

# Deportation as a Global Phenomenon: Reflections on the Draft Articles on the Expulsion of Aliens

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Critical appraisal of the International Law Commission’s Draft Articles on the Expulsion of Aliens (“Draft Articles”) demands a conceptualization of contemporary expulsion or deportation<sup>2</sup> as a global phenomenon. Deportation may be functionally defined as *a powerful government assertion of high stakes sanctions in low formality settings aimed at the most powerless and marginalized members of society*. In the United States context, deportation has been described by a prominent immigration judge as equivalent to the “death penalty . . . in a traffic court setting.”<sup>3</sup> Though analogies are always perilous, the analogy to the death penalty is disturbingly apt, if complex. As once famously described by Justice Stewart, the penalty of death differs from all other forms of criminal punishment, “not in degree but in kind.” It is “unique in its total irrevocability . . . in its rejection of rehabilitation . . . [a]nd . . . in its absolute renunciation of all that is embodied in our concept of humanity.”<sup>4</sup> One must also, of course, add that it is invariably applied in racially problematic, if not invidious, ways.

Expulsion involves many methodologies and forms, including some that apply informally at or near the border, and some that are denominated “voluntary.”<sup>5</sup> The harshest forms (though formalistically called civil)<sup>6</sup> raise similar concerns to the death penalty. These forms, which I have termed *post-entry social control*, often apply to those otherwise permitted to reside legally and permanently in a nation-state.<sup>7</sup> Consider, for example, the forced removal of a long-term legal resident who migrated as a young child (possibly as a refugee or asylum-seeker), and who

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<sup>2</sup> This essay uses the terms, “deportation,” “removal,” and “expulsion” interchangeably, to describe the phenomenon roughly as defined in the Article 2 of the *Draft Articles*. See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session, Draft Article 2, U.N. Doc. A/69/10, 12, ¶ 44 (2014) [hereinafter “ILC Draft Articles”]. Of course, there are important differences between United States and international usages of the term “deportation,” as well as among sub-variants of expulsion practices, as discussed more fully herein.

<sup>3</sup> See Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>; see also Denise Noonan Slavin & Dana Leigh Marks, *You Be the Judge: Who Should Preside Over Immigration Cases, Where and How?*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES (Kanstroom and Lykes, eds., 2015).

<sup>4</sup> *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring.)

<sup>5</sup> See generally DANIEL KANSTROOM, *AFTERMATH: DEPORTATION AND THE NEW AMERICAN DIASPORA* (2012); see also the discussion of ostensibly voluntary forms *infra*.

<sup>6</sup> Banishment, which might be similarly described, is traditionally viewed as a criminal sanction.

<sup>7</sup> See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) [hereinafter KANSTROOM, *DEPORTATION NATION*]; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893–94 (2000) (stating that “deportation of long-term lawful permanent residents for post-entry criminal conduct seems in most respects to be a form of punishment”); see also Lea McDermid, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 791 (2001); Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (highlighting how deportation straddles civil and criminal categories).

is convicted in early adulthood of a single minor drug offense. Such deportations—many thousands of which have taken place in the United States in recent years—are marked by practical irrevocability (they are accompanied by a lifetime ban), inherent harshness, lack of procedural due process, a retributive essence, a rejection of any real possibility of mercy or even dignity for the accused, and a tendency to be applied invidiously to the poor and to people of color.<sup>8</sup>

Such deportations cry out for the application of substantive norms of proportionality, protection of family, equal protection, etc. Indeed, like the death penalty, they inspire some to call for their abolition.<sup>9</sup> However, even the less stark forms of deportation (which I have generically called *extended border control*)<sup>10</sup> demand both strong procedural protections and substantive limits. In sum, one need not push the death penalty analogy to its logical limit to recognize that the expulsion of non-citizens is properly seen as a major, distinct, and harsh worldwide phenomenon in need of substantial scrutiny, critique, and legal restraint.

