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The “Right to Remain Here” as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions

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Executive Summary

This article considers the relationship between two human rights discourses (and two specific legal regimes): refugee and asylum protection and the evolving body of international law that regulates expulsions and deportations. Legal protections for refugees and asylum seekers are, of course, venerable, well-known, and in many respects still cherished, if challenged and perhaps a bit frail. Anti-deportation discourse is much newer, multifaceted, and evolving. It is in many respects a young work in progress. It has arisen in response to a rising tide of deportations, and the worrisome development of massive, harsh deportation machinery in the United States, Germany, the United Kingdom, France, Mexico, Australia, and South Africa, among others. This article’s main goal is to consider how these two discourses do and might relate to each other. More specifically, it suggests that the development of procedural and substantive rights against removal — as well as rights during and after removal — aids our understanding of the current state and possible future of the refugee protection regime.

The article’s basic thesis is this: The global refugee regime, though challenged both theoretically and in practice, must be maintained and strengthened. Its historical focus on developing criteria for admission into safe states, on protections against expulsion (i.e., *non-refoulement*), and on regimes of temporary protection all remain critically important. However, a focus on other protections for all noncitizens facing deportation is equally important. Deportation has become a major international system that transcends the power of any single nation-state. Its methods have migrated from one regime to another; its size and scope are substantial and expanding; its costs are enormous; and its effects frequently constitute major human rights violations against millions who do not qualify as refugees. In recent years there has been increasing reliance by states on generally

¹ Professor of Law, Thomas F. Carney Distinguished Scholar, and Co-Director, Center for Human Rights and International Justice at Boston College. I am most grateful to the editors of this journal and to an anonymous reader for careful, exceptionally helpful critique and commentary.

applicable deportation systems, led in large measure by the United States’ radical 25 year-plus experiment with large-scale deportation. Europe has also witnessed a rising tide of deportation, some of which has developed in reaction to European asylum practices. Deportation has been facilitated globally (e.g., in Australia) by well-funded, efficient (but relatively little known) intergovernmental idea sharing, training, and cooperation. This global expansion, standardization, and increasing intergovernmental cooperation on deportation has been met by powerful — if in some respects still nascent — human rights responses by activists, courts, some political actors, and scholars.

It might seem counterintuitive to think that emerging ideas about deportation protections could help refugees and asylum seekers, as those people by definition often have greater rights protections both in admission and expulsion. However, the emerging anti-deportation discourses should be systematically studied by those interested in the global refugee regime for three basic reasons.

First, what Matthew Gibney has described as “the deportation turn” has historically been deeply connected to anxiety about asylum seekers. Although we lack exact figures of the number of asylum seekers who have been subsequently expelled worldwide, there seems little doubt that it has been a significant phenomenon and will be an increasingly important challenge in the future. The two phenomena of refugee/asylum protections and deportation, in short, are now and have long been linked. What has sometimes been gained through the front door, so to speak, may be lost through the back door.

Second, current deportation human rights discourses embody creative framing models that might aid constructive critique and reform of the existing refugee protection regime. They tend to be more functionally oriented, less definitional in terms of who warrants protection, and more fluid and transnational.

Third, these discourses offer important specific rights protections that could strengthen the refugee and asylum regime, even as we continue to see weakening state support for the basic 1951/1967 protection regime. This is especially true in regard to the extraterritorial scope of the (deporting) state’s obligations post-deportation.

This article particularly examines two initiatives in this emerging field: The International Law Commission’s Draft Articles on the Expulsion of Aliens and the draft Declaration on the Rights of Expelled and Deported Persons developed through the Boston College Post-Deportation Human Rights Project (of which the author is a co-director). It compares their provisions to the existing corpus of substantive and procedural protections for refugees relating to expulsion and removal. It concludes with consideration of how these discourses may strengthen protections for refugees while also helping

to develop more capacious and protective systems in the future.

“Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one — the right to remain here — has a like dignity.”

Supreme Court Justice William O. Douglas, 1952²

“We need a national effort to return those who have been rejected . . . and we are working on that at the moment with great vigor.”

Angela Merkel, October 15, 2016³

I. Introduction

This article considers the relationship between two human rights discourses⁴ (and two specific legal regimes): refugee and asylum protection and the evolving body of international law that regulates expulsions and deportations.⁵ Legal protections for refugees and asylum seekers are, of course, venerable, well-known, and in many respects still cherished, if challenged and perhaps a bit frail. Anti-deportation discourse is much newer, multifaceted,

2 *Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952).

3 See *Deutsche Welle* (2016).

4 By “discourse” I mean, essentially, a formal way of thinking expressed through language. Human rights law in general, and refugee and deportation law in particular are, in this sense, structures that determine the significance, meaning, and function of various individual elements of rights claims within each system (Tetiel 2002). Put another way, the two related politico-legal regimes — one long-standing and highly developed, the other nascent and inchoate — constitute institutionalized patterns of knowledge that sustain disciplinary structures as they connect knowledge and power (Foucault 1972). In Habermasian terms, debates over the rights of refugees and of the deported represent the “reflective form” of communicative action. They are different forms of “rightness claims” about the kind of treatment we owe each other as persons (Habermas 1996).

5 This article uses the terms, “deportation,” “removal,” and “expulsion” interchangeably, to describe the phenomenon generally defined in the Article 2 of the International Law Commission’s *Draft Articles on the Expulsion of Aliens*. See ILC, Draft articles on the expulsion of aliens, with commentaries, U.N. Doc. A/69/10, ¶ 44 (2014) [hereinafter “ILC Draft Articles”]:

For the purposes of the present draft articles:

(a) “expulsion” means a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;

(b) “alien” means an individual who does not have the nationality of the State in whose territory that individual is present.

There are, of course, important differences among various types of expulsions, as well as different usages of the term “deportation.” Further, as the term “aliens” is used by the International Law Commission (ILC), I will also use it where applicable, despite the well-known scholarly and public debate about its propriety, particularly when preceded by the adjective “illegal.” In other contexts I will use the term “noncitizens,” though this, too, raises some analytic difficulties.

and evolving.⁶ It is essentially a young work in progress. It has arisen in response to a rising tide of deportations, and the worrisome development of massive, harsh deportation machinery in the United States (Meissner et al. 2013, 8-9), as well as in other nation-states including (but not limited to) Germany, the United Kingdom, France, Mexico, Australia, and South Africa.⁷ Though largely a phenomenon of the Global North, deportation ideas and practices are spreading rapidly around the world.⁸

In response, human rights discourse and emerging legal norms relating to deportation go beyond the protections against the expulsion of refugees that are primarily derived from the Universal Declaration on Human Rights, the 1951 Convention relating to the Status of Refugees (the “Refugee Convention” or “1951 Convention”), and the 1967 Protocol relating to the Status of Refugees (the “1967 Protocol”).⁹ Anti-deportation norms may also be derived from the Universal Declaration on Human Rights, as well as provisions and interpretations of the 1966 International Covenant on Civil and Political Rights (ICCPR),¹⁰ the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹¹ the European Convention on Human Rights (ECHR),¹² the American Convention on Human Rights,¹³ case law of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights and the Inter-American Commission, various other regional instruments, some national case law, and such other miscellaneous sources of emerging law and discourses as the EU Returns Directive.¹⁴ This emerging human rights legal discourse also encompasses interpretations of state domestic norms (such as US due process and statutory rights), and recent scholarship and initiatives by activists and nongovernmental organizations (NGOs) relating to expulsion and post-deportation

6 See generally, Kanstroom (2007a) (describing historical evolution of the US deportation system); De Genova and Peutz (2010) (critiquing rise of global deportation systems); Kanstroom (2012) (analyzing effects of US deportation post-1988 and surveying US deported populations abroad); Golash-Boza (2015) (critical analysis of contemporary deportation).

7 For statistical compilations of worldwide trends and links to various informational and advocacy organizations, see the Deportation Global Information Project, developed by the author and colleagues at the Post Deportation Human Rights Project, available at: <http://postdeportation.org/>. See also De Genova and Peutz (2010), Golash-Boza (2015), and Weber (2015).

8 See e.g., Seelke and Finklea (2011) (highlighting Mexico’s increasing attention to its southern border), and Boggs (2015) (deportations of children up 117 percent in Mexico from 2013 to 2014).

