ARTICLE

EXILE AS A HUMAN RIGHTS VIOLATION

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> It states that he had exercised his right to leave his country. That is not so. The sacred right is the right to live in one's country. What kind of a right is that, the right to leave? Our right should be the right to stay.[1]

1. Human Rights in Uruguay and Paraguay: Hearings Before the Subcommittee on International Organizations of the Committee on International Relations, 94th Cong. 23 (1976) (statement of Hon. Wilson Ferreira-Aldunate, Leader of the National Blanco Party in Uruguay).

I. INTRODUCTION: TAKING THE EXILIC ARC SERIOUSLY

Exile is a central dimension of the experience of oppression.[2] Historically, it has sometimes involved large populations,[3] notably following coups and as a result of the oppression of dissidents.[4] It is, intuitively, a massive trauma in the lives of those concerned.[5] There is much reason to think, moreover, that forced exile is being used by some governments as a specific form of repression. Both Nicaragua[6] and Cuba,[7] for example, have been accused of engaging in exactly such a practice, essentially pushing opponents towards the exit, with little prospect of return. Exile is also connected to the return of practices such as banishment, notably in the form of policies stripping citizenship increasingly experimented with in the West in the context of the fight against terrorism.[8]

The specificity of the plight of exiles in domains as different as literature or in social work has long been evident. Social welfare models emphasize exile as a harm specifically geared at identity

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2. Khachig Toloyan, *A General Introduction to Exile*, *in* LES DIASPORAS DANS LE MONDE CONTEMPORAIN (William Berthomière & Christine Chivallon eds., 2006).

3. Pamela Ann Smith, *The Palestinian Diaspora, 1948–1985*, 15 J. PALESTINE STUD. 90 (1986); DAVID MARSHALL LANG, THE ARMENIANS: A PEOPLE IN EXILE (2021).

4. Richard K. Ashley & R. B. J. Walker, *Introduction: Speaking the Language of Exile: Dissident Thought in International Studies*, 34 INT'L STUD. Q. 259 (1990).

5. L. Subilia & L. Loutan, *Violence, Exile, Immigration: From Trauma to Trauma,* 12 EUR. PSYCHIATRY 138s (1997); Fatima Mujcinovic, *Multiple Articulations of Exile in US Latina Literature: Confronting Exilic Absence and Trauma*, 28 MELUS 167 (2003); E. Montgomery, *Trauma, Exile and Mental Health in Young Refugees*, 124 ACTA PSYCHIATRICA SCANDINAVICA 1 (2011).

6. Nicaragua: Replacing prison by forced exile, Daniel Ortega's government's new pattern of repression, AMNESTY INT'L (2023), https://www.amnesty.org/en/latest/news/2023/02/nicaragua-exilio-forzado- por-carcel-el-nuevo-patron-represivo-del-gobierno-de-daniel-ortega/ (last visited Sept. 26, 2023).

7. Juan Pappier, *Prison or Exile*, HUM. RTS. WATCH (2022), https://www.hrw.org/report/2022/07/11/prison- or-exile/cubas-systematic-repression-july-2021-demonstrators [https://perma.cc/ZV9H-6DWP] (last visited Sept. 26, 2023).

8. Audrey Macklin, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, *in* DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP 163 (Rainer Bauböck ed., 2018); Laura Van Waas, *Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications*, *in* FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 469 (Andrea de Guttry, Francesca Capone, & Christophe Paulussen eds., 2016); Patrick Sykes, *Denaturalisation and Conceptions of Citizenship in the "War on Terror"*, 20 CITIZENSHIP STUD. 749 (2016); Tufyal Choudhury, *The Radicalisation of Citizenship Deprivation*, 37 CRITICAL SOC. POL'Y 225 (2017); Christian Joppke, *Terror and the Loss of Citizenship*, 20 CITIZENSHIP STUD. 728 (2016).

that disorganizes familial and social bonds.[9] There is a broad field of literary and cultural studies devoted to the study of exilic ruptures.[10] Yet, exile is strangely neglected under international law.[11] This is true despite the rather singular and typically neglected mention in the Universal Declaration of Human Rights that "[n]o one shall be subjected to arbitrary arrest, detention *or exile*."[12]

Even as efforts have occasionally been made to think much more generally about a right of non-displacement,[13] those efforts have not particularly focused on what it means to be forced to flee one's State. Although there has been some recurrent attention to the responsibility of States of origin that will be discussed in this Article,[14] this has been *derivative* of thinking about refugee law or even concern with IDPs, rather than based on an understanding of exile as a central category of human rights. As to the focus on "root causes" of the refugee problem, it often seems interested in a broad range of factors beyond human rights violations *stricto sensu*.[15] Even the most human-rights-oriented pleas against exile[16]

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9. J. Barudy, *A Programme of Mental Health for Political Refugees: Dealing with the Invisible Pain of Political Exile*, 28 SOC. SCI. & MED. 715 (1989).

10. *See generally* Cristián Doña-Reveco, *Memories of Exile and Temporary Return: Chilean Exiles Remember Chile*, 64 LATIN AMERICANIST 334 (2020); DAVID BEVAN, LITERATURE AND EXILE (1990).

11. Jack I. Garvey, *The New Asylum Seekers: Addressing Their Origin*, *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S, at 181 (1988).

12. G.A. Res. 217 (III) A, Universal Declaration of Human Rights [UDHR], art. 9 (Dec. 10, 1948).

13. Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT'L L. & POL'Y 689 (1993); Maria Stavropoulou, *The Question of a Right Not to Be Displaced*, 90 PROCEEDINGS OF THE ASIL ANNUAL MEETING 549, 552 (1996).

14. Flavia Zorzi Giustiniani, *The Obligations of the State of Origin of Refugees: An Appraisal of a Traditionally Neglected Issue*, 30 CONN. J. INT'L L. 171 (2014); Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM J. INT'L L. 532 (1986); Nafees Ahmad, *Refugees: State Responsibility, the Country of Origin and Human Rights*, 8 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 82 (2008).

15. Channe Lindstrøm, *European Union Policy on Asylum and Immigration. Addressing the Root Causes of Forced Migration: A Justice and Home Affairs Policy of Freedom, Security and Justice?*, 39 SOC. POL'Y & ADMIN. 587 (2005) (describing the European Union project of addressing the "root causes" of immigration as a "dangerously all-encompassing project.").

16. For an early attempt to reframe refugee law as, fundamentally, a component of international human rights law, see G.J.L. Coles, *The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry*, *in* HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW: PROCEEDINGS OF A CONFERENCE

seem little more than a byproduct of a different conversation about what to do with *refugees*. The one work that stands out as much more immersed in the politics of remedying exile, Megan Bradley's "Refugee Repatriation," sees exile, as its title indicates, mostly through a remedial rather than constitutive lens and is, at any rate, a work of normative theory rather than international law.[17]

One can speculate about the reasons for this relative international legal invisibility. If anything, the *cause célèbre* was long persons being prevented from going into exile, notably Jews during the Soviet era, rather than persons being forced into exile.[18] This may have had the unfortunate effect of making exile appear as a sort of good, preferable at least to being stuck in conditions of persecution. But the recognition of the right to emigrate, important as it may be, should not obscure that a State can be simultaneously liable for failing to allow individuals to emigrate, *and* for providing them with a reason to emigrate in the first place.

It may also be that, more paradoxically, a successful exile is one that involves a relief from the human rights violations one suffered directly at the hands of the State of origin. The point of granting asylum, in particular, is that it is meant to protect from persecution.[19] Exiles may thus be seen as less in need or worthy of help than those who stayed and suffered (the idea of the "exilio dorado" or golden exile, which, in some Latin American countries, describes the lives of relative privilege that those who left managed to enjoy).[20] Their departure makes them less susceptible, with the passing of time, to violations from the State of origin[21] and more vulnerable, by contrast, to the politics of the host State, including as it seeks to protect exiles from repression by

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HELD IN MONTREAL, NOVEMBER 29-DECEMBER 2, 1987 (Canadian Human Rights Foundation ed., 1988).

17. MEGAN BRADLEY, REFUGEE REPATRIATION: JUSTICE, RESPONSIBILITY AND REDRESS (2013).

18. Malvina H. Guggenheim, *Of the Right to Emigrate and Other Freedoms: The Feldman Case*, 5 HUM. RTS. 75 (1975).

19. Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 415 (2006).

20. Cara Levey, *Documenting Diaspora, Diasporising Memory: Memory and Mediation among Chilean and Uruguayan Hijxs Del Exilio*, 42 BULL. LATIN AM. RSCH. 189, 197 (2023).

21. Yossi Shain, *The War of Governments Against Their Opposition in Exile*, 24 GOV'T & OPPOSITION 341 (1989).

their State of origin[22] and temper exiles' activism.[23] This is particularly true of children of exiles, many born abroad, whose trauma may be seen, not always fairly, as less than that of those who had to leave,[24] and who may experience fates comparatively more privileged than those whose parents stayed.

Yet the consequences of exile often linger for those who leave. The idea of the exiles as privileged neglects the extent to which many have themselves been tortured[25] and the role that they often continue to play as leading voices for those left behind.[26] Moreover, the actual safety of exiles in asylum States must now increasingly be read in light of States of origin's sometimes relentless pursuit of policies of repression of exiles transnationally, ensuring that not even exile puts them in a position of relative safety. Operation Condor comes to mind,[27] as well as political assassinations of journalists, activists and dissidents in the diaspora (notably, Orlando Letelier),[28] along with less spectacular modes of transnational bureaucratic and intelligence harassment. International human rights law is still struggling to apprehend such scenarios of so-called "transnational repression."[29]

Instead of faulting exiles for exile's lack of visibility, then, it will be this Article's hypothesis that the fundamental reason for the invisibility of exiles *is in fact to be sought in international law itself*. If anything, the debate on exile, such as it is, has been very much on host States' asylum obligations rather than the State of origin. This is in many ways as it should be. In practice, it is that State that needs to accommodate the demands of exiles and it is indeed host

22. Siena Anstis, Noura Al-Jizawi & Ronald J. Deibert, *Transnational Repression and the Different Faces of Sovereignty*, 95 TEMP. L. REV. 641, 644 (2022).

23. EDWARD MOGIRE, VICTIMS AS SECURITY THREATS: REFUGEE IMPACT ON HOST STATE SECURITY IN AFRICA 1,2 (2019).

24. Katherine Roberts Hite, *CHILE: A Rough Road Home*, NACLA (Sep. 25, 2007), https://nacla.org/article/chile-rough-road-home [https://perma.cc/J7EN-HZAJ].

25. *See generally* SILVINA JENSEN, LOS EXILIADOS: LA LUCHA POR LOS DERECHOS HUMANOS DURANTE LA DICTADURA (2012).

26. Cara Levey, *Valijas Militantes - Activist Suitcases and Memories of Exile across the Spanish-Speaking World*, *in* MEMORY, MOBILITY, AND MATERIAL CULTURE 21 (Chiara Giuliani & Kate Hodgson eds., 2022).

27. J. Patrice McSherry, *Operation Condor and Transnational State Violence Against Exiles*, 36 J. GLOB. S. STUD. 368 (2019).

28. *See generally* JOHN DINGES & SAUL LANDAU, ASSASSINATION ON EMBASSY ROW (2014).

29. *See generally* Siena Anstis, Noura Al-Jizawi & Ronald J. Deibert, *Transnational Repression and the Different Faces of Sovereignty*, 95 TEMP. L. REV. 641 (2023).