In this essay, I consider two approaches to conceptualizing deportation and to internationalizing its norms. The first approach—that of systematization, codification, and, perhaps, “progressive realization”<sup>11</sup>—is represented by the Draft Articles.<sup>12</sup> An alternative model is more focused on human rights, especially *after* expulsion, and more aimed at improving bilateral processes between expelling and receiving states. This is exemplified by the *Declaration on the Rights of Expelled and Deported Persons* (the “Declaration”) developed by the Boston College Post-Deportation Human Rights Project.<sup>13</sup>

There is no doubt that deportation, despite its various forms and the wide variety of state practices around the world, now warrants *conceptualization as a distinct, unique phenomenon*. This presents significant, but not insurmountable, theoretical challenges.<sup>14</sup> As the first paragraph of the General Commentary of the Draft Articles notes, “the entire subject area does not have a

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<sup>8</sup> Justice Brennan, in his opinion in *Furman*, offered interesting insights about the relationship between the death penalty and expatriation: “Expatriation . . . ‘destroys for the individual the political existence that was centuries in the development . . . strips the citizen of his status in the national and international political community [and] . . . puts [h]is very existence’ in jeopardy. Expatriation thus inherently entails ‘the total destruction of the individual’s status in organized society. . . . Although death, like expatriation, destroys the individual’s ‘political existence’ and his ‘status in organized society,’ it does more, for, unlike expatriation, death also destroys ‘[h]is very existence.’ There is, too, at least the possibility that the expatriate will in the future regain ‘the right to have rights.’ Death forecloses even that possibility.” 408 U.S. at 290.

<sup>9</sup> See, e.g., Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal*, 30 J. L. & POL. 465 (2015).

<sup>10</sup> This is due to their application to those who have entered states without permission or who have overstayed their legally permitted time or violated conditions of temporary residence. See KANSTROOM, DEPORTATION NATION, *supra* note 7.

<sup>11</sup> See, e.g., the essay by Jacqueline Bhabha in this Symposium.

<sup>12</sup> ILC Draft articles, *supra* note 2.

<sup>13</sup> This Declaration was drafted with significant input by outside experts, activists, and lawyers. See Daniel Kanstroom & Jessica Chicco, *The Forgotten Deported: A Declaration on the Rights of Expelled and Deported Persons*, 47 NYU J.INT’L L. & POL’Y 537 (2015) [hereinafter, Kanstroom et al., *Forgotten Deported*]. See <http://www.bc.edu/centers/humanrights/projects/deportation.html>.

<sup>14</sup> See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480–82 (2010) (“Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.”); see also Daniel Kanstroom, *Deportation and the Right to Counsel: Padilla v. Kentucky and the Challenging Construction of the “Fifth and a Half” Amendment*, 58 UCLA L. REV. 1461 (2011) (arguing that some forms of deportation imply a right to counsel due to their unique straddling of the line between the Fifth and Sixth Amendments to the US Constitution).

foundation in customary international law or in the provisions of international conventions of a universal nature.” This is essentially correct (though many aspects are well-accepted subjects of international law).

The Draft Articles surely help with the general goal of conceptualization. They are obviously the product of much work by excellent international lawyers, some (though perhaps not enough) input from human rights experts, and much compromise with the agendas of governments.<sup>15</sup> They involve not only “the codification” but also “the progressive development of fundamental rules on the expulsion of aliens.”<sup>16</sup> Indeed, in some respects they are path breaking in their codification of certain nascent and evolving norms.<sup>17</sup> But, in the end, they leave many questions unanswered and much important work still to be done.

At the outset, one must ask whether the moment is propitious for this sort of a comprehensive project: an attempt not merely to understand but to legally capture the entire field, so to speak. When the ILC started this effort in 2000, the time may have seemed right, or at least less risky and less subject to fear and reactionary politics.<sup>18</sup> But events in Europe (and, of course, in the United States), ranging from 9/11 to the United States’ failure to enact “comprehensive immigration reform” to the Syrian crisis, render it perilous to tinker with such critically important emerging norms as proportionality, protection of family life, etc. This, I think, counsels caution.

Moreover, the essential harshness of deportation demands acute attention to the rights claims of its objects. One may approach this in the manner of limiting principles, as the Draft Articles do. But we should also consider such models as a Declaration of Rights, bi-lateral procedural protections (between deporting and receiving states), and harmonization of domestic, bi-lateral, regional, and international legal mechanisms. In contrast to the Draft Articles, such incremental mechanisms might better avoid unduly rigid reification of state power and acquiescence to symmetrical framing of such power with basic rights claims. They also support the progressive, organic evolution of norms.

