DEPORTATION AS TORTURE

ANJA BOSSOW*

Deportation, as a practice, is currently only lightly regulated under international human rights law. The only conditional defenses that an individual possesses against deportation are the threat of torture or cruel, inhuman, and degrading treatment by the receiving state or a breach of procedural norms in the making of the deportation decision. This approach to regulating deportation erases the suffering that characterizes the act of deportation itself–suffering that amounts to "the loss of all that makes life worth living." The failure of human rights law to render this suffering legally legible is concerning in practice, given the sheer scale of those living in a state of deportability, and as a matter of theory, considering human rights law's normative grounding in human dignity. Being ostensibly committed to protecting all individuals equally vis-à-vis abusive exercises of sovereign power, human rights law's silence on deportation's violence betrays its normative purpose within the international system of legality, all while rendering the vision of a more humane international legal order that drove its creation a violent fiction. In an effort to address this problem, this article analyzes the nature of the suffering inflicted by deportation through the lens of the norm against torture or cruel, inhuman, and degrading treatment. By demonstrating that the deportation of long-term residents inflicts a form of psychological torture for the purposes of punishment and discrimination, the article proposes a new substantive limit on the state's right to exclude which takes seriously the human dignity of deportees.

*NYU JSD Candidate, LLM '20 (NYU), LLM '18 (LSE), BA in Jurisprudence (University of Oxford). This Article has benefitted immensely from comments by E. Tendayi Achiume, Jeremy Waldron, Gráinne De Búrca, Jaya Ramji-Nogales, Linda Bosniak, Haley Anderson, Omar Youssef Shehabi, the participants of JILSA's Annual Meeting 2024, the NYU JSD Workshop 2023, the NYU Scholarship Clinic 2022, and the ASIL Mid-Year Meeting 2021. Special thanks also to the superb editors of the NYU Journal of International Law and Politics. All errors remain my own.

I. INTRODUCTION

Deportation is currently only lightly regulated under international human rights law. This is unsurprising, given that the act of deportation is commonly seen as an exercise of the state's right to exclude, which is widely considered an important incidence of state sovereignty.[1] Without the power to police entry, admission, and belonging, arguably little would remain of the state, conceived of as an independent, self-governing political unit tasked with ensuring the security and well-being of its own.[2] The protection of state sovereignty is ordinarily considered one of international law's central purposes. As a result of this putative connection, international human rights law bestows a general presumption of legitimacy upon the state's use of the deportation power, which can only be displaced in extremely limited

1. *See* E. Tendayi Achiume, Migration as Decolonization, 71 Stan. L. Rev. 1509, 1523–24 (2019) (exploring the right to exclude and state sovereignty); Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040, 1096 (2021) (describing the "common sense" linking of sovereignty and exclusion); Vincent Chetail, Is There Any Blood on My Hands? Deportation as a Crime of International Law, 29 Leiden J. Int'l L. 917, 917 (2016) (describing the conception deportation as related to sovereignty); Linda S. Bosniak, Part II: Interpreting the Convention: Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention, 25 Int'l Migration Rev. 737, 743 (1991) ("[S]tates' power to refuse entry and to expel aliens . . . has been treated as an integral part of this territorial sovereign power since the late nineteenth century").

2. *See* Bosniak, *supra* note 1, at 742 (discussing the fundamental nature of the rule of sovereignty and the right to exclude).

circumstances.[3] To this day, the only conditional defenses an individual possesses against deportation are the threat of torture or cruel, inhuman, and degrading treatment by the receiving state, or a breach of procedural norms in the making of the deportation decision. Notably, the latter is only available to those lawfully present on the deporting state's territory.[4]

This light-touch approach to regulating states' use of the deportation power *should* surprise us. It ignores that deportation is itself an inherently violent act that inflicts severe suffering on the deportee;[5] a suffering once evocatively characterized by U.S. Supreme Court Justice Louis Brandeis as "the loss of all that makes life worth living."[6] While the harm of deportation—in particular its punitive and world-destroying nature—is well documented and frequently acknowledged,[7] the practice's assumed compatibility with the demands of liberal-

3. *See generally*, Guy S. Goodwin-Gill, *The Limits of the Power of Expulsion in Public International Law*, 47 BRITISH Y.B. INT'L L. 55 (1976).

4. *See*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85*,* [hereinafter CAT]; International Covenant for Civil and Political Rights, art. 13*,* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Sept. 16, 1963, E.T.S. 64 [hereinafter Protocol 4]; American Convention on Human Rights, arts. 22(6) and (9), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; African Charter on Human and Peoples' Rights, arts. 12(4) and (5) Jun. 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR].

5. *See* Cházaro, *supra* note 1 at 1070–82.

6. *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922); *Bridges v. Wixon*, 326 U.S. 135 (1945).

7. *See* Cházaro, supra note 1, at 1070–71 (describing deportation as a form of violence and explaining that if the Supreme Court were to classify deportation as punishment, constitutional protections for criminal defendants could extend to noncitizens facing removal); David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973, 997 (2021) (observing that the formal separation of deportation from criminal punishment enables the executive branch to impose deportation as de facto punishment through civil proceedings); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement Persistent Puzzles in Immigration Law*, 2 U.C. IRVINE L. REV. 415, 425 (2012) (arguing that while deportation is formally classified as a civil sanction exempt from many constitutional protections, certain civil penalties—including removal—may still trigger proportionality analysis under the Fifth or Eighth Amendments); Lukas Schmid, *Deportation, Harms, and Human Rights*, 14 ETHICS & GLOB. POL. 98, 98 (2021) (arguing that deportation may only be justified if the harm it causes is necessary and proportionate, especially in cases involving long-settled migrants); Barbara Buckinx & Alexandra Filindra, *The Case against Removal: Jus Noci and Harm in Deportation Practice*, 3 MIGRATION STUD., 393, 393 (2015) (arguing that democratic states have a normative obligation to consider the significant physical, psychological, and social harm deportation may impose and proposing the principle of *jus noci* to guide harm avoidance in removal decisions).

nationalist justice has foreclosed any attempt to render the suffering it inflicts legally actionable under international human rights law.[8] This is concerning both in practice—given the sheer scale of those living in a state of deportability—and as a matter of theory—considering human rights law's normative grounding in human dignity.[9] Being ostensibly committed to protecting all individuals equally from abusive forms of state power, human rights law's silence on the suffering inflicted by deportation betrays its normative purpose within the international system of legality, while rendering the vision of a more humane international legal order that drove the field's creation a violent fiction.

In an effort to address this problem, this article analyzes the nature of the suffering that deportation inflicts through the lens of the norm against torture or cruel, inhuman, and degrading treatment. The reasons for choosing this approach are three-fold. First, the norm against torture has been emblematic of international human rights law's normative grounding in the value of human dignity, with its primary purpose being the identification of the type of coercive law-enforcement methods we reject as a violation thereof. This renders the norm the natural starting point for an analysis of deportation's compatibility with the demands of human dignity, given that deportation is a form of law enforcement. Second, in light of the norm's close relationship to value of human dignity, [10] an assessment of deportation's

---

8. *See* Matthew J. Gibney, *Is Deportation a Form of Forced Migration?*, 32 REFUGEE SURV. Q. 116, 123 (2013) (arguing that deportation aligns with liberal-statist norms by combining sovereign state authority with procedural legitimacy, distinguishing it from other forms of forced migration).

9. The precise role and meaning of human dignity in international law as well as the relationship between human dignity and human rights is subject to debate. However, key human rights instruments cast the concept as foundational to human rights protection. According to Art. 1 UDHR, '[a]ll human beings are born free and equal in *dignity* and rights' (emphasis added). The preambles to the two human rights covenants, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), further affirm that the human rights guaranteed by the covenants 'derive from the inherent dignity of the human person' (preamble para. 3). For a critical examination of the proposition that human dignity is the foundation of human rights, see, generally, Jeremy Waldron, Is Dignity the Foundation of Human Rights, in Philosophical Foundations of Human Rights, 117-137, Rowan Cruft (ed.) (2015)

10. *See* David Luban, *Torture, Power, and Law*, 125 (2014) (noting that the prohibition closely connects with other values that the world has come to regard as fundamental such as human dignity); Jeremy Waldron, Torture and Positive Law, 105 Columbia Law Review 1681, 1727 (arguing that the rule against torture is an archetype of our determination to ensure an enduring connection between the spirit of law and respect for human dignity); Zach, 56, Definition of Torture, (noting that both torture and slavery can be described as the most direct and brutal attacks on the core of human

compatibility with the norm's definitional elements also serves to clarify and conceptualize the nature of the wrong deportation inflicts. Third, the norm enjoys special status within the international system of legality due to the categorical nature of its prohibition and its nature as *jus cogens*.[11] As such, practices that violate the norm's requirements cannot be justified, certainly not for the purpose of law enforcement but also not in times of emergency, even if it is for the purpose of averting a threat to national security or safeguarding the legal-political order itself.[12] This feature renders the norm a uniquely powerful tool at our disposal to make the suffering of deportees legally actionable under international human rights law and create a new substantive limit on the state's right to exclude.

It is important to highlight some core assumptions that circumscribe the scope of my argument.[13] When referring to deportation, I mean only the practice of removing long-term residents from the territory of a nation-state. I thus set aside the question of whether or how this argument may apply to the removal of individuals recently arrived or caught in the act of border-crossing, or to those who were denied the right to enter in the first place. This distinction is underpinned by a presumption that there is something morally distinct about forcibly removing individuals that have lived for a sufficiently long amount of time in the state that seeks to deport them.[14] Deportation inflicts a special form of cruelty under these circumstances that we can, and arguably ought to, distinguish from the type of injustice that may be involved in the practice of excluding new or very recent arrivals at the border.[15]

---

dignity); J.M. Bernstein, Torture and Dignity: An Essay on Moral Injury, 25-72 (2015) (mapping how the abolition and ban of torture morally and legally inscribed the ideal of human dignity).

11. *See* Committee against Torture, *General Comment No. 2*, U.N. Doc. CAT/C/GC/2, ¶ 1 (2008).

12. *See Id.* ¶5 (noting that the prohibition is absolute and non-derogable such that *no exceptional circumstances whatsoever* may be invoked by a State to justify acts of torture, including state of war or threat thereof, internal political instability or any other emergency.)

13. To the extent this Article draws on empirical data, this will be limited to evidence from the United States and the United Kingdom. This Article therefore does not preclude the possibility that case studies from other jurisdictions might challenge or otherwise fruitfully complicate some of the conclusions drawn in this Article.

14. *See generally*, Joseph H. Carens, IMMIGRANTS AND THE RIGHT TO STAY (2010) (discussing the morality of deportation as it relates to the length of time a prospective deportee has lived in a given country).

15. *See generally,* Achiume, *supra* note 1 (exploring the concept of the right to exclude); E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J. 445, 488–94 (2022) (discussing the concept of national exclusion in sovereignty doctrine); Sarah Fine, *Immigration*

Yet, I do not foreclose the possibility that a clarification of the cruelty that border control practices involve may further elucidate the injustice of the state's exclusion power as a whole, nor do I deny the inherent relationship between the state's right to exclude and the right to deport and the difficulty this generates in determining a clear dividing line between exclusion and deportation.

Additionally, in the relevant category of long-term residents, I include both those with legal status and those without it. What matters for the purposes of understanding the cruelty involved in the act of deportation is the fact of an individual's long-term, physical presence in the deporting state, regardless of how they got to be there.[16] As a matter of law, the undocumented nature of long-term residence would only matter at a potential justification stage where the state's interest in deportation is weighed against the strength of the individual's right not to be deported. However, the norm against torture is precisely characterized by its categorical nature, foreclosing any kind of balancing exercise to that end.[17] Likewise, I will not address the question of whether an individual may deserve the suffering deportation inflicts due to the nature of a crime they have committed.

The rest of the article is structured as follows:

Part I reviews and critiques international human rights law's current approach to regulating deportation, which fails to make the suffering that the practice inflicts legally actionable. To take seriously the human dignity of deportees and the normative purpose of human rights law within the international system of legality, I propose assessing the nature of deportation's suffering through the lens of the norm against torture and cruel, inhuman and degrading treatment.

Part II explains why deportation of long-term residents should be considered a violation of the norm against torture, taking the definitional elements in the Convention against Torture as a starting point. I

---

and Discrimination, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Lea Ypi eds., 2016) (broadly discussing the concept of migratory exclusion in international law and its broader acceptance when compared to deportation).

16. *See generally* Carens, *supra* note 10 (discussing the morality of deportation as it relates to the length of time a prospective deportee has lived in a given country); JOSEPH CARENS, THE ETHICS OF IMMIGRATION (2013) (discussing, among other topics, the morality of deportation in situations where a migrant has already lived in a country for an extended period of time).

17. *See* Gerrit Zach, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art.1 Definition of Torture*, *in* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 23, 45 (Manfred Nowak, Moritz Birk, & Giuliana Monina eds., 2nd ed. 2019) (explaining the weight of norms against torture in international law).

demonstrate that because the act of deportation forcibly separates the deportee from loved ones, it may amount to a form of psychological torture that is intentionally inflicted for the purposes of punishment and discrimination.

Part III anticipates two objections to the framing of deportation as a violation of the norm against torture, grounded in the norm's severity requirement, and the related view that to attach the torture label to deportation would stretch both concepts beyond the breaking point. I contend that both the intensity and the labeling objection rest on a mistaken view of the central wrong the torture norm seeks to outlaw. This is not to be identified on the basis of an intensity of suffering approach, nor by the method through which the violence is inflicted. Instead, I argue that torture's wrongness lies in its quality as an extreme form of dignitarian harm; one that is substantially similar to the harm inflicted by deportation.

II. DEPORTATION IN INTERNATIONAL HUMAN RIGHTS LAW

A. *A Brief Genealogy of Deportation*

Deportation, since its inception in the late 19th century,[18] has been a practice mired in controversy.[19] Its addition to the sovereign nation-state's legal toolbox was driven by a political desire to remove new or existing members of the polity that were unwanted on the basis of what are now commonly considered protected grounds under international law's equality norm, such as race. In the United States, the deportation power was introduced by the Geary Act of 1889,[20] a piece of legislation that extended the Chinese Exclusion Act of 1882 for ten years. It authorized, among other things, the deportation of Chinese long-term residents of the U.S. who could not affirmatively prove that their residency was lawful.[21] The required proof was, in practice, difficult to provide because it required the testimony of at least one white witness that they had entered the United States prior to 1882.[22] The Geary Act's

18. *See* Nicholas De Genova, *The Deportation Power*, RADICAL PHILOSOPHY 23, 23 (2018).

19. *See* Matthew J. Gibney, *Asylum and the Expansion of Deportation in the United Kingdom*, 43 GOV'T & OPPOSITION 146, 147 (2008).

20. *See* Geary Act of 1892, ch. 60, 27 Stat. 25, 25–26.

21. *See id.* § 4.

22. *See id.* § 6; *see also* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 81 (1995) ("The

adoption was driven by an explicit desire to "purge Chinese immigrants from the U.S. West," with their previous exclusion from admission at the border not going far enough for the Act's supporters.[23] Subsequently, deportation remained a tool at the government's disposal to target ideological dissidents, labor organizers and other racial groups.[24]

The deportation power developed similarly across the pond. In the U.K., the inception of a comprehensive national exclusion power occurred with the Aliens Act 1905. Prior to the Act's adoption, Britain had been legislating the rights of entry and stay in an *ad-hoc* manner, with no comprehensive regulation or practice by which people were refused entry or detained.[25] The Aliens Act, *inter alia,* "defined certain immigrants as 'undesirable,' and detailed the processes by which these undesirable immigrants could be turned back at ports of entry, be deported if already resident, and appeal against such decisions."[26] While cloaked in race-neutral terms, Nadine El-Enany argues that the Act was rooted in the "spirit of the white supremacist project of the British Empire."[27] Thus, "while not targeted at raciali[z]ed British subjects but at 'aliens,' it mirrored in method and content aspects of racist

---

testimony of respectable members of the 'merchant class' or of white witnesses often helped the petitioner's case as well.") ; ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOUR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 230–31 (1971) (reporting on the enforcement of the Geary Act, the refusal of Chinese immigrants to register, and the subsequent plans for mass arrests and deportations); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 116 (2007) (stating that legal residency in the United States could only be proved by the testimony of "at least one credible white witness").

23. Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 191 (2018).

24. *See id.* at 180–81 (discussing the national origins quota system, its exemption for Western Hemisphere labor, and racially targeted deportations before its repeal in 1965); KANSTROOM, *supra* note 1 at 141–91 (examining the shift toward criminal-based deportation policies in the late 20th century and their impact on noncitizens); JULIA ROSE KRAUT, THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES 90–119 (2023) (discussing the use of denaturalization, detention, and deportation as tools of ideological exclusion and the role of executive discretion in immigration enforcement).

25. *See* NADINE EL-ENANY, BORDERING BRITAIN: LAW, RACE AND EMPIRE 47 (2020) (describing the historical development of British immigration law and the use of early carrier sanctions to control the entry of aliens); Alison Bashford and Jane McAdam, *The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law*, 23 LAW & HIST. REV. 309, 314–15 (2014) (describing how there was "no comprehensive system of regulation, restriction, or even of registration of entrants in Britain" prior to the Aliens Act's adoption in 1905).

26. Bashford and McAdam, *supra* note 21, at 315.

27. EL-ENANY, *supra* note 21, at 46.

immigration laws previously adopted in British colonies."[28] The Act's adoption was driven by rising antisemitism present in British politics,[29] further fueled by the arrival of Jewish refugees fleeing pogroms in Eastern Europe. Those campaigning for the Act's immigration control blamed Jewish immigrants and refugees for causing overcrowding in factories and housing, as well as for spreading disease.[30] While the antisemitic and anti-immigrant rhetoric was formally rejected by the legislative drafting commission, the controls advocated for were still adopted, including a centralized deportation power.[31] The power was subsequently deployed to rid the country of those perceived to be "enemies" of the state or "threats to the social fabric of the country," in light of their ideological leanings or ethnic heritage.[32]

The utility of deportation in serving the discriminatory ends of nation-states took a particularly sinister turn with the Nazis' mass deportations of Europe's Jewish populations during the Holocaust. The practice's implication in the genocide tainted it sufficiently such that it became, in comparison to pre-war times, a sparingly-exercised form of state power until the 1990s.[33] However, since then, most Western states have engaged in a "deportation turn:"[34] an increase in annual, ostensibly individualized, deportations. Today, the power to deport is widely considered a central tool of law enforcement and social

---

28. *Id.* at 47.

29. *See* Bashford and McAdam, *supra* note 21, at 316–17 ("[I]t was alleged by some speakers that the bill actually had its origin in the hatred of the Jews.").

30. EL-ENANY, *supra* note 21, at 48; *see also* Bashford and McAdam, *supra* note 21, at 316 (discussing how those opposed to immigration cast Jewish immigrants as threats to industrial conditions and as contributing to "sweating" systems of labor).

31. *See* EL-ENANY, *supra* note 21, at 49 ("The Royal Commission rejected in spirit the sensationalist anti-immigrant rhetoric which had led to its establishment, noting that people from eastern Europe had not caused a crime wave and that only 1 per cent of 'aliens' were receiving Poor Law payments. It nevertheless recommended the adoption of immigration legislation.").

32. Gibney, *supra* note 15, at 154.

33. *See* AMERICAN IMMIGRATION COUNCIL, THE GROWTH OF THE U.S. DEPORTATION MACHINE: MORE IMMIGRANTS ARE BEING "REMOVED" FROM THE UNITED STATES THAN EVER BEFORE 1 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_growth_of_the_us_deportation_machine.pdf (discussing how in the U.S., deportations drastically increased following the introduction of Immigration Reform and Control Act 1986); *see also* U.S. Department of Homeland Security, *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*, OFFICE OF HOMELAND SECURITY STATISTICS, https://ohss.dhs.gov/topics/immigration/yearbook/2019/table39 (last visited Apr. 9, 2025) (showing the number of deportations every year).

34. Gibney, *supra* note 15, at 148, 167.

control,[35] sitting alongside practices of surveillance, detention, and punishment. It legitimizes the sprawling and ever-expanding interior immigration law enforcement complex that has sprung up over the last few decades and has become increasingly intertwined with the criminal law.[36] Indeed, without the power to deport, a central branch of immigration law—one dedicated to identifying and removing resident noncitizens who are deemed to have violated the terms of their territorial admission—would simply cease to exist.[37]

Deportation's arguable centrality to the contemporary system of immigration law[38] and the system of bordered nation-states it sustains has largely foreclosed critical examination of the fact that it constitutes a form of state-sanctioned territorial expulsion.[39] More specifically, deportation amounts to the forcible removal of an individual at the hands of state agents from the territory of that state.[40] In its other forms, such as banishment, transportation or forced migration, or mass deportations, territorial expulsion is now commonly considered an illegitimate exercise of sovereign power.[41] The only feature that makes deportation different from its sister practices is the fact that it remains formally legalized within the current system of international legality. This is rooted in the practice's presumed conformity with the demands of

---

35. *See generally* KANSTROOM, *supra* note 1 (discussing deportation as tools of law enforcement and social control).

36. *See generally* César Cuahtémoc García Hernández, CRIMMIGRATION LAW (2nd ed. 2021) (asserting that criminal law and immigration law are intertwined); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (same); Jennifer Chacon, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (same).

37. Chazaro, End of Deportation, 1051-7, critiques the dominant view of immigration law as being about the acquisition of membership and its attendant rights in privileges. She contends instead that "the practice of immigration law has [also] been the practice of sorting noncitizens between those who can be properly kept in an outer circle, far from U.S. citizenship, and those who can be included in the inner circles."

38. *Id.* Chazaro, 1057 (contending that immigration law's central organizing premise is deportation (rather than potential membership).

39. *See* William Walters, *Deportation, Expulsion, and the International Police of Aliens*, 6 CITIZENSHIP STUD. 265, 266 (2002) (describing deportation as a "relatively ignored, but highly pertinent aspect of public policy").

40. *Id.* at 268; also see Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999) for a detailed overview of the historical continuity between the English system of transportation to the American colonies in the 18th century and modern-day deportation.

41. *See* Walters, *supra* note 33 at 289 (asserting that banishment, namely, expulsion from humanity, is an older practice, implying that it is no longer seen as generally acceptable); Gibney, *supra* note 8 at 128 (asserting that practices equivalent to forced migration are considered illegitimate).

liberal justice that underpin the contemporary human rights regime. These demands ordinarily mandate adherence to some procedural requirements, as well as some substantive limitations that broadly amount to respect for the inherent dignity and equality of all persons.[42]

A. *The Existing Framework*

Existing limits on deportation within international human rights law aim to instantiate these procedural and substantive requirements, with individuals able to challenge a deportation order on two grounds. The only substantive limitation on deportation is the prohibition on refoulement, a principle enshrined, *inter alia,* in the Convention relating to the Status of Refugees and the nearly universally subscribed to Convention against Torture. The prohibition on refoulement bars the deportation of individuals to a country when there are "substantial grounds" to believe the individual would be in danger of torture or cruel, inhuman, or degrading treatment in that country.[43] Even though the principle is at least a norm of customary international law and is considered by some to have acquired the status of *jus cogens*,[44] violations are frequent.[45]

---

42. *See* Gibney, *supra* note 8, at 123–25 (describing the aspects of deportation that are shaped by procedure).

43. CAT, *supra* note 4, art 3.

44. *See generally* Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Tes*t, NETH. Y.B. INT'L L. 273 (2015) (referencing the debate as to whether non-refoulement has attained the status of a jus cogens norm); Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533 (2001) (arguing that non-refoulement has attained jus cogens status). *But see* Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT'L J. REFUGEE L. 373, 389–90 (2008) (arguing that non-refoulement has not attained jus cogens status); *see also* UNHCR Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, ¶ 21 (2007) (stating that non-refoulement has not yet become customary international law).

45. *See* Katherine M Keller, *A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulemen*t, YALE HUM. RTS. & DEV. L.J. 183, 199 (1999) (discussing the frequency of prosecutions for immigration violations in the U.S.); Iris Goldner Land & Bolidzsar Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, EUR. CONST. L. REV. 442, 452 (2021) (describing frequent tactics of border control agents); Sanya Samtani, *Deporting Rohingya Refugees: Indian Supreme Court Violates Principle of Non-Refoulement*, OXFORD HUM. RTS. HUB (Apr. 11, 2018), https://ohrh.law.ox.ac.uk/deporting-rohingya-refugees-indian-supreme-court-violates-principle-of-non-refoulement/ (arguing that India's treatment of Rohingya refugees reflects a broader pattern of non-refoulement violations).

The other existing limits on a state's power to deport are several procedural requirements. Article 13 of the International Covenant on Civil and Political Rights (ICCPR) mandates any deportation decision "to be reached in accordance with law," while guaranteeing "the possibility of review by, and to be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."[46] However, these requirements only apply to those who are lawfully present, thereby excluding undocumented immigrants from these protections.[47]

Notably, by focusing either on threats emanating from the receiving state or procedural irregularities in the deportation decision, these limits assume that deportation is otherwise compatible with the demands of human dignity that international human rights law is meant to protect. Yet this ignores that deportation has always been an act characterized by cruelty and violence.[48] Deportation tears apart families,[49] subjects deportable individuals to a permanent state of subordination and vulnerability to state violence,[50] and deprives the deportee of liberty, property or "all that makes life worth living," [51] severing them from their home and banishing them to places that they frequently have no meaningful connection to anymore,[52] sometimes with

46. ICCPR, *supra* note 4, art. 13.

47. ICCPR, *supra* note 5, art. 13; Protocol 4, *supra* note 4, art. 4; ACHR, *supra* note 4, art. 22(6); ACHPR, *supra* note 4, art.12(4) and (5).

48. Gibney, *supra* note 15, at 147.

49. *See* Victoria D. Ojeda et al., *Deported Men's and Father's Perspective: The Impacts of Family Separation on Children and Families in the U.S.*, 11 FRONTIERS IN PSYCHIATRY (2020) (reporting the emotional, psychological, and sometimes fatal consequences of deportation on separated families); Mariela Olivares, *Family Detention and Family Separation: History, Struggle, and Status*, 9 BELMONT L. REV. 512 (2021) (discussing the legal and historical roots of U.S. family detention policy and its impact on immigrant families); U.S. Citizen Children Impacted by Immigration Enforcement, AM. IMMIGRATION COUNCIL (2017), https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement (last visited Jan 28, 2024) (highlighting the emotional, economic, and developmental harm faced by U.S. citizen children when parents are detained or deported).

50. *See* Cházaro, *supra* note 1, at 1080 (describing deportation as violence); Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 422 (2002) (describing illegality as entailing a social relation to the state).

51. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

52. *See generally* LUKE DE NORONHA, DEPORTING BLACK BRITONS: PORTRAITS OF DEPORTATION TO JAMAICA (2020) (describing deportation to a place where the deportee has no meaningful connection to).

deadly consequences.[53] Additionally, scholars have classified the particular cruelty of some of deportation's attendant practices such as family separation and forced removal as rising to the threshold of torture[54] or the experience of forced disappearance.[55] At the same time, violations of substantive standards of treatment rooted in the notion of human dignity are frequent, even endemic, in the process of deportation. Reports documenting state inflicted or sanctioned violence in this context are ample and include forced sterilization,[56] cruel, inhuman and degrading treatment, [57] as well as torture and unlawful killings. [58]

---

53. *See* Sarah Stillmann, *When Deportation Is a Death Sentence*, THE NEW YORKER, Jan. 8, 2018, https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence (last visited Apr 29, 2023) (explains that many migrants may face violence and murder in their home countries).

54. Beth Van Schaack, *The Torture of Forcibly Separating Children From Their Parents*, JUST SECURITY (2018) https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/; Amanda Holpuch, *Family Separation Constitutes Torture, Doctors Find*, THE GUARDIAN (2020), https://www.theguardian.com/us-news/2020/feb/25/trump-family-separations-children-torture-psychology.

55. Leti Volpp, *The Citizen and the Terrorist,* 49 UCLA Law Review 1575, 1598-9 (2002) (in drawing attention to individuals who are non-citizens and […] being […] deported and detained, asks "what it might mean to expand who occupies the category of our disappeared […] to consider also those noncitizens […]. Our government has taken them, and we do not know where they are. Are those in detention our disappeared? If not, why not? I raise this to provoke a rethinking of what bodies are centered in our consideration of what bodies disappear." The parallel between deportation and forced disappearance has also been drawn repeatedly in the context of the second Trump Administration's mass arrests and deportations of Venezuelan immigrants to El Salvador, in particular with respect to the case of Kilmar Abrego Garcia. See generally, https://www.democracynow.org/2025/4/10/kilmar_abrego_garcia_just_one_of; https://www.nytimes.com/2025/04/18/opinion/trump-supreme-court-abrego-garcia.html.

56. *See* Richard Cruz Davila, *Medical Abuse in ICE Detention Center Recalls U.S. Legacy of Forced Sterilizations*, MICHIGAN STATE UNIVERSITY JULIAN SAMORA RESEARCH INSTITUTE, https://jsri.msu.edu/publications/nexo/vol-xxiv/no-2-spring-2021/medical-abuse-in-ice-detention-center-recalls-u-s-legacy-of-forced-sterilization (last visited Jan. 28, 2024) (describing state sanctioned sterilization).

57. *See New report exposes rampant abuse in Louisiana detention facilities*, ROBERT F. KENNEDY HUMAN RIGHTS (Aug. 26, 2024), https://rfkhumanrights.org/press/new-report-exposes-rampant-abuse-in-louisiana-ice-detention-facilities/ (last visited Apr. 24, 2025) (describing treatment at detention facilities in the U.S.). https://www.laaclu.org/sites/default/files/inside_the_black_hole_systemic_human_rights_abuses_against_immigrants_detained_disappeared_in_louisiana.pdf ; https://phr.org/our-work/resources/endless-nightmare-solitary-confinement-in-us-immigration-detention/

58. For an overview, see Cházaro, *supra* note 1, at 1070–82; *see also* Julian Borger, *New claims of migrant abuse as Ice defies Biden to continue deportations*, THE GUARDIAN (Feb. 2, 2021), https://www.theguardian.com/us-news/2021/feb/02/ice-immigration-

Nonetheless, Angélica Cházaro identifies an apparent, yet unspoken consensus that frames this violence as merely incidental or as an "occasional, or even regular, add-on" to the act of deportation.[59] Such a view, she contends, forecloses the possibility that the violence that accompanies deportation is in fact part of its very nature, or rather, that deportation *is* violence.[60]

International human rights law's failure to render the suffering deportation inflicts legally actionable evinces a sacrificial logic that underpins its embrace of a system of sovereign, territorially-bound nation-states as its legitimate basic structure. This predetermines whose voices—and whose dignity—matters, leaving those that do not neatly fit into legally actionable categories vulnerable to unregulated and abusive exercises of sovereign power. This problem is particularly evident in the context of immigration law enforcement. Here, the international human rights framework explicitly and implicitly premises the enforceability of the rights it confers on an individual's law-abiding nature and/or the possession of citizenship or legal status in the state whose exclusion power they are subject to.[61] As a result, the suffering states inflict on law-breaking non-citizen immigrants is rendered strategically

---

migrants-asylum-seekers-abuse-allegations (describing allegations of torture by ICE agents); *Following Government's Forced 'Death Flight' Deportations and Torture of Black Immigrants, Advocates Seek Answers*, THE SOUTHERN POVERTY LAW CENTER (Apr. 16, 2021) https://www.splcenter.org/presscenter/following-governments-forced-death-flight-deportations-and-torture-black-immigrants/ (describing the "harm inflicted upon Black immigrants" in the U.S.); Julian Borger, *U.S. Ice officers 'used torture to make Africans sign own deportation orders'*, THE GUARDIAN (Oct. 22, 2020), https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders (describing how Cameroonian asylum seekers in the U.S. were forced to "sign their own deportation orders"); Mark Townsend, *Witnesses to deaths in detention 'deliberately' deported from the UK*, THE GUARDIAN (Apr. 17, 2021), https://www.theguardian.com/uk-news/2021/apr/17/witnesses-to-deaths-in-detention-deliberately-deported-from-the-uk (describing the deaths of migrants in the U.K. while awaiting deportation); *Jury highlight Morton Hall staff failures as inquest concludes on death of immigration detainee Carlington Spencer*, INQUEST (Nov. 11, 2019), https://www.inquest.org.uk/carlington-spencer-closes (describing the lack of care given to a U.K. detainee having a stroke); *Jimmy Mubenga: Heathrow deportee 'unlawfully killed'*, BBC (July 9, 2013) https://www.bbc.com/news/uk-england-23244203 (describing how a man deported to Angola was unlawfully killed by the guards who were restraining him).

