THE FORGOTTEN DEPORTED: A DECLARATION ON THE RIGHTS OF EXPELLED AND DEPORTED PERSONS

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I. INTRODUCTION

This article considers a "Declaration on the Rights of Expelled and Deported Persons." Drafted by the authors with significant input from a wide array of scholars, activists, judges, and others, this Declaration, re-printed in Appendix A, responds to what has become in recent years a major worldwide phenomenon: the deportation (also known as removal or expulsion) of large numbers of noncitizens.[3] Our first aim is to describe that phenomenon and to illustrate some of its most troubling features. We then survey existing legal structures

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3. HUMAN RIGHTS AND IMMIGRATION (Ruth Rubio-Marin ed., 2014).

and mechanisms that seek to protect some of the rights of the deported, both during and after removal. Our focus is primarily on the United States and Europe, though we also consider international human rights law and certain protections in the Inter-American system. Though important steps have been made in such protective regimes, especially in the European Union, we conclude that major gaps remain and that a conceptualization of the deported *as a definable legal class with specific, cognizable rights* is neither impossible nor oxymoronic.[4] It is thinkable, necessary, and may be the best way to respond to an array of problems that have too often escaped the attention they deserve.

The allure of deportation for governments is apparent, as it serves many diverse goals, including most obviously extended border control,[5] interior immigration enforcement, national security, criminal law enforcement, labor market regulation, and various other forms of social control. This substantive utility is buttressed both by its flexibility and anomalous legal status. Deportation is commonly defined as a regulatory, civil (as opposed to criminal), non-punitive mechanism in which government agents are given unusually wide latitude. Still, deportation can be functionally punitive, and often harshly so. It accomplishes incapacitation, deterrence, and retribution. And it may do so by rendering its targets right-less outcasts, analogous—as some scholars have noted—to the ancient categorization of *homo sacer*:[6] beyond meaningful law, beyond protection, and, for many, beyond political community. Even in less extreme cases, deportation routinely separates families and causes disproportionate hardships in the pursuit of amorphous, if not ephemeral, goals. It is, in short, a phe-

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4. *See generally* Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron or Necessity?*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 195 (examining the U.S. deportation process and suggesting basic human rights protections for deportees).

5. *See generally* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (demonstrating that deportation, both as a means of border control and social control, has long been a feature of U.S. law and society).

6. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 72 (Heller-Roazen trans., 1998); THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT (Nicholas De Genova & Nathalie Peutz eds., 2010).

nomenon in dramatic need not only of better conceptualization, but also of reformation and restraint.

Problems with both conceptualization and restraint derive from two inherent complexities. First, deportation implicates the strongest aspects of the sovereign power of nation-states to regulate the entry and residence of noncitizens. But it does so in ways that inevitably raise powerful human rights issues based on international legal frameworks that transcend—and in some senses may be seen to challenge or undermine—such state authority. Second, deportation is simultaneously a legal and an extra-legal mechanism. It is surely a legal system in the sense that its internal processes (i.e., within deporting nation-states) tend to be fairly precisely described by positive law and reasonably well regulated by administrative adjudicators and courts.[7] This is true even though such processes are subject to lesser constraints than criminal prosecutions. To be sure, many deportations have been widely (and in our view, correctly) criticized for their non-compliance with such legal norms as due process,[8] protection of family unity, and proportionality.[9] Also, the wide variances in the types of people to whom deportation applies—including the undocumented (some at or near the border, others with long periods of residence), asylum-seekers, long-term legal residents, and in some cases even those born in the deporting state—render it a most difficult phenomenon to understand and regulate legally.

Once a deportation is actually carried out, the legal picture deteriorates dramatically. The deported now frequently find themselves in legal limbo, if not a complete legal "black hole." The physical removal of a noncitizen from the territory of a constitutional democracy may work a terrible magic: Suddenly the deporting state may view its responsibility to the

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7. In Europe, this includes not only nation-state rules, but also a welter of supra-national institutions and legal constraints.

8. *See, e.g.* AMERICAN CIVIL LIBERTIES UNION, AMERICAN EXILE, RAPID DEPORTATIONS THAT BYPASS THE COURTROOM (Dec. 2014), *available at* https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval_0.pdf; JENNIFER LEE KOH, JAYSHRI SRIKANTIAH & KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS (Sept. 2011), *available at* www.nilc.org/document.html?id=6.

9. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 UC IRVINE L. REV. 415 (2012); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

noncitizen as having largely come to an end. A particularly strong version of this model has been applied in the United States even to cases of long-term legal permanent residents who have claimed that their deportations were legally erroneous. Motions to reopen or reconsider such cases have been jurisdictionally barred from consideration.[10] The U.S. 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."[11] This has meant that challenges to wrongful deportations and rights claims arising out of the individual's prior presence in the state and ties to the country may be completely ignored.

Consider the case of a client whom the authors represented. Mr. Wilmer Garcia was brought to the United States as a lawful permanent resident, accompanied by his parents and siblings, when he was just ten years old. Many years later, in 2005, he was deported to Honduras following a conviction for possession of a controlled substance. Such a conviction was viewed by immigration courts at this time as an "aggravated felony"—the worst possible category of offenses and one which deprived Wilmer of virtually any chance for discretionary relief from deportation. Though represented by a lawyer, he was advised that he had no chance of prevailing on an appeal, but that, if he complied with his removal, he would be able to return a decade later through a new family petition. This was incorrect advice. In fact, he would be barred permanently from the United States. After his removal, he learned that the Supreme Court had determined that his crime was not, in fact, an aggravated felony and that he should have been able to request discretionary relief from the immigration judge. He filed a "motion to reopen" after securing pro bono assistance from

10. *See* CTR. FOR HUM. RTS. & INT'L JUST. AT BOSTON COLL., POST-DEPORTATION HUMAN RIGHTS PROJECT, POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER (Mar. 2014), *available at* http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Post-Departure%20Motions%20to%20Reopen%20&%20Reconsider%203.2014.pdf.

11. Matter of Armendarez-Mendez, 24 I. & N. Dec. 646, 655-56 (B.I.A. 2008).

the Post-Deportation Human Rights Project.[12] However, because he has raised these issues after having been physically removed from the United States, he has faced a series of jurisdictional and other hurdles that have to date prevented any court from reviewing his claims on the merits.

Some U.S. courts have recently overturned this rigid administrative jurisdictional approach.[13] But this has generally been accomplished on exceedingly narrow, technical legal grounds. Few, if any, courts have ruled clearly that a noncitizen retains fundamental human or constitutional rights post-removal.[14] Further, even where domestic law may now allow limited collateral review of deportation decisions post-expulsion, it is often de facto unavailable.[15]

The legal picture is a bit less stark in Europe, owing to the strength of such procedural human rights norms as Article 13 of the European Convention on Human Rights (ECHR), which guarantees "an effective remedy before a national authority" for "everyone whose rights and freedoms . . . are violated."[16] But even there and in the Americas, where human

12. The Post-Deportation Human Rights Project, based at the Center for Human Rights and International Justice at Boston College, is designed to address the harsh effects of current U.S. deportation policies. The Project aims to conceptualize an entirely new area of law, providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members through research, policy analysis, human rights advocacy, and training programs. *Post-Deportation Human Rights Project*, BOSTON COLL. CTR. FOR HUM. RTS. & INT'L JUST., www.bc.edu/postdeportation (last visited Feb. 25, 2015).

13. *See, e.g.* Perez-Santana v. Holder, 731 F.3d 50 (1st Cir. 2013); Espinal v. Attorney Gen. of U.S., 653 F.3d 213 (3d Cir. 2011); William v. Gonzales, 499 F.3d 329 (4th Cir. 2007); Garcia-Carias v. Holder, 697 F.3d 257 (5th Cir. 2012); Contreras-Bocanegra v. Holder, 678 F.3d 811 (10th Cir. 2012).

14. Rather, courts have invalidated the agency rule following two main lines of reasoning: that it is in conflict with the statutory right to reopen granted by statute, or that it constitutes an impermissible restriction of the agency's jurisdiction. *Supra* note 13.

15. *See, e.g.*, Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 HAWAII L. REV. 139, 159-64 (2010) (discussing the many procedural and substantive hurdles encountered by deported individuals including in circuits that have narrowly interpreted or eliminated departure bar regulations).

16. *See* De Souza Ribeiro v. France (App. No. 22689/07) 2006-Eur. Ct. H.R. 2066. (finding a violation of Article 13 where the State failed to provide minimum procedural safeguards needed to protect against arbitrary expulsion).

rights law also provides a more protective framework, significant legal hurdles remain.

The size of deportation systems is clearly part of the problem, as both agencies and courts struggle to oversee even existing legal norms. The rise in deportations has been a global fact despite recent declines due in large part to economic factors that began in 2008.[17] Though still dwarfed by the more than 400,000 deportations annually undertaken by the United States,[18] Australia and Europe—among others—have also compelled very large numbers of people to return to their country of citizenship or prior residence.[19] This worldwide, massive growth of deportation is a relatively recent phenomenon. In 1985, for example, the total number of formal removals from the United States was 23,105.[20] Two decades later, the number had skyrocketed to 246,431.[21] Confirmed removals from the EU were approximately 178,000 in 2012.[22] According to Eurostat, in the past few years, well over 400,000 "third-country nationals" (i.e., not nationals of EU Member States) who have exhausted all legal avenues to legitimize their stay in

17. Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policies*, 38 POPULATION & DEV. REV. 1, 17, 25–26 (2012).

18. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS (2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf (reporting 438,421 individuals removed in FY 2013; 418,397 removed in FY 2012; and 387,134 removed in FY 2011). Initial reports of removals in FY 2014 state that 315,943 removals were carried out by Immigration and Customs Enforcement, though this figure does not include removals executed by U.S. Customs and Border Protection, which in FY 2013 constituted approximately 25% of total removals. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 (2014), *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

19. The number of apprehensions of irregular migrants in the EU has fallen from about 610,000 apprehensions in 2008 to around 440,000 in 2013. EUROPEAN COMM'N, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON EU RETURN POLICY 3 (2014) [hereinafter COMMISSION COMMUNICATION], *available at* http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf.

20. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2012 YEARBOOK OF IMMIGRATION STATISTICS, *Aliens Removed or Returned: Fiscal Years 1892 to 2012*, at 103, *available at* http://www.dhs.gov/publication/yearbook-2012.

21. *Id.*

22. COMMISSION COMMUNICATION, *supra* note 19, at 3.

the EU, or have committed offences in the EU, are ordered to leave the EU and to return to their countries of origin.[23]

In many ways, what some have well termed the "formidable machinery" of deportation has developed far faster than have legal mechanisms to restrain and monitor its excesses and mistakes.[24] Moreover, many of the deported, especially in the United States, are long-term residents with strong family and community ties.[25] It is estimated that in recent years the United States has annually deported approximately 100,000 parents of U.S. citizens.[26] One study found that, on average, former lawful permanent residents who were deported had lived in the United States for ten years.[27]

Deportation and its attendant exclusion from U.S. society and from other legal systems can work terrible, unforeseen hardships on individuals and families. Consider the case of Amelia Reyes-Jimenez, who came to the United States to seek medical care for her severely disabled son when he was an infant.[28] She settled in Arizona and gave birth to three more daughters, all U.S. citizens. One day in 2008, Amelia left her four children in the care of her partner and went to run an errand. Unbeknownst to her, her partner then took the three girls to the park and left her disabled son home alone. A

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23. Third Country Nationals Ordered to Leave – National Data (Rounded), EUROSTAT, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en (last visited Jan. 8, 2015).

24. DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 8–9 (2013), *available at* http://immigrationresearch-info.org/report/migration-policy-institute/immigration-enforcement-united-states-rise-formidable-machinery.

25. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) (2009); HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS (2013).

26. U.S. DEP'T OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CITIZENS, FISCAL YEAR 2011 REPORT TO CONGRESS 4 (2012) (reporting deportations of 46,486 parents of U.S. citizens during the first half of 2011); U.S. DEP'T OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CHILDREN, FIRST SEMI-ANNUAL CALENDAR YEAR 2013 at 4 (2014) (reporting deportations of 39,410 parents of U.S. citizens during the first half of 2013).

27. INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY, SCH. OF LAW ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 4 (2010), *available at* https://www.law.berkeley.edu/files/Human_Rights_report.pdf.

28. Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99 (2011) (using alias of "Ana").

neighbor, hearing the child's cries, called the police and both Amelia and her partner were arrested and charged with child abuse. Amelia was quickly transferred from criminal to immigration custody, and her children were placed in foster care. While Amelia remained in detention fighting deportation for more than one year, she was unable to visit with her children. From detention, she was also unable to comply with the reunification plan set by the family court. In July 2009, the Immigration Judge denied Amelia relief from removal, finding that she had not proven the requisite level of "exceptional and extremely unusual hardship."[29] The Board of Immigration Appeals affirmed the decision four months later. In the meantime, the state moved to terminate her parental rights. In May 2010, while Amelia's case was pending on appeal before the Ninth Circuit, she was deported to Mexico.[30] Following her deportation, Amelia was only able to participate in family court proceedings by telephone. Her parental rights were terminated, and all four of her children were adopted. Amelia's case is not an outlier. From 2010 to 2012, the U.S. government deported approximately 205,000 parents of U.S. citizen children.[31] At any given time, it is estimated that at least 5,100 children are in the U.S. foster care system because their parents or caretakers are in immigration detention or have been deported.[32]

Beyond questions of numbers, harshness, protection of family and private life, etc., it is also clear that there have been many wrongful deportations. By this we mean a variety of possible scenarios. For example, deportations have been based on erroneous factual records, incorrect interpretations of the law, and constitutionally defective criminal convictions. Such wrongful deportations take place with alarming frequency, as do deportations of individuals without basic procedural pro-

29. *Id.* at 107.

30. In February 2012, the Ninth Circuit denied her appeal. Reyes-Jimenez v. Holder, 469 Fed. App'x 626 (9th Cir. 2012).

31. Seth Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES, Dec. 17, 2012, http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html (analyzing data provided by the U.S. Department of Homeland Security through a Freedom of Information Act request).

32. APPLIED RESEARCH CTR., SHATTERED FAMILIES 23 (2011), *available at* http://arc.org/shatteredfamilies.

tections.[33] Indeed, in the United States, a non-trivial number of citizens have been mistakenly deported.[34]

The European system, as described in detail in the next Section, is more protective than the United States of the rights of the deported.[35] Still, the basic reality is that governments—and increasingly corporations[36]—have engaged in a quarter-century feeding frenzy in which millions of noncitizens have been prey. The current system is to earlier versions of legal removal regimes what crack cocaine is to Coca Cola. It is long past time to take deportation seriously and thus to take the human rights of the deported *particularly* seriously. Put simply, by deporting those who might hold them accountable for rights violations, governments—especially that of the United States—have effectively insulated themselves from review (ju-

33. Though the Department of Homeland Security does not keep track of how many individuals were deported based on wrongful interpretations of the law, we estimate—based on numbers of lawful permanent residents deported due to criminal convictions—that many thousands have been wrongfully deported based on erroneous interpretation of the law. *See, e.g.*, Garcia-Carias v. Holder, 697 F.3d 257 (5th Cir. 2012) (discussing motion to reopen filed because removal was based on wrong interpretation of aggravated felony); Ovalles v. Holder, 577 F.3d 288 (5th Cir. 2009) (discussing motion to reopen filed because removal was based on wrong interpretation of aggravated felony); Juan Francisco Gomez, A91 200 176 (B.I.A. June 11, 2008) (granting reopening where individual had been ordered removed based on wrong interpretation of the law); Mateusz Zbigniew Paczkowski, A27 771 098 (Jan. 27, 2009) (granting reopening where individual had been ordered removed based on wrong interpretation of the law).

34. DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 99-102 (2012); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011).

35. *See infra* Part II; Elspeth Guild, *The Variable Subject of the EU Constitution, Civil Liberties and Human Rights*, 6 EUR. J. OF MIGRATION & L. 381 (2004).

36. In the United States, for example, large private correctional companies, such as the Correction Corporation of America and GEO, Inc., operate a large portion of immigration detention facilities. *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 87 (2010) (noting that CCA and GEO Group, Inc. are the two major private prison contractors), *available at* http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf; Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 459 n.66 (2013) (listing the facilities that are entirely owned and operated by private prison companies and the percentage of detainees who are held in their facilities).

dicial or otherwise). This is a most striking manifestation of major gaps in the protection of fundamental rights.

II. THE INADEQUACY OF EXISTING LEGAL PROTECTIONS FOR THE DEPORTED

A. *Legal Regimes*

In the United States, despite some recent executive branch ameliorations such as Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA),[37] the inadequacy of legal protections in the deportation system has long been a staple of much advocacy and academic writing.[38] The basic problems include severe due process concerns such as lack of legal representation, inadequate interpretation, and lack of access to evidence and resources due to detention, as well as a general lack of proportionality and inadequate discretionary authority to ameliorate harshness in reaching deportation decisions.[39]

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37. DACA is a program granting "deferred action" to individuals who came to the United States as children and meet certain educational requirements. Memorandum from Janet Napolitano, U.S. Sec'y of Homeland Sec., to the Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. The DACA program was expanded alongside the creation of a new program, DAPA, which grants "deferred action" status to parents of U.S. citizens and green card holders who have been residing in the United States for five years and meet certain other requirements. *See* Memorandum from Jeh Johnson, U.S. Sec'y of Homeland Sec., to the Dept. of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

38. *See, e.g.*, KANSTROOM, *supra* note 5 (charting the history of deportation in America).

39. *See, e.g.*, AMERICAN BAR ASSOCIATION, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS (2008) (recommending a due process right to counsel for all persons in immigration removal proceedings, among other rights); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013) (discussing the right to counsel in immigration removal cases); KOH, SRIKANTIAH, & TUMLIN, *supra* note 8 (reporting on the removal of noncitizens without hearings).

One especially troubling recent phenomenon has been the rise of fast-track removal proceedings in the United States. A recent American Civil Liberties Union (ACLU) report[40] details such summary removal procedures—and the concomitant lack of due process—that now account for the vast majority of U.S. deportations. In 83% of all removals carried out in fiscal year 2013, individuals were deported following cursory procedures by low-level immigration officials—termed "expedited removal" and "reinstatement of removal"—and did not receive a full hearing before an immigration judge. The report documents an alarming number of instances in which even the applicable minimal safeguards, such as the availability of adequate translation, have been ignored, or in which government officials have employed threats and other coercive measures. Individuals deported through these summary processes have included long-term residents with U.S. citizen children, individuals fearing return to their country of origin, unaccompanied minors, and even a number of U.S. citizens. As the ACLU concludes: "These summary procedures invite, and guarantee, error. And yet erroneous—even illegal—summary removal orders are difficult to challenge because of the speed of the process, the limited 'evidence' required, and the absence of a complete record of the proceeding."[41] Further, though these fast-track deportations lack the procedural safeguards afforded those who receive hearings before immigration judges, they are treated as formal removals and therefore suffer from many of the same consequences that judge-ordered deportations receive. This means, for example, that individuals who have been removed pursuant to an expedited or reinstated removal order are subject to reentry bars and criminal prosecution should they attempt to return without authorization.

International human rights norms as such play, at best, a minimal role. To be sure, some human rights bodies and some courts have taken notice of the U.S. system. Indeed, in 2010, the Inter-American Commission on Human Rights found that the United States had violated core protections of the American Declaration by failing to consider the individual equities of two deported long-term lawful permanent residents—including the best interests of their U.S. citizen children—by

40. AMERICAN CIVIL LIBERTIES UNION, *supra* note 8.
41. *Id.* at 3.

subjecting them to mandatory deportation.[42] The Commission ordered that the state must return the two men and afford them a new hearing in which all facts of the case could be balanced. The U.S. has to date ignored this ruling.[43] Still, it is our contention that a Declaration—grounded in, arising out of, and elaborating well-developed relevant human rights norms—could have a powerful inspirational and invigorating effect on U.S. politico-legal discourse and ultimately on courts and policymakers.[44]

In Europe, the model is rather different, though we believe that the Declaration could be significant there, too.[45] Important basic rights of noncitizens, including those facing deportation, are protected by the 1950 European Convention on Human Rights[46] and the 2000 European Union Charter of Fundamental Rights.[47] Both the Convention and the Charter contain a welter of provisions that may specifically protect the deported. Most basically, like many other major human rights instruments, 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 punish-

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42. Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L./V/II.139, doc. 21 ¶ 5 (2010).

43. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT ¶1131-37 (2013), *available at* http://www.oas.org/en/iachr/docs/annual/2013/TOC.asp.

44. *See, e.g.*, Lawrence v. Texas, 200 U.S. 321 (2003) (holding that the state could not make private consensual sexual conduct a crime); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty for crimes committed while a minor is cruel and unusual punishment); Grutter v. Bollinger, 539 U.S. 306, 342–44 (2003) (Ginsburg, J., concurring) (holding that the narrow use of race in college admissions would not violate the equal protection clause of the 14th Amendment).

45. *See infra* Part II (discussing the legal regime in the EU). *See generally* Guild, *supra* note 35 (discussing civil liberties and human rights in the EU).

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

47. 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 twenty-eight EU Member States. Charter rights incorporate the interpretation of ECHR rights (as determined by the European Court of Human Rights (ECtHR)) insofar as they are more rights-friendly. Special thanks to Elspeth Guild for this point.

ment.[48] 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, though 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.[49] Article 7 of the Charter and ECHR Article 8 govern the right to respect for private and family life. As discussed below, 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 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 their shipment or sale. ECHR Article 14, Protocol 12, and Article 21 of the Charter protect the right to non-discrimination on prohibited grounds.[50] Charter Article 19 and Article 4 of Protocol No. 4 of the ECHR prohibit collective expulsion[51] and expulsion where there is a *refoule-*

48. Article 5 of the Charter prohibits slavery and human trafficking. Charter, *supra* note 47.

49. Detention may be justified by exceptions. *See* ECHR, *supra* note 47, art. 5(1)(f) (permitting the lawful arrest or detention of a person to prevent unauthorized entry into the country, or for purposes of deportation or extradition); Sonia Morano-Foadi & Stelios Andreadakis, *The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence*, 22 EUR. J. INT'L L. 1071 (2011).