The most direct and most protective approach begins with the *recognition of the objects of deportation or expulsion as a cognizable class of people*—in some ways analogous to refugees—with *specific rights claims*. This model, which transforms the *objects* of deportation into *subjects* of human rights law, is already inchoate in some aspects of human rights law, and increasingly explicit in certain adjudicated decisions. Such recognition better facilitates the most important normative goal: *serious, meaningful restraint on state power to expel*.

A starting point of human rights, as compared with the power of the state, also supports more fluid and functional understandings of how deportation actually works. Consider, for example, how the Draft Articles define expulsion. Article 2 defines it as “a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State . . . .”<sup>19</sup>

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<sup>15</sup> See generally Sean Murphy, *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission* (2014).

<sup>16</sup> I will not engage herein with the controversial choice of the drafters of the *Draft Articles* to use the term “alien.” It is not a usage that I favor, however.

<sup>17</sup> See, e.g., discussion *infra* regarding Articles 26–29.

<sup>18</sup> See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10)*, ¶¶ 726–728, 729(4). For the syllabus on the topic, see *id.*, annex (4); see also SUMMARIES OF THE WORK OF THE INTERNATIONAL LAW COMMISSION, <https://perma.cc/KTG6-GRUR> (describing the history of the *Draft Articles* project)

<sup>19</sup> The definition clarifies that it “does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State.” Article 2(b) describes an “alien” [a word that has

This is unobjectionable as a start. However, what is actually meant by the phrase “conduct attributable to a State”? Is the welter of coercive, but formally “voluntary” return mechanisms developed in both the United States and throughout Europe covered by this definition? The Draft Articles are not clear about this, though paragraph 3 of the General Commentary states:

the formulation “alien[s] subject to expulsion” . . . is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process . . . [including] the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision.<sup>20</sup>

This is important, but insufficiently comprehensive, as it does not clearly capture a variety of informal ostensibly voluntary “return” methods.<sup>21</sup> Similarly, Article 10 (“Prohibition of Disguised Expulsion”) covers some prohibited practices; though, again, it is not clear about ostensibly legal, but formally “voluntary” mechanisms.

A more fundamental problem with the Draft Articles is their deep, structural ambiguity, if not confusion, about rights. This is reflected in the very first sentence of the General Commentary in which the “expulsion of aliens” is referred to as “a sovereign right of the State.”<sup>22</sup> Article 3, similarly, is entitled “Right of expulsion.”<sup>23</sup> It recites, “A State has the right to expel an alien from its territory.”<sup>24</sup> To be sure, this is followed by very important qualifications relating to the force of these articles, international law, and human rights. Still, such “rights” phrasing—as applied to what would be better termed as state *sovereign power* or, perhaps, *prerogative*—is significant, even when modified by rights provisions. As Wesley Hohfeld noted a century ago, “The term ‘rights’ tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense.”<sup>25</sup> As he later elaborated, “The great practical importance of accurate thought and precise expression as regards basic legal ideas and their embodiment in a terminology not calculated to mislead is not always fully realized.”<sup>26</sup> Leaving aside the problem of determining whether a state “right” could have a correlative Hohfeldian “duty,” the Draft Articles’ formulation is deeply problematic for less abstract reasons. Essentially, the architecture of the Draft Articles reflects a perceived tension among three equivalent “rights”: (1) the “sovereign *right* of the [expelling] State,” (2) the “*rights* of an alien subject to expulsion,” and (3) the “*rights* of the expelling State in relation to the State of destination of the person expelled.”<sup>27</sup>

This is a false symmetry that demands both a contemporary critique and some historical

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garnered much controversy in the United States and elsewhere, but which is used uncritically throughout the *Draft Articles*) as follows: (b) “alien” means an individual who does not have the nationality of the State in whose territory that individual is present.” ILC Draft Articles, Draft Article 2(b), *supra* note 2.