59. Cházaro, *supra* note 1, at 1071.

60. *Id.*

61. Consider, e.g., the procedural guarantees that international human rights law grants deportees pursuant to Article 13 of the ICCPR. These are only available to individuals who are *lawfully* present in the state who is trying to deport them, thereby precluding undocumented immigrants from the right's scope.

invisible.[62] This erasure demonstrates how the liberal-nationalist assumptions that are enshrined in the texts and institutions of international human rights law can render its liberal-cosmopolitan normative goal of securing universal human dignity a hollow fiction.[63] Yet, it is precisely the pursuit of the latter that is the normative purpose of international human rights law within the international system of legality.[64]

B. *Taking Dignity Seriously*

In order to address this dual problem, I assess deportation's compatibility with the norm against torture and cruel, inhuman and degrading treatment. The choice of this norm is driven by several considerations.

First, it responds to deportation's nature as an act of law enforcement while centering the dignitarian harm its use entails. The act of territorial removal sits atop the edifice of immigration law, which deploys similar tools, institutions, and practices, to those found in the enforcement of criminal law.[65] The norm against torture and cruel, inhuman and degrading treatment, meanwhile, is centrally concerned

---

62. Francisco Villegas, *Strategic In/Visibility and Undocumented Migrants*, 386 COUNTERPOINTS 147, 149 (2010) ("[V]isibility manifests itself when . . . particular peoples fit within national paradigms and are constructed as legitimate and worthy subjects. Invisibility, in contrast, implies an erasure or dismissal of knowledges and experiences, resulting in powerlessness. Visibility and invisibility operate through a variety of markers including race, gender sexuality and immigration status . . . [which] serve to legitimize or delegitimize the daily experiences of individuals as unimportant or socially irrelevant").

63. This author thanks Professor E. Tendayi Achiume for alerting her to this problem. For a detailed account of the liberal-nationalist ethic that underpins international law, *see generally* Achiume, *supra* note 1.

64. *See* GINEVRA LE MOLI, HUMAN DIGNITY IN INTERNATIONAL LAW 1–10 (2021) (discussing human dignity as an underlying purpose in international law); Elen De Paula Bueno & Emílio Mendonça Dias Da Silva, *An International Legal Perspective on Human Dignity: The Extrinsic Recognition of an Intrinsic Condition*, 59 CAN. Y.B. INT'L L./ANNUAIRE CANADIEN DE DROIT INTERNATIONAL 313, 315–20 (2022).

65. *See* Stumpf, *supra* note 32 (describing "crimmigration"); Chacon, *supra* note 32 at 140 (discussing "the emerging use of the criminal justice system to attack the social problem of unauthorized migration"); *see also* David Alan Sklansky, *Crime, Immigration, and Ad-Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 159 (2012) ("[A] vast network of administrative holding facilities has emerged for individuals accused of immigration violations, paralleling and regularly exchanging prisoners with the jails, prisons, and other criminal correctional institutions [and that] local police agencies . . . increasingly work hand-in-hand with federal immigration officials. Immigration enforcement and criminal justice are now so thoroughly entangled it is impossible to say where one starts and the other leaves off . . . .").

with determining which acts of law enforcement fall short of the human-dignity-based non-brutality principle to which it gives expression.[66] While any act of law enforcement is necessarily coercive, the prohibition on torture in the international legal framework reflects our commitment to eliminate those methods of law enforcement that fail to respect the dignity of the individual.[67] To assess deportation's compatibility with the norm takes seriously and centers the practice's inherent cruelty and attendant violence in a way that other potentially applicable norms cannot. At the same time, given torture's intimate relationship with the meaning of human dignity, the analysis serves to clarify the precise nature of the dignitarian harm that inheres in the forcible removal of an individual from their home, family, and community.

Second, the prohibition of torture and cruel, inhuman and degrading treatment plays a special role within the international legal framework. It is one of the few human rights provisions whose protection is both categorical in kind[68] and non-derogable.[69] As such, torture cannot be justified, neither for law enforcement purposes nor in times of emergency, even if it is for the purpose of averting a threat to national security or safeguarding the legal-political order itself. This rather unusual approach to the prohibition reflects the fact that torture is widely considered "the paradigmatic human rights abuse."[70] If human rights law were to permit its use under any circumstances, there is the sense that "the whole game was being given away and human rights law itself would enter a crisis."[71] The importance of the norm's central principle is reflected not just by its incorporation within the ICCPR and one of the most widely ratified treaty regimes, the Convention against Torture, but also in its status as a *jus cogens* norm.[72]

---

66. *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, *in* CONFRONTING TORTURE: ESSAYS ON THE ETHICS, LEGALITY, HISTORY AND PSYCHOLOGY OF TORTURE TODAY 275 (Scott Anderson & Martha Nussbaum eds., 2018) (asserting that "the prohibition on torture is an archetype of our determination to draw a line between . . . law and brutality").

67. *Id.*

68. *See* CAT, *supra* note 4, art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture").

69. *See* ICCPR, *supra* note 4, art. 4 (stating that no derogations may be made under this provision).

70. Waldron, *supra* note 61, at 290.

71. *Id.* at 291.

72. Committee against Torture, *General Comment No. 2*, U.N. Doc. CAT/C/GC/2, ¶ 1 (2008). // supra note 10

The norm's special status makes it uniquely suitable to render deportation's suffering legally actionable under human rights law. By placing a further limit on the state's right to exclude that is grounded in the human dignity of deportees, the norm's application to deportation would realign international human rights law's regulatory approach to deportation with its normative purpose in the international system of legality. At the same time, the recognition of any such limit would re-orient our normative and legal thinking regarding methods of immigration law enforcement more broadly by providing a new pole against which to measure their legitimacy. While not all acts of immigration law enforcement possess the same cruelty or inflict the same suffering that deportation does, the more they do and the closer in substance they are to deportation, the more inclined we should be to reject their use as an illegitimate method of law enforcement. Harnessing this potential would go some way toward revealing and addressing the ideological function that abstract legal concepts, such as sovereignty and citizenship, have played in the context of international law's approach to immigration. These concepts have served to justify and naturalize existing legal and social arrangements, framing the costs they impose as inevitable rather than as a product of historically contingent choices that are and ought to be subject to contestation and change.[73]

III. DEPORTATION AS TORTURE

The Convention against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence

73. *See* SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 22 (2003) (discussing the "the mode of naturalization, whereby existing social arrangements come to seem obvious and self-evident, as if they were natural phenomena." […] By assuming that which requires demonstration, "we may be encouraged to take the world for granted, rather than to approach it in terms of choices. We may come to see it as an objective domain to which we must adapt, rather than a political one defined through struggle and negotiation. […] Concepts which are contested may be treated as predetermined; practices which are problematic may be treated as given; institutions which are open to debate may be treated as beyond question").

of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[74] This definition of torture under international law includes four essential elements: (A) severe pain and suffering, (B) with intent and purpose, (C) state involvement, and (D) illegality. I will consider these elements and the extent to which the practice of deportation of long-term residents meets them in turn.

A. *Severe Suffering*

For a practice to constitute torture, it must inflict a form of severe mental or physical pain or suffering on a person.[75]As the Committee against Torture has emphasized, the practice itself need not be violent *per se*; the definition also includes acts that are non-violent but nevertheless inflict suffering.[76] The classic image that the notion of torture evokes is an individual being physically brutalized. This focus on the violation of the physical body finds its roots in historical practice where torture used to be a public spectacle with the tortured, dismembered and amputated body being put on public display.[77] Despite the particular hold these physical manifestations of violence continue to possess over our legal imagination, to treat them as the "*sine qua non* [of torture] obscures the essential goals of modern torture—namely, the breaking of the will and the spread of terror. It obscures the relationship between acts of violence and the context of torture, between physical pain, and mental stress, and between mental integrity and human dignity."[78] In other words, the goal of torture itself is psychological in nature and amounts to a form of mental violence, with the brutalization of the body being only one particular method through which this may be achieved. Torture is "never of an exclusively physical character, but always [aims to affect] the minds and emotions of victims or targeted

74. CAT, *supra* note 4, art 1.

75. *Id.*

76. Committee against Torture, *Concluding Observations: Sri Lanka*, U.N. Doc. CAT/C/LKA/CO/3-4, ¶ 25 (2011).

77. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 7 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

78. Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, *in* HUMAN RIGHTS OF WOMEN 116, 122 (Cook ed., 1994).

third persons."[79] This is underscored by the fact that over time, torture's physical methods have been replaced with psychological ones.[80]

Psychological torture works by directly targeting basic psychological needs, such as "security, self-determination, dignity and identity, environmental orientation, emotional rapport and communal trust."[81] Its methods include, but are not limited to, the deliberate and purposeful infliction of fear, the deprivation of the victim's control over their lives, the inducement of a profound sense of helplessness, hopelessness and total dependency, the pro-active targeting of a victim's sense of self-worth and identity, the denial of social and emotional rapport as well as the destruction of communal trust through lack of recourse in the face of the overwhelming power of the state and group persecution.[82] In what follows, I will illustrate how deportation deploys some of these methods to inflict a form of psychological violence that amounts to torture by focusing on two phenomena that are inherent in the experience of deportation of long-term residents: forcible separation from loved ones and the condition of deportability.

1. *Forcible Separation from Loved Ones*

Humans are fundamentally social beings, and deportation of long-term residents therefore always involves forcible separation from loved ones.[83] In the U.S., for example, the majority of deportable individuals have lived in the country for years—if not decades. Their share has steadily grown over the last 15 years.[84] Many are parents or caregivers

---

79. Human Rights Council, *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur,* ¶ 23, U.N. Doc. A/HRC/43/49 (March 20, 2020).

80. *See id.* ¶ 11 (finding that "numerous States have invested significant resources towards developing methods of torture which can achieve purposes of coercion, intimidation, punishment, humiliation or discrimination without causing readily identifiable physical harm or traces").

81. *Id.* ¶ 43.

82. *Id.* ¶¶ 46, 49, 51, 56, 61.

83. *See* Karina Horsti and *P. . .ivi* Pirkkalainen, *The Slow Violence of Deportability, in* VIOLENCE, GENDER, AFFECT 182 (M. Husso et al., eds, 2021) (finding that "[d]eportation also tears apart important relations [and] affect[s] family members and people who are part of the same community: teachers at school, colleagues at work, neighbors, and friends").

84. *See* JEFFREY S. PASSEL & D'VERA COHN, OVERALL NUMBER OF U.S. UNAUTHORIZED IMMIGRANTS HOLDS STEADY SINCE 2009 6 (Pew Research Ctr. 2016), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/09/PH_2016.09.20_Unauthorized_FINAL.pdf ("[U]nauthorized

of U.S. citizens, with almost 5.9 million U.S. citizen children having at least one caregiver who does not have authorization to reside in the United States.[85]

The undeniable psychological violence that forcible separation from loved ones inflicts has recently captured collective attention in a slightly different, if related, context: the first Trump administration's family separation policy. In analyzing and contextualizing the policy's particular cruelty, a number of experts—legal and medical—have noted that the suffering it inflicted amounts to a form of psychological torture.[86] To support this claim, they cited to research which has shown that forcible and prolonged separation from parents can have profoundly damaging effects on children's psychological and physiological well-being and development.[87] Indeed, even if the family is ultimately

---

immigrants increasingly are likely to have been in the U.S. for 10 years or more . . . ."); BRYAN BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES 4 (2017), https://ohss.dhs.gov/sites/default/files/2023-12/Unauthorized%2520Immigrant%2520Population%2520Estimates%2520in%2520the%2520US%2520January%25202014_1.pdf (providing statistics on period of entry of the unauthorized immigrant population); *Profile of the Unauthorized Population: United States*, MIGRATION POLICY INSTITUTE, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (providing statistics about the years of U.S. residence of unauthorized immigrants).

85. Silva Mathema, *Keeping Families Together: Why all Americans should care about what happens to unauthorized immigrants,* UNIVERSITY OF SOUTHERN CALIFORNIA'S CENTER FOR THE STUDY OF IMMIGRANT INTEGRATION (CSII) AND CENTER FOR AMERICAN PROGRESS (2017), https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/.

86. *See* Jenny-Brooke Condon, *When Cruelty Is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37, 37 (2021) (stating that "[t]he Trump Administration separated migrant children from their parents at the southern U.S. border in 2017 and 2018 knowing and intending that the families would suffer grievous harm"); Carrie F. Cordero, Heidi Li Feldman & Chimene I. Keitner, *The Law against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 434 (2019) ("the family separation policy was intended to be a harsh mechanism of enforcement"); Van Schaack, *supra* note 51 (noting how "the threshold at which treatment of punishment may constitute torture is thus lower when it comes to children"); Amanda Holpuch, *Family Separation Constitutes Torture, Doctors Find*, THE GUARDIAN (Feb. 25, 2020), https://www.theguardian.com/us-news/2020/feb/25/trump-family-separations-children-torture-psychology (recounting a study evaluating the family separation policy's psychological impact on twenty-six people).

87. *See* Condon, *supra* note 81, at 37 (stating that "[t]he Trump Administration separated migrant children from their parents at the southern U.S. border in 2017 and 2018 knowing and intending that the families would suffer grievous harm"); Cordero, *supra* note 81, at 434 ("the family separation policy was intended to be a harsh mechanism of enforcement"); Van Schaack, *supra* note 51 (noting how "the threshold at which treatment of punishment may constitute torture is thus lower when it comes to children"); Holpuch, *supra* note 81 (recounting a study evaluating the family separation policy's psychological impact on twenty-six people).

reunited, the consequences of their forced separation often remain,[88] thereby permanently undermining a child's sense of self, emotional rapport, and communal trust.

Much of the analysis in this context has centered on the suffering inflicted on children, given that their special vulnerability arguably lowers the threshold for what constitutes impermissible suffering under international human rights law.[89] However, substantially similar considerations apply to adults who experience and witness the forcible separation from or mistreatment of loved ones by state agents.[90] The Committee against Torture has recognized that the act of forced disappearance itself constitutes an act of torture within the meaning of Article 1,[91] with the Human Rights Committee (HRC) having reached a similar conclusion.[92] Specifically, in Sarma v. Sri Lanka, the Human Rights Committee held that the forced disappearance of the author's son violated Article 7 of the Covenant both with regard to him and his family.