50. ECHR, *supra* note 46, 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."); *id.* 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."); *id.* Protocol No. 12, art. 1 (clarifying a general prohibition against discrimination).

51. In a 2012 decision 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 [GC], no. 27765/09, ECHR 2012-II; *see generally* Violeta Moreno-Lax, *Hirsi Jamaa and*

ment risk (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).[52] Articles 24, 25, and 26 of the Charter protect the rights of the child, the elderly, and those with disabilities.[53] Articles 34 and 35 of the Charter protect the rights of "everyone" to social assistance and health care.[54]

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.

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."

In addition, important EU directives protect long-term resident third-country nationals and guarantee certain family

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Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?, 12(3) HUM. RTS. L. REV. 574 (2012) (discussing the applicability of European states' commitments, including against collective expulsion, extraterritorially); Mariagiulia Giuffré, *Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy*, 61(3) INT'L & COMP. L.Q. 728 (2012) (discussing the ECHR's prohibition on collective expulsion and how it was applied extraterritorially in *Hirsi*).

52. Article 18 of the Charter references the Geneva Convention regarding the "right" to asylum. Charter, *supra* note 47.

53. *See generally* Gareth Davies, *The Family Rights of European Children: Expulsion of Non-European Parents* (European Univ. Inst., Working Paper No. RSCAS 2012/04, 2012), *available at* http://dx.doi.org/10.2139/ssrn.2002706 (analyzing the ways in which the Charter has helped to frame the ECHR's jurisprudence on the rights of migrants to bring family members with them).

54. Elspeth Guild & Claude Cahn, *Are There Lessons for the Geneva Convention from the Supervision of Economic, Social and Cultural Rights? UN and Council of Europe Perspectives, in* THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW 182 (James C. Simeon ed., 2013).

unification rights.[55] Some have sought to go further than this in protecting long-term residents. Indeed, in a 2001 non-binding recommendation, the Parliamentary Assembly of the Council of Europe concluded that settled immigrants should not be subject to expulsion.[56]

A robust, if relatively recent and somewhat opaque body of jurisprudence, has arisen at the European Court of Human Rights to protect these rights.[57] A particularly important and influential line of cases has interpreted ECHR Article 8.[58] Over time, the Court energetically confronted how an expulsion interfered with the right to respect for family life.[59] Cases have considered not only spouses and children but also a much broader array of relationships, such as grandparents and siblings.[60] More recently, however, long-term residence itself has become a salient factor as well. The Court has thus expressed concern for "the network of personal, social and economic re-

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

56. Eur. Consult. Ass., *Non-expulsion of Long-Term Immigrants*, Doc. No. 8986 (2001), *available at* http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=9216&Language=en.

57. *See generally*, PIETER BOELES ET AL., EUROPEAN MIGRATION LAW 144–70 (2009); Charlotte Steinorth, Üner v The Netherlands*: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life*, 8 HUM. RTS. L. REV. 185 (2008).

58. *See* ZH (Tanzania) v. Sec'y of State for the Home Dep't, [2011] UKSC 4 (appeal taken from Eng.); *see also* Daniel Thym, *Residence as De facto Citizenship? Protection of Long-term Residence under Article 8 ECHR*, *in* HUMAN RIGHTS AND IMMIGRATION, *supra* note 3; Marie-Benedicte Dembour, *Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-nationals at Strasbourg*, 21 NETH. Q. HUM. RTS. 63 (2003); Ann Sherlock, *Deportation of Aliens and Article 8 ECHR*, 23 Eur. L. Rev. 62 (1998) (examining cases in which deportation is challenged on the basis of Article 8).

59. 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).

60. *See* Nasri v. France, 320 Eur. Ct. H.R. 11, ¶ 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), ¶ 45 (1979), ("'[F]amily 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.").

lationships that make up the life of every human being."[61] 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 identity." Thus, "the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Article 8."[62] As one commentator has noted, this is quite a remarkable protection, though various legal systems have protected such "affiliation rights."[63]

With both theories, an inevitably complex, uneven picture involving many fact patterns and unpredictable balancing has emerged.[64] The Court has clearly held that Article 8 does not require States to treat settled immigrants the same way as their own nationals.[65] Indeed, from the outset of its Article 8 immigration jurisprudence, the Court has reiterated the legitimate right of states to "control the entry, residence, and expulsion of aliens."[66] It has also, however, viewed its interpretive power as dynamic and the Convention itself as a "living instrument."[67] Still, states are regularly afforded a "certain margin of appreciation."[68] In fact, one commentator has noted a recent "apparent hardening" in which a "surprisingly great number of cases" have rejected claims against expulsion by immigrants

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61. Slivenko et al. v. Latvia, 2003-XI Eur. Ct. H.R. ¶ 97; A.W. Khan v. United Kingdom, App. No. 4786/06 ¶¶ 31-33 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96587.

62. Üner v The Netherlands, 2006-XII Eur. Ct. H.R. ¶ 59.

63. Thym, *supra* note 58, at 115. For an example of a legal provision that protects such rights, see 8 U.S.C. § 1249, which sets forth the system of "registry" under U.S. law that enables certain long-term undocumented immigrants in the United States to acquire lawful permanent resident status.

64. *See* Steinorth, *supra* note 57 at 186 n.6 (noting that the European Court of Human Rights held that Article 8 had been violated in a number of cases); *see also*, Sisojeva, et al. v Latvia, App. No. 60654/00 (2005), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["001-69391"]} (holding that the regularization offered by Latvia satisfied human rights requirements).

65. Gül v. Switzerland, App. No. 23218/94, 22 Eur. H.R. Rep. 93, ¶ 38 (1996).

66. Moustaqium v. Belgium, 13 Eur. H.R. Rep. 802, ¶ 43 (1991).

67. Thym, *supra* note 58, at 109. Clearly this model is not uncontroversial. *See id.* at 110.

68. Üner v The Netherlands, 2006-XII Eur. Ct. H.R. ¶ 48.

who had been "residing in a country for years, if not decades."[69]

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."[70] This requires consideration of an array of factors, including the nature and seriousness of the offense, the time elapsed since the commission of the offense, and the applicant's conduct since the offense.[71] The Court will also attempt to measure the impact an expulsion order would have on the immigrant and his or her family. 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.[72] In addition, the Court will weigh "the best interests and well-being of the

69. Thym, *supra* note 58, at 121.

70. See, e.g., A.W. Khan v. United Kingdom, App. No. 4786/06 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96587; A.A. v. United Kingdom, App. No. 8000/08 (2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106282. This case concerned an applicant who was a minor when he had committed the offense and the nature and seriousness of the act was not significant. The applicant had lived in the UK for 11 years. During the period since the offense there were no further offenses. Further, he had a strong relationship with his family, had completed further education and was employed. Therefore, the decision to deport was found disproportionate to the legitimate aim of the "prevention of disorder or crime" and would not be "necessary in a democratic society." *Cf.* Balogun v United Kingdom, App. No. 60286/09 (2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110271, in which the 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 UK 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.

71. Daniel Thym, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, 57 INT'L & COMP. L.Q. 87, 93–94 (2008).

72. *Id.* at 94.

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."[73]

Another human rights model that has recently gained some traction was developed in the Human Rights Committee case of *Nystrom v. Australia.*[74] Mr. Nystrom, who had a very substantial criminal record, had lived all his life in Australia with his mother and sister. Apparently, he thought he was an Australian citizen. He had no close ties to Sweden, his country of birth; he did not speak Swedish, and he had no direct contact with his family there. The Committee majority (there were dissents) held that Australia had violated the right "to enter one's own country"[75] by deporting a man who had lived there legally since he was twenty-seven days old. This 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."[76] In such circumstances, deportation is inherently arbitrary and thus illegal. The Committee's broad interpretation of one's "own country," though long advocated by some scholars, is obviously controversial and is strenuously resisted by governments. Still, it marks an important evolving recognition of the importance of identity itself as a limit to deportation.[77]

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73. Üner v The Netherlands, 2006-XII Eur. Ct. H.R. ¶ 58.

74. Human Rights Committee, Nystrom v. Australia, U.N. Doc. CCPR/C/102/D/1557/2007 (August 18, 2011), *available at* http://www.worldcourts.com/hrc/eng/decisions/2011.07.18_Nystrom_v_Australia.pdf. The related issue of the right to leave one's country is beyond the scope of this article. However, it is becoming an increasingly important aspect of litigation regarding exclusion and removal. Commissioner for Human Rights, *The Right to Leave a Country*, COUNCIL OF EUROPE (Oct. 2013), *available at* http://www.coe.int/t/commissioner/source/prems/prems150813_GBR_1700_TheRightToLeaveACountry_web.pdf.

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

76. Nystrom v. Australia, *supra* note 74, at ¶ 7.4.

77. *Cf.* HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 58–59 (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,

B. *Systems*

One of the most significant organizations working in the context of deportation is the International Organization for Migration (IOM). As a leading intergovernmental organization on migration, the IOM has been involved in the return process for well over a decade. The organization operates projects worldwide, partnering with national governments and local NGOs. An entire division of the organization—the Migrant Assistance Division—is focused on what the IOM has termed "voluntary return and reintegration" with the goal of providing reintegration assistance to achieve "sustainability of returns."[78] Part of its mission is to advocate "for the adoption of comprehensive approaches towards voluntary return, including post-return reintegration assistance."[79] In 2013, operating seventy-five projects around the world, IOM provided post-removal assistance and reintegration services to more than 46,000 individuals,[80] representing nearly a 100% growth from the number of individuals it had assisted just two years prior.[81] Services provided to returned individuals included short-term assistance such as accommodations, but also more comprehensive aid such as medical and psychosocial support and microfinance projects.[82] In the next section, we will consider the strengths and weaknesses of the NGO model in this context. One significant concern at the outset, however, is that

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and with at least portions of the travaux preparatoires"); MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 287 (2d ed. 2005); Michelle Foster, *An "Alien" by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia*, 33 MELB. U. L. REV. 483, 520 (2009) ("One's connection to one's own country is . . . , in a fundamental way, about a person's identity . . . .").

78. *Assisted Voluntary Return and Reintegration*, INT'L ORG. FOR MIGRATION, http://www.iom.int/cms/return-assistance-migrants-governments (last visited Feb. 23, 2015).

79. *Id.*

80. INT'L ORG. FOR MIGRATION, ASSISTED VOLUNTARY RETURN AND REINTEGRATION (2014), *available at* http://www.iom.int/files/live/sites/iom/files/Country/docs/AVRR-at-a-glance-version-September-2014.pdf.

81. INT'L ORG. FOR MIGRATION, MIGRANT ASSISTANCE: ANNUAL REVIEW 8 (2012), *available at* http://www.iom.int/files/live/sites/iom/files/pbn/docs/Migration-Management-annual-review-2012.pdf.