States generally that have shown a remarkable lack of willingness to shoulder their share of the asylum burden. The resulting economy of attention nonetheless massively structures our fragmented attention to the phenomenon of exile, emphasizing, as it were, "pull" rather than "push" factors, almost to the point of a deliberate ignorance or at least reification of the conditions in the State of origin that have precipitated exile.[30]

As will be this Article's central contention, this potentially leaves the State of origin off the hook too easily. There is a somewhat bitter irony here: that the State of origin, the one that is the very source of exiles' departure, launders its human rights violations through exile, pushing those it oppresses across the border where they are no longer within its jurisdiction. For the most part, the exile's rights no longer need to be violated, as it were, because the exile is gone. In fact, it may be that the State could not violate their rights even if it wanted to, given the limitations of extra-territoriality. Exile may be laden with all the violations that led to it, but it is also emptied of all the violations that will no longer "have" to be committed. As Fidel Castro put it, in a startling twist on the no-escape-from-Communism line, "anybody who wishes to go to any other country where he is received, good riddance."[31] Such individuals, as it were, will no longer have to be harassed, surveilled, abducted, imprisoned, tortured, killed, or disappeared. In a sense, exiles have disappeared themselves, removing their bodies from reach but also, thus, from sight. They are invisible.

This also sets up a paradoxical situation wherein the State that is *a priori* most responsible for human rights violations is the one that receives the least attention, and the State that is least responsible for them is the one that seems to be at the center of all discourse. More problematically, focusing on the conditions under which asylum seekers ought to be received fails to provide a full and informed picture of what might be wrong about exile beyond the obstacles that a potential host State might put in its path, notably by denying asylum. To be clear, nothing in this

30. Jack I. Garvey, *Toward a Reformulation of International Refugee Law New Directions in International Law*, 26 HARV. INT'L. L.J. 483 (1985).

31. FELIX ROBERTO MASUD-PILOTO, FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS: CUBAN MIGRATION TO THE U.S., 1959-1995, at 85 (1996) (citing Fidel Castro).

Article should be understood as suggesting that the question of asylum is not absolutely important in its own right, a motif this Article returns to in the conclusion; merely that our rightful attention to the conditions in which a person fleeing their country is welcomed in another should not have the unfortunate side effect of leading us to entirely avert our gaze from the conditions that forced them to leave in the first place.

Although international refugee law is sometimes described as having an "exilic" bias[32] in that it is focused on persons seeking asylum, that bias turns out to be only partial and to merely refer to the *latter* half of exile as it were, rather than its foundation in departure *from* a country of origin. (The bias, if anything, is better described as "asylic.") Ironically, this is despite much attention otherwise to the extent to which international refugee law, in its traditional protective form, can be conceptualized as at least a complementary genre of human rights protection, providing a much needed safety valve to escape repressive States.[33] To take exile seriously, by contrast, is to frame it first and foremost as a tragedy involving departure *from* the State of origin and due to grave human rights violations there, and only secondarily as one involving the complexities of arrival *to* the host State and asylum law.[34]

In order to take the exilic arc seriously, then – as I believe this continued political agency of exiles enjoins us to do – this Article's hypothesis is that one must begin from the human rights predicament of exile and how it relates to the State of departure, before one envisages international refugee law and how it relates to the host State. This will require grounding the reappraisal of exile not only in the horizontal tug and tow of inter-State relations and its tendency to see refugees as at best a shared burden to be

32. Andrew Shacknove, *From Asylum to Containment Focus on the Comprehensive Plan of Action*, 5 INT'L J. REFUGEE L. 516, 522 (1993).

33. James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991); Vincent Chetail, *Moving towards an Integrated Approach of Refugee Law and Human Rights Law, in* THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Catherine Costello et al. eds., 2021), https://academic.oup.com/edited-volume/41310/chapter/352057191 [https://perma.cc/M99U-PACJ].

34. For a similar effort to assess what foregrounding the centrality of human rights in the context of the laws of war might mean, see Frédéric Mégret, *What Might a Human-Rights-Harmonious International Regime on the Use of Force Look Like?*, 14 TRANSNAT'L LEGAL THEORY 211 (2023).

allocated,[35] but in the transnational life of the exile and the claims it makes on both States simultaneously; and not only in international human rights law, whether universal or regional, but in social activism, transitional justice, and transnational litigation by which the exile's rights predicament comes into focus.

I will suggest that, somewhere in between human rights violations in the State of origin and the asylum question in the host State, lies a still truly neglected problematique: the possibility, typically lost in the interstice, of *a transnational human rights law of exile*.[36] The Article first details how one might do justice to the specificity of exile as a human rights violation, and then tries to spell out some of the implications of thinking in that manner about and for exiles.

II. THE SPECIFICITY OF EXILE AS A HUMAN RIGHTS VIOLATION

How might one go about understanding the specific nature of exile from a human rights perspective? The challenge here is that exile needs to be understood as distinct from the events, including human rights violations, that gave rise to it. Persecution can be apprehended on its own human rights terms (as the violation of several rights) but it is not the same thing as exile. For one thing, even though most of those who go into exile will have been persecuted, many persons who are persecuted do not go into exile. Moreover, the *experience* of exile is distinct from the *reasons* for exile even though the two are sometimes hard to disentangle.

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35. As typical in the broad debate on "refugee responsibility sharing." *See* Richard E Ericson & Lester A Zeager, *Coordination and Fair Division in Refugee Responsibility Sharing*, 66 J. CONFLICT RESOL. 1263 (2022); Rebecca Dowd & Jane McAdam, *International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How?*, 66 INT'L & COMPAR. L.Q. 863 (2017); Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping? Refugee Responsibility Sharing Symposium*, 110 CAL. L. REV. 897 (2022).

36. I have traced the contours of what this transnational human rights law might look in previous work. See Frédéric Mégret, *The 'Elephant in the Room'in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political*, 6 TRANSNAT'L LEGAL THEORY 89 (2015); Frédéric Mégret, *The Changing Face of Sovereign Protection in International Law*, MELBOURNE J. INT'L L. (2020); Frédéric Mégret & Moushita Dutta, *Transnational Discrimination: The Case of Casteism and the Indian Diaspora*, 13 TRANSNAT'L LEGAL THEORY 391 (2022).

A good starting point here is actual, lived exiles' agency. Indeed, whatever else they may do, exiles *do speak* and notably make continued claims on the State that forced them into exile. Not all exiled communities are active politically, but most exiled groups have long been keenly aware that their continued distancing went to the heart of their human rights predicament.[37] Among the first to organize were Argentine groups such as the Comisión de Ex- exiliados Argentinos por la Reparación and the Comisión de Exiliados Políticos de la República Argentina (COEPRA). The goal of such groups was to have their exile recognized as a form of forced displacement orchestrated by the military junta.[38] Subsequently, Colombian collectives have also made efforts to have exile recognized as a human rights violation. The Centro Nacional de la Memoria Historica published an entire book devoted to the question.[39] There is also an important multigenerational dimension to these initiatives as shown by the existence of organizations such as Hijas e Hijos del Exilio in Argentina (since 2006) and Hijas e Hijos del Exilio Chile (since 2018). Finally, Liberian[40] or Kurd exiles[41] have been active in transitional justice processes as well.

Taking seriously that continued agency frames the sort of observable patterns of rights violations that must be envisaged as constituting exile's human rights predicament, the question explored in this Part, therefore, asks what is unique about the plight of exile that is distinct from the human rights violations that gave rise to it or, for that matter, that flow from it in the host

37. David P. Lumsden, *Broken Lives? Reflections on the Anthropology of Exile & Repair*, 18 REFUGE: REVUE CANADIENNE SUR LES REFUGIES [REFUGE: CANADA'S J. ON REFUGEES] 30 (1999).

38. Symposium, Maricel Alejandra López, *Exiliados Políticos y La Constitución Como Victimas Frente al Estado: Implicaciones Para La Acción Política y El Proceso de Reparación En Argentina*, *in* I JORNADAS DE TRABAJO SOBRE EXILIOS POLÍTICOS DEL CONO SUR EN EL SIGLO XX (2012), https://www.memoria.fahce.unlp.edu.ar/trab_eventos/ev.2548/ev.2548.pdf [https://perma.cc/9UXB-HDT4].

39. *See generally* CENTRO DE MEMORIA HISTORICA (COLOMBIA), RANDOLF LAVERDE TAMAYO & JUAN PABLO LUQUE, HISTORIAS DE IDA Y VUELTA DESDE EL EXILIO (2018).

40. Jonny Steinberg, *A Truth Commission Goes Abroad: Liberian Transitional Justice in New York*, 110 AFR. AFFS. 35 (2011).

41. Bahar Baser, *Intricacies of Engaging Diasporas in Conflict Resolution and Transitional Justice: The Kurdish Diaspora and the Peace Process in Turkey*, 19 CIV. WARS 470 (2017).

State. What I will designate as the specificity of exile as a human rights violation, moreover, is a certain continued, lived, and *experiential quality* of the trauma of exile itself even when, by all appearances, that exile is successful.

A. Exile as a Violation of Discrete Rights

A first, conventional way in which exile might be considered to contradict human rights is as a violation of a series of discrete rights. If nothing else, exile violates the right to "return to one's country."[42] As the Human Rights Committee (HRC) put it, "[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country."[43] One illustration given by the HRC is that "of nationals of a country who have there been stripped of their nationality in violation of international law."[44] This could include, for example, depriving nationals in exile of the passport that they need to, inter alia, return to their country.[45] The European Court of Human Rights Guide on prohibition of expulsion of nationals (Protocol No. 4 of the ECHR) notes that "the object of the right to enter the territory of a State of which one is a national *is to prohibit the exile of nationals*, a measure of banishment that has, at certain times in history, been enforced against specific categories of individuals."[46]

A violation of the "right to return," however, is a bit of an oblique way of looking at exile. It assumes that the problem with exile is the denial of return, rather than being forced into exile in the first place. One no less suffers the indignity of exile, moreover, that one may, theoretically and often years later, be in a position to return. That return may become largely moot given that one would return to a society now thoroughly changed, and with which one may even to a degree have lost touch or which

42. UDHR, *supra* note 12, art. 13.

43. U.N. Hum. Rts. Comm., General Comment No. 27: Article 12 (Freedom of Movement), ¶ 19, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) [hereinafter General Comment No. 27].

44. *Id.* ¶ 20.

45. Vidal Martins v. Uruguay, Comm. No. 57/1979 (Hum. Rts. Comm., Mar. 23, 1982).

46. COUNCIL OF EUR., GUIDE ON ARTICLE 3 OF PROTOCOL NO. 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS - PROHIBITION OF EXPULSION OF NATIONALS 58 (2022).

may have forfeited the claim to welcome one back. In other words, the wound of exile is not of the sort that can easily be cured by merely offering a possibility of return because it is not only a formal prohibition of return and not easily cured by an invitation to do so. One may remain in exile even though one *could* return, and the consequences of that exile may be no less dramatic.

This suggests, then, that the violation of exile is first and foremost that of putting someone "on the path of exile." That experience is, in itself, a fraught and painful journey. Even though that journey may ultimately be successful, it always includes at least all of the hardships that come from "going into" rather than just "being in" exile. One argument here might be that no one ever forces someone into exile (as opposed to those who are specifically the banished). Of course, the excess difficulties that asylum States put in the way of asylum seekers, notably that reflect a willingness to renege on their international obligations, are imputable first and foremost to those States and not to the State of origin. Still, the latter must to a degree "take the world as it finds it" and at the very least exposes exiles to all the ordinary difficulties of exile which no doubt exist even in the best of cases (stress, financial hardship, adaptation, lost income, devaluation of educational achievements, loss of network, etc.).

