the more than 100 million Europeans who had never reached the stage of national freedom and self-determination to which colonial peoples already aspired and which was being held out to them. It was indeed true that the role of the Western and Central European proletariat, the oppressed history-suffering group whose emancipation was a matter of life and death for the whole European social system, was played in the East by "peoples without a history."<sup>6</sup> The national liberation movements of the East were revolutionary in much the same way as the workers' movements in the West; both represented the "unhistorical" strata of Europe's population and both strove to secure recognition and participation in public affairs. Since the object was to conserve the European status quo, the granting of national self-determination and sovereignty to all European peoples seemed indeed inevitable; the alternative would have been to condemn them ruthlessly to the status of colonial peoples (something the pan-movements had always proposed) and to introduce colonial methods into European affairs.<sup>7</sup>

The point, of course, is that the European status quo could not be preserved and that it became clear only after the downfall of the last remnants of European autocracy that Europe had been ruled by a system which had never taken into account or responded to the needs of at least 25 per cent of her population. This evil, however, was not cured with the establishment of the succession states, because about 30 per cent of their roughly 100 million inhabitants were officially recognized as exceptions who had to be specially protected by minority treaties. This figure, moreover, by no

<sup>6</sup> This term was first coined by Otto Bauer, *Die Nationalitätenfrage und die österreichische Sozialdemokratie*, Vienna, 1907.

Historical consciousness played a great role in the formation of national consciousness. The emancipation of nations from dynastic rule and the overlordship of an international aristocracy was accompanied by the emancipation of literature from the "international" language of the learned (Latin first and later French) and the growth of national languages out of the popular vernacular. It seemed that peoples whose language was fit for literature had reached national maturity *per definitionem*. The liberation movements of Eastern European nationalities, therefore, started with a kind of philological revival (the results were sometimes grotesque and sometimes very fruitful) whose political function it was to prove that the people who possessed a literature and a history of their own, had the right to national sovereignty.

<sup>7</sup> Of course this was not always a clear-cut alternative. So far nobody has bothered to find out the characteristic similarities between colonial and minority exploitation. Only Jacob Robinson, "Staatsbürgerliche und wirtschaftliche Gleichberechtigung" in *Süddeutsche Monatshefte*, 26: Jahrgang, July, 1929, remarks in passing: "A peculiar economic protectionism appeared, not directed against other countries but against certain groups of the population. Surprisingly, certain methods of colonial exploitation could be observed in Central Europe."

means tells the whole story; it only indicates the difference between peoples with a government of their own and those who supposedly were too small and too scattered to reach full nationhood. The Minority Treaties covered only those nationalities of whom there were considerable numbers in at least two of the succession states, but omitted from consideration all the other nationalities without a government of their own, so that in some of the succession states the nationally frustrated peoples constituted 50 per cent of the total population.<sup>8</sup> The worst factor in this situation was not even that it became a matter of course for the nationalities to be disloyal to their imposed government and for the governments to oppress their nationalities as efficiently as possible, but that the nationally frustrated population was firmly convinced—as was everybody else—that true freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation, that people without their own national government were deprived of human rights. In this conviction, which could base itself on the fact that the French Revolution had combined the declaration of the Rights of Man with national sovereignty, they were supported by the Minority Treaties themselves, which did not entrust the governments with the protection of different nationalities but charged the League of Nations with the safeguarding of the rights of those who, for reasons of territorial settlement, had been left without national states of their own.

Not that the minorities would trust the League of Nations any more than they had trusted the state peoples. The League, after all, was composed of national statesmen whose sympathies could not but be with the unhappy new governments which were hampered and opposed on principle by between 25 and 50 per cent of their inhabitants. Therefore the creators of the Minority Treaties were soon forced to interpret their real intentions more strictly and to point out the "duties" the minorities owed to the new states;<sup>9</sup> it now developed that the Treaties had been conceived merely as a painless and humane method of assimilation, an interpretation which naturally enraged the minorities.<sup>10</sup> But nothing else could have been ex-

<sup>8</sup> It has been estimated that prior to 1914 there were about 100 million people whose national aspirations had not been fulfilled. (See Charles Kingsley Webster, "Minorities: History," in *Encyclopedia Britannica*, 1929.) The population of minorities was estimated approximately between 25 and 30 millions. (P. de Azcarate, "Minorities: League of Nations," *ibid.*). The actual situation in Czechoslovakia and Yugoslavia was much worse. In the former, the Czech "state people" constituted, with 7,200,000, about 50 per cent of the population, and in the latter 5,000,000 Serbs formed only 42 per cent of the total. See W. Winkler, *Statistisches Handbuch der europäischen Nationalitäten*, Vienna, 1931; Otto Junghann, *National Minorities in Europe*, 1932. Slightly different figures are given by Tramples, *op. cit.*

<sup>9</sup> P. de Azcarate, *op. cit.*: "The Treaties contain no stipulations regarding the 'duties' of minorities towards the States of which they are a part. The Third Ordinary Assembly of the League, however, in 1922, . . . adopted . . . resolutions regarding the 'duties of minorities.' . . ."

<sup>10</sup> The French and the British delegates were most outspoken in this respect. Said Briand: "The process at which we should aim is not the disappearance of the minorities, but a kind of assimilation. . . ." And Sir Austen Chamberlain, British representative,

pected within a system of sovereign nation-states; if the Minority Treaties had been intended to be more than a temporary remedy for a topsy-turvy situation, then their implied restriction on national sovereignty would have affected the national sovereignty of the older European powers. The representatives of the great nations knew only too well that minorities within nation-states must sooner or later be either assimilated or liquidated. And it did not matter whether they were moved by humanitarian considerations to protect splinter nationalities from persecution, or whether political considerations led them to oppose bilateral treaties between the concerned states and the majority countries of the minorities (after all, the Germans were the strongest of all the officially recognized minorities, both in numbers and economic position); they were neither willing nor able to overthrow the laws by which nation-states exist.<sup>11</sup>

Neither the League of Nations nor the Minority Treaties would have prevented the newly established states from more or less forcefully assimilating their minorities. The strongest factor against assimilation was the numerical and cultural weakness of the so-called state peoples. The Russian or the Jewish minority in Poland did not feel Polish culture to be superior to its own and neither was particularly impressed by the fact that Poles formed roughly 60 per cent of Poland's population.

The embittered nationalities, completely disregarding the League of Nations, soon decided to take matters into their own hands. They banded together in a minority congress which was remarkable in more than one respect. It contradicted the very idea behind the League treaties by calling itself officially the "Congress of Organized National Groups in European States," thereby nullifying the great labor spent during the peace negotiations to avoid the ominous word "national."<sup>12</sup> This had the important consequence that all "nationalities," and not just "minorities," would join and that the number of the "nation of minorities" grew so considerably that

even claimed that "the object of the Minority Treaties [is] . . . to secure . . . that measure of protection and justice which would gradually prepare them to be merged in the national community to which they belonged" (C. A. Macartney, *National States and National Minorities*, London, 1934, pp. 276, 277).

<sup>11</sup> It is true that some Czech statesmen, the most liberal and democratic of the leaders of national movements, once dreamed of making the Czechoslovak republic a kind of Switzerland. The reason why even Beneš never seriously attempted to effectuate such a solution to his harassing nationality problems was that Switzerland was not a model that could be imitated, but rather a particularly fortunate exception that proved an otherwise established rule. The newly established states did not feel secure enough to abandon a centralized state apparatus and could not create overnight those small self-administrative bodies of communes and cantons upon whose very extensive powers the Swiss system of federation is based.

<sup>12</sup> Wilson notably, who had been a fervent advocate of granting "racial, religious, and linguistic rights to the minorities," "feared that 'national rights' would prove harmful inasmuch as minority groups thus marked as separate corporate bodies would be rendered thereby 'liable to jealousy and attack'" (Oscar J. Janowsky, *The Jews and Minority Rights*, New York, 1933, p. 351). Macartney, *op. cit.*, p. 4, describes the situation and the "prudent work of the Joint Foreign Committee" that labored to avoid the term "national."

the combined nationalities in the succession states outnumbered the state peoples. But in still another way the "Congress of National Groups" dealt a decisive blow to the League treaties. One of the most baffling aspects of the Eastern European nationality problem (more baffling than the small size and great number of peoples involved, or the "belt of mixed populations"<sup>13</sup>) was the interregional character of the nationalities which, in case they put their national interests above the interests of their respective governments, made them an obvious risk to the security of their countries.<sup>14</sup> The League treaties had attempted to ignore the interregional character of the minorities by concluding a separate treaty with each country, as though there were no Jewish or German minority beyond the borders of the respective states. The "Congress of National Groups" not only sidestepped the territorial principle of the League; it was naturally dominated by the two nationalities which were represented in all succession states and were therefore in a position, if they wished, to make their weight felt all over Eastern and Southern Europe. These two groups were the Germans and the Jews. The German minorities in Rumania and Czechoslovakia voted of course with the German minorities in Poland and Hungary, and nobody could have expected the Polish Jews, for instance, to remain indifferent to discriminatory practices of the Rumanian government. In other words, national interests and not common interests of minorities as such formed the true basis of membership in the Congress,<sup>15</sup> and only the harmonious relationship between the Jews and the Germans (the Weimar Republic had successfully played the role of special protector of minorities) kept it together. Therefore, in 1933 when the Jewish delegation demanded a protest against the treatment of Jews in the Third Reich (a move which they had no right to make, strictly speaking, because German Jews were no minority) and the Germans announced their solidarity with Germany and were supported by a majority (antisemitism was ripe in all succession states), the Congress, after the Jewish delegation had left forever, sank into complete insignificance.