82. *Id.* at 10. For an example of such a local project in Moldova, see *Assisted Voluntary Return and Reintegration*, INT'L ORG. FOR MIGRATION, http://www.iom.md/index.php/programs/facilitated-migration/assisted-voluntary-return-avr (last visited Feb. 23, 2015).

despite its general international focus, the vast majority of returns overseen by IOM—85%—were initiated in Europe.[83]

In Europe, an array of national and supra-national systems implement and monitor returns. The EU Return Directive,[84] adopted in 2008, requires EU Member States either to regularize the legal status of non-EU nationals or to expel them.[85] The Directive's aim is said to be "to ensure that the return of third-country nationals without legal grounds to stay in the EU is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned."[86] Though such language seems rather comprehensive, Article 2(2)(a) of the Directive allows Member States not to apply the Directive in certain "border situations" (people refused entry at the border and people apprehended in connection with an irregular border crossing), though certain basic minimum safeguards still apply.[87] Article 2(2)(b) also exempts certain people subject to return as a criminal law sanction or people who are the subject of extradition procedures.[88]

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83. INT'L ORG. FOR MIGRATION, *supra,* note 80, at 4. The majority of individuals assisted originated from Southern and Eastern Europe and Asia. *Id.* at 5.

84. 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 OJ (L 348) (hereinafter "EU Return Directive"); *see also* Elspeth Guild, The Rights of Forcibly Expelled Persons – Examining the European Union's Return Directive (draft paper) (on file with author). The directive does not apply to certain family members of EU nationals.

85. EU Return Directive, *supra* note 84, art. 9 (permitting Member States to delay the execution of a return decision).

86. COMMISSION COMMUNICATION, *supra* note 19, at 3.

87. Directive 2008/115/EC, *supra* note 84, art. IV ¶ 4.

88. Neither the Return Directive nor any other EU legal instrument prevent Member States from considering irregular entry and/or stay as a criminal offense under their national criminal law. However, several ECJ judgments have limited and constrained Member States' ability to imprison people under such regimes. *See, e.g.*, Case C-61/11 PPU, El Dridi, 2011 E.C.R. I-3031 (finding that the Return Directive precludes national rules criminalizing irregular stay insofar as such rules undermine the effectiveness of the Return Directive); Case C-329/11, Achoughbabian v. Préfet du Val-de-Marne, 2011 E.C.R. I-12709 (finding that a national law sanctioning mere irregular stay with a threat of criminal law imprisonment was incompatible with the Return Directive); Case C-430/11, Sagor 2012 E.C.R. (finding that the criminal law sanction of a financial fine which may be replaced by an

The Directive aspires to create "common standards and procedures for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of [Union] law as well as international law,"[89] and it requires consideration of the best interests of the child, family life, the state of health of the third-country national, and respect for the principle of *non-refoulement*.[90] It describes "coercive measures to carry out the removal of a third-country national who resists removal" as "a last resort" and mandates that such measures "shall be proportionate and shall not exceed reasonable force."[91] They must also be implemented "as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned."[92] Unaccompanied minors receive special protections.[93] It contains various procedural safeguards, including the form of decisions on return, appeal rights, free legal aid, and safeguards pending return.[94] Chapter IV specifically regulates detention pending removal. The Directive contains a presumption against detention during expulsion proceedings, regulates conditions of detention, defines certain review and appeal rights for detention, and limits detention to six months, which may be extended for two more periods of six months each.[95] It also requires Member States to "provide for an effective forced-return monitoring system."[96]

The EU Commission has recently analyzed the efficacy of the Return Directive.[97] The Commission noted that "return" policy is closely interlinked with what are termed "readmission

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expulsion order can be applied, provided that the expulsion procedure respects all relevant procedural safeguards of the Return Directive, and that the criminal law sanction of home detention can be applied only insofar as there are guarantees in place to make sure that its conduct does not delay return).

89. EU Return Directive, *supra* note 84, art. 1.

90. *Id.* art. 5.

91. *Id.* art. 8 ¶ 4.

92. *Id.*

93. *Id.* art.10.

94. *Id.* arts.12–14.

95. *Id.* arts. 15–16.

96. *Id.* art.8 ¶ 6.

97. COMMISSION COMMUNICATION, *supra* note 19.

and reintegration" policies.[98] All three are an integral part of the overarching framework for EU external asylum and migration policy known as the Global Approach to Migration and Mobility (GAMM).[99] Through the GAMM, the EU seeks to strengthen its political dialogue and operational cooperation with non-EU countries on migration issues, including return and readmission, "in a spirit of partnership and based on shared interests."[100] On the whole, the Commission concluded that "the establishment of an EU return *acquis* has led to significant legislative and practical changes in all Member States."[101] In particular, the Return Directive was found to have "positively influenced national law and practice regarding voluntary departure and has been a driver for change in forced return monitoring. It has contributed to convergence and reduction of maximum detention periods and has led to wider implementation of alternatives to detention across Member States. It also limited Member States' ability to criminalize "mere irregular stay," and its procedural safeguards have "contributed to more legal security."[102]

Among the more interesting comparative aspects of the Commission's report was its consideration of "entry bans" (i.e., prohibitions on entry into the EU following expulsion). The Return Directive requires an entry ban with a return decision when no period of voluntary departure has been granted or when the order to return has not been complied with. In other cases, the entry ban is optional. As to the length of an entry ban, all relevant circumstances must be taken into account. The maximum duration of five years may be exceeded only if the person represents a serious threat to public policy, public

98. *Id.* at 2.

99. EUROPEAN COMM'N, COMMUNICATION ON THE GLOBAL APPROACH TO MIGRATION AND MOBILITY 743 (2011), *available at* http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/index_en.htm; EUROPEAN COMM'N, COMMUNICATION ON THE EVALUATION OF EU READMISSION AGREEMENTS (2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0076:FIN:EN:PDF.

100. COMMISSION COMMUNICATION, *supra* note 19, at 2. The Commission also considered the amended Frontex Regulation, adopted in 2011 and the monitoring of return operations coordinated by Frontex. *Id.* at 5-6.

101. COMMISSION COMMUNICATION, *supra* note 19, at 30.

102. *Id.*

security or national security.[103] The Commission's evaluation showed that the Return Directive had contributed to convergence across Member States regarding the maximum length of entry bans.[104] In the United States, such bans regularly are ten years and may be lifetime bans in criminal cases or in cases of illegal reentry following removal.[105] It should also be noted that the Court of Justice of the European Union has made clear that entry bans must have automatic end points.[106] This contrasts with the highly discretionary nature of U.S. practice.

Critics have noted that, although the Commission considers the rules on monitoring of forced removals and notes positive legislative changes in many Member States, it does not consider the practical impact.[107] The Commission also did not assess states' obligation to postpone removal in specified cases, with the obligation to prioritize the best interests of the child, family life, *non-refoulement*, and the health of migrants; and, more generally, whether removal operations have been "proportionate," used only "reasonable force," were consistent with "fundamental rights" and observed the "dignity," and "physical integrity" of irregular migrants.[108]

The EU's external border control agency, Frontex (its name is a French amalgam of *frontières extérieures*), coordinates the control of EU external borders.[109] Frontex has played a major role in joint return operations with EU Member States.[110] In 2011, its legal basis was revised to include a duty to

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103. EU Return Directive, *supra* note 84, art. 11.

104. In eight Member States, the length of entry bans was reduced as a result of the Directive. However, in six Member States, the number of entry bans has increased. COMMISSION COMMUNICATION, *supra* note 19, at 26.

105. 8 U.S.C. §§ 1182(a)(9)(A)(ii)(II)-1182(a)(9)(C)(i)(II) (2014).

106. Case C-297/12, Filev and Osmani, (2013), ¶ 44, *available at* http://curia.europa.eu/juris/liste.jsf?language=en&num=c-297/12.

107. Steve Peers, *The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants?*, EU L. ANALYSIS (March 28, 2014), http://eulawanalysis.blogspot.com/2014/03/the-eus-returns-directive-does-it.html.

108. *Id.*

109. ELSPETH GUILD, ET AL., IMPLEMENTATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS AND ITS IMPACT ON EU HOME AFFAIRS AGENCIES: Frontex, Europol and the European Asylum Support Office (2011); Luisa Marin, *Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border*, 7 J. CONTEMP. EUR. RES. 468 (2011).

110. *Return*, FRONTEX, http://frontex.europa.eu/operations/return (last visited Feb. 23, 2015). Between 2006 and December 2013, FRONTEX coor-

protect fundamental rights.[111] A detailed "Code of Conduct" (CoC) for JROs was adopted in October 2013.[112] The Code of Conduct refers to the European Charter, including specific respect for the principle of human dignity, the right to life, *non refoulement* and the right to asylum, the prohibition on torture, the right to liberty, the rights of the child, protection of personal data, the prohibition on discrimination, and respect for private and family life. The Code's aim was to provide "effective forced return monitoring procedures and respect of returnees' fundamental rights and dignity during return operations."[113] A JRO should now include an "individual risk assessment" to avoid or limit the use of force.[114] Persons being expelled must also be given sufficient and clear information

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dinated 209 Joint Return Operations (JROs) returning 10,855 people. COMMISSION COMMUNICATION, *supra* note 19, at 5.

111. *Frontex Fundamental Rights Strategy*, FRONTEX, http://frontex.europa.eu/assets/Publications/General/Frontex_Fundamental_Rights_Strategy.pdf (last visited Feb. 23, 2015). As soon as this duty came into force, the European Ombudsman's office carried out an inquiry into the fundamental rights compliance of FRONTEX resulting in a report published in November 2013 making thirteen recommendations to improve the agency's fundamental rights record. All the recommendations except one—the creation of a complaints mechanism for people aggrieved by FRONTEX organized operations—have been accepted. *Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex*, EUROPEAN OMBUDSMAN, http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark (last visited Feb. 23, 2015).

112. *Cf.* The DRO Policy and Procedure Manual, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/ICE-DetentionDeportation-OfficerFieldManual.pdf) (redacted version, which includes provisions on the use of force during removal and a grievance procedure for individuals in immigration detention).

113. COMMISSION COMMUNICATION, *supra* note 19, at 5. The monitor should be "an independent outside observer who frequently represents an NGO or another independent monitoring body entrusted by a Member State with forced return monitoring tasks." *Id.* at 6. The Monitor is to be given all necessary information in advance of the operation and will be involved in the return process from the pre-return phase (internal briefings) until the post-return phase (debriefing). He or she will have complete access to all information and physical access to any necessary place. The observations and reports of the monitor will be included in the reporting on the JRO.