Another way one can frame exile is as a deprivation of liberty (the liberty of staying put) even as, paradoxically, it manifests a liberty to flee. In the *Susana Yofre de Vaca Narvaja* case, the Argentine Supreme Court ruled that those who left the country as a result of persecutions should be assimilated to those who had been deprived of their freedom in Argentina.[47] Even though Yofre de Vaca Narvaja did not fall explicitly under compensatory laws, this meant that she should benefit from them. Exile had been for her merely a way of "recovering her freedom since . . . at the moment of her decision to flee the country, she already suffered from the deprivation of th[e] basic right [to freedom]."[48] In

47. Yofre de Vaca Narvaja, Susana c/ Mo. del Interior s/ Resol. M.J.D.H. 221/00 (Expte. 443459/98), Sentencia (Oct. 14, 2004).

48. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 14, 2004, "Yofre de Vaca Narvaja, Susana c. Ministerio del Interior" § VI, Fallos (2004-327-4241) (Arg.) [hereinafter Yofre de Vaca Narvaja] *translated in* María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, *in* THE HANDBOOK OF REPARATIONS 21, 44 (Pablo de Greiff ed., 2006).

effect, this "opened up the possibility for those who had to abandon the country during the military dictatorship to receive reparations in the same manner as those who were detained in prisons or clandestine centers."[49]

But the violation of rights implicit in the notion of exile is potentially much broader. It includes a host of violations that are not reducible to simply the inability to be on the territory of one's State, but focus on the impact of such inability on subjects' human rights experience. Of particular note is the possibility that exile will interfere gravely with the right to family life. In the case of *Modise v. Botswana*, for example, the African Commission on Human and Peoples' Rights found that "deportation also deprived [the applicant] of his family, and his family, of his support."[50] In a case submitted by Amnesty International, the Commission found that the forced deportation of two Zambian political figures to Malawi had "forcibly broken up the family unit which is the core of society thereby failing in its duties to protect and assist the family."[51] Indeed, the "forcible exile" of political activists and expulsion of foreigners was in violation of the duties to protect and assist the family, as it forcibly broke up the family unit.[52]

On that model, a range of other rights may be violated by the very fact of exile. It may be difficult or impossible to exercise one's political rights, notably to vote or stand for office; one's livelihood may be compromised as well as access to one's property, leading to a life of relative destitution and hardship in violation of economic and social rights; and one may be frustrated in one's ability to exercise one's cultural rights as a result of living in a culturally alien country.[53] In short, if "the exercise of virtually all rights depends on territorial presence within the state," then "once stripped of the right to enter and remain in the state, enforcement means that one is effectively deprived of all the

49. José Guembe, *supra* note 48.

50. Modise v. Botswana, Communication 97/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 92 (Nov. 6, 2000), https://achpr.au.int/en/decisions-communications/john-k-modise- botswana-979314ar.

51. Amnesty International v. Zambia plus Angola, Communication 212/98, Afr. Comm'n H.P.R., ¶ 59 (May 5, 1999), https://achpr.au.int/en/decisions-communications/amnesty-international-zambia-21298.

52. *Id.*

53. EDWARD W. SAID, REFLECTIONS ON EXILE AND OTHER ESSAYS (2000).

other rights that depend (de jure or de facto) on territorial presence."[54]

The suggestion is thus sometimes that "the country that turns its own citizens into refugees is in violation of all the articles of the Universal Declaration of Human Rights."[55] One may wonder, though, if this broad sweep approach to the rights violated in exile is truly helpful to understand the predicament of those who have had to flee. On the one hand, it is over-inclusive because the degree to which each and every right of the exile is violated through exile needs to be relativized. It may be, for example, that one can still exercise some rights in the State of origin, even though dissident diasporas (e.g., Miami Cubans), and sometimes entire diasporas, are often prevented from doing so.[56] More crucially, one may be able to exercise some rights in the host State. It is not clear that human rights law mandates a right to exercise rights in a *particular* State, as opposed to exercising them *somewhere*. There may even be a danger in claiming that one cannot possibly exercise rights in exile given the emphasis put on, precisely, ensuring that refugees continue to benefit from their rights, and the evidence that exiles have occasionally become a particularly active political "vanguard" in the host society.[57]

On the other hand, the idea that exile violates all human rights is also under-inclusive. The "catalogue" vision of what is wrong with exile misses subtler elements that are hard to pin down within existing human rights frameworks, perhaps because they point to some substratum of rights that normally barely needs to be mentioned. The default assumption of human rights has mostly been one of populations living under a State,[58] which is rather indifferent to how one ended up living under one State

54. Macklin, supra note 8.

55. Lee, *supra* note 14, at 539.

56. Diana Silvia Stirbu, *Romanian Diaspora Denied the Right to Vot*e, THE GUARDIAN (Nov. 7, 2014) https://www.theguardian.com/world/ 2014/nov/07/romanian-diaspora-denied-right-to-vote [https://perma.cc/A4JN-9DVR]; Leandro Querido, *The Cuban Referendum and the Right to Vote*, LATINOAMERICA 21, (Sept. 21, 2022), https://latinoamerica21.com/en/the-cuban-referendum-and-the-right-to-vote [https://perma.cc/L9PK-7AU5].

57. Cindy Horst & Odin Lysaker, *Miracles in Dark Times: Hannah Arendt and Refugees as "Vanguard"*, 34 J. REFUGEE STUD. 67 (2021).

58. Galina Cornelisse, *A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think beyond Westphalian Sovereignty*, *in* ARE HUMAN RIGHTS FOR MIGRANTS? (2011).

rather than another (birth, migration, change of borders), aside from a very specific concern with statelessness. This is magnified by the tendency of international human rights law to emphasize humanness to the detriment of citizenship, territory over personal status, and territorial presence over territorial belonging.[59] This very abstract and universalist foundation underscores the degree to which international human rights law is ill at ease with the specifically transnational or even merely national dimensions of human rights as opposed to their supranational dimensions.

B. The Human Rights Phenomenology of Exile

The risk, then, is that a catalogue approach of conventional rights will miss crucial elements of the human rights experience of exiles. What is required, instead, is a human rights approach that adopts as its central focus the particular predicament of being forced outside of one's State of nationality or habitual residence. This reaches for a sort of pure theory of exile. Andrew Shacknove pioneered such an approach when he sought to reframe the definition of a refugee as "prior to a theory and policy of entitlements" by third States or the international community and as lying instead in the collapse of State protection.[60] However, where Shacknove's liberal take on refugeehood still emphasizes refugees' functional need for protection, my own approach to exile focuses on the political alienation from a particular State of origin as the crucial, ongoing plight of the exile. The point is that even if exiles encounter a plenitude of protection in the host State, they continue to fully suffer from rights violations.

A first approximation of what constitutes the human rights harm of exile might be the obvious dimension that neither a given territory nor citizenship are, in fact, indifferent to the human experience and thus to the enjoyment of human rights. This means, crucially, that not even a safe, expeditiously granted and long-term asylum can ever overcome, as opposed to merely attenuate, the consequences of exile. Exile prevents one from being on a *particular* territory where one had expectations of

59. Erik Roxstrom & Mark Gibney, *Human Rights and State Jurisdiction*, 18 HUM RTS. REV. 129 (2017).

60. Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 277 (1985).

spending one's life and may at least partly exclude one from the benefits of political community.[61] To not be on the territory to which one has forged intimate lifelong connections will be particularly destructive of the trajectories of those whose identity is linked to territory, such as indigenous peoples or, perhaps, those bound to toiling a particular plot of land. But there is no reason to think that it would not affect urban dwellers as well, often overrepresented among exiles and tied in their own way if not quite to territory, at least to dense spatial conurbations.

Indeed, the goal of international human rights law is not (any more than refugee law) to second guess how much emotional baggage individuals have left behind to ascertain whether their right to remain had been more or less impacted (or whether they are more or less worthy of asylum). In that respect, a violation of the right to remain in one's State, legally speaking, affects the jet setting cosmopolitans as much as, say, the rooted, indigenous peasant; those who leave everything behind and those who already had very little. It exists, in other words, independently of what uses being on that territory might have been put to, as a self-standing human rights violation, a violation of the right to be in one's State. All exiles are ultimately victims of a major unsettling of their geographic and, ergo, political moorings that prevents them from returning or from effectively returning.

Indeed, exile is not simply forced removal from any place, it is removal from a particular community and a particular State. This no doubt adds a specific dimension to those for whom such things matter: the longing for the country itself, the "mother" or "father" land and its rich associations with belonging, identity and citizenship.[62] Even for those who have reason to relativize such longing, the experience of exile as an experience of no-return (at least in the present) is an experience of unmooring, of dislocation and of deprivation of those rights that come from citizenship. Beyond territory and the mere focus on presence therein, moreover, is the sense of belonging to a national and civic community that, for all its failings, is so central to the trajectory of

61. *See generally* LUIS ROINGER, EXILE AND THE POLITICS OF EXCLUSION IN THE AMERICAS (2012).

62. Julie Peteet, *Identity and Community in Exile*, 5 CRITIQUE: CRITICAL MIDDLE E. STUD. 1 (1996).

modernity and whose partial loss orients one to an undesired life in the in- between.

Here it may be useful to connect exile to a now-dated tradition of banishment as punishment, to see how far the international legal order has come compared to times when such banishment was a rather ordinary punishment. Banishment was long practiced by the Romans,[63] was a central theme in the colonial history of the United States and Australia through the transportation of convicts,[64] continues to be practiced in some indigenous legal systems,[65] and is said to have made a comeback as a result of "denationalization policies" implemented post 9/11.[66] Although it is sometimes treated with understanding in the indigenous context as a manifestation of legal pluralism[67] and could generally be seen as mild compared to what it replaced and what replaced it, banishment is generally frowned upon in modernity as "cruel and unusual punishment."[68] Banishment is unnecessary given the existence of a properly functioning penal system, in addition to weakening of citizenship. For some societies, exile is indeed worse than death, irrespective of its actual conditions. It is, in short, "both superfluous and anachronistic."[69]

Banishment as a penal punishment is of course distinct from exile in that it is systematized as juridical sanction,[70] where exile is often more in the nature of an at least partly voluntary flight. But both are joined at the hip as, essentially, amounting to a coerced removal of undesirable bodies from the polity. Thus, the basic reasons we may have to reject banishment are also reasons why we would want to condemn exile. They embody a form of modern civil death in which ejection from territory and ejection

63. *See generally* DANIEL WASHBURN, BANISHMENT IN THE LATER ROMAN EMPIRE, 284-476 CE (2012).

64. 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).

65. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85 (2007).

66. Macklin, *supra* note 8.

67. Kunesh, *supra* note 65.

68. Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758 (1962).

69. Macklin, *supra* note 8, at 167.

70. Edda Frankot, *Exile: Banishment as a Punitive and Coercive Measure*, *in* BANISHMENT IN THE LATE MEDIEVAL EASTERN NETHERLANDS 47 (2022).

from the body politics merge. I thus want to emphasize three facets of the analytical core of what is wrong with exile from a broadened human rights perspective, attuned to the importance of place and situatedness of human beings, including as they manifest themselves through attachment to citizenship.