9 See Universal Declaration of Human Rights Article 14: “Everyone has the right to seek and enjoy in other countries asylum from persecution.” Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 A (III); Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

10 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85.

12 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, E.T.S. 5.

13 Organization of American States (OAS), American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

14 Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98-107 (EC).

monitoring (which is especially salient in the context of deported refugees and asylum seekers).¹⁵

This article's main goal is to consider various aspects of how these two discourses and legal regimes do and might relate to each other. More specifically, I want to explore how the more recent understanding and development of both substantive rights *against* removal for some migrants (who are not refugees) and substantive and procedural rights during *and after* removal might affect our understanding of the refugee protection regime.¹⁶

My basic thesis is this: the global refugee regime, though challenged both theoretically and in practice, must be maintained and strengthened. Its historical focus on developing criteria for admission into safe states, on protections against expulsion (i.e., *non-refoulement*), and on regimes of temporary protection all remain critically important.¹⁷ However, a prioritized focus on other protections for those who do not qualify as refugees but who also face deportation is critically important, too (Kanstrom 2016). Deportation has become a major international system that transcends the power of any single nation-state.¹⁸ Its methods have migrated from one regime to another; its size and scope are substantial and expanding; its costs are enormous; and its effects frequently constitute major human rights violations against millions who do not qualify as refugees.

II. *Non-refoulement* and Its Limitations

When it comes to expulsion, the core and most important norm of refugee law is that of *non-refoulement* — a strong prohibition against the deportation (functionally defined in Article 33 of the Refugee Convention [“in any manner whatsoever”]) of *certain* migrants in *certain* circumstances.¹⁹ Indeed, one might well argue that *non-refoulement* is the “cornerstone” of refugee protection, since refugees do not have an affirmative right to enter a particular state.²⁰ The principle of *non-refoulement* applies to asylum seekers, who may of course ultimately be found to be refugees. Thus, it is an established principle of international refugee law that asylum seekers should not be returned or expelled pending a final determination of their status.²¹

15 See e.g., <http://www.refugeelawinformation.org/post-deportation-monitoring>; see also Podeszfa and Manicom (2012).

16 I am certainly not the first to suggest connections of this type (see e.g., Gibney 2008; Gibney and Hansen 2003). However, I am unaware of any prior systematic treatment of the topic as contained herein in light of recent advancements regarding the rights of expelled and deported persons.

17 See e.g., Kerwin(2014) and Bergeron (2014).

18 See ILC Draft Articles, commentary (1).

19 I am grateful to an anonymous reviewer for highlighting this point. The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion” criteria) and does not come within the scope of one of its exclusion provisions (UNHCR 2007).

20 See UNHCR (ibid.) using “cornerstone” phrasing.

21 The Executive Committee of UNHCR (1977a), in its Conclusion No. 6, “Non-refoulement,” para. (c), reaffirmed “the fundamental importance of the principle of non-refoulement . . . of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.”

And yet, as discussed more fully below, asylum seekers may face expulsion in three distinct scenarios, each of which presents a unique challenge.²² First, asylum seekers might be expelled to a third country without being given access to the procedures to which they are entitled under international law. This would be manifestly illegal,²³ though it undoubtedly happens.²⁴ Second, asylum seekers whose claims are denied — either because they are deemed not to have stated a valid claim on the merits, or because they are not deemed credible or because they fall into an exception category such as the exclusion clauses enumerated in Article 1F of the 1951 Convention — face possible expulsion (UNHCR 1997). This is a rising phenomenon, especially in Europe (The Telegraph 2016). For example, the so-called “Joint Way Forward” declaration between the European Union and Afghanistan, aims “to establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals who do not fulfill the conditions in force for entry to, presence in, or residence on the territory of the European Union”²⁵ However, as a prominent group of 25 NGOs stated, the declaration “gives clear signals that Europe will once more engage in a conduct that puts into question its obligation to protect those fleeing conflicts or persecution and to safeguard the human rights of all persons.”²⁶ Third, even asylum seekers whose claims are granted may face expulsion for subsequent conduct. Indeed, in some cases, even naturalization may not fully protect against this.²⁷

Moreover, *non-refoulement*, for all its prominence and power, is a focused and limited protection.²⁸ It does not prohibit deportation as such. Rather, it precludes removal, directly or indirectly, to a place where refugees’ lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group, or political opinion (Lauterpacht and Bethlehem 2003). Nor does it protect all refugees.²⁹

III. The Rise of Deportation As a Global Phenomenon

In recent years there has been increasing reliance by states on generally applicable deportation systems, led in large measure by the United States’ radical 25 year-plus experiment with deportation.³⁰ Europe has also witnessed a rising tide of deportation, which has developed, in part, in reaction to European asylum practices.³¹ Deportation has also been facilitated globally (e.g., in Australia) by well-funded, efficient (but relatively little

22 Thanks to an anonymous reviewer for suggesting more specificity on this point.

23 Unless expulsion is to a “safe third country.”

24 See e.g., Human Rights Watch (2016).

25 https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf.

26 <https://www.icmc.net/sites/default/files/documents/statement-on-afghan-refugees-2016.pdf>.

27 See Macklin and Baubock (2015, 2), highlighting, for example, that the British Nationality Act authorizes the Secretary of State for Home Affairs (Home Secretary) to deprive a person of British citizenship where she “is satisfied that deprivation is conducive to the public good.”

28 UNHCR (2007) is of the view that the prohibition of *refoulement* of refugees also constitutes a rule of customary international law.

29 Art. 33(2) excludes those “whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

30 See generally, Kanstroom (2007a) and Kanstroom (2012).

31 This is, of course, a controversial point about which one must exercise great care so as not to blame victims or to support reactionary politics (Gibney 2003).

known) intergovernmental idea sharing, training, and cooperation (Ghezelbash 2015).³² The global expansion, standardization, and increasing intergovernmental cooperation on deportation has been met by powerful — if in some respects still nascent — human rights responses by activists, courts, some political actors, and scholars.³³

To those primarily concerned about the dreadful plight of refugees, it might seem counterintuitive or perhaps even a waste of time to focus on these emerging ideas about general deportation protections, as refugees, as noted, already have specific rights protections against expulsion.³⁴ However, not only are the emerging anti-deportation discourses³⁵ significant on their own merits, but, for three basic reasons, they also may be enlightening and useful as an aid to imagining future developments in refugee protection.

First, what Matthew Gibney (2008) has described as “the deportation turn” has historically been deeply connected to anxiety about asylum seekers.³⁶ Although we lack exact figures of the number of asylum seekers who have been subsequently expelled worldwide, there seems little doubt that it has been a significant phenomenon and will be an increasingly important challenge in the future. In early January 2016, Ross Douthout wrote in the *New York Times* that “prudence requires . . . closing Germany’s borders to new arrivals [and] beginning an orderly deportation process for able-bodied young men.” He urged Germans to give up the “fond illusion that Germany’s past sins can be absolved with a reckless humanitarianism.” Throughout 2016, such calls have increased throughout the Global North. Germany, for example, recently announced a new plan to deport over 12,000 Afghans following a new memorandum of understanding with the Afghan government. This is an accelerating phenomenon (German Federal Office for Migration and Refugees 2016). In November 2016, new statistics showed that the number of German deportations had reached a record high in 2016. Some 19,914 people had been deported in the first three-quarters of the year, just short of the 20,888 people deported in all of 2015 (Deutsche Welle 2017). The rather chilling reality is that the German government now says that there are some 550,000 people living in Germany whose asylum applications have been rejected (ibid.). The two phenomena of refugee/asylum protections and deportation, in short, are now and have long been linked.³⁷ What has sometimes been gained through the front door, so to speak, may be lost through the back door.

32 Unpublished PhD Dissertation on file with author examining how policy makers are increasingly drawing on practices in other jurisdictions when developing immigration law and policy.

33 See generally, Wouters (2009) and Wojnowska-Radzińska (2015).

34 See e.g., Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005 O.J. (L 326) 13 (EC).

35 I use the plural intentionally to highlight the fact that discourse is taking place in various venues and is of various rhetorical and politico-legal modes. This article focuses rather narrowly on two major examples. In future work, I intend to examine other anti-deportation discourses more fully.