114. FRONTEX, CODE OF CONDUCT FOR JOINT RETURN OPERATIONS COORDINATED BY FRONTEX art. 5 ¶ 1 (2013), *available at* http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf.

about the operation, including the right to make a complaint.[115] The use of coercive measures is limited to those strictly necessary for people who refuse or resist or who seek to escape, cause injury to themselves or others, or damage property.[116] Coercive measures must be proportionate and may not exceed reasonable force.[117] They must respect the person's dignity and physical integrity.[118] In particular, the use of sedatives to facilitate removal (a distressingly common and highly controversial practice) is generally forbidden.[119] The Code of Conduct also requires a medical examination of every person with a known medical condition or where treatment is required.[120] Authorities must exclude any person who is not fit to travel.[121] Escorts "are primarily and individually responsible for their actions in their work" and Member States are responsible for damages, investigation, and sanctions against escorts, including those employed by a private contractor.[122] At least one medical doctor should also be present during a JRO.[123]

Any participant in a JRO who has reasons to believe that there has been a violation of the Code is required to report this to Frontex.[124] In 2012, Frontex further created the position of Fundamental Rights Officer (FRO). The FRO's role is to monitor, assess and make recommendations regarding the protection and guarantees of fundamental rights in activities and operations including JROs.[125] The Commission has urged Frontex to further increase coordination of JROs "in a way which ensures that common standards related to humane and

115. *Id.* art. 5 ¶ 2.

116. *Id.* art. 6.

117. *Id.* art. 6 ¶ 2.

118. *Id.*

119. *Id.* art. 6 ¶ 4.

120. *Id.* art. 7 ¶ 2. Medical data must be treated in accordance with EU data protection rules.

121. *Id.* art. 7 ¶ 1.

122. *Id.* art. 8 ¶ 1.

123. *Id.* art. 11 ¶ 1.

124. *Id.* art. 16.

125. COMMUNICATION, *supra* n. 19, at 6. Frontex was also "encouraged" to further support Member States by offering training on return issues with a special focus on safeguarding returnees' fundamental rights during the return procedure. *Id.* at 11.

dignified treatment of returnees will be met in an exemplary way, going beyond mere compliance with legal obligations."[126]

The EU Commission has also promised to develop a "Return Handbook," which will contain common guidelines, best practices and recommendations to be used by Member States' competent authorities when carrying out return-related activities, and as a point of reference for return-related Schengen evaluations.[127] It will refer to the EU return *acquis* and relevant international standards such as those developed by the European Committee for the Prevention of Torture and the UN Committee on the Rights of the Child General Comment No 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration. It will also address the promotion of voluntary departure, proportionate use of coercive measures, forced return monitoring, postponement of removal, return of minors, effective legal remedies, safeguards pending return, humane and dignified detention conditions, as well as safeguards for vulnerable persons.[128] The Commission has also highlighted future use of incentives "to ensure that cooperation on return, readmission and reintegration issues is part of a balanced and consolidated EU policy towards a non-EU country, based on shared interest."[129]

The Commission clearly envisions that deportation will remain a major system for the foreseeable future. Thus, it highlights that efforts to build capacity in non-EU countries in the

126. COMMUNICATION, *supra* n. 19, at 11.

127. The Commission has set a goal of completing the handbook by March, 2015. *Id.* at 8 ("The Commission will adopt within one year a 'Return Handbook.'").

128. *Id.* This seems to be part of a response to France's temporary reintroduction of border controls in the Spring and Summer of 2011 to prevent third country nationals from moving from Italy to France. The EU institutions and many Member States called for new legislation to control when intra-Member States border controls could be re-introduced. The Commission was given wide ranging new powers to check that Member States are correctly applying the Schengen rules which the Commission now clearly considers include monitoring Member States' activities in the field of expulsion/deportation. SERGIO CARRERA ET AL., CTR. FOR EUROPEAN POLICY STUDIES, A RACE AGAINST SOLIDARITY: THE SCHENGEN REGIME AND THE FRANCO-ITALIAN AFFAIR (April 2011).

129. COMMUNICATION, *supra* n. 19, at 9 (clarifying that this includes, for example, interests "linked to enhanced mobility provisions and other policy areas such as trade, enterprise and industry").

field of return and readmission "will be strengthened by, for example, improving the ability of the responsible authorities in partner countries to respond in a timely manner to readmission applications, identify the people to be returned, and provide appropriate assistance and reintegration support to those who are being returned."[130] The EU has thus strongly emphasized "voluntary" return of irregular migrants.[131] Both governmental and non-governmental actors, especially the IOM, have implemented Assisted Voluntary Return and Reintegration (AVRR) programs that provide comprehensive return assistance and activities aimed at ensuring "sustainable reintegration" in countries of origin.[132] IOM currently operates over seventy AVR projects in twenty-six EU Member States. In 2014, IOM assisted 43,786 migrants to return voluntarily.[133] IOM stresses the importance of cooperating with countries of origin and maintaining partnerships with the EU and Member States. Still, voluntariness in this context is obviously a debatable concept.

At least two other documents warrant mention in the context of rights during and after deportation: the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW),[134] and the draft Articles on Expulsion of Aliens prepared by the International Law Commission.[135] Both of these texts guarantee important rights

130. The Commission also envisions use of the new Asylum, Migration and Integration Fund to focus on "sustainable return and re-integration of irregular migrants in their countries of origin, including through developing the capacity of these countries to better manage return and reintegration." The Asylum, Migration and Integration Fund, effective in 2014, will fund many activities, including the effective monitoring of forced return (expulsion and deportation) with a global budget of 3.13 billion euro for the period 2014–2020. Guild, *supra* note 84.

131. *See, e.g.*, ASSISTED VOLUNTARY RETURN AND REINTEGRATION: AT A GLANCE 2015, INTERNATIONAL ORGANIZATION FOR MIGRATION, *available at* https://www.iom.int/cms/en/sites/iom/home/what-we-do/assisted-voluntary-return-and-re/voluntary-return-european-network-commun.html.

132. *Id.* at 16.

133. *Id.* at 4.

134. International Convention on the Protection of the Rights of Migrant Workers and Their Families, G.A. Res. 45/158, 2220 U.N.T.S. 3 (Dec. 18, 1990) [hereinafter ICRMW].

135. Int'l Law Comm'n, Draft Articles on the Expulsion of Aliens, U.N. Doc. A/CN.4/L.832 (Sept. 12, 2014) [hereinafter "Draft Articles on the Expulsion of Aliens"]. In addition, in recognition that "there has existed no

of migrants, but neither specifically governs the rights claims and corresponding state responsibilities *following* deportation beyond the territorial boundaries of the "host" or expelling state. Nonetheless, they are part of a growing international discourse on the protection of the rights of noncitizens.

The ICRMW entered into force in 2003—thirteen years after its passing, and nearly three decades after Mexico and Morocco began their campaign for a UN convention on the protection of the human rights of migrants. The call for a comprehensive UN-based document came in the wake of the adoption of the International Labor Organization's (ILO) Convention No. 143[136] which dealt with the treatment of migrant workers, at least in part because the ILO was perceived as too narrowly focused on economic outcomes and not sufficiently rights-based.[137] Years of working groups, drafting conferences, and commenting periods followed, culminating with the adoption of the ICRMW in 1990. Though largely focused on the labor and civil rights of migrant workers in the "State of employment," the ICRMW briefly addresses deportation ("expulsion") in Article 22.[138] It provides that migrant workers and their families should not be subject to collective expulsion. It sets forth basic requirements for lawful expulsion procedures, such as having the decision on expulsion communicated in a language that is understood by the individual. It also addresses

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single legal instrument in international law that clearly and unequivocally protects the rights of all migrants," an International Migrants Bill of Rights was drafted by Georgetown University Law Center. *International Migrants Bill of Rights*, 28 GEO. IMMIGR. L.J. 9 (2013). Another noteworthy endeavor is the Boston Principles on the Economic, Social, and Cultural Rights of Noncitizens, a set of thirty standards drawn from international human rights emerging from a drafting conference at Northeastern University School of Law. *See The Boston Principles on the Economic, Social, and Cultural Rights of Noncitizens*, NORTHEASTERN UNIVERSITY SCHOOL OF LAW, http://www.northeastern.edu/law/academics/institutes/phrge/publications/boston-principles.html (last visited Feb. 25. 2015) (providing the latest draft of the Principles as well as background information).

136. Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, I.L.O. No. 143, 17426 U.N.T.S. 1120.

137. Graziano Battistella, *Migration and Human Rights: The Uneasy but Essential Relationship*, *in* MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS 47, 52 (Paul de Guchteneire et al. eds., 2009).

138. ICRMW, *supra* note 134, at art. 22.

an important post-deportation issue—the right "before or *after departure* to settle any claims for wages and other entitlements."[139]

Despite initial high expectations that the Convention would be widely adopted and would quickly enter into force, the 1990 adoption was followed by years of organized international campaigning. More than a decade passed before sufficient ratifications were obtained for the ICRMW to enter into force. Even now, essentially no "expelling States" have ratified it. It is interesting—and perhaps a lesson for the future—that Mexico was one of the champions of the Convention. Though long primarily a state of emigration, Mexico now receives a significant number of migrants. Indeed, according to figures reported by the Guatemalan government, some 114,007 Central Americans were deported from Mexico in 2014.[140]

Perhaps the ICRMW's greatest contribution—despite its sparse ratification—is as "an enabling tool that makes it possible for a wide range of actors to discuss the issue of migrants' rights, cooperate with each other and develop coherent strategies for advocacy."[141] For example, a Special Rapporteur on the Human Rights of Migrants was established in 1999—even before the ICRMW entered into force—to monitor and report on violations of the human rights of migrants.[142] A Global Migration Group was created in 2006 to establish a "high-level

139. *Id.* at art. 22(6) (emphasis added).

140. DIRECCIÓN GENERAL DE MIGRACIÓN, GOBIERNO DE GUATEMALA, CENTROAMERICANOS DEPORTADOS DE MEXICO VIA TERRESTRE, ENERO-DICIEMBRE 2014-2013, *available at* http://www.migracion.gob.gt/index.php/descargas/category/24-estadisticas-2014.html. The report also indicates that the number of these deportations in 2013 was 72,692. *Id.*

141. Paul De Guchteneire & Antonie Pécoud, *Introduction: The UN Convention on Migrant Workers' Rights*, *in* MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS 1, 30 (Paul de Guchteneire et al. eds., 2009).

142. *Special Rapporteur on the Human Rights of Migrants*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx (last visited Feb. 24, 2015) (providing background information on the Special Rapporteur on the Human Rights of Migrants as well as the annual and country reports).

inter-institutional group of agencies involved in migration-related activities."[143]

More recently, the International Law Commission (ILC) has put forth a set of draft articles on the expulsion of aliens.[144] The articles have been referred to the UN General Assembly with a recommendation that it consider the possible elaboration of a convention based on the draft articles.[145] Unlike the ICRMW, with its broad focus on migrant workers, the ILC draft exclusively addresses the expulsion of noncitizens, so at first blush it may seem to have much overlap with our proposed Declaration. However, the document is largely limited to prescribing State responsibility and individual rights in expulsion decisions and some of the processes of expulsion, i.e., the detention and transportation of individuals as they are expelled from one country and sent to another. The ILC draft only begins to address some of the issues tackled more fully in our proposed Declaration. For example, Article 20 deals with the disposal of property in the expelling State, and specifies that this will be allowed "even from abroad." Perhaps most relevant, Article 29 addresses an individual's right to return to the expelling State "if it is established by a competent authority that the expulsion was unlawful." However, these articles—addressing procedural rights and providing for a right "to challenge the expulsion decision"[146]—remain loosely worded, and the reader is left with no clear understanding of what the proclaimed rights should mean in practice.