First, exile is a loss of lifelong investments in a society. Investments does not refer to financial or monetary investments (although the loss of property can clearly be one of the costs of exile), but instead to social and political relationships that make life meaningful and worth living. As emphasized in a different context, the fundamental relevance of "life plans" to the good life is that

> a minimally decent life includes the ability to enter social, economic, and romantic relationships with others. Individuals struggle to gain these and other valuable relationships if they cannot remain where they are. They struggle to fulfill plans to enter professional relationships [. . .] if they cannot remain in the same city, town, or neighborhood.[71]

Exile, then, frustrates more than bare rights: quite simply, an expectation that one will be able to reap the rewards of one's political, social and economic investments in a particular society – indeed, the right to make these investments in the first place.

Second and more subtly, the harm of exile hinges on a loss of stability that is a cherished goal in life and that is violently uprooted by departure, often sudden and brutal. It confronts those displaced beyond their borders with the "radical and protracted uncertainty" that makes it very difficult to construct a life, putting the exile in a "liminal situation" in which "hope and waiting play central roles."[72] This is a claim made specifically by the widow of Chilean General Letelier who, interviewed about her experience abroad after Pinochet's coup, pointed out that "exile violates the project of life."[73]

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71. Mollie Gerver, *Must Refugees Return?*, 24 CRITICAL REV. INT'L SOC. & POL. PHIL. 415, 421 (2021).

72. Cindy Horst & Katarzyna Grabska, *Introduction: Flight and Exile—Uncertainty in the Context of Conflict- Induced Displacement*, 59 SOC. ANALYSIS 1, 2 (2015).

73. Tom Hayden, *An Exiled Son of Santiago*, THE NATION (Apr. 18, 2005), https://www.thenation.com/article/archive/exiled-son-santiago [https://perma.cc/3ZGM-LDUB].

Third, exile is a destruction of the identity of those who have to leave. It steals from them, or at least compromises, a deep sense of belonging, of being "from" a place. As Letelier put it, exile involves a "loss of identity" and "psychological rupture" inflicted by forced emigration.[74] Although exile in classical times may have meant merely retreating to the close proximity of the polis,

> [i]n the contemporary world of nation-states [. . .] exiles are not only spatially removed but also culturally estranged from their familiar surroundings. They lose not just their job, but their vocation, a community of belonging, a form of life. They are forced to live in alien nations, and in alienation, which typically implies an existential crisis marked by loneliness, economic troubles and the fear of stigmatization.[75]

The exile does not have an identity (yet, at least) in the host country, even as their identity in and in relation to the country of origin is gradually being erased by distance and absence. After a while, being "an" exile rather than simply "in" exile becomes the defining feature of their predicament, one of chronic estrangement.[76] This psycho-social dimension of being in exile suggests that exile as a human rights violation is more than the sum of its parts, something akin to a violation of one's fundamental dignity.

Finally, it should be noted that the rights rupture illustrated by exile lies also in the wounds it inflicts on those left behind and thus in the deeply relational character of human life. For example, surely the right to family life is a two-way street: violated for those who have left and can no longer see relatives; but also for those who stayed and can no longer interact with those who have been forced to leave. The same might be said of citizens or politicians sent in exile: that their coerced absence robs not only them of their life opportunities but also robs the polity of their presence, and thus undermines democratic institutions as a

74. *Id.*

75. Volker M. Heins, *Can the Refugee Speak? Albert Hirschman and the Changing Meanings of Exile*, 158 THESIS ELEVEN 42, 45 (2020).

76. For a slightly different take on the experiences of exile and post-exile, see Luis Roniger, *Displacement and Testimony: Recent History and the Study of Exile and Post-Exile*, 29 INT'L J. POL., CULTURE, & SOC'Y 111 (2016).

foundation of a culture of rights.[77] Indeed, the pushing out of some of the more active regime opponents is "chilling both for the exiled person and for the community that is left behind."[78] Communities left behind may then be even more vulnerable to persecution as the young and enterprising "chose" to leave.[79] In short, the phenomenology of exile points to multifarious and irreducible ways, far beyond conventional understandings of human rights violations, to a life of broadly degraded rights expectations.

C. A Right to Live in One's Country and a Duty to Allow Individuals to Remain?

What this leads to is a realization that, aside from the rights violations that may have led to exile, exile is in itself a violation of rights. There may be no "right to live in one's own country" as such,[80] but the existence of such a right can arguably be reconstituted from existing international human rights obligations. As the Human Rights Committee put it, the right to enter one's country "implies the right to remain in one's own country."[81] On the most basic level, States have an obligation to not unlawfully expulse their nationals.[82] Discriminatory expulsions would, as a general rule, be unlawful and may amount to ethnic cleansing. This is particularly the case of mass expulsions, which are regulated under the laws of war[83] or international criminal law.[84]

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77. See, in that respect, Hirschman's analysis of states encouraging exile in Latin America as a sort of "conspiracy in restraint of voice" in politics, as opposed to the advantage that Japan gained by making it harder for politicians to simply leave. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 60–61 (1972).

78. Heins, *supra* note 75, at 48.

79. *Id.* at 46 (noting how for Hirschman the Jewish community in Germany was left much weakened by the departure of émigrés).

80. *But see* Stefanie Ricarda Roos, *The Right to Live and Remain in One's Place of Origin: A United Nations' Rhetoric or an Internationally Recognized Human Right - Reflections on the Potential of a Controversial Right to Be Universally Recognized Comments*, 44 GERMAN Y.B. INT'L L. 517 (2001).

81. General Comment No. 27, *supra* note 43, ¶ 19.

82. *See generally* PAUL ARNELL, IS EXILE AN ACT OF DISCRIMINATION? (2021).

83. *See* JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE (1995).

84. *See generally* Vincent Chetail, *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 29 LEIDEN J. INT'L L. 917 (2016).

At the other end of the spectrum, States have an obligation to allow the *return* of their nationals, thus putting an end to any ongoing situation of exile. In 1996, for example, the European Court of Human Rights (ECHR) decided the landmark case of *Loizidou v. Turkey*.[85] The Court found that Titina Loizidou, a Greek-Cypriot refugee displaced from Northern Cyprus, had been unlawfully prevented from returning by Turkey.[86] The Human Rights Committee has also noted the "right to remain in, return to and reside in [one's] own country."[87] International treaties anticipating the return of persons notably after war are also testimony to a custom of anticipating return to the country of nationality.[88]

However, could one go further and understand the right to be in one's country not simply as a right to not be forcibly expulsed or to return but as framed more fundamentally to include an obligation to not create conditions that would effectively push an individual into exile? Indeed, even if there is neither expulsion per se nor strong obstacle to return, it has been argued that "[t]he mere existence of refugees, [. . .] shows that their own governments have violated these rights."[89] The case for a broad "right not to be displaced" or even more specifically a "right to remain" has been argued on and off over the years. That argument, however, is typically not exile-specific: it is based on the idea that persons should not be forcibly "moved from their homes and areas of habitual residence without their consent."[90] Nonetheless, clearly this sort of construction can be helpfully projected onto "forced movement across international borders."[91] The construction of a "right to stay" on the basis of a "right of movement" is less paradoxical than it seems: one can often infer rights from their opposite, and clearly to "stay" is also to "move" in a particular way.

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85. ECtHR - Loizidou v Turkey, Application no. 15318/89, 18 December 1996.

86. Loizidou v. Turkey, Application No. 15318/89 (Mar. 23, 1995).

87. Jiménez Vaca v. Colombia, Comm. No. 859/1999, ¶ 7.4 (Hum. Rts. Comm. Apr. 15, 2002) [hereinafter Jiménez Vaca].

88. LAUREN VAN METRE & AKAN BURCU, DAYTON IMPLEMENTATION: THE RETURN OF REFUGEES (1997), https://www.usip.org/publications/1997/09/dayton-implementation-return-refugees [https://perma.cc/PX5W-Z7BW].

89. Lee, *supra* note 14, at 538.

90. Stavropoulou, *The Question of a Right Not to Be Displaced*, *supra* note 13, at 549.

91. *Id.* at 550.

This type of thinking is evident in the notion once propounded by G. J. L. Coles that the solution to the refugee problem is not asylum (a mere "remedy") but "the prevention of conditions arising within the country of nationality that compel a national to depart or to remain outside the country of nationality."[92] The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its 1994 resolution on "The right to freedom of movement" did in fact recognize "the right of persons to remain in peace [. . .] in their own countries."[93] The Turku/Abo Declaration on Minimum Humanitarian Standards also insists that "no person shall be compelled to leave their own territory."[94] Such a construction has the advantage of connecting issues of mobility (including possibly the search for asylum in a destination country) and questions of core human rights violations in the State of origin.

There has been some skepticism of the notion of a right to remain, notably on the basis that it is an excessively broad "umbrella term" that has merely been "conjured up."[95] In effect, an emphasis on the right to remain could be understood as replacing a more specific computation of the various rights that were actually violated in the process, so that one might therefore better focus on such "the sorts of basic life rights whose effective protection is essential to the practical dimension of actually remaining anywhere (personal security, livelihood, economic activity, self-sufficiency, to mention but a few)."[96] It is true that if departure were seen as a consequence of all these violations that somehow trumped their intrinsic gravity, it might distract from those violations qua violations.

Nonetheless, the idea of a "right to remain" does capture a central and specific aspiration of human beings to exercise their

92. Coles, *supra* note 16, at 201.

93. Rep. of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, on its Forty-Sixth Session, at 67, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994).

94. Declaration of Minimum Humanitarian Standards, transmitted by letter dated 5 January 1995 from the Permanent Representative of Norway and the Chargé d'Affaires of the Permanent Mission of Finland addressed to the Commission on Human Rights, art 7.2, U.N. Doc. E/CN.4/1995/116 (1995) [hereinafter Declaration of Turku].

95. Guy Goodwin-Gill, *The Right to Leave, the Right to Return and the Question of a Right to Remain*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 59, 94 (Vera Gowland Debbas ed., 1996).

96. *Id.*

choice of place, particularly as it relates to their country of nationality. It expresses what is wrong with exile besides all of the human rights violations that gave rise to it and that it might itself, paradoxically, prolong, as well as embody "in concrete terms, the connection between individual, community and territory."[97] In short, the argument that "an explicit guarantee against forced movements would [. . .] contribute to sharper awareness of the human rights concerns involved"[98] is one that powerfully frames the evil of exile. Recognizing such a right of course does not mean that one can then be forced to remain against one's better security or interests, even in the name of protecting one's integrity.[99]

III. IMPLICATIONS OF THINKING OF EXILE AS A HUMAN RIGHTS VIOLATION

Beyond the basic case that exile ought to be treated as a human rights violation in its own right, what are some of the implications of such a model? In this Part, this Article looks at some of the obstacles on the way to operationalizing the notion of exile as a human rights violation intellectually and concretely. The main thrust of the analysis is to refocus attention on the source country when it comes to exile rather than the State of destination. A human rights analysis of exile also has a secondary influence: it focuses on the relationship between the country of origin and its citizens rather than on the country of origin and the country of destination. It thus takes seriously the extent to which exile is first and foremost a harm done to the individuals who undertake it rather than a "burden" unjustly imposed on host States because another State has failed in its obligation to "prevent refugee flows."[100] This raises questions of attribution of exile, about whether the determination of refugee status might ever be construed as at least obliquely a comment on the rights violations committed by the State of origin, as well as what sort of remedies might be available to exiles.

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97. *Id.* at 97.

98. Stavropoulou, *The Question of a Right Not to Be Displaced*, *supra* note 13, at 553.

99. Davor Sopf, *Temporary Protection in Europe after 1990: The Right to Remain of Genuine Convention Refugees*, 6 WASH. U. J.L. & POL'Y 109, 120 (2001).