The real significance of the Minority Treaties lies not in their practical application but in the fact that they were guaranteed by an international body, the League of Nations. Minorities had existed before,<sup>16</sup> but the

<sup>13</sup> The term is Macartney's, *op. cit.*, *passim*.

<sup>14</sup> "The result of the Peace settlement was that every State in the belt of mixed population . . . now looked upon itself as a national state. But the facts were against them. . . . Not one of these states was in fact uni-national, just as there was not, on the other hand, one nation all of whose members lived in a single state" (Macartney, *op. cit.*, p. 210).

<sup>15</sup> In 1933 the chairman of the Congress expressly emphasized: "One thing is certain: we do not meet in our congresses merely as members of abstract minorities; each of us belongs body and soul to a specific people, his own, and feels himself tied to the fate of that people for better or worse. Consequently, each of us stands here, if I may say so, as a full-blooded German or full-blooded Jew, as a full-blooded Hungarian or full-blooded Ukrainian." See *Sitzungsbericht des Kongresses der organisierten nationalen Gruppen in den Staaten Europas*, 1933, p. 8.

<sup>16</sup> The first minorities arose when the Protestant principle of freedom of conscience



minority as a permanent institution, the recognition that millions of people lived outside normal legal protection and needed an additional guarantee of their elementary rights from an outside body, and the assumption that this state of affairs was not temporary but that the Treaties were needed in order to establish a lasting *modus vivendi*—all this was something new, certainly on such a scale, in European history. The Minority Treaties said in plain language what until then had been only implied in the working system of nation-states, namely, that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin. The interpretative speeches on the League treaties by statesmen of countries without minority obligations spoke an even plainer language: they took it for granted that the law of a country could not be responsible for persons insisting on a different nationality.<sup>17</sup> They thereby admitted—and were quickly given the opportunity to prove it practically with the rise of stateless people—that the transformation of the state from an instrument of the law into an instrument of the nation had been completed; the nation had conquered the state, national interest had priority over law long before Hitler could pronounce “right is what is good for the German people.” Here again the language of the mob was only the language of public opinion cleansed of hypocrisy and restraint.

Certainly the danger of this development had been inherent in the structure of the nation-state since the beginning. But insofar as the establishment of nation-states coincided with the establishment of constitutional government, they always had represented and been based upon the rule of law as against the rule of arbitrary administration and despotism. So that when the precarious balance between nation and state, between national interest and legal institutions broke down, the disintegration of this form of government and of organization of peoples came about with terrifying swiftness. Its disintegration, curiously enough, started at precisely the moment when the right to national self-determination was recognized for all of Europe and when its essential conviction, the supremacy of the will of the nation over all legal and “abstract” institutions, was universally accepted.

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accomplished the suppression of the principle *culius regio eius religio*. The Congress of Vienna in 1815 had already taken steps to secure certain rights to the Polish populations in Russia, Prussia, and Austria, rights that certainly were not merely “religious”; it is, however, characteristic that all later treaties—the protocol guaranteeing the independence of Greece in 1830, the one guaranteeing the independence of Moldavia and Wallachia in 1856, and the Congress of Berlin in 1878 concerned with Rumania—speak of “religious,” and not “national” minorities, which were granted “civil” but not “political” rights.

<sup>17</sup> De Mello Franco, representative of Brazil on the Council of the League of Nations, put the problem very clearly: “It seems to me obvious that those who conceived this system of protection did not dream of creating within certain States a group of inhabitants who would regard themselves as permanently foreign to the general organization of the country” (Macartney, *op. cit.*, p. 277).

At the time of the Minority Treaties it could be, and was, argued in their favor, as it were as their excuse, that the older nations enjoyed constitutions which implicitly or explicitly (as in the case of France, the *nation par excellence*) were founded upon the Rights of Man, that even if there were other nationalities within their borders they needed no additional law for them, and that only in the newly established succession states was a temporary enforcement of human rights necessary as a compromise and exception.<sup>18</sup> The arrival of the stateless people brought an end to this illusion.

The minorities were only half stateless; *de jure* they belonged to some political body even though they needed additional protection in the form of special treaties and guarantees; some secondary rights, such as speaking one's own language and staying in one's own cultural and social milieu, were in jeopardy and were halfheartedly protected by an outside body; but other more elementary rights, such as the right to residence and to work, were never touched. The framers of the Minority Treaties did not foresee the possibility of wholesale population transfers or the problem of people who had become "undeportable" because there was no country on earth in which they enjoyed the right to residence. The minorities could still be regarded as an exceptional phenomenon, peculiar to certain territories that deviated from the norm. This argument was always tempting because it left the system itself untouched; it has in a way survived the second World War whose peacemakers, convinced of the impracticability of minority treaties, began to "repatriate" nationalities as much as possible in an effort to unscramble "the belt of mixed populations."<sup>19</sup> And this attempted large-scale repatriation was not the direct result of the catastrophic experiences following in the wake of the Minority Treaties; rather, it was hoped that such a step would finally solve a problem which, in the preceding decades, had assumed ever larger proportions and for which an internationally recognized and accepted procedure simply did not exist—the problem of the stateless people.

Much more stubborn in fact and much more far-reaching in consequence

<sup>18</sup> "The regime for the protection of minorities was designed to provide a remedy in cases where a territorial settlement was inevitably imperfect from the point of view of nationality" (Joseph Roucek, *The Minority Principle as a Problem of Political Science*, Prague, 1928, p. 29). The trouble was that imperfection of territorial settlement was the fault not only in the minority settlements but in the establishment of the succession states themselves, since there was no territory in this region to which several nationalities could not lay claim.

<sup>19</sup> An almost symbolic evidence of this change of mind can be found in statements of President Eduard Beneš of Czechoslovakia, the only country that after the first World War had submitted with good grace to the obligations of the Minority Treaties. Shortly after the outbreak of World War II Beneš began to lend his support to the principle of transfer of populations, which finally led to the expulsion of the German minority and the addition of another category to the growing mass of Displaced Persons. For Beneš' stand, see Oscar I. Janowsky, *Nationalities and National Minorities*, New York, 1945, pp. 136 ff.

has been statelessness, the newest mass phenomenon in contemporary history, and the existence of an ever-growing new people comprised of stateless persons, the most symptomatic group in contemporary politics.<sup>20</sup> Their existence can hardly be blamed on one factor alone, but if we consider the different groups among the stateless it appears that every political event since the end of the first World War inevitably added a new category to those who lived outside the pale of the law, while none of the categories, no matter how the original constellation changed, could ever be renormalized.<sup>21</sup>

Among them, we still find that oldest group of stateless people, the *Heimatlosen* produced by the Peace Treaties of 1919, the dissolution of Austria-Hungary, and the establishment of the Baltic states. Sometimes their real origin could not be determined, especially if at the end of the war they happened not to reside in the city of their birth,<sup>22</sup> sometimes their place of

<sup>20</sup> "The problem of statelessness became prominent after the Great War. Before the war, provisions existed in some countries, notably in the United States, under which naturalization could be revoked in those cases in which the naturalized person ceased to maintain a genuine attachment to his adopted country. A person so denaturalized became stateless. During the war, the principal European States found it necessary to amend their laws of nationality so as to take power to cancel naturalization" (John Hope Simpson, *The Refugee Problem*, Institute of International Affairs, Oxford, 1939, p. 231). The class of stateless persons created through revocation of naturalization was very small; they established, however, an easy precedent so that, in the interwar period, naturalized citizens were as a rule the first section of a population that became stateless. Mass cancellation of naturalizations, such as the one introduced by Nazi Germany in 1933 against all naturalized Germans of Jewish origin, usually preceded denaturalization of citizens by birth in similar categories, and the introduction of laws that made denaturalization possible through simple decree, like the ones in Belgium and other Western democracies in the thirties, usually preceded actual mass denaturalization; a good instance is the practice of the Greek government with respect to the Armenian refugees: of 45,000 Armenian refugees 1,000 were naturalized between 1923 and 1928. After 1928, a law which would have naturalized all refugees under twenty-two years of age was suspended, and in 1936, all naturalizations were canceled by the government. (See Simpson, *op. cit.*, p. 41.)

<sup>21</sup> Twenty-five years after the Soviet regime had disowned one and a half million Russians, it was estimated that at least 350,000 to 450,000 were still stateless—which is a tremendous percentage if one considers that a whole generation had passed since the initial flight, that a considerable portion had gone overseas, and that another large part had acquired citizenship in different countries through marriage. (See Simpson, *op. cit.*, p. 559; Eugene M. Kulischer, *The Displacement of Population in Europe*, Montreal, 1943; Winifred N. Hadsel, "Can Europe's Refugees Find New Homes?" in *Foreign Policy Reports*, August, 1943, Vol. X, no. 10.)

It is true that the United States has placed stateless immigrants on a footing of complete equality with other foreigners, but this has been possible only because this, the country *par excellence* of immigration, has always considered newcomers as prospective citizens of its own, regardless of their former national allegiances.

<sup>22</sup> The *American Friends Service Bulletin* (General Relief Bulletin, March, 1943) prints the perplexed report of one of their field workers in Spain who had been confronted with the problem of "a man who was born in Berlin, Germany, but who is of Polish origin because of his Polish parents and who is therefore . . . Apatride, but is claiming Ukrainian nationality and has been claimed by the Russian government for repatriation and service in the Red Army."

origin changed hands so many times in the turmoil of postwar disputes that the nationality of its inhabitants changed from year to year (as in Vilna which a French official once termed *la capitale des apatrides*); more often than one would imagine, people took refuge in statelessness after the first World War in order to remain where they were and avoid being deported to a "homeland" where they would be strangers (as in the case of many Polish and Rumanian Jews in France and Germany, mercifully helped by the antisemitic attitude of their respective consulates).