Deported individuals face myriad obstacles—from formalistic procedural hurdles to considerable practical ones. It is precisely to address these obstacles in the context of deportations from the United States that the Post-Deportation Human Rights Project was founded in 2006. For more than half a century, individuals who have been deported from the United States have been barred by agency policy (and then formal regulations) from challenging their deportation orders collat-

143. *What is the GMG?*, GLOBAL MIGRATION GROUP, http://www.globalmigrationgroup.org/what-is-the-gmg (last visited Feb. 24, 2015).

144. Draft Articles on the Expulsion of Aliens, *supra* note 135.

145. *Expulsion of Aliens: Analytical Guide*, INTERNATIONAL LAW COMMISSION, *available at* http://legal.un.org/ilc/guide/9_12.htm (last visited Feb. 25, 2015).

146. Draft Articles on the Expulsion of Aliens, *supra* note 135, art. 26(1)(b).

erally, even when new evidence or a change in interpretation of the law calls into question the accuracy of the deportation decision. In recent years, following litigation spearheaded by advocates, including the Post-Deportation Project, nearly all federal circuit courts have held that such a bar on post-deportation challenges is invalid in at least some circumstances.[147] Even such favorable developments, however, leave many roadblocks in place. Further, even though since 1996 individuals can continue to pursue their timely appeals to the federal courts even if their deportation is carried out, the lack of meaningful and effective policies to return individuals who prevail mean that many will not be able to benefit from their success in court.[148] Beyond these technical procedural hurdles—and just as importantly—deported individuals are often faced with limited or no access to legal information and limited ability to communicate with family or advocates in the country of expulsion. Therefore, they may not become aware of flaws in their deportation decisions, let alone have the knowledge and resources necessary to challenge such errors.

Ultimately, it is our conclusion that no existing instrument—at the international or regional levels—comprehensively or specifically engages the situation of individuals who have been deported. Though some relevant provisions can be found scattered across a number of documents—chief among them the EU Return Directive, the ICRMW, and the ILC's draft articles—no set of norms focuses on the rights of deported and expelled individuals. Our Declaration, by contrast, is intended to contend with both procedural and substantive rights of deported individuals from the moment their physical deportation is initiated—precisely the moment that existing documents largely identify as the end-point of a state's responsibility—as well as their continuing rights after deportation has been realized.

Gaps and deficiencies in the European human rights system's protections for migrants and of the Return Directive

147. *See supra* note 12.

148. NEW YORK UNIVERSITY SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, VICTORY DENIED: AFTER WINNING ON APPEAL, AN INADEQUATE RETURN POLICY LEAVES IMMIGRANTS STRANDED ABROAD (2014), *available at* http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/2014-7-3%20Victory%20Denied.pdf.

have been well described by many commentators.[149] Still, when compared to the U.S. practice, it is striking that EU Member States actually negotiated rather specific, transparent, and comprehensive rules for deportation. The pervasive recognition of—and references to—the European human and fundamental rights frameworks is especially important in this context. Moreover, the jurisprudence of the ECtHR and other courts have been protective in ways about which U.S. legal practitioners can only dream. Still, we believe that a Declaration of the Rights of the Deported is needed, even in Europe. In the next section we explain why and consider how such a Declaration fills important gaps and provides an important new way to think about deportation.

III. WHY A DECLARATION? WHY NOW?

A. *Basic Arguments in Favor of a Declaration*

The size, scope, and ferocity of current deportation systems demand immediate attention in a framework that prioritizes protection of basic human rights. Certain rights of the deported (and those whom states seek to deport) may, as noted, be grounded in any number of extant legal regimes and human rights or constitutional principles. However, existing international and domestic law does not sufficiently ensure the rights of deported individuals, vis-à-vis the deporting nation state or the various places to which they are sent. Though several of the major international human rights instruments speak to well-recognized universal rights—life, equal protection, protection from arbitrary detention, protection of family relationships[150]—how such rights manifest themselves in the context of post-deportation, and perhaps

149. *See, e.g.*, Peers, *supra* note 107 (discussing some problems with the return directive as it relates to irregular immigrants); *see also* Anneliese Baldaccini, The EU Directive on Return: Principles and Protest, 28 REFUGEE SURV. Q. 114 (2010).

150. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

most saliently who has the responsibility to ensure the protection of these rights, differs in complex and nuanced ways.

Further, existing international human rights instruments that address the rights of displaced populations have largely focused on the rights of migrants who are noncitizens in their country of residence, or on the rights of internally displaced persons within the boundaries of their country of citizenship.[151] The rights claims and protection needs of deported and expelled individuals differ from the traditional understanding of "migrants" in fundamental ways. Most particularly, deportation raises the problem of extra-territorial state responsibility (by the deporting state) and a need for harmonization between the legal regimes of the deporting state and the receiving state. In this sense, it is perhaps analogous to the international legal regime that was once developed to deal with problems of dual or multiple nationality.[152]

It is against this backdrop that we view the adequacy of the current rule of law and current systems pertaining to the deported. We suggest that it is woefully, indeed in the U.S. context embarrassingly, deficient. We do not naively believe that our proposed Declaration would have immediate legal impact. However, we do suggest that such a document could have a number of salutary effects. First, it would help to conceptualize systemic deficiencies. Put simply, it counters the prevalent "out of sight, out of mind" model that undergirds deportation systems. The principle aim of the draft Declaration is thus to recognize deported and expelled individuals *as a cognizable legal class*—with distinctive, particular protection needs and rights. Second, our proposed Declaration has already served—and could serve much more strongly—as a lodestar, a sort of a point of navigational reference for those who advocate for institutional reform. Its instantiation of deportees as a legal class renders their rights claims more regular and more understandable as it also implies certain solidarity among those who

151. An example is the International Convention for Protection of Rights of Migrant Workers and Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3, which despite having been adopted twenty-five years ago has failed to garner any meaningful support. *See also* Representative of the U.N. Secretary General, *Guiding Principles on Internally Displaced Persons*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

152. *See, e.g.*, Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, L.N.Doc.C.24M.13 1931 V.

have faced this system even in disparate settings. Finally, a Declaration can 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.

We should emphasize that our goal is neither to legitimize nor to facilitate deportations. We do accept—as does much of the existing corpus of human rights law—the basic legitimate authority of the nation-state to control borders and to remove those who have violated certain immigration laws. The current system, however, has metastasized beyond all recognition. The United States alone spends some $18 billion annually on immigration enforcement. In the EU, the "Return Fund," a financial support mechanism, channeled EU funds to Member States to help with "return management." The total allocation for all Member States in the period 2008-2013 amounted to €674 million.[153]

B. *Drafting History and Major Concerns/Critiques*

In the fall of 2012, the Post-Deportation Human Rights Project, an initiative of the Center for Human Rights and International Justice at Boston College, organized and hosted an interdisciplinary conference to consider drafting an international convention on the rights of the deported. Legal scholars, practitioners, activists, and psychologists came together to comment on an initial working draft of the document and to offer insight based on their research and lived experiences.[154] This initial conference addressed threshold inquiries: Should such a document exist? If the answer to this first question were to be "yes," what should the scope of such a document be?

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153. COMMISSION COMMUNICATION, *supra* note 19, at 4. An upcoming Asylum, Migration and Integration Fund (AMIF) will build on experience gained over the last six years and will continue to support the objectives of EU return policy, including alternative measures to detention, provision of social assistance, counseling and legal aid, specific assistance for vulnerable persons, independent and effective forced return monitoring, improvement of reception infrastructure, services and conditions, as well as training of staff. *Id.* at 4–5. Pursuant to various EU "external cooperation instruments," the EU has supported capacity building for non-EU countries for several aspects of return management, including the integration of returnees. Since 2005, the Commission has financed over forty projects with over €70 million. *Id.* The focus has been on "capacity building for return and reintegration." *Id.*

154. A list of participants is attached as Appendix B.

Should it encompass the entire process of deportation or should it more narrowly focus on what happens *after* deportation? Should it be drafted as "hard law," such as a convention, or "soft law," more akin to guiding principles?

A second roundtable conference was organized in the spring of 2014. In addition to legal, political science, sociology, and psychology scholars from the United States, scholars from Europe and Jamaica, representatives of non-governmental organizations, and individuals working directly with deported individuals participated in the conference. A concerted effort was made to ensure that the review process took into consideration viewpoints and knowledge outside that of the U.S. deportation context, allowing the resulting document to reflect an international perspective. For example, several participants knowledgeable with the European system spoke about the EU Returns Directive and existing monitoring mechanisms and expressed that, while a significant step in the right direction, these fail to address many of the concerns covered by the draft declaration.

The most basic concern one might raise about such a project is that it unduly impinges on the sovereign authority of states. This, however, is obviously true of all relevant human rights instruments, especially those relating to the rights of migrants. Moreover, as noted above, our conclusion is that the deportation system, as a worldwide phenomenon, is sufficiently large and harsh to warrant particular restraint. Further, much of the structure of the Declaration aims to encourage, model, and facilitate bilateral cooperation between deporting and receiving states. In that sense the Declaration is a hybrid model—partly human rights instrument, but also partly a set of guidelines and aspirational best practices that states may adopt.

Some have also expressed concerns that recognizing the rights of deported individuals and the corresponding obligations of both sending (deporting) and receiving states undermines the legitimate goal of bringing the "process" of deportation and—just as importantly—the possibility of litigation to an end. The Declaration mandates that sending states "provide a simple, accessible system for appealing or challenging an order of expulsion or deportation from outside its territorial borders, including a system of collateral motions where reasonable grounds for reopening or reconsideration of re-

moval orders are taken into consideration."[155] Although we respect the goal of finality, it may be outweighed by other considerations in cases with especially harsh consequences. Moreover, the Declaration focuses on the meaning of removal itself. The physical removal of an individual from the territory of a state should not be the defining marker of finality, especially when similarly situated individuals who have not yet been removed from the territory would (appropriately) have access to various legal avenues to challenge their deportation orders.[156] The Declaration also recognizes that "the ties accrued by those who are territorially present do not evaporate upon departure."[157] Thus, the Declaration envisions that deporting states have continuing duties—analogous to their continuing jurisdiction as a legal matter—to relate to those who have lived in their territory for long periods of time or who have accrued substantial ties there.

Some participants in the drafting conferences posed interesting questions of differentiation/discrimination: Why should deportees be entitled to more rights than those who may be similarly situated—for example have a U.S. citizen spouse and children—but who are seeking entry for the first time? The answer is two-fold: First, the Declaration says nothing about and surely does not mean to disparage the rights claims of initial entrants under such standards as ECHR Articles 8 and 13 (and of course, protections for forced migrants, refugees, etc.). However, the deported individual's plight is directly brought about by state action and derives from conduct that occurred within state territory. Also, a deported lawful permanent resident is being deprived through deportation of something s/he had already been granted. Such an individual has a qualitatively different case from, and a stronger set of rights claims than, an individual who is being denied entry in the first instance.[158] This is surely not a perfect distinction, but it is a rational one.