36 Gibney (2008) notes that the UK Labour Party used a discourse of human rights protection to enforce such policies, stressing the need to protect the asylum system from “bogus” refugees. See also Gibney and Hansen (2003).

37 As Kees Wouters (2009, 2) has noted, “While the idea of protecting people from being removed to a country where they run a risk of being subjected to human rights violations seems firmly accepted by States in international law, the exact content and scope of such protection is far from clear.” This remains true. But this lack of systematic development in this realm may ironically aid creativity and innovation.

Second, current deportation human rights discourses embody creative framing models that might aid constructive critique and reform of the existing refugee protection regime.³⁸ They tend to be more functionally oriented, less definitional in terms of who warrants protection, and more fluid and transnational.³⁹

Third, deportation human rights discourses offer important *specific* rights protections that could strengthen the refugee and asylum regime, even as we continue to see weakening state support for the basic 1951/1967 protection regime.⁴⁰ This is especially true in regard to the extra-territorial scope of the (deporting) state’s obligations after expulsion.⁴¹

IV. A Crisis of Both Protection and Assimilation

The desperate plight of refugees (and other “forced migrants”) from Syria and the Middle East more generally has focused attention on various problems of the current global refugee protection system. The very naming of the situation illustrates the deep analytic — if insufficiently protective — power of the refugee idea. Is this a “migrant crisis” (Rothman 2015) or a “refugee crisis?” Is it really a “crisis” at all?⁴² However we name it, the large number of newcomers highlights certain long-standing problems relating to refugees and asylum seekers.

First, of course, is the problem of definition itself. The basic structure of refugee law is a rational, linguistic, and definitional one, seeking to differentiate *ex ante* the rights of certain migrants from others. There is, of course, much to be said for such an approach, but it raises substantial difficulties particularly for those who fall outside accepted definitions while still fearing harm if excluded or deported.⁴³

Second is the problem of admission and permanent status versus temporary protection. Even those (distressingly few) US and European politicians who support robust protections for refugees and asylum seekers recognize serious coordination and political problems when asylum begins to look more like permanent immigration. German Chancellor Angela Merkel, for example, highlighted the rather undramatic virtue of patience as she asserted that “[t]he refugee question requires a European solution — a *sustainable*

38 For an interesting comparison between deportation and forced migration generally, see Gibney (2013).

39 See e.g., the ILC, Draft articles on Responsibilities of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/56/10 (2001) (which embody the idea that that any act of a State’s agent performed outside its territory or producing an effect outside its territory engages the responsibility of that State).

40 See e.g., Gondek (2005), noting that extraterritorial application of treaties in general public international law differs from that of human rights treaties.

41 See *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18 (2011); *Al-Jedda v. United Kingdom*, App. No. 27021/08, 53 Eur. H.R. Rep. 789 (2011); *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333. For an excellent overview of these cases, see Miltner (2012).

42 As one advocate noted in late 2015, Europe successfully integrated around a million asylum seekers and refugees from the Balkans during the mid-1990s. Moreover, as Europe struggled over some 800,000 migrants, Jordan, Lebanon, and Turkey were “hosting” almost four million Syrian refugees. On this view, with a population of over 500 million, “a million newcomers need not represent a crisis” for Europe (Koser 2015).

43 For example, the distinction between those fleeing desperate economic oppression and those fleeing political persecution has long been recognized as intellectually unstable, if not ideologically imbalanced and immoral.

solution — *and that solution requires time*” (Oltermann 2016, emphasis added). An increasingly vocal chorus, however, recapitulates the debates of the 1990s (and of course earlier) by questioning the entire asylum enterprise if it implies long-term admission and permanent status.⁴⁴ Right-wing politicians regularly highlight the twin fears of crime and terrorism with barely concealed xenophobic undertones. Frauke Petry of the right-wing, anti-immigrant Alternative für Deutschland (AfD) Party speaks darkly of challenges to “social cohesion” and alleges an “‘ethnicisation’ of violence” (Oltermann 2016). Often, such impulses translate into calls for stricter border controls, Trumpian walls, and the like. Indeed, Ms. Petry once reportedly said that border police should be empowered to shoot refugees who cross the German border from Austria without permission (Connolly 2016).⁴⁵ The French National Front leader, Marine Le Pen, referred to Canada’s (rather modest) plan to admit 25,000 Syrian refugees as “madness” (Mayor 2015). Particularly in the Global North, such critiques of generous refugee admission policies have often led to calls for more robust deportation systems. Stricter asylum adjudication practices then spawn more deportations. As a recent *New York Times* article noted, “Germany, once seen as Europe’s most welcoming country, rejected or deported thousands of asylum seekers last year, as public support for migrants waned . . .” (Goldman 2017). In October 2016, Chancellor Merkel herself said deportations had to happen more quickly, to show the electorate that concerns over migration were being taken seriously. In a remarkable turnaround, Merkel intoned that it was “undisputed” that “[w]e need a national effort to return those who have been rejected,” and that “we are working on that at the moment with great vigor” (Deutsche Welle 2016).

It is thus apparent that the current “crisis” involves *both* the propriety of temporary protection and the nature of the long-term solution. A widely reported, poignant interview with a 13-year-old Syrian boy illustrates the issue well (Dore 2015). Intuitively understanding the resistance of many Europeans to merging temporary refugee protection with long-term immigration policy, he simply pled, “*Please help the Syrians . . . The Syrians need help now. Just stop the war.*” To this he added a tragic, sad offer that he thought might garner additional support: “*We don’t want to stay in Europe, just stop the war.*”

V. The Definitional Model and Its Discontents

Let us begin with legal basics. The definition and protection of refugees — with all of its complexities, gaps, variations, and implementation lapses — must be counted as one of the great politico-legal achievements of the twentieth century, though the more general concept of asylum is of course an ancient one (UNHCR 1993).⁴⁶ It is well-known — to the point of hardly needing to be said — that we now differentiate the very limited rights of “international migrants” from the powerful, enforceable rights claims of refugees, i.e., those who fear “persecution” *for reasons of* “race, religion, nationality, membership of a

44 See e.g., Kanstroom (1993).

45 “People must stop migrants from crossing illegally from Austria [into Germany] . . . If necessary, [they] should use firearms. I don’t want this, but the use of armed force is there as a last resort” (Connolly 2016).

46 “The concept of asylum has been in existence for at least 3,500 years and is found, in one form or another, in the texts and traditions of many different ancient societies.”

particular social group or political opinion.”⁴⁷ Thus, refugee law represents an analytic “definitional turn” in which the category into which a person may be placed has enormous implications for rights claims and systematic protections. The category necessarily involves both the person and the harm s/he may face.

This is, of course, not the only way to conceive of human rights protections, though one sees similar approaches in such other human rights instruments as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴⁸ and the Convention on the Rights of the Child.⁴⁹ One could, for example, focus *primarily* on the nature of the harm. The Convention Against Torture (CAT), for example, aims more at the definition of the *conduct* of torturers than towards a categorization of the *person* who fears such conduct.⁵⁰ This illustrates the significance of the name of CAT (“against torture”), as compared to the Convention relating to the Status of Refugees. One of the implications of the CAT model is its virtually total lack of exclusion criteria compared to the refugee regime.

Further along this continuum, consider the operation of such concepts as arbitrariness and proportionality, which act as functional *restraints on government action* without demanding a threshold definition of *either* the category of the rights-claimant herself or even of the substance of the relevant conduct.

Simply put, the emerging body of human rights discourse relating to deportation is more like the latter two types than it is like refugee law in this regard. It is largely functional, less categorical as to the person, and less rigid than refugee law in its exclusions. We must consider whether this matters.

There is no question that many millions of lives have been saved as a result of the basic conceptualization of the rights of refugees and the attendant protection regimes. Still, pride in this prodigious accomplishment has always — from the very beginning — been accompanied by critique,⁵¹ by fear of losing hard-won protective concepts, structures, and mechanisms, and by recognition of the failure to fully address the demoralizing array of humanitarian crises with which our world seems inevitably to be confronted.⁵² There are, for example, long-standing regional refugee definitions that go beyond those of the 1951

47 Persecution is generally recognized as having been designed to be a flexible concept (Grahl-Madsen 1966, 193). It has been equated with “severe measures and sanctions of an arbitrary nature incompatible with the principles of human dignity set out in the UDHR” (ibid.).