100. *Id.*

A. Questions of Attribution

Cases where individuals are forcibly removed from the territory of their State would be the clearest case of a State being liable for exile. But a complexity arises as a result of the fact that many persons go in exile more or less voluntarily without, as it were, being literally pushed across the border. One argument by States of origin, then, might be that the person who goes into exile makes a deliberate decision to remove themselves from their State of origin, preferring, in the words of Albert Hirschman, "exit" over "voice" or "flight" over "fight."[101] This then in a sense interrupts the chain of causality that might make the human rights violation imputable to them. In essence, exile is presented as a self-inflicted human rights violation, one in which the exile is the main driving force and therefore cannot then claim reparations. This could then also further weaken the claim to seeking asylum by blurring the already sometimes fragile distinction between refugees and immigrants.

It is true that an exile might be precocious in that one might leave relatively long before the moment of danger. This could, in turn, suggest a lack of fortitude that contradicts the idea that one was *forced* to leave. Treaty bodies have sometimes found that someone was "not forced into exile . . . but left the country voluntarily."[102] Even among regime opponents, there are those who will criticize "those who left" and led relatively privileged lives, [103] perhaps even implicitly faulting them for having failed to lead the fight against the regime. There may be an obligation as a citizen to minimally complain of human rights violations that one knows of before leaving, especially if remedies are reasonably likely to be forthcoming. Flight at the slightest whiff of human rights violations might theoretically be problematic for those casting a complaint about their exile, although it is difficult to imagine who would go into exile for such trivial violations.

But this line of argument, in its generality at least, seems largely spurious and potentially even toxic. Although some

101. HIRSCHMAN, *supra* note 77.

102. Womah Mukong v. Cameroon, Comm. No. 458/1991, ¶ 9.10 (Hum. Rts. Comm. Aug. 10, 1994).

103. Orla Ryan, *Returning Exiles: Those Who Left and Those Who Stayed*, FINANCIAL TIMES (Dec. 7, 2011), https://www.ft.com/content/3dfb960e-1b6a-11e1-85f8-00144feabdc0 [https://perma.cc/7ZVC-Y3K4].

literary thinkers of exile have long emphasized its voluntary and even transcendentally creative dimensions,[104] this is as part of an attempt to recapture their agency in the place of exile[105] in what are otherwise quite diminished circumstances of choice. Edward Said, one of the foremost theorists of the transformative nature of exile, nonetheless reminded us that even as "exile is strangely compelling to think about," it is "terrible to experience," and that "the achievements of exile are permanently undermined by the loss of something left behind forever."[106] And although it may be true that exile has never been as productive politically as it is in our times, with diasporas reconstituting themselves abroad as powerful political communities that sometimes have an outsized influence on the politics of the State of origin and make the most of "the virtues of exit"[107] – this changes little to the fundamentally tragic circumstances of its occurrence.

It has been underlined that "exile still implies an element of choice, if only because the person who feels forced to go into exile needs to decide where exactly to find a better place and how to make sense of the physical move out of the native country."[108] Yet the "voluntariness" and even felicitous character of exile is evidently quite relative. For example, surely there is no defensible human rights case for having to await actual persecution (in many cases, it will already be ongoing anyhow) and, more often than not, an "irresistible pressure" to leave will mean that the flight into exile was hardly a choice.[109] In other words, if a threat of persecution is reason enough to impose an obligation on a third State to grant asylum, then it is reason enough to attribute the responsibility for flight to the State of origin, and certainly not the exile's fault that they fled.

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104. *See generally* Hannah Arendt, *We Refugees*, *in* INTERNATIONAL REFUGEE LAW 3 (Héléne Lambert ed., 2010).

105. *See generally* Roberto Bolaño, *Exiles*, N.Y. REV. BOOKS (Apr. 13, 2011), https://www.nybooks.com/online/2011/04/13/exiles [https://perma.cc/28KY-RT35].

106. SAID, *supra* note 53, at 180.

107. *See generally* JENNET KIRKPATRICK, THE VIRTUES OF EXIT: ON RESISTANCE AND QUITTING POLITICS (2017).

108. Heins, *supra* note 75, at 44.

109. Brigitte Stern, *Commentaires Sur: La Responsabilité de l'Etat d'origine Des Réfugiés*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 81, 86 (Vera Gowland Debbas ed., 1996).

Nor is the exile responsible for their own exile because they can be accused of having ruptured an obligation of loyalty to their home State. There is no obligation to "not go into exile" at considerable risk to one's life and rights simply because of some foundational obligation of citizenry. Such an obligation could not, furthermore, be derived from obligations of solidarity with the citizenry, including fellow citizens who may be left in a weaker position as a result of one's departure. Citizenship is not a suicide pact and conditions will sometimes emerge that relieve citizens of an obligation to stay put (although they may of course decide to do so as a result of their personal courage). As Judith Shklar has emphasized, the "disloyal government" that persecutes its citizens forfeits its claim if not to their continued loyalty,[110] at least to their continued presence on its territory at the peril of their own life and integrity.[111]

Indeed, coercion need not involve actual physical removal across borders and away (it rarely does). As the Argentine Supreme Court of the Nation ruled in the 2004 *Yofre de Vaca Narvaja* case,

> [T]he conditions in which the plaintiff had to remain and then abandon the country [. . .] demonstrate that her decision [. . .] far from being considered as 'voluntary' or willfully adopted, was the only and desperate alternative she had in order to save her life in the face of the threat posed by the State or parallel organizations.[112]

This suggests a "no other alternative" threshold, which ought to be understood contextually in light of the fundamentally coercive circumstances that gave rise to exile. In particular, a merely formal, liberal conception of "coercion" understood as the forceful removal of persons from their State will not do. This would be true notably in the many cases where the decision to leave is effectively triggered by a risk of persecution and a host of factors that compromise the ability to enjoy one's rights. Any other outcome would effectively allow States to profit from their own wrong: de facto pushing people to flee but then invoking those individuals' agency at the final hour to wipe their hands

110. JUDITH N. SHKLAR, ORDINARY VICES 184 (1984).

111. *See generally* Judith N. Shklar, *Obligation, Loyalty, Exile*, 21 POL. THEORY 181 (1993).

112. Yofre de Vaca Narvaja, *supra* note 48, at 44.

clean of the consequences. Interestingly, the question of what constitutes "voluntary" departure has been examined on the other end of the spectrum in relation to refugee repatriation, where it has long been, for essentially the same reasons, considered with suspicion: often asylum seekers "voluntarily" departing a host State have done so "as a result of severe pressures and violations of their rights"[113] that belie any notion of genuine voluntariness.[114]

Revealingly, there is some understanding in the human rights case law of the fact that exile is not a person's fault and cannot be invoked against them. This is perhaps most evident in the African Court of Human Rights case of *Kennedy Gihana & Others v. Republic of Rwanda* (2019).[115] The applicants had fled Rwanda to South Africa, at which point they realized that their passports had been invalidated. Rwanda argued that the application should be dismissed inter alia because the applicants had not exhausted local remedies.[116] The Court found that the applicants feared for their lives when they left and that, given the circumstances in which their passports had been invalidated, it was reasonable for them to be apprehensive about their security.[117] In such circumstances the non-voluntary nature of their exile justified an exemption from the requirement to exhaust local remedies in Rwanda, since those remedies were effectively unavailable.[118]

A similar conceptual question arises as a result of States being in a position to claim, perversely, that they are not preventing an exile from *returning* to their country. That possibility may be more theoretical than real, however, and put the exile in a position where they run the risk of being persecuted anew upon return. Even if there is no such risk (for example, because there has been a clear change of regime), States may be tempted to claim

113. INT'L REFUGEE RTS. INITIATIVE, "I WAS LEFT WITH NOTHING": "VOLUNTARY" DEPARTURES OF ASYLUM SEEKERS FROM ISRAEL TO RWANDA AND UGANDA 2 (2015).

114. *Id. See generally* AMNESTY INT'L, FORCED AND UNLAWFUL - ISRAEL'S DEPORTATION OF ERITREAN AND SUDANESE ASYLUM SEEKERS TO UGANDA (2018).

115. Kennedy Gihana v. Republic of Rwanda, No. 017/2015, Judgment, African Court on Human and People's Rights [Afr. Ct. H.P.R.] (Nov. 28, 2019) ¶¶ 65-74, https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/775/5e9/5f57755e98b4c245511180.pdf [https://perma.cc/7642-YF7U].

116. *Id.* art. VI, §(A)(iv), ¶ 57.

117. *Id.* ¶ 73.

118. *Id.* ¶¶ 73-74.

that an exile's decision to stay abroad is strictly their own. For example, the post-Pinochet Chilean State claimed in the course of litigation by a torture victim exiled in the UK complaining that his right to remedy was frustrated that "since Chile returned to democracy in 1990, there are no exiles" and that "[t]he ideal scenario would be that Mr. García Lucero return to Chile."[119]

Such claims must be evaluated critically in the light of the many valid life reasons one may have to stay in the host society and continue to claim one's status as an exile. One cannot be forced, having been launched on the path of exile, to remedy this by returning decades later. Exiles owe neither the host society nor their State of origin to "return." Just as they could not be faulted for their initial flight, they cannot be faulted, having overcome all the obstacles of asylum, for wanting to stay in place: their exile is not, as it were, on them. This is all the more so given conditions where the long-term trust between sovereign of origin and citizens may have been irretrievably ruptured.[120] In short, the State of origin cannot invoke the more or less voluntary character of a departure *or* of a continued stay in exile as a sort of intervening variable that breaks the chain of causality and allows it to, in essence, blame the exiles for their own exile.

Having said that, there may be circumstances where, for other reasons, the State of origin may be able to assert that its responsibility is tempered or even null given the existence of independent variables that have precipitated the exile. Sometimes, the conditions whereupon a territory becomes inhospitable for a population or part thereof may not be, at least entirely, the State's fault. This is perhaps most obviously the case when a State is being invaded by another. Ukraine is not responsible for those who have gone into exile as a result of the occupation of part of its territory by Russia. Indeed, it has been remarked that there is an inherent unfairness to imposing an obligation on asylum States for acts that may have been provoked by third States, notably in the case of war.[121]

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119. García Lucero v. Chile, Preliminary Objection, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 176 (Aug. 28, 2013).

120. Judith N. Shklar, *Obligation, Loyalty, Exile*, 21 POLITICAL THEORY 181 (1993).

121. Fahad Siddiqui, *Finding the Third State: International Human Rights Law and State Responsibility for Iraqi Refugees*, § III (2011),

Still, even in such circumstances, one might expect the State of origin to seek to moderate the consequences of any such violence as part of its "obligation to protect" the rights of persons in its territory.[122] For example, States have an obligation to make sure that their nationals are not forced into exile obviously as a result of their own actions and what they could have reasonably foreseen as their consequences,[123] but also the violence or threats of third States or non-State actors on their territory,as part of a "right to remain."[124] Even if a State has failed to prevent exile, it at least has an obligation ex post to correct the circumstances that gave rise to flight in an effort to comprehensively remedy exile, notably as part of a politics of return.

B. Persecution as a Human Rights Violation by the State of Origin Identified Through the Refugee Determination Process

The focus on a "well-founded fear of persecution" is, classically, a standard to be met entirely in the host State as part of a process of asylum determination.[125] Persecution is envisaged as the trigger that creates the conditions demanding that asylum be granted.[126] Formally at least, the point of ascertaining the risk of persecution is emphatically not to condemn the State that is behind it, let alone make it formally liable. Indeed, it is not even obvious that human rights violations constitute persecution, for the simple reason that persecution is not only ill-defined in refugee law but, classically at least, a bit of non-concept in international human rights law.[127] A finding of a well- founded

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2035488 [https://perma.cc/9T7J-FMBA] (last visited Oct 2, 2023).