Unimportant in himself, apparently just a legal freak, the *apatride* received belated attention and consideration when he was joined in his legal status by the postwar refugees who had been forced out of their countries by revolutions, and were promptly denationalized by the victorious governments at home. To this group belong, in chronological order, millions of Russians, hundreds of thousands of Armenians, thousands of Hungarians, hundreds of thousands of Germans, and more than half a million Spaniards—to enumerate only the more important categories. The behavior of these governments may appear today to be the natural consequence of civil war; but at the time mass denationalizations were something entirely new and unforeseen. They presupposed a state structure which, if it was not yet fully totalitarian, at least would not tolerate any opposition and would rather lose its citizens than harbor people with different views. They revealed, moreover, what had been hidden throughout the history of national sovereignty, that sovereignties of neighboring countries could come into deadly conflict not only in the extreme case of war but in peace. It now became clear that full national sovereignty was possible only as long as the comity of European nations existed; for it was this spirit of unorganized solidarity and agreement that prevented any government's exercise of its full sovereign power. Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of "emigration, naturalization, nationality, and expulsion";<sup>23</sup> the point, however, is that practical consideration and the silent acknowledgment of common interests restrained national sovereignty until the rise of totalitarian regimes. One is almost tempted to measure the degree of totalitarian infection by the extent to which the concerned governments use their sovereign right of denationalization (and it would be quite interesting then to discover that Mussolini's Italy was rather reluctant to treat its refugees this way<sup>24</sup>). But one should bear in mind at the same time that there was hardly a country left on the Continent that did not pass between the two wars some new legislation which, even if it did not use this right

<sup>23</sup> Lawrence Preuss, "La Dénationalisation imposée pour des motifs politiques," in *Revue Internationale Française du Droit des Gens*, 1937, Vol. IV, Nos. 1, 2, 5.

<sup>24</sup> An Italian law of 1926 against "abusive emigration" seemed to foreshadow denaturalization measures against anti-Fascist refugees; however, after 1929 the denaturalization policy was abandoned and Fascist organizations abroad were introduced. Of the 40,000 members of the *Unione Popolare Italiana* in France, at least 10,000 were authentic anti-Fascist refugees, but only 3,000 were without passports. See Simpson, *op. cit.*, pp. 122 ff.

extensively, was always phrased to allow for getting rid of a great number of its inhabitants at any opportune moment.<sup>25</sup>

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as "inalienable" those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves. Their situation has deteriorated just as stubbornly, until the internment camp—prior to the second World War the exception rather than the rule for the stateless—has become the routine solution for the problem of domicile of the "displaced persons."

Even the terminology applied to the stateless has deteriorated. The term "stateless" at least acknowledged the fact that these persons had lost the protection of their government and required international agreements for safeguarding their legal status. The postwar term "displaced persons" was invented during the war for the express purpose of liquidating statelessness once and for all by ignoring its existence. Nonrecognition of statelessness always means repatriation, *i.e.*, deportation to a country of origin, which either refuses to recognize the prospective repatriate as a citizen, or, on the contrary, urgently wants him back for punishment. Since non-totalitarian countries, in spite of their bad intentions inspired by the climate of war, generally have shied away from mass repatriations, the number of stateless people—twelve years after the end of the war—is larger than ever. The decision of the statesmen to solve the problem of statelessness by ignoring it is further revealed by the lack of any reliable statistics on the subject. This much is known, however: while there are one million "recognized" stateless, there are more than ten million so-called "*de facto*" stateless; and whereas the relatively innocuous problem of the "*de jure*" stateless occasionally comes up at international conferences, the core of statelessness, which is identical with the refugee question, is simply not mentioned. Worse still, the number of potentially stateless people is continually on the increase. Prior to the last war, only totalitarian or half-totalitarian dictatorships resorted to the weapon of denaturalization with

<sup>25</sup> The first law of this type was a French war measure in 1915 which concerned only naturalized citizens of enemy origin who had retained their original nationality; Portugal went much farther in a decree of 1916 which automatically denaturalized all persons born of a German father. Belgium issued a law in 1922 which canceled naturalization of persons who had committed antinational acts during the war, and reaffirmed it by a new decree in 1934 which in the characteristically vague manner of the time spoke of persons "*manquant gravement à leurs devoirs de citoyen belge.*" In Italy, since 1926, all persons could be denaturalized who were not "worthy of Italian citizenship" or a menace to the public order. Egypt and Turkey in 1926 and 1928 respectively issued laws according to which people could be denaturalized who were a threat to the social order. France threatened with denaturalization those of its new citizens who committed acts contrary to the interests of France (1927). Austria in 1933 could deprive of Austrian nationality any of her citizens who served or participated abroad in an action hostile to Austria. Germany, finally, in 1933 followed closely the various Russian nationality decrees since 1921 by stating that all persons "residing abroad" could at will be deprived of German nationality.

regard to those who were citizens by birth; now we have reached the point where even free democracies, as, for instance, the United States, were seriously considering depriving native Americans who are Communists of their citizenship. The sinister aspect of these measures is that they are being considered in all innocence. Yet, one need only remember the extreme care of the Nazis, who insisted that all Jews of non-German nationality "should be deprived of their citizenship either prior to, or, at the latest, on the day of deportation"<sup>25a</sup> (for German Jews such a decree was not needed, because in the Third Reich there existed a law according to which all Jews who had left the territory—including, of course, those deported to a Polish camp—automatically lost their citizenship) in order to realize the true implications of statelessness.

The first great damage done to the nation-states as a result of the arrival of hundreds of thousands of stateless people was that the right of asylum, the only right that had ever figured as a symbol of the Rights of Man in the sphere of international relationships, was being abolished. Its long and sacred history dates back to the very beginnings of regulated political life. Since ancient times it has protected both the refugee and the land of refuge from situations in which people were forced to become outlaws through circumstances beyond their control. It was the only modern remnant of the medieval principle that *quid quid est in territorio est de territorio*, for in all other cases the modern state tended to protect its citizens beyond its own borders and to make sure, by means of reciprocal treaties, that they remained subject to the laws of their country. But though the right of asylum continued to function in a world organized into nation-states and, in individual instances, even survived both World Wars, it was felt to be an anachronism and in conflict with the international rights of the state. Therefore it cannot be found in written law, in no constitution or international agreement, and the Covenant of the League of Nations never even so much as mentioned it.<sup>26</sup> It shares, in this respect, the fate of the Rights of Man, which also never became law but led a somewhat shadowy

<sup>25a</sup> The quotation is taken from an order of Hauptsturmführer Dannecker, dated March 10, 1943, and referring to the "deportation of 5,000 Jews from France, quota 1942." The document (photostat in the Centre de Documentation Juive in Paris) is part of the Nuremberg Documents No. RF 1216. Identical arrangements were made for the Bulgarian Jews. Cf. *ibidem* the relevant memorandum by L. R. Wagner, dated April 3, 1943, Document NG 4180.

<sup>26</sup> S. Lawford Childs (*op. cit.*) deplores the fact that the Covenant of the League contained "no charter for political refugees, no solace for exiles." The most recent attempt of the United Nations to obtain, at least for a small group of stateless—the so-called "*de jure* stateless"—an improvement of their legal status was no more than a mere gesture: namely, to gather the representatives of at least twenty states, but with the explicit assurance that participation in such a conference would entail no obligations whatsoever. Even under these circumstances it remained extremely doubtful whether the conference could be called. See the news item in the *New York Times*, October 17, 1954, p. 9.

existence as an appeal in individual exceptional cases for which normal legal institutions did not suffice.<sup>27</sup>

The second great shock that the European world suffered through the arrival of the refugees<sup>28</sup> was the realization that it was impossible to get rid of them or transform them into nationals of the country of refuge. From the beginning everybody had agreed that there were only two ways to solve the problem: repatriation or naturalization.<sup>29</sup> When the example of the first Russian and Armenian waves proved that neither way gave any tangible results, the countries of refuge simply refused to recognize statelessness in all later arrivals, thereby making the situation of the refugees even more intolerable.<sup>30</sup> From the point of view of the governments concerned it was understandable enough that they should keep reminding the League of Nations "that [its] Refugee work must be liquidated with the utmost rapidity";<sup>31</sup> they had many reasons to fear that those who had been ejected

<sup>27</sup> The only guardians of the right of asylum were the few societies whose special aim was the protection of human rights. The most important of them, the French-sponsored *Ligue des Droits de l'Homme* with branches in all democratic European countries, behaved as though the question were still merely the saving of individuals persecuted for their political convictions and activities. This assumption, pointless already in the case of millions of Russian refugees, became simply absurd for Jews and Armenians. The Ligue was neither ideologically nor administratively equipped to handle the new problems. Since it did not want to face the new situation, it stumbled into functions which were much better fulfilled by any of the many charity agencies which the refugees had built up themselves with the help of their compatriots. When the Rights of Man became the object of an especially inefficient charity organization, the concept of human rights naturally was discredited a little more.

<sup>28</sup> The many and varied efforts of the legal profession to simplify the problem by stating a difference between the stateless person and the refugee—such as maintaining "that the status of a stateless person is characterized by the fact of his having no nationality, whereas that of a refugee is determined by his having lost diplomatic protection" (Simpson, *op. cit.*, p. 232)—were always defeated by the fact that "all refugees are for practical purposes stateless" (Simpson, *op. cit.*, p. 4).