48 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

49 Convention on the Rights of the Child, Nov. 20 1989, 1577 U.N.T.S. 3.

50 I do not mean to suggest that defining torture is simple, but merely that the methodology of the CAT is somewhat different from the Refugee Convention, which necessitates a definition of persecution, but also many other terms in order to create a cognizable “refugee.”

51 See e.g., Millbank (2000).

52 Indeed, as early as 1952, the distinction between millions of “displaced persons” and “refugees” was recognized as a conceptual and practical problem (Rothman 2015).

Convention and the 1967 Protocol.⁵³ More recent initiatives have also sought to develop greater protections through such concepts as “forced migration,” “internally displaced persons,” “environmental refugees” and “vulnerable migrants.”⁵⁴ Some of these trend towards a more functional approach, while others follow the definitional model of refugee law itself.

VI. The Possible Value of a Functional Turn to Deportation Rights Protection

To assess the possible value added of deportation discourses to such protective models, consider the nature of protections available to refugees and to those who seek asylum. Such protections do not include a “right” to be admitted to state territory. Indeed, state sovereignty, state control over territory, and state control over persons on state territory are venerable, foundational principles that undergird traditional formulations of the “right” or “competence” of the state to grant asylum.⁵⁵ As Atle Grahl-Madsen put it, “[t]he right of a State to grant asylum flows from its territorial integrity, which is a pillar of international law” (Grahl-Madsen 1980).⁵⁶ Thus, insofar as one speaks of a general “right” to asylum, the traditional view has been that the “right of asylum” is the right of a state *to grant asylum*, not the right of an individual to obtain it (Goodwin-Gill 1983).⁵⁷ A grant of asylum in this sense is a discretionary exercise of state sovereignty. However, a “right” to seek asylum may be understood as a variant of the right to “leave any country, including his [sic] own.”⁵⁸

Asylum seekers do have powerful rights against removal to a place where they might face persecution. As Article 32 of the 1951 Convention relating to the Status of Refugees states, “The Contracting States *shall not expel* a refugee lawfully in their territory save on grounds of national security or public order”(emphasis added). Article 33 mandates that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race,

53 The Convention Governing the Specific Aspects of Refugee Problems in Africa, for example, includes article I(2), “the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” Convention governing the Specific Aspects of Refugee Problems in Africa, *adopted* Sept. 10, 1969, 1001 U.N.T.S 45 (entered into force 20 June 1974)). The 1984 Cartagena Declaration on Refugees expands the refugee definition to include “persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of *human rights* or other circumstances which have seriously disturbed public order.” Cartagena Declaration on Refugees, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984-85).

54 See International Migrants Bill of Rights (IMBR) Article 4 (IMBR Initiative 2013).

55 See e.g., Morgenstern (1949): “There can thus be no doubt that states are competent to grant asylum.”

56 See generally, Boed (1994).

57 The “individual . . . has no right to be granted asylum” as the right of asylum “appertains to states” (Goodwin-Gill 1983). The American Convention on Human Rights (Article 22(7)) does, however, include both the right to seek and be granted asylum.

58 Article 13(2) of the Universal Declaration of Human Rights; see also Article 12(2), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

religion, nationality, membership of a particular social group or political opinion.”⁵⁹ These provisions stand in sharp contrast to Article 34, which is entitled “Naturalization” and is noteworthy (when compared with Articles 32 and 33) for its discretionary tone (“shall as far as possible facilitate . . .”).

Thus, although neither the 1951 Convention nor the 1967 Protocol provide a right to be *granted* asylum,⁶⁰ the evolution of human rights law has made clear that certain aspects of the asylum formulation may be understood as individual rights. Thus, as noted above, once one is recognized as a refugee, a right *not to be expelled* to face one’s persecutor is clear. Indeed, the right exists even prior to formal recognition. Although the Refugee Convention does not contain any explicit obligations on states if a refugee is removed in breach of Article 33 of the Refugee Convention, an abdication of adjudicative or protective responsibility would clearly nullify effective protection from *refoulement*. States could too easily evade their responsibility simply by removing all individuals seeking international refugee protection (Wouters 2009).

The principle of *non-refoulement* is thus a *duty* of a state (and may concomitantly be conceptualized as an individual’s right) not to return a person to a place of persecution (Goodwin-Gill 1983, 69-97).⁶¹ As Paul Weis put it many years ago, whereas asylum entails “admission, residence and protection,” *non-refoulement* is a “negative duty, not to compel a person to return to a country of persecution” (Weis 1969).⁶² Protection against *refoulement* has thus been well-described as “the cornerstone of international refugee and asylum law” (Wouters 2009, 23). States, in general, are obliged not to return a person to any country to face a risk of being subjected to serious harm or serious human rights violations.

59 The main restrictions result from the cessation clauses referred to in Article 1C and the exclusion clauses mentioned in Article 1D, E, and F of the Refugee Convention.

60 See Martin (1990), noting that the Convention does not guarantee asylum “even for those duly adjudged to be refugees under its provisions.” The Basic Law for the Federal Republic of Germany formerly provided at Article 16(2) that “[p]ersons persecuted on political grounds shall enjoy the right of asylum.” Grundgesetz [Constitution] [GG] art. 16(2) (Ger.). This was amended in May 1993 to preclude noncitizens from “safe” countries from receiving asylum in Germany. The fear that asylum had become in effect migration policy was a large part of the motivation for the change. See German Federal Ministry of the Interior (1993), arguing that the earlier form of the right of asylum, “gave persons suffering political persecution an entitlement to be granted asylum, leaving no scope for discretion. . . . The right of asylum has more and more turned into uncheckable vehicle of uncontrolled migration.”

61 However, one may still be sent elsewhere: a fact that has long raised serious concerns about the protective value of *non-refoulement*.

62 It must be noted, albeit with shame, that the US Supreme Court has interpreted the *non-refoulement* provision of the Refugee Convention to have no extraterritorial effect. *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993). *Cf.* Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, (1997) (United States violated the petitioners’ right to seek asylum as well as their right to life, liberty, and security of the person when it summarily returned interdicted Haitians — many of whom were subsequently arrested by Haitian authorities — without providing them with a meaningful opportunity to have their claims adjudicated). Conversely, the (non-binding) 1967 Declaration on Territorial Asylum, art. 3(1) provides that “No person . . . shall be subjected to measures such as rejection at the frontier.” Still, Article 3(2) provides an exception “for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.” Declaration on Territorial Asylum, art. 1(1), G.A. Res. 2312 (Dec. 14, 1967). *Cf.* UNHCR (1992) (“In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection.”)

However, the principle of *non-refoulement* does not preclude a state from sending an asylum seeker to a country in which [s]he would not be persecuted (Weis 1969, 166). It is a particular form of protection against removal to particularly defined places for particularly defined migrants. Recognition of a right against exclusion or expedited expulsion for a certain class of migrants is also recognized by other protective conventions (including regional instruments),⁶³ and has been interpreted as a part of other, more general human rights regimes.⁶⁴ For example, Article 3 of the 1984 Convention Against Torture prohibits the expulsion or return of a person where there is a real risk of torture:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁶⁵

In sum, both Article 33 of the Refugee Convention and Article 3 of CAT — the two most specific existing international law restraints on deportation — mandate very targeted, and potentially temporary, state obligations.⁶⁶

Let us consider in a bit more detail temporary protections against removal versus the potential accrual of long-term residence rights and more robust general protections against removal. The UN refugee regime, as noted, differentiates *non-refoulement* (Article 33)⁶⁷

63 See e.g., the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, Article III(3):

No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.

See also, Article 22(8) of the American Human Rights Convention adopted in November 1969:

In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.

64 Article 7 of the International Covenant on Civil and Political Rights (hereafter the ICCPR) and Article 3 of the European Convention on Human Rights and Fundamental Freedoms (hereafter the European Convention or ECHR) do not explicitly protect from *refoulement* but the supervising bodies have interpreted these articles to provide protection from *refoulement*.