122. *See generally* Giustiniani, *supra* note 14.

123. Pooja R. Dadhania, *State Responsibility for Forced Migration*, 64 B.C. L. REV. 745, 782-93 (2023).

124. U.S. v. Cotroni, [1989] S.C.R. 1469 (Can.).

125. *See* Convention relating to the Status of Refugees art. 1(A)2, July 28, 1951, 189 U.N.T.S. 137. *See generally* Mark Gibney, *A "Well-Founded Fear" of Persecution*, 10 HUM. RTS. Q. 109 (1988).

126. UDHR, *supra* note 12, art 14.

127. For a critique of this orthodoxy (and a discussion of the indeterminate nature of the term "persecution"), see Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law, in* HUMAN RIGHTS AND IMMIGRATION (Ruth Rubio-Marín ed., 2014), https://doi.org/10.1093/acprof:oso/9780198701170.003.0002 [https://perma.cc/ZS8A-N473].

fear of persecution, then, is in no way determinative of the responsibility of the State of origin since, as Goodwyn-Gill put it, "the purpose [of the asylum determination process] is not to attribute responsibility, in the sense of State responsibility, for the persecution."[128]

This confirms that, even though "[a]nalogous aspects may arise" between State responsibility for persecution and the refugee determination process, that "correlation is coincidental, however, not normative" and "the issue of State responsibility for persecution, relevant though it may be in other circumstances, is not part of the refugee definition."[129] The "protection theory" of refugee determination is that individuals are entitled to asylum regardless of the origin of the threat they escape, and notably, as opposed to the "accountability theory,"[100] of whether the persecution is at the hands of a State or even significantly results from State inaction in protecting them from non-State actors.[130]

From an asylum perspective, this is defensible, but the net effect is that there is little focus on the actual source of the persecution, as the case may be. "Country of origin information" is gathered and relied on heavily to make a determination of persecution that involves detailed risk assessments, including by expert witnesses and data provided by the services of the host government, notably its embassies and consulates, as well as international agencies and NGOs.[131] However, that information is analyzed not so much for the purposes of evaluating that State's actual responsibility than the obligations of the host State. The situation in the country of origin is treated as a "fact" (or "legal fact") rather than law, a refracted reality seen entirely through the lens of asylum obligations. There is no practice, for example, of the State of origin intervening in asylum procedures to weigh on whether it is or not a source of persecution of certain individuals.

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128. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 77 (4th ed. 2021).

129. *Id.*

130. Jennifer Moore, *Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection*, 13 INT'L J. REFUGEE L. 32, 34–36 (2001).

131. Femke Vogelaar, *A Legal Analysis of a Crucial Element in Country Guidance Determinations: Country of Origin Information*, 31 INT'L J. REFUGEE L. 492 (2019).

Indeed, States which grant asylum are strictly speaking merely abiding by their own international humanitarian obligations. They are sometimes keen on making sure that this is not perceived as a comment on the State of origin. As the Preamble to the Declaration on Territorial Asylum of 1967 puts it, granting asylum from persecution "is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State."[132] This is of course somewhat ironic: a process entirely devoted to imposing an obligation on the host State and that relies exclusively on something wrong that another State has done but for which (as part of that process at least) it itself incurs no responsibility. But could it be otherwise, and could a finding of persecution - indirectly but meaningfully - designate the State of origin as responsible for human rights violations, including such violations as led an individual on the path to exile? Can the exile itself (and not just the persecution leading to it) be considered a form of persecution?

This requires some conceptual work, first, on the very notion of persecution as it appears in refugee law. Persecution, it is true, is not a self-standing human rights violation or much of a term of art in international human rights instruments except for a brief mention in the Universal Declaration of Human Rights.[133] However, it is also very much treated in the refugee process as based on the occurrence of serious human rights violations, notably of basic human rights (to life, to be free from torture, to be free from slavery, etc.). According to James Hathaway's influential account, persecution is "the sustained or systematic violation of basic human rights demonstrative of a failure of state protection."[134] The OHCHR describes "a threat to life or freedom on account of race, religion, nationality, political or membership of a particular social group" as "always persecution."[135] Crucially, this overlaps with the main grounds of discrimination under

132. G.A. Res. 2312 (XXII), 1967 Declaration on Territorial Asylum, at 81 (Dec. 14, 1967).

133. UDHR, *supra* note 12, art 14.

134. JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 185 (2014).

135. UN HIGH COMM'R FOR REFUGEES [UNHCR], HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS: UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 14 (1992).

international human rights law. It has also been argued that the understanding of persecution stands much to gain by being connected to international human rights law.[136] And the European Parliament, in its Qualification Directive, has found that persecution is a harm "sufficiently serious by its nature or repetition as to constitute a severe violation of human rights."[137] In other words, it is a remarkably short stretch from finding that there is persecution or a well-founded fear thereof and actual or potential human rights violations in the State of origin.

Note also that, even though the determination of a risk of persecution is not as such an inquiry into the responsibility of the State of origin, it of course often ends up relying quite directly and pivotally on evidence of that State's involvement. For example, refugee determination routinely relies on reports about the country of origin's persistent rights violations (so-called "country of origin information"): there can be no well-founded fear of persecution without proving to a relatively high degree the systematicity of human rights violations in the country of origin.[138] Even when the persecution is the act of private third parties, asylum practice has often focused on whether the State tolerated or encouraged it or at the very least whether it subsequently provided adequate national protection.[139] Indeed, knowledge production about the country of origin has become a key, if neglected, dimension of the determination of asylum.[140] To say so is not here to release pressure on host States to welcome refugees; it is merely to point out that host States de facto subtly participate

136. Nicholas R. Bednar & Margaret Penland, *Asylum's Interpretative Impasse: Interpreting Persecution and Particular Social Group Using International Human Rights Law*, 26 MINN. J. INT'L L. 145 (2017).

137. Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), art. 9.

138. Femke Vogelaar, *The Eligibility Guidelines Examined: The Use of Country of Origin Information by UNHCR*, 29 INT'L J .REFUGEE L. 617 (2017).

139. *See generally* Matthew J. Lister, *The Place of Persecution and Non-State Action in Refugee Protection, in* THE ETHICS AND POLITICS OF IMMIGRATION: CORE ISSUES AND EMERGING TRENDS (Alex Sager ed., 2016).

140. Jasper van der Kist, Huub Dijstelbloem & Marieke de Goede, *In the Shadow of Asylum Decision-Making: The Knowledge Politics of Country-of-Origin Information*, 13 INT'L POL. SOCIO. 68 (2019).

in an at least tangential exercise of evaluation of the State of origin's record.

That the determination of asylum de facto if not de jure impugns the human rights record of the State of origin is clear in a marginal but persistent doctrine that sees it as bordering on intervention in the affairs of the State of origin.[141] This means that a grant of asylum can be seen as both an invitation to flee, an evaluation of a State's acts vis à vis its own citizens and even the application of the asylum State's standards to the behavior of the State of origin. Although the degree to which this is truly interference can easily be relativized when common international human rights standards are involved (the asylum State is not evaluating the State of origin on the basis of rules by which the latter is not bound) and given the absence of coercion,[142] this at least points to a significant socio-legal dimension of findings of a risk of persecution: that they, inevitably, reflect on the performance of the State of origin and therefore, directly or indirectly, characterize its human rights performance.

Moreover, this is not simply a theoretical matter as shown the way some States of origin have occasionally vigorously protested or otherwise opposed the granting of refugee status by denying the risk of persecution. For example, China has been quite active in protesting awards of refugee status to dissidents abroad. The Chinese ambassador to Canada once went on the record to warn the Canadian government against giving asylum to Hong Kong residents fleeing repression there, warning "the Canadian side not [to] grant so-called political asylum to those violent criminals in Hong Kong because it is the interference in China's domestic affairs. . . . . [c]ertainly, it will embolden those violent criminals."[143] China similarly protested the granting of asylum to

141. Jack I. Garvey, *Toward a Reformulation of International Refugee Law New Directions in International Law*, 26 HARV. INT'L. L.J. 483, 487-493 (1985).

142. NĪRAJ NATHWANI, RETHINKING REFUGEE LAW 124–25 (2003).

143. Mike Blanchfield, *Chinese Envoy Warns Canada against Granting Asylum to Hong Kong Protesters*, CP24 (Oct. 15, 2020), https://www.cp24.com/news/chinese-envoy-warns-canada-against-granting-asylum-to-hong-kong-protesters-1.5146972?cache=%3FclipId%3D89530%2F5-things-to-know-for-monday-july-22-2019-1.4517630 [https://perma.cc/ZFY4-5SPW].

a Hong Kong student protester in Germany, [144] and to one in the UK.[145] It was quite clear to the German authorities, moreover, that the granting of asylum did rest on an evaluation of human rights conditions in Hong Kong, although they insisted that ultimately territorial asylum was a right that belonged to the State as such and that "he who uses his right offends no one."[146]

Finally, one could also point the role that refugees have often had in documenting, through interviews, violations in their country of origin. And whilst the trend is more for general human rights reports to be used in asylum determination processes, it is not impossible that asylum claim outcomes would be used to document human rights violations. In short, the fact that some States are piqued by the asylum granted to some of their nationals is an indication that a pronouncement on persecution by the State of origin is already a noteworthy byproduct of refugee determination, quite correctly occasionally identified as such by such States.

C. Remedies: Return and/or Compensation?

The idea that countries of origin have an obligation, including one of reparation, to those forced to go into exile has been touted on and off by scholars and, beyond questions of asylum, brings the exilic predicament more squarely in focus. Over the years, R. Yewdall Jennings,[147] Christian Tomuschat,[148]

144. Helen Davidson, *Hong Kong Says Germany Harbouring a Criminal after Granting Asylum to Protester*, THE GUARDIAN (Oct. 22, 2020), https://www.theguardian.com/world/2020/oct/22/hong-kong-says-germany-harbouring-a-criminal-after-granting-asylum-to-protester [https://perma.cc/DPD9-2FJV].

145. *UK Grants Nathan Law Asylum, Reveals $59m Fund for Hong Kongers*, AL JAZEERA, (Apr. 8 2021), https://www.aljazeera.com/news/2021/4/8/hong-kong-democracy-activist-granted-asylum-in-the-uk [https://perma.cc/BHT9-CXZR].

146. Stefan Talmon, *China Criticises Germany for Granting Asylum to Hong Kong Activists*, GERMAN PRAC. INT'L L. [GPIL] (Feb. 23, 2021), https://gpil.jura.uni-bonn.de/2021/02/china-criticises-germany-for-granting-asylum-to-hong-kong-activists [https://perma.cc/N2CC-W22L].

147. *See generally* R. Yewdall Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT.Y.B. INT'L L. 98, 110 (1939).

148. *See generally* Christian Tomuschat, *State Responsibility and the Country of Origin*, *in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 59 (Vera Gowland Debbas ed., 1996).