<sup>29</sup> The most ironical formulation of this general expectation was made by R. Yewdall Jermings, "Some International Aspects of the Refugee Question" in *British Yearbook of International Law*, 1939: "The status of a refugee is not, of course, a permanent one. The aim is that he should rid himself of that status as soon as possible, either by repatriation or by naturalization in the country of refuge."

<sup>30</sup> Only the Russians, in every respect the aristocracy of the stateless people, and the Armenians, who were assimilated to the Russian status, were ever officially recognized as "stateless," placed under the protection of the League of Nations' Nansen Office, and given traveling papers.

<sup>31</sup> Childs, *op. cit.* The reason for this desperate attempt at promptness was the fear of all governments that even the smallest positive gesture "might encourage countries to get rid of their unwanted people and that many might emigrate who would otherwise remain in their countries even under serious disabilities" (Louise W. Holborn, "The Legal Status of Political Refugees, 1920-38," in *American Journal of International Law*, 1938).

See also Georges Mauco (in *Esprit*, 7e année, No. 82, July, 1939, p. 590): "An assimilation of the German refugees to the status of other refugees who were taken care of by the Nansen office would naturally have been the simplest and best solution

from the old trinity of state-people-territory, which still formed the basis of European organization and political civilization, formed only the beginning of an increasing movement, were only the first trickle from an ever-growing reservoir. It was obvious, and even the Evian Conference recognized it in 1938, that all German and Austrian Jews were potentially stateless; and it was only natural that the minority countries should be encouraged by Germany's example to try to use the same methods for getting rid of some of their minority populations.<sup>32</sup> Among the minorities the Jews and the Armenians ran the greatest risks and soon showed the highest proportion of statelessness; but they proved also that minority treaties did not necessarily offer protection but could also serve as an instrument to single out certain groups for eventual expulsion.

Almost as frightening as these new dangers arising from the old trouble spots of Europe was the entirely new kind of behavior of all European nationals in "ideological" struggles. Not only were people expelled from country and citizenship, but more and more persons of all countries, including the Western democracies, volunteered to fight in civil wars abroad (something which up to then only a few idealists or adventurers had done) even when this meant cutting themselves off from their national communities. This was the lesson of the Spanish Civil War and one of the reasons why the governments were so frightened by the International Brigade. Matters would not have been quite so bad if this had meant that people no longer clung so closely to their nationality and were ready eventually to be assimilated into another national community. But this was not at all the case. The stateless people had already shown a surprising stubbornness in retaining their nationality; in every sense the refugees represented separate foreign minorities who frequently did not care to be naturalized, and they never banded together, as the minorities had done temporarily, to defend common interests.<sup>33</sup> The International Brigade was organized into national

for the German refugees themselves. But the governments did not want to extend the privileges already granted to a new category of refugees who, moreover, threatened to increase their number indefinitely."

<sup>32</sup> To the 600,000 Jews in Germany and Austria who were potentially stateless in 1938, must be added the Jews of Rumania (the president of the Rumanian Federal Commission for Minorities, Professor Dragomir, having just announced to the world the impending revision of the citizenship of all Rumanian Jews) and Poland (whose foreign minister Beck had officially declared that Poland had one million Jews too many). See Simpson, *op. cit.*, p. 235.

<sup>33</sup> It is difficult to decide what came first, the nation-states' reluctance to naturalize refugees (the practice of naturalization became increasingly restricted and the practice of denaturalization increasingly common with the arrival of refugees) or the refugees' reluctance to accept another citizenship. In countries with minority populations like Poland, the refugees (Russians and Ukrainians) had a definite tendency to assimilate to the minorities without however demanding Polish citizenship. (See Simpson, *op. cit.*, p. 364.)

The behavior of Russian refugees is quite characteristic. The Nansen passport described its bearer as "*personne d'origine russe*," because "one would not have dared to tell the Russian émigré that he was without nationality or of doubtful nationality." (See Marc Vichniac, "Le Statut International des Apatrides," in *Recueil des Cours de*



battalions in which the Germans felt they fought against Hitler and the Italians against Mussolini, just as a few years later, in the Resistance, the Spanish refugees felt they fought against Franco when they helped the French against Vichy. What the European governments were so afraid of in this process was that the new stateless people could no longer be said to be of dubious or doubtful nationality (*de nationalité indéterminée*). Even though they had renounced their citizenship, no longer had any connection with or loyalty to their country of origin, and did not identify their nationality with a visible, fully recognized government, they retained a strong attachment to their nationality. National splinter groups and minorities, without deep roots in their territory and with no loyalty or relationship to the state, had ceased to be characteristic only of the East. They had by now infiltrated, as refugees and stateless persons, the older nation-states of the West.

The real trouble started as soon as the two recognized remedies, repatriation and naturalization, were tried. Repatriation measures naturally failed when there was no country to which these people could be deported. They failed not because of consideration for the stateless person (as it may appear today when Soviet Russia claims its former citizens and the democratic countries must protect them from a repatriation they do not want); and not because of humanitarian sentiments on the part of the countries that were swamped with refugees; but because neither the country of origin nor any other agreed to accept the stateless person. It would seem that the very undeportability of the stateless person should have prevented a government's expelling him; but since the man without a state was "an anomaly for whom there is no appropriate niche in the framework of the general law"<sup>34</sup>—an outlaw by definition—he was completely at the mercy of the police, which itself did not worry too much about committing a few illegal acts in order to diminish the country's burden of *indésirables*.<sup>35</sup> In other words, the state, insisting on its sovereign right of expulsion, was forced by

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*l'Académie de Droit International*, Vol. XXXIII, 1933.) An attempt to provide all stateless persons with uniform identity cards was bitterly contested by the holders of Nansen passports, who claimed that their passport was "a sign of legal recognition of their peculiar status." (See Jermings, *op. cit.*) Before the outbreak of the war even refugees from Germany were far from eager to be merged with the mass of the stateless, but preferred the description "*réfugié provenant d'Allemagne*" with its remnant of nationality.

More convincing than the complaints of European countries about the difficulties of assimilating refugees are statements from overseas which agree with the former that "of all classes of European immigrants the least easy to assimilate are the South, Eastern, and Central Europeans." (See "Canada and the Doctrine of Peaceful Changes," edited by H. F. Angus in *International Studies Conference: Demographic Questions: Peaceful Changes*, 1937, pp. 75-76.)

<sup>34</sup> Jermings, *op. cit.*

<sup>35</sup> A circular letter of the Dutch authorities (May 7, 1938) expressly considered each refugee as an "undesirable alien," and defined a refugee as an "alien who left his country under the pressure of circumstances." See "L'Emigration, Problème Révolutionnaire," in *Esprit*, 7e année, No. 82, July, 1939, p. 602.

the illegal nature of statelessness into admittedly illegal acts.<sup>36</sup> It smuggled its expelled stateless into the neighboring countries, with the result that the latter retaliated in kind. The ideal solution of repatriation, to smuggle the refugee back into his country of origin, succeeded only in a few prominent instances, partly because a nontotalitarian police was still restrained by a few rudimentary ethical considerations, partly because the stateless person was as likely to be smuggled back from his home country as from any other, and last but not least because the whole traffic could go on only with neighboring countries. The consequences of this smuggling were petty wars between the police at the frontiers, which did not exactly contribute to good international relations, and an accumulation of jail sentences for the stateless who, with the help of the police of one country, had passed "illegally" into the territory of another.

Every attempt by international conferences to establish some legal status for stateless people failed because no agreement could possibly replace the territory to which an alien, within the framework of existing law, must be deportable. All discussions about the refugee problems revolved around this one question: How can the refugee be made deportable again? The second World War and the DP camps were not necessary to show that the only practical substitute for a nonexistent homeland was an internment camp. Indeed, as early as the thirties this was the only "country" the world had to offer the stateless.<sup>37</sup>

Naturalization, on the other hand, also proved to be a failure. The whole naturalization system of European countries fell apart when it was confronted with stateless people, and this for the same reasons that the right of asylum had been set aside. Essentially naturalization was an appendage to the nation-state's legislation that reckoned only with "nationals," people born in its territory and citizens by birth. Naturalization was needed in exceptional cases, for single individuals whom circumstances might have driven into a foreign territory. The whole process broke down when it be-

<sup>36</sup> Lawrence Preuss, *op. cit.*, describes the spread of illegality as follows: "The initial illegal act of the denationalizing government . . . puts the expelling country in the position of an offender of international law, because its authorities violate the law of the country to which the stateless person is expelled. The latter country, in turn, cannot get rid of him . . . except by violating . . . the law of a third country. . . . [The stateless person finds himself before the following alternative]: either he violates the law of the country where he resides . . . or he violates the law of the country to which he is expelled."

Sir John Fischer Williams ("Denationalisation," in *British Year Book of International Law*, VII, 1927) concludes from this situation that denationalization is contrary to international law; yet at the Conférence pour la Codification du Droit International at the Hague in 1930, it was only the Finnish government which maintained that "loss of nationality . . . should never constitute a punishment . . . nor be pronounced in order to get rid of an undesirable person through expulsion."

<sup>37</sup> Childs, *op. cit.*, after having come to the sad conclusion that "the real difficulty about receiving a refugee is that if he turns out badly . . . there is no way of getting rid of him," proposed "transitional centers" to which the refugee could be returned even from abroad, which, in other words, should replace a homeland for deportation purposes.

came a question of handling mass applications for naturalization:<sup>38</sup> even from the purely administrative point of view, no European civil service could possibly have dealt with the problem. Instead of naturalizing at least a small portion of the new arrivals, the countries began to cancel earlier naturalizations, partly because of general panic and partly because the arrival of great masses of newcomers actually changed the always precarious position of naturalized citizens of the same origin.<sup>39</sup> Cancellation of naturalization or the introduction of new laws which obviously paved the way for mass denaturalization<sup>40</sup> shattered what little confidence the refugees might have retained in the possibility of adjusting themselves to a new normal life; if assimilation to the new country once looked a little shabby or disloyal, it was now simply ridiculous. The difference between a naturalized citizen and a stateless resident was not great enough to justify taking any trouble, the former being frequently deprived of important civil rights and threatened at any moment with the fate of the latter. Naturalized persons were largely assimilated to the status of ordinary aliens, and since the naturalized had already lost their previous citizenship, these measures simply threatened another considerable group with statelessness.