65 CAT Article 2 provides: “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

66 Even though a person meets the criteria of the definition of a refugee of Article 1A of the Refugee Convention, there is neither an explicit obligation on the state or a right of the refugee to be granted legal status in any form, including a residence permit (Wouters 2009, 1; Goodwin-Gill [1983] 1996, 199-202).

67 Article 33(1) of the 1951 Convention, provides that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This is also an obligation under the 1967 Protocol by virtue of Article I(1). See also the UN Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967. In article 3(1) of this declaration it is stated that:

No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

from Article 34’s opportunities for asylum seekers to integrate and naturalize.⁶⁸ However, protections against expulsion continue for refugees long after the immediate period of their admission. Article 32(1) of the Refugee Convention protects refugees “lawfully in their territory” from expulsion except “on grounds of national security or public order.”⁶⁹ In addition, Article 32(2) mandates specific procedural safeguards for the expulsion of “lawful” refugees.⁷⁰ A refugee must be allowed to submit evidence to rebut the allegation of being a risk to the state’s national security or public order. Refugees also have a right to appeal the expulsion decision and to be represented.⁷¹ Article 32(3) requires that a refugee who is to be expelled must be allowed a reasonable time to seek legal admission into another country. Article 33(2) also allows the removal of refugees who are “a danger to the community” of the host country, provided that they “have been convicted by a final judgment of a particularly serious crime.” The relationship between Articles 32 and 33 is complex and its full explication is beyond the scope of this article. It does seem clear, however, that, although Article 33(2) contains no explicit safeguards, it *must* contain them implicitly, given the character of the prohibition of *refoulement* (Wouters 2009, 177).

VII. Specific Versus General Protections against Removal

The relationship between well-recognized specific rights against *refoulement* to face persecution or torture and broader rights protections against expulsion is complex and evolving.⁷² The allure of deportation for governments is powerful. Its utility for extended border control, national security, criminal law enforcement, labor market regulation, and various other forms of social control is enhanced by its flexibility and its anomalous legal

68 See generally, UNHCR (1977b).

69 Refugees who are lawfully within the territory of a state party include (1) a person who is admitted to a State party’s territory; (2) a person whose status has not (yet) been regularized but who has applied for a refugee status; and (3) a person whose claim for refugee status the host state has opted not to assess (Wouters 2009, 177; Hathaway 2005, 174-75, 183-85).

70 Article 32 of the Refugee Convention:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

71 However, where compelling reasons of national security require otherwise, even lawful refugees may be exempted from these rights.

72 See generally Kanstroom and Chicco (2015). The European Court of Human Rights (ECtHR) has recognized expulsion protections in the context of Article 2 (the right to live) and Article 1 of Protocols Nos. 6 and 13 (the abolition of the death penalty) to the European Convention of Human Rights (ECHR). The ECtHR has also accepted a prohibition of *refoulement* under Article 6, in exceptional cases (the right to a fair trial); under Article 5 (the right to liberty and security); under Article 8 (the right to private and family life); and perhaps under Article 9 (the freedom of thought, conscience and religion) (Wouters 2009, 187).

status.⁷³ Still, deportation can be harshly punitive. Deportation routinely separates families and causes disproportionate hardships. In the United States, the legal system provides some procedural protections, but virtually no substantive restraints on the power of government to deport even long-term legal residents with families for minor offenses.⁷⁴ The legal picture is a bit less stark in Europe, owing to the strength of various human rights norms applicable to deportation proceedings.⁷⁵ But even where human rights law provides a more protective framework, such as in Europe and in much of the Americas, legal protections remain insufficient.

The 1950 European Convention on Human Rights (ECHR)⁷⁶ and the 2000 European Union Charter of Fundamental Rights (the “Charter”)⁷⁷ protect important basic rights of noncitizens, including those facing deportation. Article 1 of the Charter protects the right to human dignity. Article 4 of the Charter and ECHR Article 3 prohibit torture, inhuman, or degrading treatment or punishment.⁷⁸ Article 3 of the Charter also protects the “right to the integrity of the person,” which may implicate the treatment of persons during the deportation process. Article 6 of the Charter and ECHR Article 5 guarantee the rights to liberty and security of the person.⁷⁹ Article 7 of the Charter and ECHR Article 8 govern the right to respect for private and family life. These have led to an especially important line of jurisprudence at the European Court of Human Rights. Article 8 of the Charter protects personal data, which could include exchanges of personal information among states regarding persons being or having been deported. Article 1 of Protocol No. 1 to the ECHR and Article 17 of the Charter protect the right to property (and its enjoyment), which may protect those who are deported without the opportunity to collect pay, belongings, or to arrange for the shipment or sale of their belongings. ECHR Article 14, Protocol 12, and Article 21 of the Charter protect the right to nondiscrimination on prohibited grounds.⁸⁰ Charter Article 19 and Article 4 of Protocol No. 4 of the ECHR prohibit collective

73 Deportation is commonly defined as a regulatory, civil (as opposed to criminal), non-punitive mechanism in which government agents are given unusually wide latitude (Kanstroom and Chicco 2015, 538).

74 See generally Kanstroom (2007a).

75 See e.g., Article 13 of the ECHR, which guarantees “an effective remedy before a national authority” for “everyone whose rights and freedoms . . . are violated.” *De Souza Ribeiro v. France*, Eur. Ct. H.R. 2066 (2006) (finding a violation of Article 13 where the State failed to provide minimum procedural safeguards needed to protect against arbitrary expulsion).

76 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

77 Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 2 [hereinafter Charter]. The Charter is a part of the EU constitution given treaty status in 2009 and binding the 28 EU member states. Charter rights incorporate the interpretation of ECHR rights (as determined by the ECtHR insofar as they are more rights friendly. Special thanks to Elspeth Guild for this point.

78 Article 5 of the Charter prohibits slavery and human trafficking.

79 Article 5 § 1(f) of the ECHR permits the arrest or detention of a foreigner to prevent unauthorized access to the state, or for the purpose of deportation or extradition (see Morano-Foadi and Andreadakis 2011).

80 ECHR, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”); ECHR art. 21 (“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”); ECHR Protocol No. 12, art. 1 (clarifying a general prohibition against discrimination).

expulsion⁸¹ and expulsion where there is a risk of return to a country where there is a well-founded fear of persecution or a real risk of torture, inhuman, or degrading treatment or punishment.⁸² Articles 24, 25, and 26 of the Charter protect the rights of the child, the elderly, and those with disabilities.⁸³ Articles 34 and 35 of the Charter protect the rights of “everyone” to social assistance and health care (Guild and Cahn 2013). Special protections for those who are lawfully resident are contained in Protocol No.7, Article 1 of the ECHR, which provides in relevant part that:

An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.⁸⁴

In addition, important EU directives protect long-term resident third-country nationals and guarantee certain family unification rights⁸⁵ Indeed, in a 2001 nonbinding recommendation, the Parliamentary Assembly of the Council of Europe concluded that settled immigrants should not be subject to expulsion (Council of Europe 2001). It is thus apparent, even from this sketch, that this emerging body of law is more broadly protective of many rights of noncitizens — including rights against deportation — than is refugee law.

The European Court of Human Rights (the “Court”) has developed a body of jurisprudence to protect and enhance these rights.⁸⁶ A particularly important line of cases has interpreted ECHR Article 8 relating to interference with the right to respect for family life.⁸⁷ Cases have considered not only spouses and children but also a much broader array of relationships, such as grandparents and siblings.⁸⁸ Indeed, long-term residence itself has also been recognized a source of powerful rights claims. The Court has expressed concern for “the network of personal, social and economic relationships that make up the life of every human being.”⁸⁹ The concept of “private life” encompasses “the right to establish and develop relationships with other human beings and the outside world” and “aspects of an individual’s social

81 In 2012 the ECtHR held that when Italian authorities rescued people in the Mediterranean and took them to Libya, it had breached the prohibition on collective expulsion. *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R..

82 Article 18 of the Charter references the Refugee Convention regarding the “right” to asylum.

83 See generally Davies (2012), analyzing the ways in which the Charter has helped to frame the ECtHR’s jurisprudence on the rights of migrants to bring family members with them.