Megan Bradley,[149] Flavia Zorzi Giustiniani[150] and Luke T. Lee,[151] for example, have all argued for focusing on the "responsibilities of the source country" to both refugees and, indeed, asylum countries. The risk, however, is still that conceptions of refugees as a burden may feed into a discourse that is anti-asylum. After all, the suggestion might be, if host States do not get compensation, why should they bother with unilaterally and unjustly shouldering that burden? This reinforces a vision of refugees as mere pawns in inter-State relations, a commodity, and, at any rate, as a harm/net cost/burden on the host society, very much at the expense of a recognition of the agency and dignity of asylum seekers.[152]

The better view, then, is that it is the direct victims of exile – the exiles themselves – rather than the States who welcome them, whose rights are violated, both by the host state that potentially doubles down on their plight by unjustly denying them asylum but also, first and foremost, by the state of origin for forcing them on the path of exile. Indeed, return as a form of reparation only really makes sense as reparation towards the victims of exile themselves. This is precisely the contribution of a human rights approach to exile, one that ruptures the horizontality of State-to-State relations to create bold "vertical" lines of accountability between exiles and, notably, their State of origin.

In human rights, the accountability of the State of origin for exile manifests itself typically through a right of return. This is sometimes understood as the "basic, or primordial solution"[153] to the problem of refugees, the only one that provides a solution to the underlying problem of being denied the ability to live in one's country. After the South American transitions, an encouragement of exiles' return was a noted dimension of a commitment to correct abuses that often included not only the lifting of legal obstacles but also a range of social initiatives to ease

149. *See generally* BRADLEY, *supra* note 17.

150. *See generally* Giustiniani, *supra* note 14.

151. *See generally* Lee, *supra* note 14.

152. Jennifer Peavey-Joanis, *A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 254 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

153. Coles, *supra* note 16, at 201.

return.[154] Indonesia has made gestures towards granting rights to exiles following the 1965 anti-communist massacres, notably reintegrating them into their citizenship so that they could return.[155] Permitting return entails more than refraining from formally preventing nationals from returning: a true obligation to render that right effective by not putting obstacles in its way.

A State, in short, cannot "evade the duty by the creation of internal conditions which make it impossible for a humanitarian government to insist on the return of nationals."[156] Thus Colombia was found to have violated the rights of one of its nationals by not providing "effective domestic remedies allowing the author to return from involuntary exile in safety."[157] In the *Communidad Moiwana Community v. Suriname* case, for example, the Inter-American Court of Human Rights found that members of the Moiwana community who were also Suriname nationals and who had been forcibly exiled to French Guiana after an armed attack were de facto if not de jure prevented from returning.[158] Thus, Suriname had

> failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, [. . .] as there is objectively no guarantee that their human rights, particularly their rights to life and to personal integrity, will be secure. By not providing such elements – including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack – [. . .] the State has effectively deprived those community members still exiled in French Guiana of their rights to enter their country and to remain there.[159]

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154. Luis Roniger, *Exile, Transnational Life, Return, and Diasporas: The Southern Cone Experience*, 7 MIDDLE ATL. REV. LATIN AM. STUD. 1, 13-18 (2023) .

155. Mahinda Arkyasa, *Govt to Offer Options for Indonesian Political Exiles Abroad*, TEMPO (May 4, 2023), https://en.tempo.co/read/1722001/govt-to-offer-options-for-indonesian-political-exiles-abroad [https://perma.cc/4NYF-8MK9].

156. Jennings, *supra* note 147, at 113.

157. Jiménez Vaca, *supra* note 87.

158. Communidad Moiwana v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 120 (June 15, 2005).

159. Communidad Moiwana v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 120 (June 15, 2005).

Another type of case has concerned the existence of positive obligations by the State of nationality to facilitate return, for example by interceding on behalf of their nationals vis à vis third States or more generally providing transport to potential returnees. The case of *H.F. v. France*, involving former Daesh members seeking repatriation, gave rise to some interesting discussion of Article 3 § 2 of Protocol No. 4 to the ECHR.[160] The question was whether the right of return was merely a negative liberty (States have a duty to not prevent national persons from returning) or also included a positive obligation. As the Court put it, "[i]f Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrived at the national border or who had no travel documents, it would be deprived of effectiveness in the context of [this] contemporary phenomena."[161] This meant that, although there was no right to active repatriation or diplomatic protection, Article 3 § 2 "may impose a positive obligation on the State where, in view of the specificities of a given case, a refusal by that State to take any action would leave the national concerned in a situation comparable, de facto, to that of exile."[162]

At any rate, a forceful emphasis on a right of return is not necessarily a panacea. It might render exiles hostage to the politics of both the State of asylum (wishing to divest itself of that responsibility through possibly forced or coerced repatriation) and the State of origin (wanting its population "back" for whatever, potentially problematic, reason). As such it might frustrate the desire of exiles themselves to have the possibility to return whilst not actually returning,[163] in a context where they will have often taken root, for better or for worse in terms of their life trajectories, in the asylum State. Moreover, it is unclear how a right of return specifically *repairs* exile, as opposed to simply putting an end to it, which is not the same thing. One can surmise, then, that a right of return is a necessary but not sufficient condition of addressing exile.

160. H.F. v. France, App. Nos. 24384/19 and 44234/20, ¶ 211 (Sept. 14, 2022), https://hudoc.echr.coe.int/fre?i=001-219333 [https://perma.cc/2DUS-S6FC].

161. *Id.*

162. *Id.* ¶ 260.

163. In that respect, the emphasis in the very different field of international humanitarian law has notably been on not returning prisoners of war to their country – even though they undeniably have that right – against their will. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 259 (2000).

In addition to a right of return, therefore, exiles have a right to specific compensation, a further logical consequence of finding that exile is a human rights violation. The Cairo Declaration stipulates that "[a] state is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien."[164] There is some practice that points to States acknowledging their historical responsibility for, particularly, the mass expulsion of its nationals. West Germany, for example, compensated Jews who had been forced to leave Germany to escape the Holocaust.[165] Argentina in the late 1990s, as part of its transition to democracy, discussed a draft law of Reparación al Exilio, which would have awarded financial compensation for those in exile.[166] Although the law itself was never approved, the debates it gave rise to led the courts subsequently to accept reparation claims from exile as a human rights violation. There has been much talk, following a favorable ICJ judgment, [167] of compensating Chagosians for their forced displacement, including for the severe impoverishment that ensued.

Although such reparations could include rehabilitation and compensation, if exile is indeed first and foremost characterized by a loss of community, then reparation of exile should be directed at reintegrating individuals in such a community. Beyond the mere ability to return, then, initiatives that purport to reinstate the presence of the exile diaspora at the heart of the political becoming of the State of origin not only make sense from a transitional justice perspective or mesh well with exiles' own

164. International Law Association, *The Cairo Declaration of Principles of International Law on Compensation to Refugees (Report of the 65th Conference in Cairo, 1992)* [hereinafter Cairo Declaration] *reproduced in* 87 AM. J. INT'L L. 157, 158 (1993).

165. Andrea A. Sinn, *Returning to Stay? Jews in East and West Germany after the Holocaust*, 53 CENT. EUR. HIST. 393, 399 (2020).

166. Luciana Micaela Gianoglio Pantano, *Los Exiliados En La Justicia Transicional Argentina: Una Aproximación A Perspectivas Y Debates Respecto Al Exilio*. I JORNADAS DE TRABAJO SOBRE EXILIOS POLITICOS DEL CONO SUR EN EL SIGLO XX 1 (2012), https://www.memoria.fahce.unlp.edu.ar/trab_eventos/ev.2544/ev.2544.pdf [https://perma.cc/QD24-4FPX].

167. *See* ICJ, Separate Opinion of Judge Cançado Trindade, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, section XVI. See also, for an older take on the long-term consequences of exile in that case, David Vine, *The Impoverishment of Displacement: Models for Documenting Human Rights Abuses and the People of Diego Garcia*, 13 HUM. RTS. BRIEF 6 (2006).

aspirations but in themselves go to repair the void created by exile. In that respect, the participation of exiles in transitional justice processes or constituent assemblies should be seen as a process that is in itself reparative of exile, especially of course to the extent that it takes into account the experience of displacement itself.[168]

One illuminating question is whether the State of origin can limit reparations to exiles if they decline to return upon a resumption of conditions of safety. In light of the suggestion above that unwillingness to return does not fundamentally alter one's status and experience as an exile, it makes logical sense to consider that reparations should not be denied to those who do not return. This means offering reparations to victims of exile even in their exile country and even as they might (now) safely return. The Committee against Torture, for example, has recommended to Chile that it "take into consideration the obligation to ensure redress for all victims of torture and that it consider concluding cooperation agreements with countries where they reside so that they may have access to the kind of medical treatment required by victims of torture."[169]

In the *Lucero* case, Chile nonetheless argued that, if the applicant were in Chile, he would fully benefit from the "whole system of reparation that exists in Chile" but that "it is impossible to extend to the exiles who still live abroad for practical reasons and also a matter of resources, because it would be necessary to take resources away from the programs that are provided in Santiago in order to deal with situations of Chileans who live abroad."[170] The Court, noted, based on an analysis of a right to an effective remedy, that "although Mr. García Lucero is entitled to this 'right,' he cannot enjoy it while he lives outside Chile."[171] Even though the court could not conclude whether the right had been violated because of insufficient evidence about what Lucero had done to have it implemented, it cited the testimony of an

168. Roger Duthie, *Transitional Justice and Displacement*, 5 INT'L J. TRANSITIONAL JUST. 241, 343 (2011).

169. Concluding Observations of the Committee Against Torture: Chile, ¶ 18, U.N. Doc. CAT/C/CHL/CO/5 (2009).

170. García Lucero v. Chile, Preliminary Objection, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 176 (Aug. 28, 2013).

171. *Id.* ¶ 197.

expert witness who had noted that "[t]he right to reparation can never depend on where the persons lives," and that "[i]n situations where people have been forcibly expelled or exiled by the authorities, the obligation to provide redress, which includes [. . .] rehabilitation is even more evident."[172]

IV. CONCLUSION: ON THE POLITICS OF NOT BEING THROWN INTO EXILE

Hannah Arendt intuited that the stateless were the most vulnerable because they had ceased to have the right to have rights.[173] In the second half of the 20th century, this has oriented international legal developments towards the development of the refugee regime which, for all its limitations and faults, is at least supposed to ensure asylum and soften the consequences of forced migration. Somewhat forgotten in that process and, in fact, at risk of being dangerously obscured is, as Megan Bradley has argued,[174] the extent to which the State of origin, in pulling the rug from under citizens' feet, is the original and principal cause of the despondency of exile. It is the one that withdrew the condition prior to rights including, in a world of States, not only the right to stand and live on any bit of the planisphere but to do so in a State one has strong, typically national, ties to. Also neglected as a result is the possibility that, in reckoning with their own experience through literal or metaphorical return, exiles might bring a powerful antidote to their own uprooting predicament.

As this Article has argued, the better view is that refugee law always points back to a world in which human rights were already and perhaps irredeemably violated and often continue to be. That violation might certainly be made worse by third States' failure to exercise their responsibility as subsidiary hosts and this is rightly the focus of much attention. However, just as it could continue despite the granting of asylum, an understanding of refugee law as part of a broader arc of international human rights law can never entirely turn a blind eye to the original persecution that makes asylum necessary in the first place. This original

172. *Id.* n.207.

173. *See generally* ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW (2012).

174. BRADLEY, *supra* note 17, ch. 1.

persecution grounds the international human rights law of exile, understanding persecution as a very specific compound of rights violations rather than merely a condition requiring asylum.