It was almost pathetic to see how helpless the European governments were, despite their consciousness of the danger of statelessness to their established legal and political institutions and despite all their efforts to stem the tide. Explosive events were no longer necessary. Once a number of stateless people were admitted to an otherwise normal country, statelessness spread like a contagious disease. Not only were naturalized citizens in danger of reverting to the status of statelessness, but living conditions for all aliens markedly deteriorated. In the thirties it became increasingly diffi-

<sup>38</sup> Two instances of mass naturalization in the Near East were clearly exceptional: one involved Greek refugees from Turkey whom the Greek government naturalized en bloc in 1922 because it was actually a matter of repatriation of a Greek minority and not of foreign citizens; the other benefited Armenian refugees from Turkey in Syria, Lebanon, and other formerly Turkish countries, that is, a population with which the Near East had shared common citizenship only a few years ago.

<sup>39</sup> Where a wave of refugees found members of their own nationality already settled in the country to which they immigrated—as was the case with the Armenians and Italians in France, for example, and with Jews everywhere—a certain retrogression set in in the assimilation of those who had been there longer. For their help and solidarity could be mobilized only by appealing to the original nationality they had in common with the newcomers. This point was of immediate interest to countries flooded by refugees but unable or unwilling to give them direct help or the right to work. In all these cases, national feelings of the older group proved to be “one of the main factors in the successful establishment of the refugees” (Simpson, *op. cit.*, pp. 45-46), but by appealing to such national conscience and solidarity, the receiving countries naturally increased the number of unassimilated aliens. To take one particularly interesting instance, 10,000 Italian refugees were enough to postpone indefinitely the assimilation of almost one million Italian immigrants in France.

<sup>40</sup> The French government, followed by other Western countries, introduced during the thirties an increasing number of restrictions for naturalized citizens: they were eliminated from certain professions for up to ten years after their naturalization, they had no political rights, etc.

cult to distinguish clearly between stateless refugees and normal resident aliens. Once the government tried to use its right and repatriate a resident alien against his will, he would do his utmost to find refuge in statelessness. During the first World War enemy aliens had already discovered the great advantages of statelessness. But what then had been the cunning of individuals who found a loophole in the law had now become the instinctive reaction of masses. France, Europe's greatest immigrant-reception area,<sup>41</sup> because she had regulated the chaotic labor market by calling in alien workers in times of need and deporting them in times of unemployment and crisis, taught her aliens a lesson about the advantages of statelessness which they did not readily forget. After 1935, the year of mass repatriation by the Laval government from which only the stateless were saved, so-called "economic immigrants" and other groups of earlier origin—Balkans, Italians, Poles, and Spaniards—mixed with the waves of refugees into a tangle that never again could be unraveled.

Much worse than what statelessness did to the time-honored and necessary distinctions between nationals and foreigners, and to the sovereign right of states in matters of nationality and expulsion, was the damage suffered by the very structure of legal national institutions when a growing number of residents had to live outside the jurisdiction of these laws and without being protected by any other. The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime. More than that, the entire hierarchy of values which pertain in civilized countries was reversed in his case. Since he was the anomaly for whom the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal.

The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights. For then a criminal offense becomes the best opportunity to regain some kind of human equality, even if it be as a recognized exception to the norm. The one important fact is that this exception is provided for by law. As a criminal even a stateless person will not be treated worse than another criminal, that is, he will be treated like everybody else. Only as an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no lawyers and no appeals. The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizen because of a little theft. Even if he is penniless he can now get a lawyer, complain about his jailers, and he will be listened to respectfully. He is no

<sup>41</sup> Simpson, *op. cit.*, p. 289.

longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person.<sup>42</sup>

A much less reliable and much more difficult way to rise from an unrecognized anomaly to the status of recognized exception would be to become a genius. Just as the law knows only one difference between human beings, the difference between the normal noncriminal and the anomalous criminal, so a conformist society has recognized only one form of determined individualism, the genius. European bourgeois society wanted the genius to stay outside of human laws, to be a kind of monster whose chief social function was to create excitement, and it did not matter if he actually was an outlaw. Moreover, the loss of citizenship deprived people not only of protection, but also of all clearly established, officially recognized identity, a fact for which their eternal feverish efforts to obtain at least birth certificates from the country that denationalized them was a very exact symbol; one of their problems was solved when they achieved the degree of distinction that will rescue a man from the huge and nameless crowd. Only fame will eventually answer the repeated complaint of refugees of all social strata that "nobody here knows who I am"; and it is true that the chances of the famous refugee are improved just as a dog with a name has a better chance to survive than a stray dog who is just a dog in general.<sup>43</sup>

The nation-state, incapable of providing a law for those who had lost the protection of a national government, transferred the whole matter to the police. This was the first time the police in Western Europe had received authority to act on its own, to rule directly over people; in one sphere of public life it was no longer an instrument to carry out and enforce the law, but had become a ruling authority independent of government and ministries.<sup>44</sup> Its strength and its emancipation from law and government grew in direct proportion to the influx of refugees. The greater the ratio of state-

<sup>42</sup> In practical terms, any sentence meted out to him will be of small consequence compared with an expulsion order, cancellation of a work permit, or a decree sending him into an internment camp. A West Coast Japanese-American who was in jail when the army ordered the internment of all Americans of Japanese ancestry would not have been forced to liquidate his property at too low a price; he would have remained right where he was, armed with a lawyer to look after his interests; and if he was so lucky as to receive a long sentence, he might have returned righteously and peacefully to his former business and profession, even that of a professional thief. His jail sentence guaranteed him the constitutional rights that nothing else—no protests of loyalty and no appeals—could have obtained for him once his citizenship had become doubtful.

<sup>43</sup> The fact that the same principle of formation of an elite frequently worked in totalitarian concentration camps where the "aristocracy" was composed of a majority of criminals and a few "geniuses," that is entertainers and artists, shows how closely related the social positions of these groups are.

<sup>44</sup> In France, for instance, it was a matter of record that an order of expulsion emanating from the police was much more serious than one which was issued "only" by the Ministry of Interior and that the Minister of Interior could only in rare cases cancel a police expulsion, while the opposite procedure was often merely a question of bribery. Constitutionally, the police is under the authority of the Ministry of Interior.

less and potentially stateless to the population at large—in prewar France it had reached 10 per cent of the total—the greater the danger of a gradual transformation into a police state.

It goes without saying that the totalitarian regimes, where the police had risen to the peak of power, were especially eager to consolidate this power through the domination over vast groups of people, who, regardless of any offenses committed by individuals, found themselves anyway beyond the pale of the law. In Nazi Germany, the Nuremberg Laws with their distinction between Reich citizens (full citizens) and nationals (second-class citizens without political rights) had paved the way for a development in which eventually all nationals of "alien blood" could lose their nationality by official decree; only the outbreak of the war prevented a corresponding legislation, which had been prepared in detail.<sup>44</sup> On the other hand, the increasing groups of stateless in the nontotalitarian countries led to a form of lawlessness, organized by the police, which practically resulted in a co-ordination of the free world with the legislation of the totalitarian countries. That concentration camps were ultimately provided for the same groups in all countries, even though there were considerable differences in the treatment of their inmates, was all the more characteristic as the selection of the groups was left exclusively to the initiative of the totalitarian regimes: if the Nazis put a person in a concentration camp and if he made a successful escape, say, to Holland, the Dutch would put him in an internment camp. Thus, long before the outbreak of the war the police in a number of Western countries, under the pretext of "national security," had on their own initiative established close connections with the Gestapo and the GPU, so that one might say there existed an independent foreign policy of the police. This police-directed foreign policy functioned quite independently of the official governments; the relations between the Gestapo and the French police were never more cordial than at the

<sup>44a</sup> In February, 1938, the Reich and Prussian Ministry of Interior presented the "draft of a law concerning the acquisition and loss of German nationality" which went far beyond the Nuremberg legislation. It provided that all children of "Jews, Jews of mixed blood or persons of otherwise alien blood" (who could never become Reich citizens anyway) were also no longer entitled to the nationality, "even if the father possesses German nationality by birth." That these measures were no longer merely concerned with anti-Jewish legislation is evident from an opinion expressed July 19, 1939, by the Minister of Justice, who suggests that "the words Jew and Jew of mixed blood should if possible be avoided in the law, to be replaced by 'persons of alien blood,' or 'persons of non-German or non-Germanic [*nicht artverwandt*] blood.'" An interesting feature in planning this extraordinary expansion of the stateless population in Nazi Germany concerns the foundlings, who are explicitly regarded as stateless, until "an investigation of their racial characteristics can be made." Here the principle that every individual is born with inalienable rights guaranteed by his nationality has been deliberately reversed: every individual is born rightless, namely stateless, unless subsequently other conclusions are reached.