84 It does, however, allow exceptions for cases where “expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

85 Council Directive 2003/109, 2003 O.J. (EC); Council Directive 2003/86, 2003 O.J. (EC).

86 See generally, Boeles et al. (2008) and Steinorth (2008).

87 *Moustaqium v. Belgium*, 13 Eur. H.R. Rep. 802 (1991); see also *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) (1988) (considering expulsion to affect family life with young daughter); *ZH (Tanzania) v. Sec’y of State for the Home Dep’t* [2011] UKSC 4 (appeal taken from Eng.); see also Thym (2014), *Dembour* (2003), and *Sherlock* (1998) (examining cases in which deportation is challenged on the basis of Article 8).

88 See *Nasri v. France*, 320 Eur. Ct. H.R. 11, P 44 (1995) (giving weight to the fact that several of applicant’s siblings have become French citizens); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A), P 45 (1979) (“Family life’, within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life”).

89 *Slivenko et al. v. Latvia*, 2003-XI Eur. Ct. H.R. P 97; *A.W. Khan v. United Kingdom*, App. No. 4786/06 PP 31-33 (2010).

identity.” Therefore, “the totality of social ties between settled migrants and the community in which they are living” may be protected pursuant to Article 8.⁹⁰

A complex legal picture involving many fact patterns has emerged. The Court has held that Article 8 does not require states to treat settled immigrants the same way as their own nationals.⁹¹ It has also, however, viewed its interpretive power as dynamic and the European Convention on Human Rights itself as a “living instrument.”⁹²

In cases that involve expulsion due to crime, the Court will determine whether the interference with the rights guaranteed by Article 8 was “necessary in a democratic society and proportionate to the legitimate aim pursued.”⁹³ This requires consideration of an array of factors, including the nature and seriousness of the offense, and the time elapsed and applicant’s conduct since its commission (Thym 2008). The Court will also attempt to measure the impact an expulsion order would have on the immigrant and his or her family.⁹⁴ In addition, the Court will weigh “the best interests and well-being of children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination.”⁹⁵

Another intriguing human rights model was developed in the UN Human Rights Committee (the “Committee”) case of *Nystrom v. Australia*,⁹⁶ which focused on whether the right “to enter one’s own country”⁹⁷ was violated by deporting a man who had lived there legally since he was 27 days old. The Committee majority held that “there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.”⁹⁸ In such circumstances, deportation is inherently arbitrary and thus illegal.⁹⁹

90 *Uner v. The Netherlands*, 2006-XII Eur. Ct. H.R. P 59.

91 *Gul v. Switzerland*, 22 Eur. H.R. Rep. 93, P 38 (1996).

92 Thym (2014, 109).

93 See, e.g., *A.W. Khan v. United Kingdom*, App. No. 4786/06 PP 31-33 (2010); *A.A. v. United Kingdom*, App. No. 8000/08 (2011) (applicant who was a minor when he had committed the offense and the nature and seriousness of the act was not significant). Cf. *Balogun v. United Kingdom*, App. No. 60286/09 (2013) (applicant’s family ties were not strong enough to amount to “family life.” His deportation would have a serious impact on his private life, given his length of stay in the United Kingdom since the age of three and the limited ties with Nigeria. However, his repeated history of drug-related offences, the majority of which were during his adulthood, led the Court to conclude that the interference with his right to respect to private life was not disproportionate.)

94 Criteria include the length of the applicant’s stay in the country from which he or she is to be expelled, the nationalities of the various persons concerned, the applicant’s family situation, whether the spouse knew about the offense when she or he entered into a family relationship, whether there are children of the marriage and their age, and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. *Id.* at 94.

95 *Uner v. The Netherlands*, 2006-XII Eur. Ct. H.R. P 58.

96 *Nystrom v. Australia*, U.N. Doc. CCPR/C/102/D/1557/2007 (2011).

97 International Covenant on Civil and Political Rights art. XII, P 4, Dec. 16, 1966, 999 U.N.T.S. 171 (“No one shall be arbitrarily deprived of the right to enter his own country”).

98 *Nystrom v. Australia*, U.N. Doc. CCPR/C/102/D/1557/2007 P 7.4 (2011).

99 See Hannum (1987) (arguing that the proper interpretation of this phrase “includes nationals, citizens and permanent residents” and is “most consistent with the ordinary meaning of the words in the text, and with at least portions of the travaux préparatoires”); Nowak ([1993] 2005); and Foster (2009) (“One’s connection to one’s own country is . . . in a fundamental way, about a person’s identity.”).

Such jurisprudence has inspired some interesting recent initiatives relating to the general rights of those who face deportation.¹⁰⁰ For example, Article 11 of the International Migrants Bill of Rights (IMBR)¹⁰¹ restates well-accepted protections against “discriminatory or arbitrary expulsion or deportation, including collective expulsion.” Article 13 provides that “[e]very migrant has the right against *refoulement*.” This right is linked to such well-accepted protections against expulsion as, “where there are substantial grounds for believing that the migrant would be subjected to torture or cruel, inhuman or degrading treatment or punishment;” and “where the migrant’s life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.” The IMBR then goes further, however, protecting against expulsion “to another State where there are substantial grounds for believing that the migrant would be subjected to a serious deprivation of fundamental human rights;”¹⁰² and even suggesting that no migrant “should” be expelled, “where there are substantial grounds for believing that the migrant would be subjected to other serious deprivations of human rights.”¹⁰³

Such general human rights prohibitions on *refoulement* tend more clearly to affirm rights of individuals than to define specific state obligations (Wouters 2009, 15).¹⁰⁴ Still, as we shall see, human rights protections relating to the deportation process itself may augment and clarify such duties.

VIII. The International Law Commission’s Draft Articles on the Expulsion of Aliens

The International Law Commission (ILC) was created by the UN General Assembly in 1947 as part of its mandate to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”¹⁰⁵ The Commission began its work regarding the expulsion of “aliens” in 2004.¹⁰⁶ Since then, Special Rapporteur Maurice Kamto prepared nine separate reports which culminated in “Draft Articles” being adopted by the Commission on June 6, 2014, followed by commentaries adopted on August 5, 2014.¹⁰⁷ The Commission then recommended that the General Assembly “take note of the Draft Articles”; annex them to a resolution; disseminate them as widely as possible; and, ultimately, consider a convention based on them (ILC 2014). Although the Draft Articles received a rather unfriendly response from

100 See generally, von Sternberg (2014).

101 International Migrants Bill of Rights, developed at Georgetown Law Center. See IMBR Initiative (2013).

102 Article 13(4).

103 Article 13(5).

104 Of course, all discourses have definitional complexities. Even the apparently simple term “migrant” is the subject of considerable contestation. It was historically roughly defined by UNHCR as “any person who changes his or her country of usual residence.” See, e.g., IMBR (defining “migrant” simply as “a person who is outside of a State of which the migrant is a citizen or national, or, in the case of a stateless migrant, the migrant’s State of birth or habitual residence”). There are also a number of more capacious definitions that focus less on residence and permanence and more on the simple fact of international transit (UN DESA 1998).

105 UN Charter, Art. 13. See also ILC Statute, Article 1.

106 As noted above, this is the term of the article used by the Commission.

107 The reports are available at http://legal.un.org/ilc/guide/9_12.shtml.

a number of nation-states,¹⁰⁸ and were ultimately not acted upon by the General Assembly, they constitute an important step forward in the conceptualization of expulsion as a subject of international law and of the rights of those who face deportation.

The Draft Articles reflect much work by excellent international lawyers, some (though perhaps not enough) input from human rights experts, and serious engagement with the often repressive and reactionary contemporary agendas of governments (*ibid.*).¹⁰⁹ They involve not only “the codification” but also “the progressive development of fundamental rules on the expulsion of aliens.”¹¹⁰ In some respects they are path breaking, although they leave many questions unanswered and much important work still to be done (Kanstroom 2016). Their current status is unclear. Nevertheless, as we consider the state of anti-deportation legal discourse, the Draft Articles must be a major focal point.