<sup>20</sup> ILC Draft Articles, *supra* note 2.

<sup>21</sup> See generally DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012) [hereinafter, KANSTROOM, *AFTERMATH*].

<sup>22</sup> Draft Articles, *supra* note 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). I am grateful to Katie Young for reminding me of Hohfeld’s work in this regard.

<sup>26</sup> Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

<sup>27</sup> Draft Articles, *supra* note 2 (emphasis added).

review. Though limitations of space prevent this essay from engaging this false symmetry fully, the essential critique is that one should not seek to balance a “right” of states against basic human rights.<sup>28</sup> Rather, one must recognize that the legitimacy of deportation and expulsion *depends upon* its compliance with both domestic and international law and basic human rights.<sup>29</sup>

These articles are, of course, not the first to frame state sovereign power as a “right.” Indeed, in 1892, the International Law Institute (*L’Institut de Droit International*) began an earlier version of this project with a rather similar framing: “Considering that, for each State, the *right* to admit or not admit foreigners to its territory, or to admit them conditionally, or to expel them, is a logical and necessary consequence of its sovereignty and independence . . . .”<sup>30</sup>

Similarly, as recited by the United States Supreme Court in its 1893 foundational deportation case, *Fong Yue Ting v. United States*,<sup>31</sup> Théodore Ortolan used this sort of framing a half-century earlier when he wrote, “The Government of each State has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier.”<sup>32</sup> The pre-human rights theoretical underpinning of this “right” is worth recalling: “This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is a matter of pure permission, of simple tolerance, and creates no obligation.”<sup>33</sup> Still, even Ortolan’s rather formalistic and binary model recognized that the exercise of this right “may be subjected, doubtless, to certain forms by the domestic laws of each country.” Today, it is obvious that international law itself also provides powerful restraints, and qualifications. It is thus quite jarring from a modern human rights perspective to think of sovereign state power defined as a “right.”<sup>34</sup>

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<sup>28</sup> See, e.g., OHCHR, *Expulsions of Aliens in International Human Rights Law* (Sept. 2006) (“[T]hree types of protection are available, namely substantive protection against return to face grave violations of human rights, procedural safeguards during deportation procedures, and protection with regard to the methods of expulsions.”).

<sup>29</sup> See *id.*; see also *Twenty Guidelines on Forced Return* (Sept. 2005), [http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20\\_Guidelines\\_Forced\\_Return\\_en.pdf](http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf) [<https://perma.cc/KF65-R6DS>].

<sup>30</sup> Emphasis added. The original reads: *Considérant que, pour chaque État, le droit d'admettre ou de ne pas admettre des étrangers sur son territoire, ou de ne les y admettre que conditionnellement, ou de les en expulser, est une conséquence logique et nécessaire de sa souveraineté et de son indépendance*. The translation is the author’s. See *Règles internationales sur l'admission et l'expulsion des étrangers*, [http://www.justitiaetpace.org/idiF/resolutionsF/1892\\_gen\\_01\\_fr.pdf](http://www.justitiaetpace.org/idiF/resolutionsF/1892_gen_01_fr.pdf).

<sup>31</sup> 149 U.S. 698 (1893).

<sup>32</sup> *Id.* at 708.

<sup>33</sup> THÉODORE ORTOLAN, *DIPLOMATIE DE LA MER* 297 (4th ed. 1864) (cited in *Fong Yue Ting*, 149 U.S. at 708).

<sup>34</sup> The ICCPR, for example, refers to states’ “obligation under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.” International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]. ICCPR Article 4 recognizes that state parties “may take measures derogating from their obligations under the present Covenant.” *Id.* But this is not designated a “right” of states. Indeed, ICCPR Article 13 expressly limits the power of States to expel “lawfully resident aliens.” *Id.* This may be done only “in pursuance of a decision reached in accordance with law . . . .” *Id.* The International Convention on the Elimination of All Forms of Racial Discrimination defers to state *power* as to “distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352. It also makes clear that “[n]othing in this Convention may be interpreted as affecting in any way the legal *provisions* of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.” *Id.* But it does not elevate such state practices, powers, and provisions to a “right.” The UN Charter refers to “sovereign equality.” It does recognize “the inherent *right* of individual or collective self-defence” but this relates less to inherent state power than to the