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155. *Infra* App. A, art. 22 ¶ 2.

156. KANSTROOM, *supra* note 34, at 191 ("A rigid reliance on this single factor, however, ignores the complex interaction among space, time, and status that has long marked U.S. immigration law.").

157. Rosenbloom, *supra* note 15, at 155.

158. Goldberg v. Kelly, 397 U.S. 354 (1970) (noting that due process requires notice and an opportunity to be heard before termination of government benefits).

Some also raised concerns that it was the deported individual's own actions—such as a criminal offense or remaining in the country illegally—that was the actual cause of deportation. In this regard, it is important to note that the Declaration is not an abolitionist document. It continues to recognize the legitimate power of the nation-state to deport (though we are strongly sympathetic to calls—such as that of the European Parliament noted above—to abolish deportations of long-term legal residents). The Declaration strongly supports the evolving jurisprudence of the ECtHR and other bodies to maintain powerful proportionality protections, protections of family and private life, etc. Even for individuals who had not been granted a positive right to live in the United States, the state's tacit acquiescence—which allowed family and other ties to form— distinguishes this individual's posture from that of an individual who is seeking entry or some other benefit in the first instance.[159]

We have also noted a few possible perverse consequences of this Declaration. It might, for example, seem to grant the deported greater rights in their "home" countries than are available to those who have never left those countries. This could be due to the dual responsibilities of the deporting and receiving states. This strikes us as a very unlikely outcome in reality, however. But, as a matter of theory, it derives from the unusual circumstances of the lives of migrants, and in that sense it hardly seems unfair for accrued rights to be protected.

Finally, the Declaration seeks to balance a variety of pragmatic considerations: It tries not to go too far in micro-managing and to leave a "margin of appreciation" for state action within its prescribed boundaries of rights protections. It is purposefully not designed as a Convention in large part because of its unique, path-breaking character, which argued for maximum flexibility more as a statement of principles than as a set of rigid, universal binding obligations. It is our hope, however, that future developments could be more binding. Some argued that a more strongly worded convention would not in any event garner support from major sending countries. Others, however, expressed hope that a formalized convention would lend more credibility and recognition to established bi-

159. Plyler v. Doe, 457 U.S. 202 (1982) (recognizing the rights of undocumented children present in the United States to free public education).

lateral agreements and nascent initiatives concerning the mechanisms of international deportation. We believe that, if taken seriously by nation-states, these principles could well be seen to have pragmatic utility, beyond their normative power.

This, however, raises another set of very serious concerns: The consensus in the drafting conferences was strongly in favor of the propriety of 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 legitimation risk did not outweigh the need for a strong, rights-based response.

Others, who favored a broader scope, were concerned that a narrow focus on post-deportation rights would draw attention from the violations of basic rights and fundamental fairness in deportation decisions themselves. Some feared that an international convention would inevitably lead to a "race to the bottom" in search of the lowest common denominator that would be palatable to states.

We have also responded to a number of more particular concerns that were articulated at the initial conference. For example, a community activist who had himself faced deportation expressed the sentiment that using the term "deportee" reduced individuals to a single identity rather than recognizing their dignity as multi-faceted human beings. This was in response to our initial formulation of the convention as pertaining to the rights of "deportees." Another participant suggested that a preferable term might be "deported person," as it defines people by the action of the state rather than by their status.[160] We chose the term "expelled and deported persons" both to avoid using the term "deportee"—with its negative

160. These and related concerns were echoed at our second conference by Dr. Bernard Headley, a sociology professor who directs a reintegration organization in Jamaica, who attested to the stigma carried by the label "deportee." Bernard Headley, *Giving Critical Context to the Deportee Phenomenon*, 33 Soc. Just.40 (2006), *available at* http://www.socialjusticejournal.org/archive/103_33_1/103_04Headley.pdf; *see also* M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigrant-Crime Nexus and Post-Deportation Exper-*

connotations—and to reflect a diversity of terminology and the many tactics states employ to compel or induce an individual to leave the country.

Ultimately, we also decided to maintain the narrow scope of the document to address rights of deported individuals from the moment of deportation or expulsion. This was partly a pragmatic decision—attempting to tackle the entire process of deportation, including the permissible considerations in making deportation decisions and the weight they should be given, as well as the procedures and protection in deportation decisions and any accompanying detention, is a tremendous project to undertake. In addition, many of these issues are already addressed, at least in part, elsewhere in international law—in the Refugee Convention, the Convention Against Torture, and the International Covenant on Civil and Political Rights provisions against arbitrary detention, to name a few. Lastly, as noted, the International Law Commission has been working on a set of draft articles on expulsion, which take up the rights of individuals undergoing expulsion procedures.[161] In short, our major interest was to focus on the area that has been largely ignored—what happens after removal from the territory of the deporting state.

We concluded that the document should be aspirational—framed as an assertion of positive and negative rights and state obligations—while addressing issues with sufficient specificity to be meaningful. For example, it would not just include a broad assertion to the right to family unity, but include particular provisions to make such a right meaningful in the context of post-deportation.

C. *A Brief Exegesis of the Declaration*

The Declaration is designed to be accessible and easy to understand. We will therefore not reiterate its provisions here. However, as an overview, it should be apparent that much of it is aimed at coordination and regulation of processes between sending and receiving states to ensure protection of substantive rights. As noted above, these are major gaps, especially in the United States.

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iences: En/Countering Stereotypes in Southern California and El Salvador, 31 LA VERNE L. REV. 363 (2010) (discussing deportee stereotypes).

161. Int'l Law Comm'n, *supra* note 144.

After setting out key definitions and several articles of general applicability to issues such as non-discrimination—the right to life, respect for dignity, security of person and property—and protection from arbitrary detention, the draft Declaration tackles a number of issues specific to the post-deportation setting. Its core protections are procedural. However, unique substantive protections are also part of its structure. Article 7, for example, enunciates an important norm of non-discrimination. Much research has shown such discrimination to be an especially serious problem in many countries to which U.S. deportees are sent.[162]

Part 3 focuses on rights of deported and expelled persons in the course of travel and reception in the country of removal or the transit country, including 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 is noteworthy, as it protects expelled and deported persons who require special attention. It 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 receiving the informed consent of the individual.

Part 4 addresses compelling problems of adjustment and reintegration in the receiving country. For example, the right of individuals to identification documents that do not identify them as deported or expelled individuals (Article 15), the 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).

The three articles in Part 5 respond to the obstacles deported individuals face in challenging wrongful removals fol-

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162. *See generally* KANSTROOM, *supra* note 34, 145-57; *see also* Kathleen Dingeman-Cerda & Rubén Rumbaut, *Unwelcome Returns: The Alienation of the New American Diaspora in Salvadoran Society, in* THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES (Daniel Kanstroom & M. Brinton Lykes, eds. forthcoming NYU Press 2015) (examining human rights issues faced by the deported in El Salvador).

lowing their deportation. Article 21 begins by asserting the right to continued participation in legal proceedings—not just as they relate to deportation, but also criminal and civil, including family court proceedings. It specifically provides that states should facilitate travel and entry for 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 last article in this Part affirms the right of deported individuals to return to the expelling state, and calls for limits and waivers of any imposed reentry bans. Finally, Part 6 confirms the right to respect of family life, and provides that States should allow avenues for family reunification and generously grant requests for visits through visas or parole.

IV. CONCLUSION

Compared to other human rights movements, the push for recognition of the rights of deported and expelled persons is still in its infancy. The draft Declaration is simply one step forward in the effort to solidify this nascent idea. Still, the Declaration has powerful attributes. First, it recognizes that deportation is a major worldwide phenomenon in need of a focused human rights response. Second, it recognizes sufficient commonality among the deported to treat them as a cognizable class. Third, the Declaration definitively rejects the sort of "formalist territorial 'on/off switch' for rights"[163] that has marked much of U.S. legislation and jurisprudence. Fourth, it extends beyond courts to create a framework—analogous to but more protective than the current European model—in which a deporting ("sending") country's involvement with the deported individual does not end with the removal of the individual from that country's territory.

The Declaration is built on the premise that deporting countries share the responsibility of ensuring that the basic rights of deported individuals are protected. Further, it compels receiving countries to grapple with the practical difficulties and stigma faced by deported individuals, and demands respect for fundamental human rights enshrined elsewhere in

163. KANSTROOM, *supra* note 34, at 226.

international law—such as family unity—but experienced in unique ways by deported individuals. Finally, it may have utility as a mobilization strategy, engaging the support and advocacy expertise of national and international NGOs. The Declaration could also—as was suggested by several participants of the May 2014 conference—facilitate bilateral negotiations. In that setting, it might serve as a blueprint for dialogue and negotiations.

To be sure, although the Declaration enunciates some rights, the form in which these rights will be respected must evolve and may vary contextually. What constitutes the required protection of a right will undoubtedly depend on the individual's situation, as the jurisprudence of the ECtHR demonstrates. For example, a long-term lawful resident of a country who has been forced to leave behind a spouse and children may have a stronger right to visit family than would an undocumented person whose residence was for a short time period. In the reintegration context, a deported person who has been absent from the country of citizenship for fifteen years, or who left that country as a child, may be entitled to more assistance in reintegrating and finding work than someone who has been gone a matter of weeks, though both were deported. But the inevitability of a certain measure of discretion and a certain margin of appreciation should not obscure the importance of enunciating basic rights for the deported. In this regard, the Declaration is, we hope, path breaking, inspirational, productive, and largely unique.

APPENDIX A

DECLARATION ON THE RIGHTS OF EXPELLED AND DEPORTED PERSONS

PREAMBLE

WHEREAS all persons, including expelled and deported persons, are entitled to respect for their dignity, due process of law, equal treatment, freedom from discrimination, freedom from arbitrary and disproportionately harsh practices, and the protection of their human rights and fundamental freedoms under the Charter of the United Nations, Universal Declaration of Human Rights, various generally accepted regional and international human rights instruments, international humanitarian law, and *jus cogens* norms,

RECALLING the obligation of all States, in conformity with the Charter of the United Nations and the human rights instruments to which they are party, to respect, protect and promote human rights and fundamental freedoms of all persons,

DECLARING and RECOGNIZING that expelled and deported persons are a legally-cognizable class entitled to special protection to ensure their human rights and fundamental freedoms,

RECOGNIZING that these rights derive from the inherent dignity of the human person, not citizenship or immigration status, and that they therefore justify international protection to reinforce and complement such protections as may be provided by the law of States and regional bodies,

ACKNOWLEDGING the legitimate concerns of States and supranational entities and the widely recognized legal fact of sovereignty as bases for regulating the movement of people across borders in conformity with law and human rights,

CONCERNED, however, about many of the current practices of border and migration controls, and the harmful consequences of massive, inhumane and harsh expulsions and deportations for individuals, their families and communities,

RECOGNIZING that expulsion and deportation should be measures of last resort and, if they are ever deemed to be necessary, should be undertaken by the most humane and least restrictive means possible, without the use of force or detention, unless absolutely necessary,

RECOGNIZING that the rights of noncitizens, including those facing expulsion or deportation, have been widely recognized in such instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Rights of All Migrant Workers and Members of Their Families, and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,

DETERMINED now to affirm respect for human dignity and human rights, and due process of law into the practices of expulsion and deportation, and especially into the reception, adjustment and reintegration of expelled and deported persons,

Proclaims this Declaration:

PART 1: DEFINITIONS AND SCOPE

Article 1.