The Draft Articles contain 31 provisions. Some simply seek to restate (and thus to “codify”) existing and well-accepted aspects of international law. For example, Article 2 offers what would seem a basic, uncontroversial definition of the terms, “expulsion” and “alien”:

(a) “expulsion” means a formal act or conduct attributable to a state, by which an alien is compelled to leave the territory of that state; it does not include extradition to another state, surrender to an international criminal court or tribunal, or the non-admission of an alien to a state;

(b) “alien” means an individual who does not have the nationality of the state in whose territory that individual is present.

As I have noted elsewhere, however, even the most basic definitional aspects of a document such as this warrant careful scrutiny (*ibid.*). For example, it is far from clear what is actually meant by the phrase, “conduct attributable to a state.” Attributable by whom? In what context? Is the welter of coercive (indeed sometimes oppressive), but formally “voluntary” return mechanisms developed in the United States and Europe covered by this definition?¹¹¹ Paragraph 3 of the General Commentary to the Draft Articles states:

the formulation “alien[s] subject to expulsion” . . . is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process . . . [including] the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision.¹¹²

This important, but insufficiently comprehensive phrasing does not clearly capture a variety of informal, ostensibly voluntary “return” methods.¹¹³

108 See generally Murphy (2014).

109 See also, the US response: <https://www.state.gov/documents/organization/153456.pdf>.

110 I will not engage herein with the controversial choice of the drafters of the Draft Articles to use the term “alien.” It is not a usage that I favor, however.

111 E.g., “voluntary departure” is often coerced by agents of Customs and Border Protection, and Immigration and Customs Enforcement (Kanstroom 2012).

112 ILC Draft Articles.

113 See generally Kanstroom (2012). Similarly, Article 10 (“Prohibition of Disguised Expulsion”) covers some prohibited practices; though, again, it is not clear about ostensibly legal, but formally “voluntary” mechanisms.

Other provisions of the Draft Articles aim to reconcile the rights of “aliens” in expulsion proceedings with such special protections as those of the Refugee Convention, the Convention Against Torture, the Convention on the Rights of the Child, etc. This is a critically important aspect of the project in that the drafters’ goal was clearly to *expand* protections, not to limit them. However, the phrasing of some provisions is ambiguous, thereby raising questions about the exact relationship envisioned between what one might term two forms of *lex specialis*. Article 3, in a rather baroque formulation, states that “[e]xpulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.”

The problem, however, is understanding what is meant by “without prejudice.” As Gerald Neuman (2016) notes, the Draft Articles’ “without prejudice” clauses function in different ways, “sometimes as a savings clause for rules that give greater protection to the alien facing expulsion; sometimes as preserving powers of the state that might otherwise seem inconsistent with the norm set forth in the text; and sometimes by depriving the particular provision of any normative force at all.”

To the extent that the Draft Articles accurately codify international law, the phrase would seem to be unobjectionable but also unnecessary and implicitly redundant. Where the existing rules of international law differ from the Draft Articles, however (which may be especially the case where the Draft Articles aim for “progressive realization”), then the “without prejudice” formulation would seem to be regressive and contradictory to the thrust of the Draft Articles themselves. Even if one envisions a gap — i.e., an area where there is no clear rule of international law — then it is still unclear what is meant by “without prejudice.” In such situations, one would think that the Draft Articles should now occupy the field, so to speak.

Similarly, Article 6 states that the Draft Articles are “without prejudice to the rules of international law relating to refugees, as well as to any more favorable rules or practice on refugee protection.” It then lists some rules “in particular,” that are derived from the 1951 Convention and the 1967 Protocol.¹¹⁴ Article 7 is said to be “without prejudice” to the rule of international law relating to stateless persons. The difficult interpretive question is what, exactly, is meant by the phrase “without prejudice” (Neuman 2016). The commentaries to the Draft Articles explain that the formulation is “aimed at ensuring the continued application to refugees of the rules concerning their expulsion, as well as of any *more favourable* rules or practice on refugee protection” (emphasis added). But, again, neither “prejudice” nor the operative concept of favorability is defined.

114 The portion of Article 6 that lists “particular” rules states:

- (a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;
- (b) a State shall not expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

On the more positive (progressive) side, the Draft Articles expressly aim for progressive development in:

- Article 23(2) (regarding *non-refoulement* for an “alien” who faces the death penalty);¹¹⁵
- Article 26 (which extends important procedural rights to aliens who are unlawfully within the territory of the state seeking to expel them);
- Article 27 (which standardizes the “suspensive” effect of an appeal against an expulsion decision);¹¹⁶ and
- Article 29 (which recognizes a qualified¹¹⁷ right of readmission after an “unlawful” expulsion.

In addition, as Gerald Neuman notes, other examples of progressive development may include Article 21(1), favoring voluntary departure, and Article 5(3), if understood as imposing a case-by-case reasonableness standard for all expulsion decisions (Neuman 2016).¹¹⁸

Their aim notwithstanding, it is not clear if all the Articles identified above as progressive actually go beyond existing law. A fundamental problem with the Draft Articles is their deep, structural ambiguity, if not confusion, about rights.¹¹⁹ This is reflected in the very first sentence of the General Commentary, in which the “expulsion of aliens” is referred to as “a sovereign right of the State.” Article 3, similarly, is entitled “Right of expulsion.” It recites, “A State has the right to expel an alien from its territory.” To be sure, this is followed by very important qualifications relating to the force of these articles, international law, and human rights. Still, such “rights” phrasing — as applied to what would be better termed as state *sovereign power* or, perhaps, *prerogative* — is significant, even when modified by rights provisions. Note the similarity between this framing and that regarding the “right” of a state to grant asylum discussed above. In this context, it would seem better to recognize that the legitimacy of deportation and expulsion *depends upon* its compliance with both domestic and international law and basic human rights, including of course, refugee law where applicable.¹²⁰

Consider an alternative approach which would begin with a view that expulsion is of *fundamentally questionable* legitimacy. Expulsion, with its attendant “formidable machinery,” is an awesome power of states (Meissner et al. 2013), perhaps legitimate in some of its

115 Though Gerald Neuman (2016) argues that these paragraphs “do not adequately capture the circumstances in which the right to life generates *non-refoulement* obligations.”

116 Article 27 states that “[a]n appeal . . . shall have a suspensive effect on the expulsions decision when there is a real risk of serious irreversible harm.” The insertion of three adjectives: “real, serious, and irreversible” indicates, I suppose, how much controversy swirled around this provision.

117 The Article 29 right of readmission is limited by the recognition that the state may deny readmission that “constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.”

118 It should also be noted that detention is inevitably a component of expulsion, with its own protective norms. For example, ICCPR Article 9 mandates that any “alien,” even if unlawfully present, has the right to notice of the reasons for an arrest, and the right to bring proceedings before a court to determine whether the detention is unlawful (Neuman 2016).

119 For a fuller discussion of this issue, see Kanstroom (2016).

120 See Council of Europe (2005).

manifestations, but illegitimate in many of its increasingly prevalent forms. As noted above, one might avoid some hazards of the “definitional turn” by focusing *functionally* on the mechanisms and consequences of expulsion. Despite their states’ rights orientation, however, the Draft Articles contain much that is useful to a critique of this sort.

But if we are serious about codifying the rights of those who face deportation (as I believe we must be), then we should ratify the proposition that those who face deportation are a *definable legal class with specific, cognizable rights*. The burden would then be on the deporting state to justify the rights infringement that takes place. Global deportation demands a framework that prioritizes protection of basic human rights. The Draft Articles are somewhat limited in this regard.¹²¹

IX. Do the Deported Have Rights Post-Deportation?

Whether deported individuals have post-deportation international human rights *vis-à-vis* the deporting nation-state is a difficult question, the answers to which are evolving.¹²² Indeed, a deported person may also have specific rights claims in the country to which she is deported (typically her country of nationality) based on discrimination against her as a “deportee.” Such claims may overlap, as is discussed more fully below. The content of such rights, and perhaps most saliently, *which state has the responsibility to ensure the protection of these rights*, are works in progress.¹²³

Some might suggest that the very idea of rights claims against the deporting state is oxymoronic once a deportation has been legally completed (Kanstroom 2007b). Under US law, in particular, the deported have been held to be stripped of virtually all rights they may have had to challenge various aspects of their deportation. The US Board of Immigration Appeals, which has appellate jurisdiction over decisions made by immigration judges, has held that “physical removal of an alien from the United States is a transformative event that fundamentally alters an alien’s posture under the law.”¹²⁴ This has meant that challenges to wrongful deportations and rights claims arising out of the individual’s prior presence and ties to the country were completely ignored. In situations like this, the suggestion that the deported are, *as a class*, subjects of international law with particular types of recognized rights claims, analogous to refugees, could be especially significant.¹²⁵

121 Article 26, for example, protects the right to be “represented,” while deferring to the divergence of state practice regarding whether this is a right to appointed legal counsel. However, as the United States Supreme Court has recently intimated in *Padilla v. Kentucky*, certain forms of deportation warrant such a right as a matter of due process and fundamental fairness. In addition, another limitation appears in Article 5, where the phrase “for the sole purpose of” seems to make grants of a right to liberty too easy to evade. Commentary (3) seems to affirm the suspicion that undue deference was given to state practices and desires here. See also ILC Draft Articles, art. 11 (similarly limiting its protection to actions done “for the purpose of” confiscation of assets).