Regional human-rights courts too have recognized the possibility that experiencing the forced disappearance of a family member can inflict suffering which meets the threshold of severe pain or suffering that amounts to torture, regardless of the victim's age. In *Çakici v. Turkey*, the European Court of Human Rights outlined a series of "special factors" used to establish whether "a family member of a 'disappeared person' is thereby a victim of treatment contrary to [the prohibition of torture and cruel, inhuman, and degrading treatment [under] Article 3

88. American Psychological Association, *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. CMTY. PSYCH. 3, 4 (2018); *see also* Jacqueline Hagan, Karl Eschbach, Nestor Rodriguez, U.*S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64, 83–84 (2018) (stating that "[n]umerous news accounts and some scholarly reports have documented the horrors of deportation both for returning migrant . . . and for the family members left behind, many of whom suffered emotional, financial, and psychological trauma"); Johanna Dreby, U.S. *Immigration Policy and Family Separation: The consequences for children's well-being*, 132 SOC. SCI. & MED. 245–51 (2015) (describing how reunited children experience emotional harm).

89. *See* Van Schaack, *supra* note 51 (noting how "the threshold at which treatment of punishment may constitute torture is thus lower when it comes to children").

90. *See id.* ("this policy has the potential to cause long-lasting psychological harm to all the parties involved").

91. Francisco Dionel Guerrero Larez v. Bolivarian Republic of Venezuela, Communication No. 456/2011, Committee against Torture, ¶ 6.6 (May 15, 2015).

92. *See* Mr. S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, Human Rights Committee, ¶ 9.3, 9.5 (July 16, 2003) (noting that the forced disappearance of the son violated article 7 of the Covenant regarding both the author's son and the author's family).

[of the European Convention on Human Rights]."[93] These factors include, *inter alia,* "the extent to which the family member witnessed the events in question."[94] In *Çakici* itself, the brother of the disappeared person was found not to have suffered a violation of Article 3, in part because he was not present when the security forces took his brother.[95] The Inter-American Court meanwhile found that a complainant had suffered psychological torture after being forced to endure the cries of his brother as he was beaten by police agents, among other abuses.[96] Such caselaw confirms that witnessing traumatizing events, such as separation from and abuse of a loved one at the hands of state agents, is *prima facie* capable of meeting the threshold of severe pain or suffering in the definition of torture even for adults.

There is no convincing reason to confine the classification of this type of mental suffering as a form of psychological torture to the context of the first Trump administration's family separation policy or the context of forced disappearance. For one, long-standing research documenting the destructive impact deportation policy has had on family unity confirms that it inflicts substantially similar psychological and physiological suffering to the suffering found to amount to psychological torture in the context of Trump's family separation policy.[97] Indeed, any supposed distinction would have to rest on the idea that there

---

93. Cakici v. Turk., App. No. 23657/94, ¶ 98 (Jul. 8, 1999), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58282%22]}; *see also* Janowiec & Others v. Russ., Judgment, App. Nos. 55508/07 & 29520/09, ¶ 177 (Apr. 16, 2012), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-110513%22]} ("[I]n order for a separate violation of Article 3 of the Convention to be found in respect of the victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from the emotional distress inevitable stemming from the aforementioned violation itself.").

94. Cakici, *supra* note 88, at ¶ 98.

95. *Id.* at ¶ 99.

96. Cantoral-Benavides v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶¶ 63(f), 104 (Aug. 18, 2000).

97. *See* Kalina M. Brabeck, Brinton Lykes, & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 496–505 (2014) (examining the literature on the psychosocial consequences of detention); Luis H. Zayas, Sergio Aguilar-Gaxiola, Hyunwoo Yoon & Guillermina Natera Rey, *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD & FAM. STUD. 3213, 3213–23 (2015) (finding negative psychological outcomes for children who experienced a parent's deportation); Johanna Dreby, *The Burden of Deportation on Children in Mexican Immigrant Families*, J. MARRIAGE & FAM. 829, 829–43 (2012) (describing the impact of deportation on children); Rachel Aviv, *The Trauma of Facing Deportation*, THE NEW YORKER (Mar. 27, 2017), https://www.newyorker.com/magazine/2017/04/03/the-trauma-of-facing-deportation (describing the trauma of refugee children in Sweden whose families are facing deportation).

is something unique about families being forcibly separated by state agents at the border. This mistakenly construes the border as a geographical place, rather than a conceptual space which can be reproduced anywhere within or even outside the territory of nation-states.[98] At the same time, with regards to the caselaw on forced disappearance, there is a substantial similarity between witnessing the forced disappearance of a loved one and their apprehension by immigration enforcement officers. After all, in both cases state agents seize individuals and forcibly separate them from their loved ones, with the explicit intent of making them disappear from the community. [99] The similarity between the practice of forced disappearance and deportation has become more explicit during the second Trump administration's aggressive immigration law enforcement campaign. Following the apprehension and deportation of more than 200 Venezuelan immigrants to El Salvador in April 2025, relatives, lawmakers, and human rights experts have cast their removal discursively as a form of forced disappearance.[100]

Moreover, we must also refrain from a narrow focus on the separation of heteronormative, nuclear families when analyzing this aspect of deportation's violence. As feminist and queer scholars have long argued, such a focus is an incomplete, and often violent, essentialization of the multifarious forms that intimacy, kinship, and meaningful

---

98. *See* Nicholas De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 439 (2002) ("[T]he spatialized condition of 'illegality' reproduces the physical borders of nation-states in the everyday life of innumerable places throughout the interiors of the migrant-receiving states . . . ."); *see also* Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility*, *in* 69 BEHIND THE HEADLINES 1, 1 (2021), https://thecic.org/wp-content/uploads/2021/12/Shachar-BtH-Paper.pdf ("[T]he border has broken free of the map; it may extend well beyond the edge of a territory or well into its interior . . . .").

99. *See* Amina Zarrugh, *The Development of U.S. Regimes of Disappearance: The War on Terror, Mass Incarceration, and Immigrant Deportation*, 46 CRITICAL SOCIO. 257, 257–71 (2020) (describing the impact of the removal of family members by state agents on families); Monique O. Madan, *'Either he's dead or he's been kidnapped': ICE detainees go 'missing' amid coronavirus*, MIAMI HERALD (June 17, 2020), https://www.miamiherald.com/news/local/immigration/article243545852.html (recounting the inability of families to contact family members of abducted by ICE to know their health status or location); IMMIGRANT DEF. PROJECT, DENIED, DISAPPEARED, DEPORTED 12 (2020) (relaying the experience of an attorney whose client was abducted by ICE in their presence).

100. *See US/El Salvador: Venezuelan Deportees Forcibly Disappeared*, Human Rights Watch, (April 11, 2025, at 00:00 ET), https://www.hrw.org/news/2025/04/11/us/el-salvador-venezuelan-deportees-forcibly-disappeared.

human relationships take.[101] The focus has nonetheless been particularly prevalent in the context of immigration law, which has a long history of privileging ties of blood, marriage, and monogamy.[102] Deportation decisions, like admissions decisions, systematically fail to recognize and/or willfully ignore the significance of relationships that are not sanctioned by the state in the form of heteronormative, monogamous, and nuclear, marriages.[103] While deportation certainly separates familial entities that fit into this framework, it is important to highlight that the violence it inflicts lies in one's separation from those one loves—and these can be individuals one is not married to, otherwise related to, nor even in a romantic relationship with. To take this argument seriously also serves to rebut the argument that not all deported long-term residents are forcibly separated from a sufficiently close, nuclear, family member. This may be true, but with long-term residence comes an inevitable form of communal attachment and a flourishing of meaningful relationships, separation from which is capable of inflicting the very same type of mental violence that one's separation from a nuclear family member may—and for some may not—impose.

2. *The Violence of Deportability*

Aside from forcible separation from loved ones, there is another aspect of deportation that renders it a form of sufficiently severe violence to constitute torture—the violence of the condition of deportability. It is important to note that suffering in the form of psychological torture need not be inflicted by a single act or method that crosses a severity threshold but can be created through the formation of "a 'torturous environment,' that is to say, a combination of circumstances and/or practices designed or of a nature, as a whole, to intentionally inflict pain or suffering of sufficient severity to achieve the desired torturous purpose."[104] Where there is an absence of physical pain, "due

---

101.De NORONHA, *supra* note 47, at 247–48. *See generally* KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (rev. ed. 1997) (discussing kinship and family in lesbian and gay communities); Judith Butler, *Is Kinship Always Heterosexual?,* 13 J. FEMINIST CULTURAL STUD. 14–44 (2002) (discussing the existence of kinship relationships that do not conform to the nuclear family); ELIZABETH POVINELLI, THE EMPIRE OF LOVE: TOWARD A THEORY OF INTIMACY, GENEALOGY, CARNALITY (2008) (conceptualizing systematic relations between forms of love and governance).

102.DE NORONHA, *supra* note 47, at 128–29.

103.See *id.* at 127–40 for an overview of how immigration law fails to respect relationships that do not fit into the heteronormative essentialist view of relationships.

104.H.R.C. Rep. 43/49, *supra* note 74, ¶ 70.

consideration must always be given to the context in which certain methods are used,"[105] as this can change the quality of the suffering that is inflicted. It follows that systematic, state-sponsored vilification and persecution involving additional measures such as arbitrary detention, constant surveillance, systematic denial of justice, and serious threats or intimidation, can render otherwise unobjectionable or solely criminal acts a form of psychological torture.[106]

With these considerations in mind, the violence of the condition of deportability can be considered a form of severe suffering inflicted by deportation, one that is intrinsic to the practice itself. Academic writing on deportation in anthropology and sociology has coined the term "deportability" to describe an individual's experience of living with the constant "possibility of being removed from the space of the nation-state."[107] Deportability reproduces a state's border in the immigrant's everyday life,[108] thereby thrusting them into a state of permanent precarity and susceptibility to violence that is both physical and psychological in character.[109] It is through this lens that we must conceptualize the frequent reports of state agents brutalizing immigrants they are tasked with deporting, either at the point of apprehension, in detention, or during deportation itself. We may also view the intimidation, exploitation, and harassment, that deportable individuals experience by employers, landlords, and other private actors, in this light.[110]

Underlying these physical manifestations of deportability's violence lies constant, mental violence that draws on the methodological toolbox of psychological torture. Agencies tasked with deportation resort to tactics that purposefully inflict fear, for example, through the issuance of public threats and an excessive demonstration of public

105.*Id.* ¶ 69.

106.*Id.*

107.Genova, *supra* note 45, at 439.

108.*Id.*; *see also* NICK VAUGHAN- WILLIAMS, BORDER POLITICS: THE LIMITS OF SOVEREIGN POWER 32 (2009) (stating that the "commonsensical picture of the concept of the border of the state as something fixed territorially at the geographical outer edge of the sovereign state is somewhat chimerical.")

109.*See* Yajaira Ceciliano-Navarro, Tanya Golash-Boza, and Luis Ruben Gonzalez Marquez, *Reflections on Anti-immigration Narratives and the Establishment of Global Apartheid*, *in* BEYOND BORDERS: THE HUMAN RIGHTS OF NON-CITIZENS AT HOME AND ABROAD 102–04 (Molly Land, Kathryn Libal & Jillian Chambers eds., 2021) (explaining how the 'conditions of possibility' for mass deportations have been created and maintained in the United States and Europe in past decades).

110.Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2350 (2019) (describing the normalization of intervention by government and non-state actors into the lives of immigrants as the normalization of 'slow violence' via regulation).

force in conducting arrests and raids.[111] Studies have shown that immigration raids and deportations inflict a form of collective trauma that leaves community members more fearful and distrustful of public institutions, and therefore, less likely to participate in communal life, such as churches, schools, health clinics, cultural activities, and social services. [112] The erosion of trust in community and the sense of permanent persecution that these practices of deportability deliberately foster have been recognized as methods of psychological torture for undermining an individual's sense of security and replacing it with a feeling of helplessness.[113] Whatever remnants of communal trust remain are further undermined through lack of any recourse in the face of felt group persecution and suffering inflicted at the hands of state agencies[114] and the transformation of communal places like hospitals, banks, and private residences, into border checkpoints. This occurs by mandating private citizens and civil servants to do frontline immigration enforcement through identity checks.[115]

111.As an example, ICE's acting director has warned undocumented immigrants: "You should look over your shoulder, and you need to be worried" and ICE is increasingly making arrests at court-houses. *See* Rachel Levinson-Waldman, *The Abolish ICE Movement Explained*, BRENNAN CENTER, (Jul. 30, 2018), https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained.

112.*See, e.g.,* S.W. Henderson & C.D. Baily, *Parental Deportation, Families, and Mental Health*, 52(5) J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 451, 451–53 (2013) (finding that workplace raids concretely impacted the emotional regulation of children and familial relations within the household); RANDY CAPPS ET AL., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 38–45 (Migration Policy Institute ed. 2011) (finding drops in public school enrollment for Hispanic families impacted by immigration enforcement in 287(g) jurisdictions); Jacqueline Maria Hagan et al., *Social Effects of Mass Deportations by the United States Government 2000–2010,* 34(8) ETHNIC AND RACIAL STUDIES 1374, 1374–91 (2011) (finding that expanded U.S. enforcement policies strained transnational family ties and exacerbated residency difficulties even if legally present); Edward D. Vargas, *Immigration Enforcement and Mixed Status Families: The Effects of Risk of Deportation on Medicaid Use*, 57 CHILD YOUTH SERV. REV. 83, 83–89 (2015) (finding a correlation between deportation risk and decreased use of Medicaid); D. Becerra, *Anti-Immigration Policies and Fear of Deportation: A human Rights Issue,* 1(3) J. HUM. RTS. & SOC. WORK 109, 109–19 (2016) (finding that those reporting a greater fear of deportation were significantly more likely to report trouble finding or maintaining employment, having been asked for immigration documents, personal or familial suffering, distrust of the police and courts, and lack of optimism in a better future); https://www.nytimes.com/2025/06/16/us/immigration-raids-school-absences-deportation-fears.html.

113.H.R.C. Rep. 43/49, *supra* note 74, ¶ 63.

114.*Id.* ¶ 46, 49, 51, 56, 61.

115.Human Rights Council, *Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia & Related Intolerance*, ¶ 55–56, U.N. Doc. A/HRC/41/54/Add.2 (May 27, 2019).

It is important to recognize that these strategies form part of a larger, systematic, and state sponsored, campaign of vilification and persecution of immigrants, driven by the explicit adoption of a philosophy of "attrition through enforcement."[116] Attrition is a strategy taken from the military, which aims to deprive an enemy of all essential material resources to the point where their fighting capacity erodes.[117] In the context of immigration, it amounts to the design of an environment so hostile to immigrants,[118] undocumented and documented, that they choose to voluntarily self-deport. While this purported goal has proven largely illusory,[119] this state-driven contempt of immigrants has translated into a strategic and targeted assault on their "preconditions for survival,"[120] inducing a sense of insecurity in meeting basic needs. By deliberately fostering "fear as a public policy,"[121] an environment is created in which the cumulative features of deportability lead to the infliction of psychological suffering that is severe enough to reach the threshold of psychological torture.

B. *Inflicted Intentionally for a Purpose*

For conduct to violate the norm against torture, the infliction of severe suffering on an individual must also occur intentionally for a certain purpose, such as to obtain information or a confession, to punish, to intimidate or coerce, or for any reason based on discrimination of any kind.[122] The intent requirement indicates that purely negligent

---

116.*E.g.*, Kris Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2007).