The original dossier concerning the draft of this legislation, including the opinions of all Ministries and the *Wehrmacht* High Command, can be found in the archives of the Yiddish Scientific Institute in New York (G-75).

time of Leon Blum's popular-front government, which was guided by a decidedly anti-German policy. Contrary to the governments, the various police organizations were never overburdened with "prejudices" against any totalitarian regime; the information and denunciations received from GPU agents were just as welcome to them as those from Fascist or Gestapo agents. They knew about the eminent role of the police apparatus in all totalitarian regimes, they knew about its elevated social status and political importance, and they never bothered to conceal their sympathies. That the Nazis eventually met with so disgracefully little resistance from the police in the countries they occupied, and that they were able to organize terror as much as they did with the assistance of these local police forces, was due at least in part to the powerful position which the police had achieved over the years in their unrestricted and arbitrary domination of stateless and refugees.

Both in the history of the "nation of minorities" and in the formation of a stateless people, Jews have played a significant role. They were at the head of the so-called minority movement because of their great need for protection (matched only by the need of the Armenians) and their excellent international connections, but above all because they formed a majority in no country and therefore could be regarded as the *minorité par excellence*, i.e., the only minority whose interests could be defended only by internationally guaranteed protection.<sup>45</sup>

The special needs of the Jewish people were the best possible pretext for denying that the Treaties were a compromise between the new nations' tendency forcefully to assimilate alien peoples and nationalities who for reasons of expediency could not be granted the right to national self-determination.

A similar incident made the Jews prominent in the discussion of the refugee and statelessness problem. The first *Heimatlose* or *apatrides*, as they were created by the Peace Treaties, were for the most part Jews who came from the succession states and were unable or unwilling to place themselves under the new minority protection of their homelands. Not until Germany forced German Jewry into emigration and statelessness did they form a very considerable portion of the stateless people. But in the years following Hitler's successful persecution of German Jews all the minority countries began to think in terms of expatriating their minorities, and it was only natural that they should start with the *minorité par excellence*, the only nationality that actually had no other protection than a minority system which by now had become a mockery.

The notion that statelessness is primarily a Jewish problem<sup>46</sup> was a pre-

<sup>45</sup> On the role of the Jews in formulating the Minority Treaties, see Macartney, *op. cit.*, pp. 4, 213, 281 and *passim*; David Erdstein, *Le Statut juridique des Minorités en Europe*, Paris, 1932, pp. 11 ff.; Oscar J. Janowsky, *op. cit.*

<sup>46</sup> This was by no means only a notion of Nazi Germany, though only a Nazi author dared to express it: "It is true that a refugee question will continue to exist even

text used by all governments who tried to settle the problem by ignoring it. None of the statesmen was aware that Hitler's solution of the Jewish problem, first to reduce the German Jews to a nonrecognized minority in Germany, then to drive them as stateless people across the borders, and finally to gather them back from everywhere in order to ship them to extermination camps, was an eloquent demonstration to the rest of the world how really to "liquidate" all problems concerning minorities and stateless. After the war it turned out that the Jewish question, which was considered the only insoluble one, was indeed solved—namely, by means of a colonized and then conquered territory—but this solved neither the problem of the minorities nor the stateless. On the contrary, like virtually all other events of our century, the solution of the Jewish question merely produced a new category of refugees, the Arabs, thereby increasing the number of the stateless and rightless by another 700,000 to 800,000 people. And what happened in Palestine within the smallest territory and in terms of hundreds of thousands was then repeated in India on a large scale involving many millions of people. Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state.

For these new states this curse bears the germs of a deadly sickness. For the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality, which originally was destined to replace the older laws and orders of the feudal society, the nation dissolves into an anarchic mass of over- and underprivileged individuals. Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states. The clearer the proof of their inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police.

## II: *The Perplexities of the Rights of Man*

THE DECLARATION of the Rights of Man at the end of the eighteenth century was a turning point in history. It meant nothing more nor less than that from then on Man, and not God's command or the customs of history, should be the source of Law. Independent of the privileges which history had bestowed upon certain strata of society or certain nations, the declaration indicated man's emancipation from all tutelage and announced that he had now come of age.

when there is no longer a Jewish question; but since Jews form such a high percentage of the refugees, the refugee question will be much simplified" (Kabermann, "Das internationale Flüchtlingsproblem," in *Zeitschrift für Politik*, Bd. 29, Heft 3, 1939).



Beyond this, there was another implication of which the framers of the declaration were only half aware. The proclamation of human rights was also meant to be a much-needed protection in the new era where individuals were no longer secure in the estates to which they were born or sure of their equality before God as Christians. In other words, in the new secularized and emancipated society, men were no longer sure of these social and human rights which until then had been outside the political order and guaranteed not by government and constitution, but by social, spiritual, and religious forces. Therefore throughout the nineteenth century, the consensus of opinion was that human rights had to be invoked whenever individuals needed protection against the new sovereignty of the state and the new arbitrariness of society.

Since the Rights of Man were proclaimed to be "inalienable," irreducible to and undeducible from other rights or laws, no authority was invoked for their establishment; Man himself was their source as well as their ultimate goal. No special law, moreover, was deemed necessary to protect them because all laws were supposed to rest upon them. Man appeared as the only sovereign in matters of law as the people was proclaimed the only sovereign in matters of government. The people's sovereignty (different from that of the prince) was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the "inalienable" rights of man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government.

In other words, man had hardly appeared as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people. From the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an "abstract" human being who seemed to exist nowhere, for even savages lived in some kind of a social order. If a tribal or other "backward" community did not enjoy human rights, it was obviously because as a whole it had not yet reached that stage of civilization, the stage of popular and national sovereignty, but was oppressed by foreign or native despots. The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure them. As mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual, was the image of man.

The full implication of this identification of the rights of man with the rights of peoples in the European nation-state system came to light only when a growing number of people and peoples suddenly appeared whose elementary rights were as little safeguarded by the ordinary functioning of nation-states in the middle of Europe as they would have been in the heart of Africa. The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it

turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them. Or when, as in the case of the minorities, an international body arrogated to itself a nongovernmental authority, its failure was apparent even before its measures were fully realized; not only were the governments more or less openly opposed to this encroachment on their sovereignty, but the concerned nationalities themselves did not recognize a nonnational guarantee, mistrusted everything which was not clear-cut support of their "national" (as opposed to their mere "linguistic, religious, and ethnic") rights, and preferred either, like the Germans or Hungarians, to turn to the protection of the "national" mother country, or, like the Jews, to some kind of interterritorial solidarity.<sup>47</sup>

The stateless people were as convinced as the minorities that loss of national rights was identical with loss of human rights, that the former inevitably entailed the latter. The more they were excluded from right in any form, the more they tended to look for a reintegration into a national, into their own national community. The Russian refugees were only the first to insist on their nationality and to defend themselves furiously against attempts to lump them together with other stateless people. Since them, not a single group of refugees or Displaced Persons has failed to develop a fierce, violent group consciousness and to clamor for rights as—and only as—Poles or Jews or Germans, etc.

Even worse was that all societies formed for the protection of the Rights of Man, all attempts to arrive at a new bill of human rights were sponsored by marginal figures—by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists. The groups they formed, the declarations they issued, showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals. No statesman, no political figure of any importance could possibly take them seriously; and none of the liberal or radical parties in Europe thought it necessary to incorporate into their program a new declaration of human rights. Neither before nor after the second World War have the victims themselves ever invoked these fundamental rights, which were so evidently denied them, in their many attempts to find a way out of the barbed-wire labyrinth into which events had driven them. On the contrary, the victims shared the disdain

<sup>47</sup> Pathetic instances of this exclusive confidence in national rights were the consent, before the second World War, of nearly 75 per cent of the German minority in the Italian Tyrol to leave their homes and resettle in Germany, the voluntary repatriation of a German island in Slovenia which had been there since the fourteenth century or, immediately after the close of the war, the unanimous rejection by Jewish refugees in an Italian DP camp of an offer of mass naturalization by the Italian government. In the face of the experience of European peoples between the two wars, it would be a serious mistake to interpret this behavior simply as another example of fanatic nationalist sentiment; these people no longer felt sure of their elementary rights if these were not protected by a government to which they belonged by birth. See Eugene M. Kulisher, *op. cit.*

and indifference of the powers that be for any attempt of the marginal societies to enforce human rights in any elementary or general sense.

The failure of all responsible persons to meet the calamity of an ever-growing body of people forced to live outside the scope of all tangible law with the proclamation of a new bill of rights was certainly not due to ill will. Never before had the Rights of Man, solemnly proclaimed by the French and the American revolutions as the new fundament for civilized societies, been a practical political issue. During the nineteenth century, these rights had been invoked in a rather perfunctory way, to defend individuals against the increasing power of the state and to mitigate the new social insecurity caused by the industrial revolution. Then the meaning of human rights acquired a new connotation: they became the standard slogan of the protectors of the underprivileged, a kind of additional law, a right of exception necessary for those who had nothing better to fall back upon.

The reason why the concept of human rights was treated as a sort of stepchild by nineteenth-century political thought and why no liberal or radical party in the twentieth century, even when an urgent need for enforcement of human rights arose, saw fit to include them in its program seems obvious: civil rights—that is the varying rights of citizens in different countries—were supposed to embody and spell out in the form of tangible laws the eternal Rights of Man, which by themselves were supposed to be independent of citizenship and nationality. All human beings were citizens of some kind of political community; if the laws of their country did not live up to the demands of the Rights of Man, they were expected to change them, by legislation in democratic countries or through revolutionary action in despotisms.

The Rights of Man, supposedly inalienable, proved to be unenforceable—even in countries whose constitutions were based upon them—whenever people appeared who were no longer citizens of any sovereign state. To this fact, disturbing enough in itself, one must add the confusion created by the many recent attempts to frame a new bill of human rights, which have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are. Although everyone seems to agree that the plight of these people consists precisely in their loss of the Rights of Man, no one seems to know which rights they lost when they lost these human rights.