122 See Kanstroom and Chicco (2015).

123 See Returns Directive, FRONTEX Code of Conduct, etc.

124 *Matter of Armendarez-Mendez*, 24 I.&N. Dec. 646, 655-56 (B.I.A. 2008). This ruling has since been challenged and overturned by a number of US Courts of Appeals.

125 *Cf.* OHCHR 2006).

To state this objective is not to underestimate its prodigious challenges. Undoubtedly, the legitimate rights claims of refugees and other migrants have been difficult enough to develop and maintain.¹²⁶ However, protecting the basic human rights of the deported demands both extraterritorial state responsibility (by the deporting state) and a need for better coordination between the legal regimes of the deporting state and the receiving state, to coordinate transfers of documents, earned benefits, property, medical records, etc., and to protect the deported from discrimination, persecution, and social stigma.

The Draft Articles do not consider either extraterritorial state responsibility or legal coordination extensively, though they do take some positive steps in these directions. Article 20, for example, provides that the expelling state “shall take appropriate measures to protect the property of an alien subject to expulsion.”¹²⁷ Article 29 goes so far as to state a “right” to be admitted to the expelling state if the expulsion is found to have been “unlawful.” Of course, much will depend on what is meant by “unlawful”; this protection is limited to those who were “lawfully present,” a criterion that appears frequently in the ICCPR and elsewhere.¹²⁸

Clarifying the rights of the deported could, as noted, have a number of salutary effects. Most basically, it *foregrounds* the rights of individuals affected by expulsion. One model for doing this is the draft Declaration on the Rights of Expelled and Deported Persons developed through the Boston College Post-Deportation Human Rights Project (of which the author is a co-director).¹²⁹ The Declaration is similar to the Draft Articles, but goes further, as it powerfully counters the prevalent “out of sight, out of mind” mentality that undergirds deportation systems, especially post-deportation. The Declaration thus clearly recognizes deported and expelled individuals *as a cognizable legal class* with distinctive, particular protection needs and rights.¹³⁰ This instantiation of deportees as a legal class renders their rights claims more regular and more understandable as it also implies and enhances solidarity among those who have faced deportation in disparate settings.

The Declaration could also serve as a matrix for nation-states to develop mechanisms — jointly or individually — to provide greater regularity and greater rights protections for the deported.

126 An example is the International Convention for Protection of Rights of Migrant Workers and Their Families which, despite having been adopted twenty-five years ago, has failed to garner much meaningful support (OHCHR 1998).

127 But should this not also be a duty of the receiving state, and a duty of both to coordinate?

128 Article 29 of the Draft Articles states that:

An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

129 For the full text of the draft Declaration, see <http://www.bc.edu/content/dam/files/centers/humanrights/pdf/DRAFT%20Declaration%20on%20the%20Rights%20of%20Expelled%20and%20Deported%20Persons.pdf>.

130 The Draft Articles do, of course, also embody such protections in important ways. See, e.g., ILC Draft Articles, arts. 13-20. However, when one pauses on Article 15, commentary (3), the value of reciprocal obligations becomes clear. It is significant to recognize as the commentary does, that “all categories of vulnerable persons that might merit special protection” cannot be listed. Therefore, it is important, as Article 15 does, to protect “other vulnerable persons.” But it might also be helpful to diverge from the passive voice here and to clarify which state or states must protect the expelled with due regard for their vulnerabilities.

The goal, of course, is neither to legitimize nor to facilitate deportations. The Declaration seeks to balance a variety of pragmatic considerations as it leaves a significant “margin of appreciation” for state action within its prescribed boundaries of rights protections.¹³¹

The Declaration is designed to be relatively simple and accessible. It applies to *all forms of deportation and to all deportees*, regardless of prior legal status or lack thereof. Of course, it also applies to refugees and asylum seekers.

Many of the Declaration’s core protections focuses on the rights of deported and expelled persons in the course of travel and reception in the country of removal or transit country. Part 3 of the Declaration, for example, includes a strict limitation on the use of restraints, special protections for vulnerable individuals, the right to bring or transfer assets and personal property, and the right to contact family members or others in the receiving state to notify them of their arrival. Article 11, which protects expelled and deported persons who require special attention, specifically mandates that “sending” (i.e., deporting) and receiving states should coordinate to provide adequate services to such individuals, or establish procedures to connect them to existing services. Such procedures may include information sharing, such as the transfer of medical records upon the informed consent of the individual.

The Declaration provides other unique protections. Article 7, for example, enunciates an important norm of nondiscrimination in the countries to which deportees are sent.¹³² Part 4 addresses compelling problems of adjustment and reintegration in the receiving country. Among other things, that part includes a right of individuals to have identification documents that do not identify them as deported or expelled individuals (Article 15), a right to be free from social stigma (Article 17), and the right to housing, healthcare, and work on equal footing as other citizens of the receiving country (Articles 18-20).

Part 5 of the Declaration covers obstacles faced by deported individuals in challenging wrongful removals. Its protections go beyond those stated in the Draft Articles. Article 21 of the Declaration, for example, states the right to continued participation in legal proceedings of all kinds — criminal or civil — not just those that relate to deportation. It specifically provides that states should facilitate travel and entry for the purposes of participating in legal proceedings. The right to appeal or challenge wrongful expulsions, including through collateral motions, and to return to the expelling state should they prevail on such challenges, is set forth in Article 22. The Declaration also affirms the right of deported individuals to return to the expelling state, and calls for limits and waivers of any imposed reentry bans (as do the Draft Articles). Finally, in an important challenge to states’ alleged “right” to exclude, Part 6 confirms the right to respect for family life, and provides, in a very progressive formulation, that states should allow avenues for family reunification and generously grant requests for visits through visas or parole.

131 The consensus in the drafting conferences was strongly in favor of the propriety and immediate need for this initiative. However, some participants, particularly those who identified themselves as “deportation abolitionists,” were concerned about increasing the legitimization of the practice of deportation by creating more law around it. Though this critique was always a major concern of ours, most conference participants concluded that current policies and practices worldwide indicate that massive deportation is likely to be a reality for some time to come and the legitimization risk did not outweigh the need for a strong, rights-based response.

132 See generally Kanstroom (2012). See also Dingeman-Cerda and Rumbaut (2015).

Conclusion

Though it might seem counterintuitive to think that emerging ideas about deportation protections could help refugees and asylum seekers, the emerging anti-deportation discourses should be systematically studied by those interested in preserving and improving the global refugee regime. This is so not only because asylum seekers themselves increasingly face the brunt of harsh deportation practices. It is imperative because the phenomena of refugee/asylum protections and deportation are inherently linked. Reform of the global refugee system without paying specific attention to the rise of deportation and its opposing discourses risks gaining benefits through the front door, so to speak, which may later be lost through the back door due to the long-term duration of many refugee crises, complexities of assimilation, and fear of crime and terrorism. Emerging deportation human rights discourses embody creative framing models that can aid constructive critique and reform of the existing refugee protection regime. Finally, these discourses offer important specific rights protections that could strengthen the refugee and asylum regime. This is especially true in regard to the extraterritorial scope of the deporting state's obligations post-deportation.

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