Indeed, such framing recalls the most absolutist and binary United States Supreme Court statements in support of state authority to exclude and deport. When the Supreme Court moved from the assertion of unreviewable power to exclude in *Chae Chan Ping v. United States*<sup>35</sup> to the much more complex question of the power to expel, the simplistic language of sovereign “right” deflected attention from this complexity: “The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”<sup>36</sup> Though the Court cited some commentators on the law of nations, it ignored even then the subtleties of their formulations.<sup>37</sup> This may seem like a linguistic quibble, as the Draft Articles do note the powerful limitations of contemporary human rights law,<sup>38</sup> but it reflects significant framing choices.

Consider an alternative approach. One might begin with a view that the practice is of *fundamentally questionable* legitimacy. Expulsion, with its attendant “formidable machinery,”<sup>39</sup> is an awesome power of states, perhaps legitimate in some of its manifestations, but illegitimate

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rejection of “aggressive war.” See Charter of the International Military Tribunal art. 6 (“[P]lanning, preparation, initiation or waging of a war of aggression . . .”).

<sup>35</sup>130 U.S. 581 (1889). As Justice Stephen Field put it in *Chae Chan Ping*:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

*Id.* at 609.

<sup>36</sup>149 U.S. 698, 707 (1893).

<sup>37</sup>For example, Vattel *did* write, “Every nation has the *right* to refuse to admit a foreigner into the country.” *Id.* But he continued, “when he cannot enter without putting the nation in evident danger, or doing it a manifest injury.” *Id.* He also wrote, “Thus, also, it has a *right* to send them elsewhere . . .” but he followed this with the extremely important phrase “if it has just cause to . . .” EMER DE VATTEL, THE LAW OF NATIONS §§ 230, 231 (cited in *Fong Yue Ting*, 146 U.S. at 707) (emphasis added). See generally KANSTROOM, DEPORTATION NATION, *supra* note 7.

<sup>38</sup>The terminology of state “rights” has, unsurprisingly, often been used by government agents. As Justice Field recounted:

Mr. Everett, then secretary of state under President Fillmore, writes: “This government could never give up the right of excluding foreigners whose presence it might deem a source of danger to the United States. . . .” In a dispatch to Mr. Fay, our minister to Switzerland, in March, 1856, Mr. Marcy, secretary of state under President Pierce, writes: “Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war.” In a communication in September, 1869, to Mr. Washburne, our minister to France, Mr. Fish, secretary of state under President Grant, uses this language: “The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state, are too clearly within the essential attributes of sovereignty to be seriously contested.” In a communication to Mr. W. J. Stillman, under date of August 3, 1882, Mr. Frelinghuysen, secretary of state under President Arthur, writes: “Thus government cannot contest the right of foreign governments to exclude, on police or other grounds, American citizens from their shores.”

*Chae Chan Ping*, 130 U.S. at 607.

<sup>39</sup>DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013), <http://immigrationresearch-info.org/report/migration-policy-institute/immigration-enforcement-united-states-rise-formidable-machinery>[<https://perma.cc/92JB-B9JJ>].

in many of its increasingly prevalent forms. The best way to distinguish the legitimate from the illegitimate forms is to *start* with the view that those who face deportation are a *definable legal class with specific, cognizable rights*. The burden is then on the deporting state to justify the rights infringement that takes place. Some might suggest that this is oxymoronic, post-deportation.<sup>40</sup> By definition, the deported have been stripped of whatever rights they may have had in the deporting state, and they are not (yet?) clear subjects of international law as are, for example, refugees.<sup>41</sup> However, this merely illustrates the need for re-conceptualization.<sup>42</sup>