The first loss which the rightless suffered was the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world. This calamity is far from unprecedented; in the long memory of history, forced migrations of individuals or whole groups of people for political or economic reasons look like everyday occurrences. What is unprecedented is not the loss of a home but the impossibility of finding a new one. Suddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they would be assimilated, no territory where they could found a new community of their own. This, moreover, had next to

nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization. Nobody had been aware that mankind, for so long a time considered under the image of a family of nations, had reached the stage where whoever was thrown out of one of these tightly organized closed communities found himself thrown out of the family of nations altogether.<sup>48</sup>

The second loss which the rightless suffered was the loss of government protection, and this did not imply just the loss of legal status in their own, but in all countries. Treaties of reciprocity and international agreements have woven a web around the earth that makes it possible for the citizen of every country to take his legal status with him no matter where he goes (so that, for instance, a German citizen under the Nazi regime might not be able to enter a mixed marriage abroad because of the Nuremberg laws). Yet, whoever is no longer caught in it finds himself out of legality altogether (thus during the last war stateless people were invariably in a worse position than enemy aliens who were still indirectly protected by their governments through international agreements).

By itself the loss of government protection is no more unprecedented than the loss of a home. Civilized countries did offer the right of asylum to those who, for political reasons, had been persecuted by their governments, and this practice, though never officially incorporated into any constitution, has functioned well enough throughout the nineteenth and even in our century. The trouble arose when it appeared that the new categories of persecuted were far too numerous to be handled by an unofficial practice destined for exceptional cases. Moreover, the majority could hardly qualify for the right of asylum, which implicitly presupposed political or religious convictions which were not outlawed in the country of refuge. The new refugees were persecuted not because of what they had done or thought, but because of what they unchangeably were—born into the wrong kind of race or the wrong kind of class or drafted by the wrong kind of government (as in the case of the Spanish Republican Army).<sup>49</sup>

The more the number of rightless people increased, the greater became the temptation to pay less attention to the deeds of the persecuting governments than to the status of the persecuted. And the first glaring fact was that these people, though persecuted under some political pretext, were no

<sup>48</sup> The few chances for reintegration open to the new migrants were mostly based on their nationality: Spanish refugees, for instance, were welcomed to a certain extent in Mexico. The United States, in the early twenties, adopted a quota system according to which each nationality already represented in the country received, so to speak, the right to receive a number of former countrymen proportionate to its numerical part in the total population.

<sup>49</sup> How dangerous it can be to be innocent from the point of view of the persecuting government, became very clear when, during the last war, the American government offered asylum to all those German refugees who were threatened by the extradition paragraph in the German-French Armistice. The condition was, of course, that the applicant could prove that he had done something against the Nazi regime. The proportion of refugees from Germany who were able to fulfill this condition was very small, and they, strangely enough, were not the people who were most in danger.

longer, as the persecuted had been throughout history, a liability and an image of shame for the persecutors; that they were not considered and hardly pretended to be active enemies (the few thousand Soviet citizens who voluntarily left Soviet Russia after the second World War and found asylum in democratic countries did more damage to the prestige of the Soviet Union than millions of refugees in the twenties who belonged to the wrong class), but that they were and appeared to be nothing but human beings whose very innocence—from every point of view, and especially that of the persecuting government—was their greatest misfortune. Innocence, in the sense of complete lack of responsibility, was the mark of their rightlessness as it was the seal of their loss of political status.

Only in appearance therefore do the needs for a reinforcement of human rights touch upon the fate of the authentic political refugee. Political refugees, of necessity few in number, still enjoy the right to asylum in many countries, and this right acts, in an informal way, as a genuine substitute for national law.

One of the surprising aspects of our experience with stateless people who benefit legally from committing a crime has been the fact that it seems to be easier to deprive a completely innocent person of legality than someone who has committed an offense. Anatole France's famous quip, "If I am accused of stealing the towers of Notre Dame, I can only flee the country," has assumed a horrible reality. Jurists are so used to thinking of law in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than the layman to recognize that the deprivation of legality, *i.e.*, of *all* rights, no longer has a connection with specific crimes.

This situation illustrates the many perplexities inherent in the concept of human rights. No matter how they have once been defined (life, liberty, and the pursuit of happiness, according to the American formula, or as equality before the law, liberty, protection of property, and national sovereignty, according to the French); no matter how one may attempt to improve an ambiguous formulation like the pursuit of happiness, or an antiquated one like unqualified right to property; the real situation of those whom the twentieth century has driven outside the pale of the law shows that these are rights of citizens whose loss does not entail absolute rightlessness. The soldier during the war is deprived of his right to life, the criminal of his right to freedom, all citizens during an emergency of their right to the pursuit of happiness, but nobody would ever claim that in any of these instances a loss of human rights has taken place. These rights, on the other hand, can be granted (though hardly enjoyed) even under conditions of fundamental rightlessness.

The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems *within* given communities—but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no

law exists for them; not that they are oppressed but that nobody wants even to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly "superfluous," if nobody can be found to "claim" them, may their lives be in danger. Even the Nazis started their extermination of Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion they had carefully tested the ground and found out to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged.

The same is true even to an ironical extent with regard to the right of freedom which is sometimes considered to be the very essence of human rights. There is no question that those outside the pale of the law may have more freedom of movement than a lawfully imprisoned criminal or that they enjoy more freedom of opinion in the internment camps of democratic countries than they would in any ordinary despotism, not to mention in a totalitarian country.<sup>50</sup> But neither physical safety—being fed by some state or private welfare agency—nor freedom of opinion changes in the least their fundamental situation of rightlessness. The prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them; their freedom of movement, if they have it at all, gives them no right to residence which even the jailed criminal enjoys as a matter of course; and their freedom of opinion is a fool's freedom, for nothing they think matters anyhow.

These last points are crucial. The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion. Privileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did, or may do.

We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and

<sup>50</sup> Even under the conditions of totalitarian terror, concentration camps sometimes have been the only place where certain remnants of freedom of thought and discussion still existed. See David Rousset, *Les Jours de Notre Mort*, Paris, 1947, *passim*, for freedom of discussion in Buchenwald, and Anton Ciliga, *The Russian Enigma*, London, 1940, p. 200, about "isles of liberty," "the freedom of mind" that reigned in some of the Soviet places of detention.

opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation. The trouble is that this calamity arose not from any lack of civilization, backwardness, or mere tyranny, but, on the contrary, that it could not be repaired, because there was no longer any "uncivilized" spot on earth, because whether we like it or not we have really started to live in One World. Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.

Before this, what we must call a "human right" today would have been thought of as a general characteristic of the human condition which no tyrant could take away. Its loss entails the loss of the relevance of speech (and man, since Aristotle, has been defined as a being commanding the power of speech and thought), and the loss of all human relationship (and man, again since Aristotle, has been thought of as the "political animal," that is one who by definition lives in a community), the loss, in other words, of some of the most essential characteristics of human life. This was to a certain extent the plight of slaves, whom Aristotle therefore did not count among human beings. Slavery's fundamental offense against human rights was not that it took liberty away (which can happen in many other situations), but that it excluded a certain category of people even from the possibility of fighting for freedom—a fight possible under tyranny, and even under the desperate conditions of modern terror (but not under any conditions of concentration-camp life). Slavery's crime against humanity did not begin when one people defeated and enslaved its enemies (though of course this was bad enough), but when slavery became an institution in which some men were "born" free and others slave, when it was forgotten that it was man who had deprived his fellow-men of freedom, and when the sanction for the crime was attributed to nature. Yet in the light of recent events it is possible to say that even slaves still belonged to some sort of human community; their labor was needed, used, and exploited, and this kept them within the pale of humanity. To be a slave was after all to have a distinctive character, a place in society—more than the abstract nakedness of being human and nothing but human. Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.

The right that corresponds to this loss and that was never even mentioned among the human rights cannot be expressed in the categories of the eighteenth century because they presume that rights spring immediately from the "nature" of man—whereby it makes relatively little difference whether this nature is visualized in terms of the natural law or in terms of a being created in the image of God, whether it concerns "natural" rights or divine commands. The decisive factor is that these rights and the human dignity they bestow should remain valid and real even if only a single human

being existed on earth; they are independent of human plurality and should remain valid even if a human being is expelled from the human community.

When the Rights of Man were proclaimed for the first time, they were regarded as being independent of history and the privileges which history had accorded certain strata of society. The new independence constituted the newly discovered dignity of man. From the beginning, this new dignity was of a rather ambiguous nature. Historical rights were replaced by natural rights, "nature" took the place of history, and it was tacitly assumed that nature was less alien than history to the essence of man. The very language of the Declaration of Independence as well as of the *Déclaration des Droits de l'Homme*—"inalienable," "given with birth," "self-evident truths"—implies the belief in a kind of human "nature" which would be subject to the same laws of growth as that of the individual and from which rights and laws could be deduced. Today we are perhaps better qualified to judge exactly what this human "nature" amounts to; in any event it has shown us potentialities that were neither recognized nor even suspected by Western philosophy and religion, which for more than three thousand years have defined and redefined this "nature." But it is not only the, as it were, human aspect of nature that has become questionable to us. Ever since man learned to master it to such an extent that the destruction of all organic life on earth with man-made instruments has become conceivable and technically possible, he has been alienated from nature. Ever since a deeper knowledge of natural processes instilled serious doubts about the existence of natural laws at all, nature itself has assumed a sinister aspect. How should one be able to deduce laws and rights from a universe which apparently knows neither the one nor the other category?