117.DANIEL ROTHBART, THE ATTRITION OF UNAUTHORIZED IMMIGRANTS IN STATE DOMINATION AND THE PSYCHO-POLITICS OF CONFLICT 75-6 (2019) (discussing that attrition in war refers to a strategy to create the conditions in which an enemy suffers from the deprivation of essential material resources to the point where their fighting capacity erodes, prompting their surrender.)

118.The author is referring here to the UK's adoption of their "hostile environment policy" which is substantially similar to the US's attrition through enforcement strategy. *See generally* Jamie Grierson, *Hostile environment: anatomy of a policy disaster*, THE GUARDIAN (Aug. 27, 2018), https://www.theguardian.com/uk-news/2018/aug/27/hostile-environment-anatomy-of-a-policy-disaster (discussing the UK's "hostile environment" policy).

119.*See* Lee, *supra* note 114, at 2351 ("The impact of these policies has not been to compel migrants to leave but simply to generate suffering within the interior of the United States.").

120.ROTHBART, *supra* note 111, at 75.

121.*Id.* at 86.

122.CAT, *supra* note 4, art. 1.

or accidental conduct can never amount to torture.[123] At the same time, it does not require the presence of malice,[124] nor does it require the infliction of severe suffering to be "specifically intended," in the sense of suffering being the sole intended purpose of the act. The latter reading would have precluded a finding of torture in cases where a state agent knowingly caused pain or suffering but had some other purpose, such as extracting information.[125] This interpretation was widely rejected on the ground that it was precluded by both the text and the *travaux préparatoires* of the Convention, which support a reading of the intent requirement as merely requiring knowledge that the intended act causes the suffering.[126]

Yet, some commentators argue that torture is nonetheless a crime of specific intent because it requires the intentional infliction of pain or suffering *for a prohibited purpose.*[127] The definition's wording suggests

---

123.*See* Manfred Nowak, *What's In a Name? The Prohibitions on Torture and Ill Treatment Today*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 307, 315 (Gearty & Douzinas eds., 2012) ("One cannot torture simply be being reckless or negligent."); Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 34 , U.N. Doc. A/HRC/13/39/Add.5, (Feb 5, 2010) ("The element of intent contained in the definition of torture in the Convention requires that severe pain or suffering be intentionally inflicted on the victim . . . ."); *see also* Prosecutor v. Furund'ija, Case No. IT-95-17/1-A, Judgment, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 21, 2000) (finding that intent is satisfied when the "treatment", in this case being hung naked by his arms with his arms tied behind his back, "could only have been deliberately inflicted" and where the treatment was "administered with the aim of obtaining admissions or information from the applicant."); Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 345 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (providing the five elements to establish guilt under a command responsibility theory, one of which is that "the commander had either actual knowledge of the commission of the violation of the law of war . . . ."); Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Chamber Judgment, ¶ 238 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1993) (describing the *mens rea* requirement of torture).

124.This suggestion was defeated at the drafting stage. Zach, *supra* note 13, at 53.

125.Under such a standard, if the accused knowingly causes pain or suffering but had some other objective for which pain and suffering was merely incidental, such as extracting information, he lacks the requisite "specific intent." This was the standard adopted in the Torture Memos but was met with widespread condemnation. Oona Hathaway, Aileen Nolan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture under International and U.S. Law*, 52 VA. J. INT'L L. 791, 793 (2012).

126.*See* Copelon, *supra* note 73, at 128 (describing the intent needed for torture and drafter rejection of the view that torture be "deliberately and maliciously" inflicted); Zach, *supra* note 13, at 54 (describing the deletion at the drafting stage).

127.Hathaway, *supra* note 119, at 795; Zach, *supra* note 13, at 53. Notably, all signatories to CAT, except the United States, define torture as acts committed with general intent, which may include grossly negligent acts, reckless acts or even negligence.

that the intent requirement extends beyond the actus reus of the action itself.[128] By also being "directed at the purpose to be achieved by such conduct," it places "the crime of torture comfortably in the company of other specific intent crimes."[129] However, as the Committee against Torture has stated, a finding of intent and purpose does not rest on "a subjective inquiry into the motivations of the perpetrator" but rather must be based on "objective determinations under the circumstances."[130] Therefore, it is clear that no evidence of the mental state of the perpetrator is necessary. [131] In practice, the Committee has refrained from specifying which facts and circumstances are relevant to finding intent and purpose.[132] Instead, it often simply states that a certain conduct was intentional and identifies or imputes the relevant purpose to the conduct in question.[133] A common denominator in the complaints that found relevant purpose appears to be that the suffering was inflicted at the hands of the state party,[134] particularly in situations of state custody, or rather, powerlessness;[135] a term coined by Manfred

---

Irene Scharf, *Untorturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 10 (2013).

128.See Gerrit Zach, Article 1. Definition of Torture, in THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY (Manfred Nowak et al. eds., 2nd ed. 2019), ¶ 102 (noting that "the intention must be directed at the conduct of inflicting severe pain or suffering as well as at the purpose to be achieved by such conduct. This follows from the clear wording of Article 1 ('is intentionally inflicted on a person for such purposes as'). If severe pain or suffering is inflicted, for instance, in the course of a fully justified medical treatment, such conduct cannot constitute torture as it lacks both a purpose enumerated in Article 1 and the intention in relation to such a purpose.")

129.Hathaway, *supra* note 119, at 836.

130.CAT, *General Comment No. 2*, *supra* note 67, ¶ 9; *see also* Deborah E. Anker, *Understanding "Suffering," Yet Misconstruing Intentionality: U.S. Compliance and Non-Compliance with the Convention against Torture*, REFLAW (Aug. 6, 2017), http://www.reflaw.org/understanding-suffering-yet-misconstruing-intentionality-u-s-compliance-and-non-compliance-with-the-convention-against-torture/ (providing the text of the convention).

131.Zach, *supra* note 13, at 53.

132.Hathaway, *supra* note 119, at 822–24.

133.Zach, *supra* note 13, at 54–56. For example, in EN v Burundi, "the State party argued that the act of severe beatings committed by police officers in a police station after arrest cannot be classified as torture because the Burundian Criminal Code requires that acts of torture must be committed to obtain information or a confession. The Committee concluded that the beating was most likely undertaken in order to punish him for an act he was thought to have committed." *Id.* at 56. In Patrice Gahungu v. Burundi, "the Committee concluded that the treatment inflicted was 'probably aimed at forcing a confession from him,' and consequently found torture. [internal citations omitted]" *Id.* at 55–56.

134.Zach, *supra* note 13, at 54.

135.*Id.* at 56–57.

Nowak to capture situations of control that include but extend beyond classical instances of arrest, detention, and incarceration. [136] Under such conditions, the Committee appears to presume the presence of relevant purpose. A similar pattern exists in the jurisprudence of the European Court of Human Rights, though its caselaw evidences that this is a rebuttable presumption.[137]

Under an objective test, deportation is an intentional act in the general sense, as it is hardly possible to deport somebody accidentally or negligently. Moreover, by considering the context and circumstances that attend the practice, it is also possible to infer the presence of several of the purposes that characterize severe suffering as torture. While it is commonly assumed that the purpose that renders violence a form of torture is one of extracting information, the definition in the Convention against Torture lists multiple impermissible purposes, and the list itself is not exhaustive.[138] In the context of deportation two of the listed, impermissible, purposes can be inferred based on the relevant facts and circumstances: punishment and discrimination.

1. *Deportation as Punishment*

International human rights law does not provide a clear test as to how to establish a sanction's nature as criminal punishment. However, the Human Rights Council (HRC) noted in General Comment 32 that a sanction can be penal in nature due to its purpose, character, or severity, irrespective of its qualification in domestic law.[139] It has reiterated in individual communications that the definition of a penalty is autonomous from the meaning with which it is imbued in domestic law,[140] and that severity matters in determining a sanction's punitive nature.[141] The HRC has also found that preventive detention

---

136.See *id.* at 57–58 for an overview of caselaw in which courts found that victims were subjected to torture while being under the direct control of the state party but not in detention.

137.*See* Clare McGlynn, *Rape, Torture and the European Convention on Human Rights*, 58 INT'L & COMPAR. L. Q. 565, 581–82 (2009) (providing an overview of caselaw in the European Court of Human Rights).

138.Rhonda Copelon*, Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 CUNY L. REV. 229, 249 (2008); Hathaway, *supra* note 119, at 804.

139.Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, ¶ 15 (Aug. 23, 2007).

140.Van Duzen v. Canada, Comm. No. R12/50, Views of 7 April 1982, ¶ 10.2.

141.Sazadi and Vinck v. Belgium, Comm. No. 1472/2006, Views of 22 October 2008, ¶ 10.11.

imposed in the aftermath of a served prison sentence constitutes punishment. [142]

Similar considerations guide the European Court of Human Rights' (ECtHR) approach to determining the concept of a 'penalty' within the meaning of Article 7(1), which contains the guarantee against punishment without law. Similar to the Human Rights Committee, the Court has emphasized the concept's autonomous meaning, and that the "Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty"".[143] While the starting point for assessing the existence of a 'penalty' is to ascertain whether the measure in question was ordered following a criminal conviction, the lack of such conviction does not rule out the existence of a penalty. Other factors the Court considers are "the nature and purpose of the measure in question; its characteri[z]ation under national law; the procedures involved in the making and implementation of the measure; and its severity."[144] Importantly, it does not consider the severity of the measure as decisive because many non-criminal, preventive measures can have a substantial impact on the person. In applying these criteria, the Court has found, *inter alia,* the replacement of a prison sentence with expulsion and a ten-year prohibition of residence to be a 'penalty'[145] within the meaning of Article 7(1).

Yet, it is important to note that the ECtHR does not generally consider exclusion orders to be a criminal penalty because of their "essentially preventive nature."146 In Maaouia v. France, the Court affirmed that "the domestic legal order's characteri[z]ation of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature," and that "[o]ther factors, notably the nature of the penalty concerned, have to be taken into account."147 However, it then proceeded by noting that "in general, exclusion orders are not classified as criminal within the member States of the Council of Europe [but] constitute a special preventive measure for the purposes of immigration control […]."148 In characterizing exclusion orders as

142.Fardon v. Australia, Comm. No 1629/2007, Views of 18 March 2010, ¶ 7.4; Tillman v. Australia, Comm. No. 1635/2007, Views of 10 May 2010, ¶ 7.4.

143.G.I.E.M. S.R.L. and Others v. Italy (merits) [GC], 2018, § 210.

144.G.I.E.M. S.R.L. and Others v. Italy (merits) [GC], 2018, §§ 211; Welch v. the United Kingdom, 1995, § 28; Del Río Prada v. Spain [GC], 2013, § 82; Galan v. Italy (dec.), 2021, §§ 70 and 85-96).

145.Gurguchiani v. Spain, 2009, § 40.

146.Maaouia v France, [2000] ECHR 455, 39

147.Maaouia v France, [2000] ECHR 455, 39.

148.Maaouia v France, [2000] ECHR 455, 39.

non-criminal penalties, the ECtHR emulates the approach to deportation that many domestic legal systems take. These generally cast deportation as a civil sanction.149 However, as we have seen the test for impermissible purpose under international human rights law is objective. It is therefore necessary to look beyond the official label or the intent expressed by states when assessing a sanction's punitive nature. This is particularly relevant at a time "where legislators increasingly rely on civil and administrative legal institutions to impose highly coercive measures and where measures of a hybrid nature, such as between criminal law and immigration law, are a common feature of a response to crime."150

When considering the criteria set out by the HRC to determine a sanction's nature as a criminal penalty, it is possible to view deportation of long-term non-citizen residents as a form of punishment.[151] For one, because deportation entails the often permanent, but at least long-term, banishment of the individual from their place of residence, it constitutes a particularly severe penalty.[152] As mentioned above, studies on deportation have chronicled both the emotional and material hardship that the practice inflicts on deportees and their relatives alike.[153] Deportees are frequently thrust into extreme poverty upon return to their country of origin where they often have little to fall back on, and may be demonized and treated with hostility by both the government and the community into which they supposedly belong. [154]

149.*See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307–13 (2000) (discussing the "traditional" view of deportation as a civil proceeding). Deportation's nature as a civil sanction was first established in Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("[T]he order of deportation is not a punishment for crime. It is not banishment . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.").

150.Ivo Coca-Vila, *Our 'Barbarians' at the Gate: On the Undercriminalized Citizenship Deprivation as a Counterterrorism Tool*, 14 CRIM. L. & PHIL. 149, 153 (2020).

151.Bleichmar, *supra* note 34, at 151–60, establishes the punitive nature of deportation.

152.Dan-Cohen, Immorality of Death Penalty, 209, (argues that banishment belongs into a cluster of unconstitutional punishments, alongside the death penalty and slavery.)

153.See, supra note 92 and 106.

154.*See generally* DE NORONHA, *supra* note 47 (highlighting the experience of reintegration after being deported to Jamaica); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of their Families*, 32(1)

Those left behind, meanwhile, are often pushed into destitution, in addition to experiencing the emotional toll that comes with the loss of a loved one.[155]

Equally important for inferring deportation's punitive nature is the argument made by Daniel Kanstroom that deportation rests on similar philosophical intuitions as criminal punishment, such as incapacitation, deterrence, and retribution.[156] From this perspective, deportation is a cost-effective alternative to incarceration in pursuit of incapacitating criminal offenders. Historically, banishment has served as the more humane alternative to the death penalty: the ultimate form of incapacitation.[157] At the same time, deportation clearly serves a deterrence function. This is popularly represented in the adoption of an attrition through enforcement or hostile environment policy by governments. Ramped up deportations of so-called "illegal immigrants" is a core component of the desire of governments to deter more immigrants from coming in and prevent others from staying. Finally, deportation can also be understood as a form of retribution: for many, deportation is merely a form of just deserts for immigrants who fail to abide by the conditions upon which they were admitted in the first place.

Moreover, conceptualizing deportation as a form of banishment highlights the deep, historical, roots of the practice as a form of punishment. Reaching all the way back to Ancient Greece and Rome, political communities have consistently resorted to banishment to punish members that have breached their norms.[158] As Javier Bleichmar illustrates, it is possible to draw a clear historical line between banishment's colonial iteration, the practice of transportation, and the modern practice of deportation of criminal non-citizens.[159] Transportation from the British mainland to the Colonies was imposed as punishment for subjects who had committed minor criminal offences. From 1718 until the Independence of the United States in 1776, some 30,000-50,000

N.Y.U. REV. L. & SOC. CHANGE 55, 74–5 (2008) (discussing the Haitian government policy of detaining incoming deportees in deplorable conditions to dissuade them from committing future crimes in Haiti).

155.*Id.* at 70–74.

156.Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts Why Hard Laws Make Bad Cases*, 11 HARVARD L. REV. 1889, 1894 (2000).

157.Pauw, *supra* note 145, at 326 (noting the death penalty as the most extreme form of incapacitation and deportation's historical use as an incapacitating punishment).

158.For an overview, *see* Matthew Gibney, *Banishment and the Pre-History of Legitimate Expulsion Power*, 24 CITIZENSHIP STUD. 277–300 (2020).

159.Bleichmar, *supra* note 34, at 148–51.

criminals not sentenced to death were instead sentenced to transportation.[160]

Finally, characterizations of deportation as punitive in kind are further supported by the fact that deportation of long-term residents is increasingly linked to criminal conduct as a matter of law. [161] Moreover, as Daniel Kanstroom points out, deportation proceedings are akin to criminal ones, in that proceedings are initiated and undertaken by a government enforcement agency, are [often] directly based on criminal conduct, involve incarceration and forced movement of persons, and may result in lifetime banishment.[162] That being said, the connection between deportation and criminal conduct is not clear cut. This is because deportation can also be a sanction for individuals that simply lack the legal right to remain. Lack of legal status can be the result of illegal entry, which counts as a crime in certain jurisdictions.[163] However, it is more often the case that individuals lack legal status because their initial status simply expired. While an individual's resulting unlawful *presence* does not constitute a criminal offense, it is generally treated as a quasi-crime.[164] This reflects the tendency of states to criminalize immigrant behavior through quasi or procedural criminalization—i.e. the incorporation of practices and institutions traditionally associated with the criminal justice system within immigration law.[165] It is a strategy that is

160.*Id.* at 116.