One must also situate deportation as a globally ascendant practice. It is most basically related to global inequalities that are protected by the nation-state system and by borders.<sup>43</sup> It is a flexible tool of anomalous legal status that serves many diverse state goals, beyond *extended border control*: national security, criminal law enforcement, labor market regulation, and various aspects of social control. Its power is derived from the marginalization and rather weak rights claims available to its noncitizen targets. Though commonly defined as a regulatory, civil (as opposed to criminal), non-punitive mechanism, it can be functionally punitive, and often harshly so. In effect, it renders some of its targets rightless outcasts, analogous—as others have noted—to the ancient categorization of *homo sacer*: Beyond meaningful law, beyond protection, and, for many, beyond political community.<sup>44</sup> In many cases, deportation also separates families and causes disproportionate hardships in the pursuit of amorphous, if not ephemeral, goals.<sup>45</sup>

The increasing size of deportation systems is also relevant, as agencies and courts struggle to apply existing legal norms. The rise in deportations has been a global fact, despite some recent United States declines due in part to economic factors that began in 2008 and to presidential executive initiatives such as DACA and DAPA.<sup>46</sup> Though still dwarfed by the

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<sup>40</sup> See Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron or Necessity?*, 3 STAN. J. C.R. & C.L. 195 (2007).

<sup>41</sup> Cf. *Expulsions of Aliens in International Human Rights Law*, OHCHR Discussion Paper 2006, <http://www.unhcr.org/4bf6813a9.html>

<sup>42</sup> See Kanstroom et al., *Forgotten Deported*, *supra* note 13.

<sup>43</sup> This fact is significant, even if one does not advocate for the abolition of the nation-state system. Border control and removal systems are fundamentally designed to maintain a *status quo* that derives from what Ayelet Schahar has aptly critiqued as an unjust “birthright lottery” with disturbingly feudal attributes on a global scale. See generally AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

<sup>44</sup> See 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).

<sup>45</sup> See Kanstroom et al., *Forgotten Deported*, *supra* note 13.

<sup>46</sup> See Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policies*, 38 POPULATION & DEV. REV. 1, 17, 25–26 (2012). DACA, or Deferred Action for Childhood Arrivals, created a program to grant “deferred action” to individuals who came to the United States as children and meet certain educational requirements. See Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/6U7H-RP5Q>]. The DACA program was expanded alongside the creation of a new program, DAPA, or Deferred Action for Parental Accountability, 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, *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), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/PG35-79KS>].

number of deportations annually undertaken by the United States,<sup>47</sup> Australia and many states in Europe—among others—have also compelled very large numbers of people to return to their country of citizenship or prior residence.<sup>48</sup>

Moreover, many of the deported, especially in the United States, are long-term residents with strong family and community ties.<sup>49</sup> In recent years, the United States has annually deported approximately 100,000 parents of U.S. citizens.<sup>50</sup> One study found that, on average, former lawful permanent residents who were deported had lived in the United States for ten years.<sup>51</sup> Many, perhaps most, such people have no ties whatsoever in the “home” countries to which they are sent. Their job prospects are bleak at best; they may not even speak the language, and they are routinely ostracized.<sup>52</sup>

Deportation, in sum, is “different.” Its problematic basic purposes, its anomalous legal status, its size and scope, its irrevocability, its frequent harshness and disproportionality, and its discriminatory application all contribute to this. Moreover, there have been many *wrongful deportations*. In the United States, many 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 protections. Indeed, in the United States, a non-trivial number of citizens have been mistakenly deported.<sup>53</sup>

For all of these reasons, the global phenomenon of deportation demands a framework that *prioritizes* protection of basic human rights. The Draft Articles are limited in this regard. It is, for example, important to reaffirm, as Article 4 does, that “[a]n alien may be expelled only in pursuance of a decision reached in accordance with law.” And yet, Comment (7) simply notes various deferential approaches taken with regard to whether internal law was violated in an expulsion case.<sup>54</sup> More particularly, Article 26 protects the right to be “represented,” while deferring to the divergence of state practice regarding whether this is a right to appointed legal

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<sup>47</sup> DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS (2013), <https://perma.cc/9SYQ-LC86> (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, FY 2015 ICE IMMIGRATION REMOVALS, <https://perma.cc/QG69-FHWP>, 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. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS (2013), <https://perma.cc/9SYQ-LC86>.