For the purposes of the present Convention:

(1) The terms "expelled person" and "deported person" refer to a non-citizen of the sending State who has been returned, removed or expelled to her/his country of citizenship or a third country as a result of the sending State's order/action compelling or inducing the individual to leave. The terms imply forcible state action but also include so-called voluntary mechanisms. The term "deported person" may under highly unusual circumstances include, but is not limited to the type of deportation that is defined as a war crime and a crime against humanity in the 1945 Charter of the International Military Tribunal at Nuremberg, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, Article 7(1) of the

Rome Statute of the International Criminal Court, and related instruments.

(2) The term "sending State" refers to a State or supranational entity that has induced or compelled the return, removal, expulsion or deportation of a non-citizen.

(3) The term "receiving State" refers to a State or supranational entity to which the expelled or deported person is sent whether or not it is the person's country of citizenship.

Article 2.

The present Declaration pertains to the rights of expelled and deported persons from the moment they are compelled or induced to depart from the sending State; it aims to supplement the rights such persons have before and during expulsion or deportation processes prior to departure as recognized by national laws and international instruments cited in the Preamble and related instruments.

PART 2: ARTICLES OF GENERAL APPLICATION

Article 3.

The present Declaration is applicable to all expelled and deported persons - whether in the sending State, receiving State or in transit - without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, age, sexual orientation, gender identity, disability, economic position, property ownership, or marital status.

Article 4.

(1) States and regional and international bodies should undertake all appropriate legislative, administrative, juridical and other measures for the implementation of the rights recognized in the present Declaration.

(2) Both sending and receiving States have the independent duty and responsibility to ensure the rights set forth in the present Declaration, including during

the time after an individual has departed from the sending State. Wherever necessary, sending and receiving States should collaborate closely to ensure protection of the rights set forth in the present Declaration.

(3) Individuals should never be expelled or deported to States, territories, or failed States in which governments cannot protect their basic rights as defined herein or to a place in which the person will not be received permanently.

(4) With regard to economic, social and cultural rights in this Declaration, States should undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation, especially through collaboration and coordination between the sending and receiving States.

Article 5.

(1) All expelled and deported persons, whether in the sending State, receiving State or in transit, have the right to life, respect for dignity, security of person and property, and protection from arbitrary detention.

(2) No one shall be subjected to torture or cruel inhuman or degrading treatment or punishment.

Article 6.

All expelled or deported persons have the right to recognition everywhere as a person before the law.

Article 7.

(1) Expelled and deported persons should not be discriminated against in receiving States on the grounds that they have been expelled or deported.

(2) Expelled and deported persons should not be discriminated against in receiving States on the basis of criminal history, except that they may be subjected to

generally applicable laws in the same way as citizens or legal residents of those receiving States.

(3) Expelled and deported persons who are citizens or nationals of the receiving State should enjoy the same rights and privileges as other citizens or nationals in the receiving State.

(4) Expelled and deported persons who are non-citizens of the receiving state shall enjoy the same rights and privileges as other individuals who are legally present in the receiving State.

(5) Sending States should not expel or deport persons to receiving States in which they do not have a right of legal permanent residence. Exceptions may be made under circumstances where the individual has requested such expulsion or deportation and the sending State has determined that the person would not be subject to persecution, torture, re-expulsion and similar practices.

Article 8.

(1) States should neither expel nor deport particularly vulnerable persons. Nor should expulsion or deportation be carried out when it would be disproportionate, unfair or otherwise in violation of fundamental human rights. Legal process must be fully available to ensure compliance with these evolving norms.

(2) If sending States deem it legal and necessary to deport such persons, certain expelled and deported persons who require special attention, such as children, especially unaccompanied minors, pregnant and nursing women, persons with physical or mental disabilities, persons whose claims for asylum, withholding of removal, non-refoulement and similar forms of protection were denied, victims of human trafficking and other serious crimes, persons living with HIV/AIDS or other serious medical conditions, are entitled to protection and assistance required by their condition and to treatment which takes into account their special needs. Both sending and receiving States should coordinate protection, care, and treatment of such persons.

Article 9.

The present Declaration shall not be interpreted as restricting or impairing the provisions of any international human rights instrument, Court or Committee decisions or rights granted to persons under domestic or international law.

PART 3: ARTICLES RELATING TO TRAVEL AND RECEPTION

Article 10.

(1) All expelled and deported persons should be treated with respect and dignity during all stages of travel to and upon arrival at the receiving State, and should not be subject to torture, arbitrary detention, unreasonable physical or chemical restraint or other forms of cruel, inhuman or degrading treatment or punishment.
(2) Restraints may only be imposed to ensure the physical safety of the individual or others around her/him, when less restrictive interventions have proven unsuccessful. When a restraint is deemed necessary, it should be done in the least restrictive method possible.

Article 11.

(1) All expelled and deported persons should have access to food, water, sanitation, basic healthcare, shelter and other basic needs during all stages of travel to and upon arrival at the receiving State.
(2) Sending and receiving States shall coordinate to meet such basic needs. States through which a person may be compelled to travel also bear responsibility for that person.

Article 12.

(1) Expelled and deported persons who require special attention, including children, especially unaccompanied minors, pregnant and nursing women, persons

with physical or mental disabilities, persons whose claims for asylum, withholding of removal, non-refoulement and similar forms of protection were denied, victims of human trafficking and other serious crimes, persons living with HIV/AIDS or other serious medical conditions, should be entitled to protection and assistance required by their condition and treatment which takes into account their special needs during travel and upon arrival.

(2) Sending 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.

(3) Sending States should be especially mindful when coordinating the departure and travel of individuals who have made claims under specially protected grounds of international law.

Article 13.

(1) Expelled and deported persons, if they choose, should be permitted to notify family members or others in the receiving State of their expected arrival.

(2) Sending and receiving States should coordinate resources to assist individuals with opportunities to contact their family members or others.

Article 14.

(1) All expelled and deported persons should be able to bring their assets and personal effects to the receiving State, and should have continuing access to such assets and effects in the sending State, including funds, anticipated legal settlements, pensions, social security and other government benefits.

(2) Sending States should assist expelled and deported persons in making arrangements to liquidate or transfer their assets before departure.

(3) Sending and receiving States should coordinate to assist expelled and deported persons with accessing their assets in the sending State after departure.

PART 4: ARTICLES RELATING TO ADJUSTMENT AND REINTEGRATION

Article 15.

Expelled and deported persons should have the same rights to participate in public affairs and have the same access to public services as those with comparable citizenship or legal status in the receiving State.

Article 16.

(1) All expelled and deported persons should be issued identification documents that enable them to enjoy their rights and privileges in the receiving State.
(2) Expelled and deported persons should be issued the same identification documents as those with comparable citizenship or legal status in the receiving State.
(3) The receiving State should make obtaining such documents accessible and affordable.
(4) At no time after departure should the sending State retain the personal identification documents of a person being expelled or deported.
(5) Family members accompanying or following to join expelled or deported persons should also be issued identification documents that enable them to enjoy applicable legal rights and privileges in the receiving State.

Article 17.

(1) All expelled and deported persons have the right to be free from social stigma and the discrimination and violence that may arise from social stigma.
(2) The receiving State should protect all expelled and deported persons against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

Article 18.

(1) All expelled and deported persons have the right to housing comparable to that of legal residents in the receiving State.
(2) Sending and receiving States should collaborate to make appropriate housing arrangements for expelled and deported persons, especially for individuals who require special attention as identified in Article 8(2).

Article 19.

(1) All expelled and deported persons have the right to the highest attainable standard of health care.
(2) Sending and receiving States should coordinate to ensure continuity of medication and medical treatment upon arrival, such as transferring medical records upon the informed consent of the individual, and providing appropriate referrals.
(3) Whenever possible, sending and receiving States should coordinate to make special care available for individuals who have special needs.

Article 20.

(1) All expelled and deported persons have the rights to work, to free choice of employment, to just and favorable conditions of work, to fair compensation and to protection against unemployment.
(2) The receiving State should ensure fair hiring practices for all expelled and deported persons without negative discrimination.
(3) Sending and receiving States should coordinate to provide services that ensure these rights, including skills training, language courses, job placement, and small business loans.

PART 5: ARTICLES RELATING TO CONTINUED ACCESS TO LEGAL PROCEEDINGS

Article 21.

(1) All expelled and deported persons have the right to participate in legal proceedings, in sending States, including criminal, civil and family court proceedings after they have been expelled or deported.
(2) Sending and receiving States should facilitate travel and entry to the sending State for the purpose of participating in legal proceedings.

Article 22.

(1) All expelled and deported persons have the right to appeal or challenge wrongful expulsions.
(2) The sending State should provide a simple, accessible system for appealing or challenging an order of expulsion or deportation from outside its territorial borders, including a system of collateral motions where reasonable grounds for reopening or reconsideration of removal orders are taken into consideration. The following non-exhaustive list shall provide sufficient grounds for reconsideration of a final order, even where all appeals have been exhausted: a) major change in law; b) discovery of a material mistake of law or fact; c) lack of notice of the expulsion or deportation hearing; e) material and substantial changed circumstance.
(3) The sending State should be especially mindful when considering appeals and collateral challenges of cases based on claims for asylum, withholding of removal, non-refoulement and similar forms of protection.
(4) All expelled and deported persons have the right to physically return to the sending State without undue costs, restrictions, or restraints if they prevail on an appeal or collateral challenge to a removal order.

Article 23.

Expelled and deported persons have the right to seek to return lawfully to the sending State, whether permanently

or temporarily, through existing channels. Where the expulsion or deportation was accompanied by a reentry ban, such a ban should be limited in length and a waiver of the ban should be made available for humanitarian reasons, for purposes of family reunification, or when otherwise in the public interest.

PART 6: ARTICLES RELATING TO RESPECT OF FAMILY LIFE AND FAMILY UNITY

All expelled and deported persons have the right to respect of family life, as recognized under international human rights law.

In cases where expulsion or deportation has led to separation of family members, sending and receiving States should provide avenues for family reunification, and generously grant requests for visits through special visas or parole, especially for humanitarian purposes.

In determining the custody of children of expelled or deported persons the best interests of the child shall be of paramount consideration. The fact that a parent has been expelled or deported should not be a reason for the termination of custody, parental rights or visitation rights.

Sending and receiving States should facilitate travel and entry to the sending State for the purpose of participating in child custody hearings.

PART 7: ACCOUNTABILITY

All expelled and deported persons whose human rights as set forth in this Declaration are violated are entitled to have those directly or indirectly responsible for the violation, whether officials of a State or supranational entity or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation.

APPENDIX B
List of participants in one or both drafting conferences

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