161.*See, e.g.*, Immigration and Nationality Act of 1952 § 237, 8 U.S.C. § 1227(2); *UK Borders Act 2007*, c. 30, § § 32, 37 (UK). In the UK, the term 'deportation' is specifically reserved to describe an individual's removal following a criminal conviction, whereas removal for lack of status is called administrative removal. The relationship between a criminal conviction and deportation is rendered automatic and unchallengeable whenever an immigrant has been sentenced to more than 12 months' imprisonment. Meanwhile, in the United States the link between criminal convictions and deportation was also strengthened to the extent of rendering it virtually certain with the adoption of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Div. C ('IIRIRA'). This not only expanded the ground for deportation but also abolished the possibility for relief for those convicted of so-called aggravated felonies. While this term of art initially only referred to serious offences such as murder, nowadays, it covers more than thirty types of offenses, including simple battery, theft, perjury, filing a false tax return, or failing to appear in court. *See*, Immigration and Nationality Act § 101(a)(43).

162.Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts Why Hard Laws Make Bad Cases*, 11 HARVARD L. REV. 1889, 1894 (2000).

163.*See, e.g.*, *Immigration and Nationality Act*, 8 U.S.C. § 275(a).

164.For an explanation of how unlawful entry operates as a quasi-crime within the criminal justice system, see Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011).

165.Leanne Weber, *The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care*, 14 CURRENT ISSUES IN CRIM. JUST. 9, 14 (2002).

deployed in the context of unlawful presence, whose "offenders" are just as much subject to what Juliet Stumpf has identified as the "crimmigration" apparatus as those subject to a criminal conviction. At the very least then, this strategy of quasi-criminalization appears to weaken any sharp distinction between deportations that result from formally criminalized behavior, and those that arise from behavior that while not labelled criminal, is nonetheless treated as if it is.

2. *Deportation as Discrimination*

The facts and circumstances surrounding deportation underscore that the practice may also serve the impermissible purpose of discrimination. Even though the Committee against Torture has emphasized that "the principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention,"[166] there has been comparatively little exploration of the reference to discriminatory purpose found in the torture definition.[167] However, this reference is of special significance in the context of deportation. Given deportation's quality as a bordering practice, it demarcates the boundary between citizens and non-citizens. Depending on what side of the divide one falls, the very same act can trigger a fundamentally different response by the state, thereby treating people differently on the basis of a morally arbitrary status, attributed by the sheer luck of birth.[168]

As a matter of international human rights law, citizenship status is famously not a protected ground, with "distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and non-citizens," explicitly singled out as permissible in the International Convention on the Elimination of Racial Discrimination (ICERD).[169]

166.CAT, *General Comment No. 2*, *supra* note 67, ¶ 20.

167.Some exceptions are the Committee's own statements on the matter, and its use in the push to recognize sexual violence as a form of torture. *See generally* CAT, *General Comment No. 2*, *supra* note 67, at ¶ 20–24; Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1993–1994); Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, ¶ 545 (finding that the rape of Victim A constitutes torture because the assailant raped the victim because she was a Tutsi, which is a discriminatory purpose.).

168.*See* Patricia Lenard, *Democracies and the Power to Revoke Citizenship*, 30 ETHICS & INT'L AFF. 73, 81 (2016) (describing how the law draws a distinction between those whose citizenship "status is acquired by birth and those whose status is acquired via naturalization").

169.In*ternational Convention on the Elimination of Racial Discrimination* art. 1(2), Dec. 21, 1965, 660 U.N.T.S. 195.

This, however, does not automatically establish that all distinctions that occur ostensibly on the basis of citizenship status are justifiable from the perspective of international human rights law. As the Committee on the Elimination of Racial Discrimination (CERD) has made clear, the restriction of rights embodied in Article 1(2) should be construed narrowly so as to avoid undermining the basic prohibition of racial discrimination.[170] Specifically, the CERD stated that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purpose of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[171] In practice, this means that "while distinctions according to citizenship/nationality may be drawn by States parties, they will be tested for inference that they are racially based, or used as a 'pretext for racial discrimination', in purpose or effect." [172]

The CERD has interpreted the test for discrimination to include direct, indirect, and structural discrimination.[173] This interpretation flows naturally from the Convention's text, which speaks of discrimination in purpose and effect. For our purposes, it matters that the CERD considers neither intention nor purpose necessary for a finding of discrimination.[174] Rather it is sufficient that an "action has an unjustifiable disparate impact upon a group distinguished by race, color, etc."[175] To establish disparate impact, the Committee calls for general,

---

170.Committee on the Elimination of Racial Discrimination (CERD), *General Comment No. 30*, CERD/C/64/Misc.11/rev.3, ¶ 2, (2005); PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 146 (2016).

171.CERD, *supra* note 161, ¶ 4.

172.THORNBERRY, *supra* note 161, at 147.

173.*See* CERD, *supra* note 161, ¶ 2–3 (stating that art. 1(2) must not undermine the general equality and non-discrimination provisions enshrined in art 5 of the convention and other international legal instruments); *see also* Committee on the Elimination of Racial Discrimination (CERD), *General Comment No. 34*, ¶ 6, CERD/C/GC/34 (2011) (describing the "[r]acism and structural discrimination against people of African descent").

174.*See* THORNBERRY, *supra* note 161, at 115 (describing how CERD "has not drawn clean lines"). Indeed, CERD has been critical of jurisdictions that insist that claims of discrimination must be accompanied by evidence of intention. Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 35, CERD/C/USA/CO/6, (May 8, 2008); Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, ¶ 5, CERD/C/USA/CO/7-9, (Sep. 25, 2014).

175.Committee on the Elimination of Racial Discrimination (CERD), *General Comment No. 14*, ¶ 2, U.N. Doc. A.48/18 (Sep. 15, 1993).

group-based data as evidence and scrutinizes the overall circumstances of vulnerable groups or in relation to specific policies.[176] In assessing the permissibility of allegedly discriminatory distinctions, the CERD considers whether the criteria for differentiation are compatible with the object and purpose of the Convention, whether the distinction is applied pursuant to a legitimate aim and is proportional to the achievement to this aim.[177] Additionally, the Committee has clarified that determining that an action or differentiation is based on a prohibited ground does not require the prohibited ground to be the sole one upon which the action is based.[178] Instead, it suffices that the prohibited ground make a significant or non-negligible contribution to the prohibited action, bearing in mind that discriminatory actions may result from a complex set of factors, not all of which are legally relevant.[179]

Statistical data on deportation regimes is sparse, but there is growing evidence that deportation indirectly and structurally discriminates on the bases of race, color, and national or ethnic origin. In the U.S., a disproportionate amount of those deported are non-white, and have, over the last decade, predominantly involved individuals with the same ethnic and national origin.[180] Most of the 7 million people deported in

176.THORNBERRY, *supra* note 161, at 116.

177.*Id.* at 132–33; *see also* CERD, *supra* note 161, ¶ 4 (stating that differential treatment based on either citizenship or immigration status must have criteria, applied proportionally, in pursuance of a legitimate aim under the objective and purpose of the Convention).

178. THORNBERRY, *supra* note 161, at 134–35.

179.*Id.*

180.For the U.S., black immigrants have been statistically proven to be disproportionately vulnerable to deportation. *See* Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, THE ATLANTIC (Sept. 30, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/ (stating that while only 7% of non-citizens are black, they make up 20% of those facing deportation on criminal grounds); *see also ICE Deportations: Gender, Age, and Country of Citizenship*, TRACIMMIGRATION (Apr. 9, 2014), https://trac.syr.edu/immigration/reports/350/ (demonstrating that, for example, in the years 2012 and 2013, the top ten countries of citizenship for ICE deportations remained the same and were entirely Latin American and Caribbean countries). Similar patterns exist elsewhere, too. *See generally* Yajaira Ceciliano-Navarro, Tanya Golash-Boza & Luis Rubén González Márquez, *Reflections on Anti-Immigration Narratives and the Establishment of Global Apartheid*, *in* BEYOND BORDERS: THE HUMAN RIGHTS OF NON-CITIZENS AT HOME AND ABROAD 94 (Jillian Robin Chambers, Kathryn Rae Libal, & Molly Katrina Land eds., 2021) (contending that the disproportionate hardship faced by immigrants of color around the world, in locations such as the United States, European Union, Chile, and Israel, constitutes a paradigm of global apartheid).

the last three decades were men from Latin American countries,[181] with Black immigrants being disproportionately represented amongst the non-citizens facing deportation,[182] revealing clear racial and gendered patterns. Similar concrete data is not available for the U.K. system.[183] However, research has shown that deportees are overwhelmingly and disproportionately male[184] and from countries that do not form part of the European Economic Area (EEA),[185] despite the fact that nationals of EEA countries such as Ireland, Germany, and Italy, form a significant part of the U.K.'s non-citizen population.[186] Deportation's disparate application to certain racial and national groups replicates the incontestable racial bias of immigration control more broadly.[187] This bias is arguably inevitable in an international order that

---

181.Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program,* 11 LATINO STUDIES 271, 272 (2013).

182.*See* JULIANA MORGAN-TROSTLE & KEXIN ZHENG, THE STATE OF BLACK IMMIGRANTS 19–20 (2016), https://stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf (finding that although black immigrants comprise only 7.2% of the total non-citizen population, they made up more than 10% of all immigrants in removal proceedings between 2003 and 2015).

183.This is the largely because the Home Office itself does not appear to be collecting relevant data on its non-citizen population. *See* Rajeev Syal, *Home Office Has No Idea How Many People Are in the UK Illegally*, THE GUARDIAN (June 17, 2020, 12:01 AM), https://www.theguardian.com/uk-news/2020/jun/17/home-office-has-no-idea-how-many-people-are-in-the-uk-illegally (explaining that the Home Office does not collect relevant data on the non-citizen population).

184.*See* Peter William Walsh & Mihnea V. Cuibus*, Deportation and Voluntary Departure from the UK*, MIGRATION OBSERVATORY, 5 (2021), https://migrationobservatory.ox.ac.uk/wp-content/uploads/2021/08/MigObs-Briefing-Deportation-and-Voluntary-Departure-from-the-UK-2024.pdf (analyzing UK Home Office Immigration Statistics to visually represent that the vast majority of those deported from the UK are male, illustrated in Figure 1).

185.*Id.* at 11 (analyzing UK Home Office Immigration Statistics to visually represent enforced and voluntary returns by nationality, illustrated in Figure 7).

186.*Id.* at 7 (analyzing UK Home Office Immigration Statistics to visually represent the top countries of origin for migrants in the UK, which include Ireland, Italy, and Germany, as illustrated in Figure 3).

187.*See* Vincent Chetail, *Demystifying Sovereignty: Totem and Taboo of Migration Control in International Law*, 118 AJIL UNBOUND 193, 195 (2024), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/546A643ED373651BDEC7D1DAD656AD63/S2398772324000321a.pdf/demystifying-sovereignty-totem-and-taboo-of-migration-control-in-international-law.pdf (arguing that the racial bias in migration control is "incontestable" and explaining its link to broader immigration law practices).

was built and shaped by colonial powers.[188] Scholars have shown that contemporary national borders and the legal practices that sustain them are both informed by and reinforce the global color line erected by colonialism.[189] As a result, borders structurally benefit some racial, national, and ethnic groups, at the expense of others, resulting in default differential treatment on the basis of race.[190]

Differential treatment on prohibited grounds is only considered discriminatory by the CERD if it lacks a reasonable and objective justification. To be justified, the differentiation ought to serve a legitimate aim and be proportional to the achievement of this aim.[191] Deportation is often said to serve facially legitimate policy objectives, such as the security and protection of the political community from crime and terrorism, and the maintenance of the integrity of immigration law.[192] However, there is at least some evidence to indicate that these facially-legitimate objectives are in fact underpinned by racially-discriminatory motives. Scholars have long argued that the discourse and practices of securitization and bordering are deeply racialized.[193] Moreover, as we have seen, the very invention of the deportation power was driven by

---

188.E. Tendayi Achiume, *Racial Borders*, *supra* note 11, at 448 (arguing that racial bias in international law is a product of an order shaped by historical colonialism, which continues to influence migration policies).

189.*See generally* Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59 WM. & MARY L. REV. 2617 (2018) (examining how the plenary power doctrine established in a case rooted in racial exclusion reflects international law norms); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 MELB. J. INT'L L. 392 (2013) (examining how international migration law challenges traditional notions of absolute sovereignty, arguing that evolving norms increasingly constrain states' exclusionary prerogatives).

190.*See* Achiume, *Racial Borders*, *supra* note 11, at 449 (analyzing the intentionality of border structures to produce racially differentiated outcomes that systematically privilege certain groups).

191.Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 32*, ¶ 8, U.N. Doc. CERD/C/GC/32 (2009).

192.*See* Sarah Fine, *Immigration and Discrimination*, *in* MIGRATION POL. THEORY 125, 132 (Fine & Ypi eds., 2016) (providing that the "clear targeting of particular groups is thinly veiled behind what states see as more legitimate, 'acceptable' policy objectives").

193.*See, e.g.*, Tanya Golash- Boza, *Structural Racism, Criminalization, and Pathways to Deportation for Dominican and Jamaican Men in the United States*, 44 SOC. JUST. 137, 138–39 (2017) (discussing structural racism in immigration policing); Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3(1) SOCIO. RACE & ETHNICITY 82, 82 (2017) (arguing that "local law enforcement agents racialize Latinos by punishing illegality"); Niamh Quille, *The Windrush Generation in Britain's 'Hostile Environment': Racializing the Crimmigration Narrative,* CRIM. JUST. BORDERS & CITIZENSHIP RSCH. PAPER NO. 327453, 1, 2 (2018) (extending the existing "crimmigration" literature with a focus on racialized processes).

racial animus and the desire to remove certain racial groups from the body politic.[194]

Additionally, concrete examples of appeals to facially legitimate policy objectives concealing discriminatory motives abound. France, for example, justified its 2009 decision to deport 10,000 Roma by arguing that it was simply clamping down on illegal activities, despite clear evidence that it was deliberately targeting Roma;[195] a pattern that underpins the deportation of Roma across Europe. Similarly, the British Equality and Human Rights Commission identified a breach of the U.K.'s equality laws in the context of its hostile environment policies. The hostile environment idea was first introduced in 2012 and refers to a set of policies that were designed to make life deliberately difficult for immigrants lacking legal status to deter them from staying and coming in the first place. Ramped-up deportations that predominantly targeted Black immigrants were a central component of this strategy, with the Home Office seeking to justify them as a way of reducing immigration.[196] This anecdotal evidence raises doubts as to whether policy justifications for deportations are genuine and legitimate, or pretextual covers for discrimination.

Even assuming that the objectives that deportation serves are legitimate, there is the further question whether it is a proportionate means to achieve them. When deportation is justified as a means to safeguard the community, it is important to recall that deportable long-term residents have already been punished for whatever crimes they have committed. To argue that deportation is nonetheless necessary to pursue this objective, appears to deny the effectiveness of traditional modes of punishment altogether in keeping the community safe. We should at least query whether deportation delivers sufficiently meaningful additional benefits to community safety, after the fact of punishment and incarceration. The picture is only slightly more complicated

---

194.*See* discussion *supra* Part I, Section A, A Genealogy of Deportation Power.