<sup>48</sup> According to Eurostat, in the past few years, well over 400,000 “third-country nationals” (i.e., not nationals on EU Member States) who have exhausted all legal avenues to legitimize their stay in the EU, or have committed offences in the EU, have been ordered to leave the EU. EUROSTAT, THIRD COUNTRY NATIONALS ORDERED TO LEAVE. ANNUAL DATA (2016), [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eiord&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en).

<sup>49</sup> HUM. RTS. WATCH, FORCED APART (BY THE NUMBERS) (2009); HUM. RTS. WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS (2013).

<sup>50</sup> U.S. DEP’T OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CITIZENS, FISCAL YEAR 2011 REPORT TO CONGRESS (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 (2014) (reporting deportations of 39,410 parents of U.S. citizens during the first half of 2013).

<sup>51</sup> INT’L HUM. RTS. LAW CLINIC U.C BERKELEY SCHOOL OF LAW, IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), <https://perma.cc/B4ZP-HVX9>.

<sup>52</sup> See generally KANSTROOM, AFTERMATH, *supra* note 21.

<sup>53</sup> See generally Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & LAW 606 (2011); KANSTROOM, AFTERMATH, *supra* note 21.

<sup>54</sup> Article 5(2) is similarly deferential to state internal law.



counsel. As I have argued elsewhere—and as I think the United States Supreme Court has recently intimated in *Padilla v. Kentucky*—certain forms of deportation warrant such a right as a matter of due process and fundamental fairness. These principles are well established in human rights law and can be easily applied to expulsion proceedings by analogy.<sup>55</sup> On the other hand, very important—though limited—protections are developed progressively by Article 27 (“An appeal . . . shall have a suspensive effect on the expulsions decision when there is a real risk of serious irreversible harm.”).<sup>56</sup>

Whether deported individuals have rights *vis-à-vis* the deporting nation-state or in the various places to which they are sent regarding their deportation is a difficult question, the answers to which are evolving.<sup>57</sup> Indeed, the content of such rights (if any), and perhaps most saliently, *who has the responsibility to ensure the protection of these rights*, remain a new frontier. International human rights instruments 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. These claims are difficult enough to develop and maintain.<sup>58</sup> However, deportation also demands *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 nationalities.

The Draft Articles do not consider this modality extensively, though they take steps in the right direction. Article 20, importantly, provides that the expelling state “shall take appropriate measures to protect the property of an alien subject to expulsion . . . .”<sup>59</sup> Similarly, Article 29 is quite significant in its grant of a “right” to be admitted to the expelling state if the expulsion is found to have been “unlawful.” Of course, much will depend on what is meant by a “competent authority” and “unlawful.” Moreover, the limitation of protection to those who were “lawfully present” is both vague and worrisome. Still, as a progressive development of various bodies of law—including perhaps *habeas corpus* law—this provision may turn out to be quite significant.

#### AN ALTERNATIVE/COMPLEMENT: A DECLARATION ON THE RIGHTS OF EXPELLED AND DEPORTED PERSONS

As an alternative or complement to the *Draft Articles*, a *Declaration on the Rights of Expelled and Deported Persons*<sup>60</sup> could have a number of salutary effects. Primarily, it helps to conceptualize systemic deficiencies by *foregrounding* the individuals affected by expulsion. Put

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<sup>55</sup> In a related vein, one wonders why the phrase “for the sole purpose of” was inserted as a sort of *mens rea* clause in Article 5. This seems much too easy to evade, given the stakes. Commentary (3) seems to affirm the suspicion that undue deference was given to State practices and desires here. See ILC Draft Articles, art. 11, *supra* note 2 (similarly limiting its protection to actions done “for the purpose of” confiscation of assets).

<sup>56</sup> The insertion of three adjectives: “real, serious, and irreversible” indicates, I suppose, how much controversy swirled around this provision.

<sup>57</sup> See Kanstroom et al., *Forgotten Deported*, *supra* note 13.

<sup>58</sup> An example is the *International Convention for Protection of Rights of Migrant Workers and Their Families* which, despite having been adopted twenty-five years ago, has failed to garner much meaningful support. See Office of the U.N. High Comm’r for Human Rights, *Guiding Principles on Internally Displaced Persons*, E/CN.4/1998/53/Add.2 (Feb. 11, 1998), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>.