Man of the twentieth century has become just as emancipated from nature as eighteenth-century man was from history. History and nature have become equally alien to us, namely, in the sense that the essence of man can no longer be comprehended in terms of either category. On the other hand, humanity, which for the eighteenth century, in Kantian terminology, was no more than a regulative idea, has today become an inescapable fact. This new situation, in which "humanity" has in effect assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible. For, contrary to the best-intentioned humanitarian attempts to obtain new declarations of human rights from international organizations, it should be understood that this idea transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and, for the time being, a sphere that is above the nations does not exist. Furthermore, this dilemma would by no means be eliminated by the establishment of a "world government." Such a world government is indeed within the realm of possibility, but one may suspect that in reality it might differ considerably from the version promoted by idealistic-minded organizations. The crimes against human rights, which have become a specialty of totalitarian regimes, can always



be justified by the pretext that right is equivalent to being good or useful for the whole in distinction to its parts. (Hitler's motto that "Right is what is good for the German people" is only the vulgarized form of a conception of law which can be found everywhere and which in practice will remain ineffectual only so long as older traditions that are still effective in the constitutions prevent this.) A conception of law which identifies what is right with the notion of what is good for—for the individual, or the family, or the people, or the largest number—becomes inevitable once the absolute and transcendent measurements of religion or the law of nature have lost their authority. And this predicament is by no means solved if the unit to which the "good for" applies is as large as mankind itself. For it is quite conceivable, and even within the realm of practical political possibilities, that one fine day a highly organized and mechanized humanity will conclude quite democratically—namely by majority decision—that for humanity as a whole it would be better to liquidate certain parts thereof. Here, in the problems of factual reality, we are confronted with one of the oldest perplexities of political philosophy, which could remain undetected only so long as a stable Christian theology provided the framework for all political and philosophical problems, but which long ago caused Plato to say: "Not man, but a god, must be the measure of all things."

These facts and reflections offer what seems an ironical, bitter, and belated confirmation of the famous arguments with which Edmund Burke opposed the French Revolution's Declaration of the Rights of Man. They appear to buttress his assertion that human rights were an "abstraction," that it was much wiser to rely on an "entailed inheritance" of rights which one transmits to one's children like life itself, and to claim one's rights to be the "rights of an Englishman" rather than the inalienable rights of man.<sup>51</sup> According to Burke, the rights which we enjoy spring "from within the nation," so that neither natural law, nor divine command, nor any concept of mankind such as Robespierre's "human race," "the sovereign of the earth," are needed as a source of law.<sup>52</sup>

The pragmatic soundness of Burke's concept seems to be beyond doubt in the light of our manifold experiences. Not only did loss of national rights in all instances entail the loss of human rights; the restoration of human rights, as the recent example of the State of Israel proves, has been achieved so far only through the restoration or the establishment of national rights. The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human. And in view of objective political conditions, it is hard to say how the concepts of man upon which human rights are based—that he is

<sup>51</sup> Edmund Burke, *Reflections on the Revolution in France*, 1790, edited by E. J. Payne, Everyman's Library.

<sup>52</sup> Robespierre, *Speeches*, 1927. Speech of April 24, 1793.

created in the image of God (in the American formula), or that he is the representative of mankind, or that he harbors within himself the sacred demands of natural law (in the French formula)—could have helped to find a solution to the problem.

The survivors of the extermination camps, the inmates of concentration and internment camps, and even the comparatively happy stateless people could see without Burke's arguments that the abstract nakedness of being nothing but human was their greatest danger. Because of it they were regarded as savages and, afraid that they might end by being considered beasts, they insisted on their nationality, the last sign of their former citizenship, as their only remaining and recognized tie with humanity. Their distrust of natural, their preference for national, rights comes precisely from their realization that natural rights are granted even to savages. Burke had already feared that natural "inalienable" rights would confirm only the "right of the naked savage,"<sup>53</sup> and therefore reduce civilized nations to the status of savagery. Because only savages have nothing more to fall back upon than the minimum fact of their human origin, people cling to their nationality all the more desperately when they have lost the rights and protection that such nationality once gave them. Only their past with its "entailed inheritance" seems to attest to the fact that they still belong to the civilized world.

If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man. This is one of the reasons why it is far more difficult to destroy the legal personality of a criminal, that is of a man who has taken upon himself the responsibility for an act whose consequences now determine his fate, than of a man who has been disallowed all common human responsibilities.

Burke's arguments therefore gain an added significance if we look only at the general human condition of those who have been forced out of all political communities. Regardless of treatment, independent of liberties or oppression, justice or injustice, they have lost all those parts of the world and all those aspects of human existence which are the result of our common labor, the outcome of the human artifice. If the tragedy of savage tribes is that they inhabit an unchanged nature which they cannot master, yet upon whose abundance or frugality they depend for their livelihood, that they live and die without leaving any trace, without having contributed anything to a common world, then these rightless people are indeed thrown back into a peculiar state of nature. Certainly they are not barbarians; some of them, indeed, belong to the most educated strata of their respective countries; nevertheless, in a world that has almost liquidated savagery, they appear as the first signs of a possible regression from civilization.

The more highly developed a civilization, the more accomplished the

<sup>53</sup> Introduction by Payne to Burke, *op. cit.*

world it has produced, the more at home men feel within the human artifice—the more they will resent everything they have not produced, everything that is merely and mysteriously given them. The human being who has lost his place in a community, his political status in the struggle of his time, and the legal personality which makes his actions and part of his destiny a consistent whole, is left with those qualities which usually can become articulate only in the sphere of private life and must remain unqualified, mere existence in all matters of public concern. This mere existence, that is, all that which is mysteriously given us by birth and which includes the shape of our bodies and the talents of our minds, can be adequately dealt with only by the unpredictable hazards of friendship and sympathy, or by the great and incalculable grace of love, which says with Augustine, "*Volo ut sis* (I want you to be)," without being able to give any particular reason for such supreme and unsurpassable affirmation.

Since the Greeks, we have known that highly developed political life breeds a deep-rooted suspicion of this private sphere, a deep resentment against the disturbing miracle contained in the fact that each of us is made as he is—single, unique, unchangeable. This whole sphere of the merely given, relegated to private life in civilized society, is a permanent threat to the public sphere, because the public sphere is as consistently based on the law of equality as the private sphere is based on the law of universal difference and differentiation. Equality, in contrast to all that is involved in mere existence, is not given us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.

Our political life rests on the assumption that we can produce equality through organization, because man can act in and change and build a common world, together with his equals and only with his equals. The dark background of mere givenness, the background formed by our unchangeable and unique nature, breaks into the political scene as the alien which in its all too obvious difference reminds us of the limitations of human activity—which are identical with the limitations of human equality. The reason why highly developed political communities, such as the ancient city-states or modern nation-states, so often insist on ethnic homogeneity is that they hope to eliminate as far as possible those natural and always present differences and differentiations which by themselves arouse dumb hatred, mistrust, and discrimination because they indicate all too clearly those spheres where men cannot act and change at will, *i.e.*, the limitations of the human artifice. The "alien" is a frightening symbol of the fact of difference as such, of individuality as such, and indicates those realms in which man cannot change and cannot act and in which, therefore, he has a distinct tendency to destroy. If a Negro in a white community is considered a Negro and nothing else, he loses along with his right to equality that freedom of action which is specifically human; all his deeds are now explained as "necessary" consequences of some "Negro" qualities; he has become some speci-

men of an animal species, called man. Much the same thing happens to those who have lost all distinctive political qualities and have become human beings and nothing else. No doubt, wherever public life and its law of equality are completely victorious, wherever a civilization succeeds in eliminating or reducing to a minimum the dark background of difference, it will end in complete petrification and be punished, so to speak, for having forgotten that man is only the master, not the creator of the world.

The great danger arising from the existence of people forced to live outside the common world is that they are thrown back, in the midst of civilization, on their natural givenness, on their mere differentiation. They lack that tremendous equalizing of differences which comes from being citizens of some commonwealth and yet, since they are no longer allowed to partake in the human artifice, they begin to belong to the human race in much the same way as animals belong to a specific animal species. The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general—without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself—and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.

The danger in the existence of such people is twofold: first and more obviously, their ever-increasing numbers threaten our political life, our human artifice, the world which is the result of our common and co-ordinated effort in much the same, perhaps even more terrifying, way as the wild elements of nature once threatened the existence of man-made cities and countrysides. Deadly danger to any civilization is no longer likely to come from without. Nature has been mastered and no barbarians threaten to destroy what they cannot understand, as the Mongolians threatened Europe for centuries. Even the emergence of totalitarian governments is a phenomenon within, not outside, our civilization. The danger is that a global, universally interrelated civilization may produce barbarians from its own midst by forcing millions of people into conditions which, despite all appearances, are the conditions of savages.<sup>54</sup>

<sup>54</sup> This modern expulsion from humanity has much more radical consequences than the ancient and medieval custom of outlawry. Outlawry, certainly the "most fearful fate which primitive law could inflict," placing the life of the outlawed person at the mercy of anyone he met, disappeared with the establishment of an effective system of law enforcement and was finally replaced by extradition treaties between the nations. It had been primarily a substitute for a police force, designed to compel criminals to surrender.

The early Middle Ages seem to have been quite conscious of the danger involved in "civil death." Excommunication in the late Roman Empire meant ecclesiastical death but left a person who had lost his membership in the church full freedom in all other respects. Ecclesiastical and civil death became identical only in the Merovingian era, and there excommunication "in general practice [was] limited to temporary withdrawal or suspension of the rights of membership which might be regained." See the articles "Outlawry" and "Excommunication" in the *Encyclopedia of Social Sciences*. Also the article "Friedlosigkeit" in the *Schweizer Lexikon*.