195.*See Q&A: France Roma Expulsions*, BBC NEWS (Oct. 19, 2010), http://www.bbc.co.uk/news/world-europe-11027288 (detailing France's deportation of Romanian and Bulgarian Roma).

196.*See* Amelia Gentlemen, *Home Office broke equality laws with hostile environment measures*, THE GUARDIAN (Nov. 24, 2020), https://www.theguardian.com/uk-news/2020/nov/25/home-office-broke-equalities-law-with-hostile-environment-measures (describing how the Equality and Human Rights Commission concluded that the Home Office broke equalities law when it introduced hostile environment immigration measures); Afua Hirsch, *The Home Office, mired in racism claims, now plans another deportation of black people*, THE GUARDIAN (Nov. 27, 2020), https://www.theguardian.com/commentisfree/2020/nov/27/home-office-racism-deportation-black-people-jamaica-flights (describing how the Home Office "banished" 50 people to Jamaica while "mired in racism claims").

with regards to maintaining the integrity of immigration law. The costs inflicted by deportation on both the individual and the communities they are plucked from are astronomical. There are, without doubt, less costly alternatives to deportation that could fulfill the same objective, such as fines, community service, or reconsideration of the individual's capacity for admission on the merits.[197]

C. *By State Agents*

Severe pain or suffering only constitutes torture in the understanding of the Convention if it is "inflicted by or at the institution of or with the consent or acquiescence of a public official or other person acting in an official capacity."[198] This requirement reflects the traditional view that states can only be held accountable for human rights violations committed by state actors.[199] Deportation easily meets this definitional requirement for it is a quintessential form of state power, authorized, undertaken, and executed, by agents of the state. The fact that the administration of deportation may be outsourced to private contractors does not exempt the state from responsibility for their actions. The Committee has been clear that, e.g., in case of a privately run or owned detention centers, the staff is acting in official capacity and carrying out a state function, with state parties' obligations extending to all contexts of custody and control.[200]

D. *Not Incidental to a Lawful Sanction*

A more significant definitional hurdle to classifying deportation as torture appears to be the lawful sanctions clause. It stipulates that "suffering arising only from, inherent in or incidental to a lawful sanction" cannot amount to a violation of the norm against torture. At first glance, this appears to rule out any possibility of deportation as a violation of the norm, given that domestic law clearly treats deportation as a lawful sanction to an individual's breach of immigration laws. However, while the precise scope of application of the lawful sanction's clause remains a subject of debate, both the HRC and the CAT

197.*See* Rainer Bauböck & Vesco Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, 30 GEO. IMMIGR. L. J. 47, 79 (2015) (noting that reconsideration for admission on the merits can be an alternative way of enforcing immigration and citizenship law).

198.CAT, *supra* note 4, at art.1, ¶ 1.

199.Zach, *supra* note 13, at 59.

200.CAT*, General Comment No. 2*, *supra* note 67, at ¶ 15.

have concluded that a sanction's legality under domestic law alone is not enough to render it compatible with the torture norm.[201] The most convincing reading of the clause is that it requires a sanction to conform with all relevant international legal standards—standards that deportation is likely to fall short of.

As Zach notes, the lawful sanctions clause "was already the most controversial element of the definition during the drafting of Article 1 and remains highly controversial today."[202] It derives from the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture,[203] which was the Convention's predecessor. In the Declaration, lawful sanctions were only an exception to torture to the extent they were consistent with the Standard Minimum Rules for the Treatment of Prisoners. Because these rules are a non-binding soft-law instrument, there was a concerted, but ultimately unsuccessful, effort to replace the reference to them with a limitation that did refer to binding international standards. Western states drove this effort because they did not want the lawful sanctions clause to operate as a justification for serious corporal and capital punishment.[204]

There are competing assertions as to the clause's precise meaning and effect.[205] States whose criminal law provides for corporal and capital punishment have argued that it exempts any sanction that is lawful under domestic law.[206] But such an interpretation is clearly incompatible with international human rights law. It was rejected by several

---

201.Osbourne v. Jamaica, Communication 759/1997, Human Rights Committee, ¶ 9.1 (Mar. 15, 2000), https://juris.ohchr.org/casedetails/896/en-US; *See* Committee against Torture, Concluding Observations on Saudi Arabia, ¶ 4(a) (b), and 8(b), U.N. Doc. CAT/C/CR/28/5 (Jun. 12, 2002) (finding that the State party's corporal punishments were in breach of the Convention); Committee against Torture, Concluding Observations on Saudi Arabia, ¶ 11, U.N. Doc. CAT/C/SAU/CO/2 (Jun. 8, 2016) (requesting that the State party end practices of corporal punishment).

202.Zach, *supra* note 13, at 64.

203.G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 9, 1975) ("[Torture] does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.").

204.*See* Nowak, *supra* note 117, at 316 (stating that the lawful sanctions clause was "inserted on the insistence of the USA and certain Islamic states for the purpose of justifying corporal and capital punishment"); Zach, *supra* note 13, at 64 ("The reference to the Standard Minimum Rules was deleted from Article I CAT only on the ground that certain Governments, notably from Western Europe, did not wish to include in a binding treaty a reference to a non-binding soft law instrument. ").

205.*See* Zach, *supra* note 13, at 66 (discussing the differing interpretations of the clause's meaning).

206.*Id.*

governments at the time of ratification and is incompatible with the Vienna Convention on the Law of Treaties which prohibits states from "invoking the provisions of its internal law as justification for its failure to perform a treaty."[207] This prohibition now forms part of customary international law and has been echoed repeatedly in international and regional human rights courts. [208] In line with this, the Human Rights Committee has held that the permissibility of a sentence under domestic law cannot be invoked as justification under the Covenant.[209] The Committee against Torture too has, after initial hesitancy, repeatedly indicated that sanctions that may be lawful under domestic law—such as corporal punishment—can nonetheless be in breach of the torture norm.[210] It thereby followed the Human Rights Committee which had already held in 1982, two years before the Convention against Torture was adopted, that corporal punishment violates Article 7 of the ICCPR.[211]

In the context of deportation, it is also important to highlight that the Committee against Torture has taken issue with a broader construction of the lawful sanctions clause that suggested a possible defense of suffering inflicted with "lawful authority, justification or excuse"[212] or

---

207.Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

208.*See* Doebbler v. Sudan, Communication 236/2000, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 42 (May 15–29, 2003), https://africanlii.org/akn/aa-au/judgment/achpr/2003/42/eng@2003-05-29 ("Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty.").

209.Osbourne v. Jamaica, Communication 759/1997, Human Rights Committee, ¶ 9.1 (Mar. 15, 2000), https://juris.ohchr.org/casedetails/896/en-US.

210.*See* Committee against Torture, Concluding Observations on Saudi Arabia, ¶ 4(a) (b), and 8(b), U.N. Doc. CAT/C/CR/28/5 (Jun. 12, 2002) (finding that the State party's corporal punishments were in breach of the Convention); Committee against Torture, Concluding Observations on Saudi Arabia, ¶ 11, U.N. Doc. CAT/C/SAU/CO/2 (Jun. 8, 2016) (requesting that the State party end practices of corporal punishment).

211.The HRC has already expressed the unanimous opinion that the prohibition of Art. 7 CCPR "must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure." Human Rights Committee, *General Comment No 7: Article 7. Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 2, (May 30, 1982). Since the landmark decision of Osbourne v. Jamaica, *supra* note 199, ¶ 9.1, in which the Committee unanimously confirmed its "firm opinion" that "corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant," this interpretation has developed into constant jurisprudence.

212.Committee against Torture, Concluding Observations on Hong Kong, ¶ 10, U.N. Doc. CAT/C/CHN-HKG/CO/5 (Feb. 3, 2016).

as a result of "legitimate acts."[213] The Committee thus appears to oppose the possibility of construing the exception in a way that would justify treatment by the state that fits the torture definition but is inflicted in its exercise of one of the state's lawful or legitimate functions, such as the enforcement of immigration law. This is consistent with the fact that international law requires the Convention to be interpreted in light of its object and purpose.[214]

The most convincing reading of the lawful sanctions clause is that it only exempts sanctions that comply with both national and international legal standards. Zach points out that the relevant standards are *at least* Article 16 CAT, Articles 7 and 10 CCPR, and the prohibition of all forms of cruel, inhuman, or degrading treatment or punishment as a rule of customary international law.[215] Other relevant ones may be the right to family and private life or the prohibition on racial discrimination. Ginbar has argued that this interpretation of the lawful sanctions clause "essentially confines the exception to the deprivation of liberty,"[216] which, however unpleasant, "as long as it comports with basic internationally accepted standards…is no doubt a lawful sanction."[217] Zach, however, has suggested that in individual cases, a deprivation of liberty through incarceration too could amount to torture when all definitional elements of the norm are met. This is so even though the application in such cases was not necessarily envisaged in the *travaux préparatoires*.[218]

There is continuing uncertainty and contestation as to which sanctions are exempted by the lawful sanctions clause. However, there appears to be convergence on the view that "practically there is only very rarely a scope of application" for the clause.[219] When the definitional elements of the torture norm are met by a sanction, as they arguably are in the case of deportation, only an affirmative showing of the sanction's conformity with both domestic and international legal standards should be able to exempt it from the norm's scope. It matters

---

213.Committee against Torture, Concluding Observations on Kazakhstan, ¶ 24, U.N. Doc. CAT/C/KAZ/CO/3 (Dec. 12, 2014).

214.VCLT, *supra* note 197, at art. 31.

215.Zach, *supra* note 13, at 68.

216.Yuval Ginbar, *Making Human Rights Sense of the Torture Definition*, *in* TORTURE AND ITS DEFINITION IN INTERNATIONAL LAW: AN INTERDISCIPLINARY APPROACH 273, 284 (Metin *Başoğlu ed.*, 2017).

217.Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Torture and Other Inhuman or Degrading Treatment or Punishment Report of the Special Rapporteur, Mr. Nigel S. Rodley*, U.N. Doc. E/CN.4/1997/7, ¶ 8 (January 10, 1997).

218.Zach, *supra* note 13, at 68.

219.Zach, *supra* note 13, at 69.

then, that deportation violates several international legal standards, including the prohibition on cruel, inhuman, and degrading treatment and punishment[220] found in Article 7 ICCPR and Article 16 CAT and the protection of the right to family life under Article 17(1) and Article 23 ICCPR. As pertains to Article 7, the HRC made clear that the aim of Article 7 'is to protect both the dignity and the physical and mental integrity of the individual.'[221] As Foster notes, "it is not difficult to construct an argument that 'a probable life term of separation from [one's] home, family, job and adopted country'[222] attains the necessary level of severity and fundamentally undermines the inherent dignity and mental integrity of an individual subjected to such treatment."[223] Deportation, in other words, falls short of the international legal standards it ought to conform to for the lawful sanctions exemption to apply.

IV. DEPORTATION AS TORTURE: OBJECTIONS AND OPPORTUNITIES

I have so far illustrated that deportation of long-term residents can meet the definition of torture under international human rights law. If the analysis holds, it suggests that where deportation leads to an individual's separation from loved ones, it should be barred by the torture norm and generally be considered an illegitimate exercise of sovereign power. There are, however, two additional objections that I anticipate to the framing of the violence of deportation and the suffering it inflicts as a form of torture. Some may argue that even though deportation undeniably inflicts suffering, it does not cross the relevant threshold of intensity required for a type of violence to amount to torture. Under this view, whatever suffering deportation inflicts, it, at best, amounts to a form of cruel, inhuman, or even 'just' degrading treatment. Others, meanwhile, might contend that regardless of whether deportation inflicts the necessary intensity of suffering, to call it a form of torture would amount to an inflationary use of the torture label that stretches the concept beyond its breaking point. Both the intensity and the labeling objection, I contend, rest on a mistaken view of the central

220.*See* Michelle Foster, '*An "Alien" by the Barest of Threads' – The Legality of the Deportation of Long-Term Residents from Australia*, 33 Melb. L. Rev. 483, 527–31 (2009) (arguing that deportation could amount to cruel or degrading treatment under art. 7).

221.Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.9 (vol I) (1992) [hereinafter *General Comment No. 20*].

222.*Beharry v. Reno*, 183 F. Supp. 2d 584, 602 (E.D.N.Y. 2002).

223.Foster, *supra* note 211, at 528.

wrong that the torture norm is concerned with prohibiting. This wrong is not defined by the intensity of suffering it inflicts, nor by the methods of violence we commonly associate with the torture label, but by its quality as an extreme form of dignitarian harm.

A. *The Intensity Objection*

The argument that deportation's suffering does not reach the necessary level of intensity to amount to a form of torture rests on a particular view as to what renders torture distinct from other types of state-inflicted violence, such as cruel, inhuman, and degrading treatment. The idea that torture is distinguishable on the grounds of relative intensity originated in the European human rights system. In 1969, in the *Greek* case, the Commission, as the first human rights institution tasked with the legal application of the prohibition on torture or cruel, inhuman and degrading treatment, suggested that torture is generally a more severe, or aggravated, form of inhuman treatment. [224] Subsequently, the Commission's approach influenced the drafters of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – the Convention against Torture's precursor – which incorporated the notion that torture is an aggravated form of cruel, inhuman, and degrading treatment in Article 1(2). [225] The Declaration's approach, in turn, fed back into European case law.[226] In 1976, in the seminal case of *Ireland v. U.K.*, the European Court of Human Rights directly cited to the Declaration when it held the distinction between cruel, inhuman, and degrading treatment and torture to derive "principally from a difference in the intensity of suffering inflicted."[227] It concluded that the five techniques deployed by the British "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[228] Subsequently, the focus on severity as a relevant threshold criterion to classify a given practice as torture

---

224.The Greek Case 1969, *12 Yearbook of the European Convention on Human Rights (1972) p. 186*.

225.*See* Res. 3452 (XXX), *supra* note 193, art. 1(2) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."); *See also*, Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55 CURRENT LEGAL PROBS. 467, 471 (2002)

226.Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55 CURRENT LEGAL PROBS. 467, 471 (2002).

227.Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser.B), ¶ 167 (197).

228.*Id.* ¶ 96.

was also adopted by some of the ad-hoc international criminal tribunals.[229]

However, this focus on intensity of suffering as the decisive criterion in identifying a practice as torture has mostly been discredited. For example, none of the definitions found in international law actually contain a reference to relative intensity as a criterion of the distinction between torture and other forms of cruel, inhuman, and degrading treatment. The definition adopted in the Convention against Torture itself dropped the Declaration's suggestion that torture is an aggravated form of cruel, inhuman, and degrading treatment.[230] Relative severity is also absent in subsequently adopted definitions, such as the one found in the Rome Statute and the African Convention of Human and Peoples' Rights.[231] This development appears to reflect the fact that a distinction focusing on relative severity fails to acknowledge that both torture and cruel or inhuman treatment or punishment require the infliction of severe pain or suffering. The ordinary meaning of the term 'cruel or inhuman treatment' indicates a very severe form of ill treatment, "and it would be strange to require for torture a level of pain or suffering which is even stronger than cruel or inhuman."[232]

Relative severity as a primary criterion of distinction has also proven largely unworkable in practice, in part because it is entirely unclear where exactly the relevant threshold of severity lies. As one commentator has pointed out, even the Court that first created the criterion, "appears to defy the practical application of the approach which is most commonly associated with it . . .;"[233] with the ECtHR never having applied the severity of suffering approach with consistency. Instead, in determining the requisite severity, the Court subsequently

---

229.*See* Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Chamber, ¶ 226 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) ("[T]he threshold of pain or suffering for torture is higher than for cruel treatment . . . ."); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber, ¶181 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 15, 2002) ("[O]nly acts of substantial gravity may be considered to be torture . . . .").

230.CAT, *supra* note 4, at art 1.