<sup>59</sup> But should this not also be a duty of the receiving State, and a duty of both to coordinate?

<sup>60</sup> See Appendix, *infra*.

simply, it counters the prevalent “out of sight, out of mind” mentality that undergirds deportation systems. The principle aim of the Declaration is thus to recognize deported and expelled individuals *as a cognizable legal class*—with distinctive, particular protection needs and rights.<sup>61</sup>

The Declaration has also 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 and enhances solidarity among those who have faced deportation systems in disparate settings.

Finally, the Declaration could serve as a matrix for nation-states to develop mechanisms—jointly or individually—to provide greater regularity and greater rights protections for the deported. The goal, of course, is neither to legitimize nor to facilitate deportations. Acceptance of the basic legitimate authority of the nation-state to control borders and to remove those who have violated certain immigration laws does not mandate acquiescence. Nevertheless, the Declaration seeks to balance a variety of pragmatic considerations as it leaves a significant “margin of appreciation” for state action within its prescribed boundaries of rights protections.<sup>62</sup>

The Declaration is designed to be accessible and easy to understand. In this regard, it applies to *all forms of deportation*. 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 in the countries to which deportees are sent.<sup>63</sup> Part 4 also addresses compelling problems of adjustment and reintegration in the receiving country. For example, it describes 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).

Part 3 focuses on rights of deported and expelled persons in the course of travel and reception in the country of removal or 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, which protects expelled and deported persons who require special attention, specifically mandates that “sending” (i.e., deporting) and receiving states *should coordinate* to provide adequate services to such individuals, or establish procedures to

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<sup>61</sup> The Draft Articles do, of course, also embody such protections in important ways. *See, e.g.*, ILC Draft Articles, *supra* note 2, arts. 13–20. However, when one pauses on Article 15, Commentary (3), the value of reciprocal obligations becomes clear. It is significant to recognize as the Commentary does, that “all categories of vulnerable persons that might merit special protection” cannot be listed. Therefore, it is important, as Article 15 does, to protect “other vulnerable persons.” But it might also be helpful to diverge from the passive voice here and to clarify which State or States must protect the expelled with due regard for their vulnerabilities?

<sup>62</sup> The consensus in the drafting conferences was strongly in favor of the propriety and immediate need for this initiative. However, some participants, particularly those who identified themselves as “deportation abolitionists,” were concerned about increasing the legitimization of the practice of deportation by creating more law around it. Though this critique was always a major concern of ours, most conference participants concluded that current policies and practices worldwide indicate that massive deportation is likely to be a reality for some time to come and the legitimization risk did not outweigh the need for a strong, rights-based response.

<sup>63</sup> *See generally* KANSTROOM, AFTERMATH, *supra* note 21. *See also*, Kathleen Dingeman-Cerda & Rubén Rumbaut, *Unwelcome Returns: The Alienation of the New American Diaspora in Salvadoran Society*, in *THE NEW DEPORTATIONS DELIRIUM* (Kanstroom & Lykes eds., 2015).

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.

Part 5 covers obstacles faced by deported individuals in challenging wrongful removals. Article 21 asserts the right to continued participation in legal proceedings—not just as they relate to deportation, but also in 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 Declaration also affirms the right of deported individuals to return to the expelling state, and calls for limits and waivers of any imposed reentry bans. Finally, in an important challenge to states' alleged "right" to exclude, 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.

#### CONCLUSION

I write primarily not to bury, but to praise the Draft Articles and their many authors and editors. Still, we have much work left to do if we are to properly understand the growing worldwide phenomenon of expulsion and deportation and to grant those who have faced its awesome power the respect and rights they deserve. I therefore urge those who care about these matters to consider the Declaration as a friendly amendment.

## 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**

- (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 10.

- (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 11.

- (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 12.

- (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 13.

- (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 14.

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 15.

- (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 16.

- (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 17.

- (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 18.

- (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 19.

- (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 20.

- (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 21.

- (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 22.

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**

Article 23.

- (1) All expelled and deported persons have the right to respect of family life, as recognized under international human rights law.
- (2) 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.

Article 24.

- (1) 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.
- (2) 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**

Article 25.

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.