231.*Rome Statute of the International Criminal Court*, art. 7(2)(e), Jul. 1, 2002, 2187 U.N.T.S. 90 ("'Torture' means the intentional infliction of severe pain or suffering, whether mental or physical, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions . . . ."); *African Charter on Human and Peoples' Rights*, art. 5, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 ("All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment shall be prohibited.").

232.Nowak, *supra* note 117, at 315.

233.Malcolm D. Evans, *Getting to Grips with Torture*, 51 INT'L COMPAR. L.Q. 365, 372 (2002).

adopted a subjective approach. This meant it took into account aspects such as the duration of the treatment; the physical or mental effects of treatment; and the sex, age, and state of health of the victim,[234] all while also holding that severity is only one element of an increasingly complex matrix.[235] The fuzziness of severity as a criterion of distinction has been further exacerbated by both the ECtHR and international criminal tribunals embracing the view that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future."[236]

The difficulty of using the severity approach to identify which practices amount to torture illustrates that the criterion of distinction must be qualitative in character, rather than quantitative.[237] Ideally, it should also capture what is morally distinctive about torture.[238] In this respect, the ECtHR itself has also begun to stress the intentional and purposive element of torture as a criterion of distinction.[239] This is in line with the *travaux préparatoires* of Articles 1 and 16 of the Convention against Torture and the systematic interpretation of both provisions in light of the practice of the Committee against Torture.[240] As the former Special Rapporteur Manfred Nowak argues, both establish that the relevant criterion of distinction is "the purpose of the conduct . . ., rather than the intensity of the pain or suffering inflicted."[241] Further,

234.Ireland v. UK, *supra* note 218, ¶ 162; *see also* Selmouni v. France, 66 Eur. Ct. H.R., ¶ 100 (1999); Raninen v. Finland, App. No 20972/92, Eur. Ct. H.R., ¶ 55 (1997).

235.Keenan v. UK, App. No 27229/95, Eur. Ct. H.R., ¶ 112 (2001) (concluding that "while it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor").

236.Selmouni, *supra* note 225, ¶ 101; Prosecutor v. Brdanin, Case No. IT- 99- 36-A, ¶ 250 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber Apr. 10, 2007); Prosecutor v. Martic, Case No. IT- 95-1, ¶ 70 and 75, (Int'l Crim. Trib. for the Former Yugoslavia Trial Chamber Jun. 12, 2007).

237.Jeremy Waldron, *Cruel, Inhuman and Degrading: The Words Themselves*, 23(2) CAN. J. L. & JURIS. 269, 272 (2010); Evans, *supra* note 235, at 372–73.

238.Jacob Bronsther, *Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 442 (2019) (arguing that a definition or theory of torture should capture what renders it morally special and qualitatively distinct).

239.*See, e.g.*, Ilhan v. Turkey, App. No 22277/93, ¶ 85 (June 27, 2000), https://hudoc.echr.coe.int/eng?i=001-58734 (highlighting the intentional and purposive element of torture); Salman v. Turkey, App. No. 21986/93, ¶ 114 (June 27, 2000), https://hudoc.echr.coe.int/eng?i=001-58735 (highlighting the intentional and purposive element of torture).

240.*See* Zach, *supra* note 13, at 45 (noting that the purpose and intention are relevant).

241.Human Rights Commission, *Report of the Special Rapporteur on the question of torture*, ¶ 39, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005).

focusing on intent and purpose provides both a degree of conceptual clarity and practical utility that are clearly absent in the intensity of suffering approach.

More importantly, focusing on intent and purpose as the distinguishing characteristic of torture speaks more accurately to torture's central wrongness. This is not, as the intensity of suffering approach presupposes, the severity of the pain inflicted. Instead, as the intent and purpose approach suggest, torture's central wrongness lies in its meaning as a deliberate attack on the victim's human dignity.[242] Torture is more than just excessive violence; it involves "degradation, humiliation, terror, and shame which outlast the pain and work on the personality, the sense of wholeness, and self-worth,"[243] of the victim. Torture's wrongness must therefore be characterized by its invidious meaning as a form of extreme disrespect that denies the distinctive value we possess by virtue of being human.[244] The focus on purpose and intent as the distinguishing criterion of torture serves to single out actions that deny this value by enacting a conception of the victim as something less than human; as just a means to an end, not an end in themselves.[245] It thereby captures that torture amounts "to an especially egregious expression of disrespect, and so to a derogation of the victim's dignity."[246]

Seen in this light, to suggest that deportation cannot amount to torture because the suffering it inflicts is not severe enough misses the point. The real question is whether deportation shares torture's quality as an egregious expression of disrespect and violation of human dignity.

B. *The Labeling Objection*

Even if the intensity of suffering objection is misplaced, this does not immediately prove that deportation is correctly described as a form of torture. The torture label has "a particular stigma attached which

---

242.Bronsther, *supra* note 229, at 479 (noting that mens rea matters to the determination of an affirmative denial of human dignity).

243.Copelon, *supra* note 73, at 135.

244.*See* Meir Dan-Cohen, *On the (Im)Morality of the Death Penalty*, U.C. J. CRIM. L. 194, 210 (2018) (noting that the idea of human dignity proscribes practices that ascribe a net negative value to an individual).

245.*Id.* at 208 (noting that the *deliberate* infliction of a severe deprivation enacts a conception of the victim as a mere means, someone whose own rights and interests can be trampled at will.)

246.*Id.*

means that this term should not be used in any inflationary manner."[247] Some may therefore argue that it is fundamentally misconceived to label deportation a form of torture, irrespective of whether the practice meets the norm's definitional requirements. They would contend that doing so unduly stigmatizes a practice that does not inflict the kind of extreme disrespect that torture amounts to, while simultaneously devaluing the power that labeling a practice as torture has. Worse still, it appears to amount to a distortion of the concept of torture itself.

This type of objection betrays a fundamental misunderstanding of the nature of deportation, rooted in its traditional framing as a core tenet of a nation-state's sovereignty. This has not just served to obscure deportation's violence[248] but also its quality as a dignitarian harm—one that I contend is substantially similar to the harm inflicted by torture. Recall that torture's central wrongness lies in its character as a form of extreme disrespect that denies the victim's status as a human being. What renders us distinctly human—and thus provides the source of our dignity—is our capacity to choose and pursue certain values that serve to guide our actions and lives.[249] We exercise this capacity diachronically, by stitching moments together over time to construct an overall good life.[250] Central to this diachronic activity is the pursuit of valuable goods such as membership in social and political communities, as well as the establishment of families, friendships, or careers, that results therefrom. In fixing and pursuing our individual identities as citizens, community members, mothers, friends, and lawyers, we are therefore "enacting and articulating a more abstract identity, [our] common identity as [human beings], which [one] share[s] with everyone else."[251]

Respect for another person's dignity—their status as a human being—imposes a duty to respond appropriately thereto. In abstract terms, this requires us to treat one another as loci of value in-and-of

---

247.Nowak, *supra* note 117, at 313*; see also* Ireland v. UK, *supra* note 218, at 167 (stating that the torture label is reflective of the 'special stigma' attaching to "deliberate inhuman treatment causing very serious and cruel suffering.")

248.Chetail, *supra* note 178, at 195 ("[T]erritorial sovereignty gives the appearance of an objective and natural justification for a practice which otherwise should be considered an archetype of racial discrimination. The veil of sovereignty makes the violence at the border a course of action that is normalized and inevitable as if there is no alternative. History teaches us that there is nothing inexorable in this.").

249.*See* Dan-Cohen, *supra* note 151, at 204 (arguing that values that guide our actions allow us to view ourselves as autonomous).

250.*See* Bronsther, *supra* note 229, at 466–67 (arguing for an Aristotelian line on human value which derives it from our capacity to stitch moments together through time and construct good lives.)

251.*See* Dan-Cohen, *supra* note 235, at 206.

ourselves, "as ends capable of making sense of [our] actions and . . . [our lives]."[252] Actions that deliberately obstruct or interfere with our capacity for value realization fail to do so, rendering them a form of disrespect. Of course, not all forms of disrespect are equally severe and thus worthy of the same moral or legal condemnation. Our every day is rife with acts of disrespect, ranging from the mundane to the egregious. Crucially, in determining the degree of disrespect any given action inflicts, what matters is not the method chosen but the meaning it conveys; it is, as Meir Dan-Cohen puts it, the action's expressive claim that is decisive in determining its moral status.[253] Torture, as the most extreme form of disrespect, expresses a negation of the victim's value altogether.[254] A widely recognized *method* that carries such meaning is the deliberate infliction of physical pain so extreme that it turns the individual into a "squealing piglet at slaughter."[255] Such pain serves to temporarily disrupt our value-generating capacity by converting the mind into the body as pain.[256] Yet, this should not lead us to believe that the extreme disrespect of an individual's dignity that the torture label seeks to outlaw can *only* occur through such practices.[257]

Such a view is unduly restrictive and evinces the continued grip this originally identified method of torture—the body's physical mutilation—has on our legal and moral imagination. If we are concerned with outlawing the particular wrong that torture constitutes, there is no reason to confine our condemnation to one particular tried-and-tested method through which this wrong is inflicted. Because torture is a form of sovereign violence, it can be inflicted through multiple methods, not just the physical mutilation of the body. Deportation is one of those methods. By destroying an individual's status as a member of the

---

252.*Id.* at 205.

253.*See id.* at 206 (arguing that the moral status of the action is measured by its meaning, by the message it conveys; it is not just a matter of brute facts); *see generally* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 985 (2016) (describing that penalties for wrongdoing are best interpreted as expressive claims that serious wrongs forfeit one's moral humanity).

254.*See* Dan-Cohen, *supra* note 235, at 210 (arguing that human dignity bars punishment that ascribes a net negative value to an individual because humanity's moral worth which attaches to an individual must remain untouched).

255.Bronsther, *supra* note 229, at 448.

256.*See* ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 29 (1985) (arguing that when torturers inflict physical pain on prisoners to compel confessions, the agony experienced by prisoners renders them incapable of understanding the significance or context of the questions they are being asked).

257.Bronsther, *supra* note , at 429 (suggesting that the severe disrespect that torture inflicts will *usually* take the form of a non-symbolic, physical interference with someone's value generating capacity while conceding that certain symbolic forms of disrespect may also qualify.)

community within which they have been pursuing the goods that are evidence of our shared humanity, deportation bears the same invidious meaning as torture. Deportation, just like torture, expresses the conviction that the deportee's value-building capacity—their humanity—is fundamentally worthless and undesirable to such a degree that it deserves to be destroyed.[258] Deportation therefore enacts a conception of the deportee as a locus of disvalue, which constitutes the most egregious form of disrespect.[259] At its core, deportation and torture's moral quality is substantially similar, as both amount to an act of extreme disrespect of an individual's dignity.

To call the deportation of long-term residents a form of torture, then, is not attaching any undue stigma to an uncontroversial and legitimate practice, nor is it an inflationary use of the torture label that distorts the concept's meaning. To the contrary, labeling deportation as torture constitutes a necessary reinvigoration of our thinking on both practices. By rendering the suffering of deportees morally legible and legally actionable, it takes their human dignity seriously. It captures the gravity of deportation's harm and thereby re-politicizes "the enormity of suffering" that our societies have so far simply accepted as unavoidable or perhaps even necessary.[260] As a society, we must confront the harms from deportation if we are to take our collective commitment to human dignity seriously. It is the very stigma of the torture label, and the normative significance it possesses, that renders it the appropriate tool in that regard. To call a practice a form of torture is to taint it, legally and morally, to such a degree that, at the very least, it requires us to engage with the origins and reasons of its embrace as a legitimate form of immigration control. Ideally, it further demands a radical rethinking of the legal and political order that has so far condoned the suffering deportation inflicts.

Additionally, labeling deportation a form of torture moves our discussion of torture away from long-standing debates over whether it

---

258.*See* Dan-Cohen, *supra* note 235, at 217 (arguing that the morally decisive failing of punishments that are incompatible with human dignity is that they "proclaim the offender's worthlessness by deeming the obliteration of the offender . . . to be a desirable thing"); Bronsther, *supra* , at 478-79 (noting that treatment becomes impermissibly degrading and thus torture when it rejects an offender's standing as a human by embodying the conviction that his life-building capacity–the very basis of his humanity–is fundamentally worthless).

259.*See* Dan-Cohen, Immorality of Death Penalty, 211 (explaining that it is the attribution of negative moral significance and denial of moral worth to an individual that renders the death penalty, slavery, and banishment a violation of human dignity.)

260.Copelon, *supra* note 73, at 139.

may be justified in exceptional, yet entirely artificial, circumstances.[261] Instead, it centers torture as a form of sacrificial violence, inflicted for the purpose of sovereign self-legitimation, and clarifies its central wrongness as a fundamental dignitarian harm. To highlight the comparable gravity of deportation and torture reveals the uncomfortable truth that the harm of torture is pervasive,[262] and that it lurks within practices whose violence we have so far accepted uncritically or perhaps even deemed necessary. This, in turn, emphasizes the urgency of tapping into the potential of the norm against torture to shed light on violations of human dignity that have silently multiplied in sovereignty's shadows, in our quest to render international human rights law's commitment to a more humane international legal order more credible.

V. CONCLUSION

International human rights law has historically turned a blind eye to the human suffering inflicted by states' immigration law enforcement methods, ignoring or setting this suffering aside as an inevitable and perhaps necessary cost of state sovereignty. This article illustrates that the norm against torture provides a useful tool with which to challenge this orthodox position and to effectively advance the value of human dignity in its place. To that end, I have demonstrated that there is no meaningful obstacle in the legal definition of the norm against torture that forecloses the possibility of framing deportation of long-

261.*See, e.g.*, MICHELLE FARREL, THE PROHIBITION OF TORTURE IN EXCEPTIONAL CIRCUMSTANCES (Cambridge University Press 2013) (arguing that the "ticking time bomb" argument in support of torture "bear[s] little or no relation to real situations in which torture occurs"); FRITZ ALLHOFF, TERRORISM, TICKING TIME-BOMBS, AND TORTURE: A PHILOSOPHICAL ANALYSIS, ix (2012) (arguing that the traditional philosophical debate on torture is "severely misguided"); DAVID LUBAN, *Liberalism, Torture, and the Ticking Bomb*, *in* TORTURE, POWER, AND LAW*, 43, 45–46, 60* (2014) (criticizing the ticking-bomb hypothetical as a single ad hoc decision which does not represent the real world and as "intellectual fraud" because it uses "intuitions based on the exceptional case to justify institutionalized practices"); Joseph Spino & Denise Dellarosa Cummins, *The Ticking Time Bomb: When the Use of Torture Is and Is Not Endorsed*, 5 REV. PHIL. & PSYCH. *543, 543–44 (2014) (discussing the runaway trolley problem and arguing that it bears little resemblance to the moral dilemmas faced in real life)*; Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE WESTERN RESERVE J. INT'L L. 231, 231 (2006) (arguing that imaginary examples like the ticking-bomb hypothetical mislead understanding of real cases because of idealization and abstraction).

262.*See* Copelon, *supra* note 73, at 139 (arguing that instead of worrying about diluting the meaning of torture, we should confront the practice's pervasiveness and that to recognize forms of violence as falling within the definition reveals the banality of evil and the enormity of suffering that society has accepted).

term residents as a violation thereof. While many may consider this a provocative—if not downright mistaken—equation of two distinct practices, I have showed that putting them in dialogue with each other serves to clarify both the nature and purpose of deportation and the torture norm. To view deportation through the lens of the norm against torture takes international human rights law's commitment to human dignity seriously. At the same time, it produces a new perspective on the legal and moral character of deportation,—one that pushes us to think more critically about international law's conception of sovereignty and the bordering practices it has legitimized.