"Non-exile" in this context could be to international human rights law what "non-refoulement" is to refugee law. At the same time, it is important to note the two are not functional equivalents, for at least three reasons. First, since exile is a condition antecedent to even having to seek asylum. It points to the root cause of the problem and not simply its consequence. Second, given the primacy of the links that bind a State to its population as opposed to the contingent links that may emerge from the chance encounter of asylum, the continued plight of exile manifests itself most strongly as a claim made against the State of origin which is specially obliged towards its nationals. Third and axiologically, whereas asylum is notoriously not-quite-a-right and more in the nature of a State obligation,[175] non-exile is, fully, a human right and ought to be recognized as such, including in terms of remedies. This asymmetry between the two principles, then, could set the stage for an almost paradigmatic reversal of the approach to refugees, one that gives genuine pride of place to the experience of exile understood first as coerced uprooting and only secondarily as the search for asylum.

It is in this spirit that this Article has made an argument for taking exile seriously as a human rights violation. Exile is not merely a marginal add-on to existing human rights violations. Rather, it is the combination of violations that give rise to it and of continued violations that flow from it. In the transnational space that it occupies, it is the pivotal concept that ties persecution in the State of origin as a human rights violation, and the further challenges of obtaining asylum in the host State. It captures the unique condition of those who are no longer of the society that they have had to leave and not yet or perhaps ever of the society

175. Michael Lysander Fremuth, *Access Denied? – Human Rights Approaches to Compensate for the Absence of a Right to Be Granted Asylum*, 4 U. VIENNA L. REV. 79 (2020).There has increasingly been a tendency to think of asylum as a human right to non-refoulement but on narrow grounds that are distinct from those of refugee law. See Salvatore Fabio Nicolosi, *Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law: The Role of Regional Human Rights Systems*, 4 INT'L HUM. RTS. L. REV. 303 (2015).

that they have been obliged to settle in, but who would have chosen neither.

It is largely our inability to think of human rights violations as anything but occurring in a stato-national space that has given rise to the strangely disjointed understanding of the experience of exiles under international law: individuals without past or history who merely show up at borders and whose sad tales of persecution are heard entirely within the confines of an asylum-determination process that largely shuns the responsibility of the State responsible for exile in the first place. Conversely, an emphasis on exile as a central modality of human rights violations, and on the powerful legacies and contributions of returnees to their society of origin[176] reinscribes their dignity as nationals and citizens, beyond their bare humanity, powerfully connecting human rights themes in the host and origin societies.

I note that the focus on the State of origin is not without, potentially, its own problematic politics. One concern has long been flagged in the context of earlier debates about a "right to remain:" what if that right was just too tempting a leverage for States intent on reneging on their asylum obligations to insist that States of origin should "hang onto" their populations?[177] The right to remain, if pushed to its logical conclusion (it is sometimes described, dramatically, as a "right to not be a refugee"),[178] might certainly focus attention on the responsibilities of the State of origin at the risk of eliding the responsibility of host States. The same concern emerged in the context of the promotion of compensation claims imposed on the State of origin which might make host Governments more reluctant to assist refugees and distract from the pressing issue of the moment.[179]

In the context of a fraught global migration debate, "blaming" States of origin for their production of exiles could be

176. *See,* e.g., Melina Schierloh, *La Reparacion y Sus Sentidos: El Exilio Come Violacion a Los Derechos Humanos*, *in* LIBERANDO MEMORIAS. SOBRE EXILIOS Y DESEXILIOS 111 (Cristina B. Garcia Vasquez ed., 2022).

177. James C. Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection*, 8 J. REFUGEE STUD. 288, 292 (1995).

178. T. Alexander Aleinikoff & Stephen Poellot, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VA. J. INT'L L. 195 (2013).

179. *See,* e.g., Lisa Khoury, *Palestinians in Lebanon: "It's like Living in a Prison"*, AL JAZEERA (Dec. 16, 2017), https://www.aljazeera.com/news/2017/12/16/palestinians-in-lebanon-its-like-living-in-a-prison [https://perma.cc/SQG7-46SG].

a further argument for host States seeking to further divest themselves of their asylum obligations. This might fuel policies, in turn, – such as those long applied to Palestinians in the Middle East – that, under the guise of maintaining the sacrality of a right of return end up instrumentalizing refugees and better denying them any future as citizens in the host State "to divert attention from their failure to provide meaningful protection to refugees."[180] It has even occasionally steered dubious calls for "interventions" in the State of origin to stop it from hemorrhaging refugees.[181] A corollary of a right to remain, moreover, might be an obligation on refugees to return as soon as the risk of persecution has faded, an obligation that one has reason to be wary of given what may by then be a credible and defensible case to remain, this time in the host country.[182]

Ultimately, however, the idea that one should not recognize a specific genre of human rights violation because to do so might unwittingly lend a helping hand to those willing to abuse that recognition for their own end, is a weak argument. The fact that the emphasis on exile might be abused is not particularly new nor decisive: there are few rights claims that cannot be turned against themselves to mean something else than what they were initially understood to mean or that we might ideally wish them to mean.[183] The reality remains that, although much of the attention has rightly focused on potential host States because they act as primary vectors of protection in situations of emergency, there can be no asylum seeking without the violent uprooting of exile in the first place.

To take the rights of asylum seekers seriously, then, is to understand them as potentially violated by two sovereigns that co-produce their plight: the State of origin and, as the case may be, the potential host State. On some level, if there were no human rights violations in the State of origin then there would be no problem of asylum altogether; but initial rights violations by the

180. James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 117 (1991).

181. Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT'L SEC. 43, 45-46 (1996).

182. Gerver, *supra* note 71, at 17.

183. Frédéric Mégret, *Human Rights Populism*, 13 HUMANITY: INT'L J. HUM. RTS., HUMANITARIANISM, & DEV'T 240, 243 (2022).

state of origin can be compounded by the further denial of asylum by the host states. In some cases, violations in the State of origin may be closely tied to the politics of the host State itself (for example because the latter invaded the former), leading to a heightened normative case for the host State's responsibility to grant asylum and a lessened sense that the original exile is entirely imputable to the State of origin.[184] Exile is a tragedy that is the product of national as well global conditions, and that can be made worse (but in a sense only worse than what it is already) by the unjust denial of the ability to seek asylum.

As this Article has shown, the idea that reparations are owed to individuals for exile rather than to host States for refugee inflows, usefully recalibrates the debate away from interstate relations and towards human rights, first and foremost as they relate to the State of origin. More importantly, there is nothing in the specific complaint that exiles can make to their State of origin that does or should be understood as limiting or eroding their ability to make a claim to a State of asylum. This was affirmed in the ILA's Cairo Declaration, which pointed out long ago that "[t]he possibility that refugees or UNHCR may one day successfully claim compensation from the country of origin should not serve as a pretext for withholding humanitarian assistance to refugees or refusing to join in international burden-sharing meant to meet the needs of refugees."[185]

At any rate, the symmetrical problem—that of an excessive focus on asylum "at the expense of the fundament rights of the individual to return to his country and to enjoy his basic human rights"[186]—should also count potentially as a danger of an exclusive focus on refugee determination. In fact, a proper understanding of the specific human rights gravity of exile can and should reinforce an argument about the necessity of a welcoming and international law-abiding host society. It highlights the political agency of refugees and thus reinforces a

184. *See generally* Alise Coen, *Capable and Culpable? The United States, RtoP, and Refugee Responsibility-Sharing*, 31 ETHICS & INT'L AFFS. 71 (2017); JAMES SOUTER, ASYLUM AS REPARATION: REFUGE AND RESPONSIBILITY FOR THE HARMS OF DISPLACEMENT (2022); Luke Glanville, *Hypocritical Inhospitality: The Global Refugee Crisis in the Light of History*, 34 ETHICS & INT'L AFFS. 3 (2020).

185. Cairo Declaration, *supra* note 164, at 159.

186. Coles, *supra* note 16, at 10.

sense of their inherent dignity, rather than their mere definition through subjection to possible persecution. That agency simultaneously takes the form of acting as deterritorialized agents of the self- determination of the people exiles left behind;[187] as what Arendt referred to as "acting pariahs" in the host State;[188] and as a sort of cosmopolitan vanguard for the rights of the stateless.[189]

In effect, the point is merely that both the State of origin *and* the State of destination can violate the rights of the exile in their own, irreducible ways: the former by setting persons on the path to exile; the latter by denying them the asylum necessary for or to attenuate the consequences of that exile. This also means that one *can* insist that exiles have it both ways because, as this Article has shown, they do meaningfully manifest their desire to have it both ways: both interim or permanent protection on the one hand *and* ongoing, meaningful possibilities of return and reparations on the other. Indeed, the emphasis on a "responsibility to solve" the problem of refugees[190] points to the need to address both questions of asylum and integration in the host State and return and/or compensation in the State of origin.

For the sake of completeness, this Article notes the potential of these debates about the relative responsibilities of State of origin and host State to bleed, problematically, into the categories of ordinary migration. Pooja R. Dadhania has recently focused attention on the broader problem of State responsibility for "forced migration."[191] Given that forced migrants are not normally entitled to asylum, the case that their State of origin is relatively more responsible for their departure from a human rights perspective ought to be a strong one. Might there nonetheless be a darker dimension to the intimations of State of origin responsibility, holding them accountable for their having

187. For an illustration, see Ruba Salih, *From Bare Lives to Political Agents: Palestinian Refugees as Avant-Garde*, 32 REFUGEE SURV. Q. 66 (2013).

188. Wolfgang Heuer, *Europe and Its Refugees: Arendt on the Politicization of Minorities*, 74 SOC. RSCH.: INT'L Q. 1159 (2007).

189. *See generally* Ali Emre Benlin, *March of Refugees, Cosmopolitanism, and Avant-Garde Political Agency*, *in* MIGRATION, PROTEST MOVEMENTS AND THE POLITICS OF RESISTANCE: A RADICAL POLITICAL PHILOSOPHY OF COSMOPOLITANISM 115 (Tamara Caraus & Elena Paris eds., 2018).

190. Aleinikoff & Poellot, *supra* note 178.

191. Dadhania, *supra* note 123.

not prevented their nationals from emigrating – by failing to retain them as it were? Such suggestions, which are not implausible in the current political climate, need to be taken very carefully. Blaming States for their emigration can be in the worst tradition not only of rich world smugness and condescension, but also of simply minimizing the agency of migrants.

There is reason, nonetheless, to think that arguments that may work in the refugee context do not work and should not be replicated in the emigration context. States are not "responsible" for the migration of their citizenry in the same way they are, if at all, responsible for their coerced exile. The conditions of structural poverty that determine migration from the country of origin, for example, are more likely to not be that country's exclusive fault, even as it is certainly under an obligation to minimize their incidence.[192] Indeed, in some cases forced migration may be the responsibility of the host State to which migrants direct themselves (for example, a State that historically colonized the State that migrants seek to escape), suggesting that it cannot shift the burden of responsibility entirely back to the State of origin.[193]

In sum, if the intuition that exile can in some cases primarily be understood as a human rights violation by the State of origin is followed through systematically, then the consequences of this shift may be sizable. Whilst in no way minimizing the crucial importance of asylum, this should also reorient thinking towards the entire exilic arc and not merely a truncated version of it. Yet perhaps the greatest contribution of a human rights approach to exile is that it does not take as its starting point a conversation about the exigencies of interstate life (asylum, deportation, burden sharing, State responsibility), but locates concern with the

192. *See generally* Paulette Dieterlen, *Taking Economic and Social Rights Seriously: A Way to Fight against Poverty*, *in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: THEORY AND POLITICS (Pogge Thomas ed., 2009).

193. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019); Sara Amighetti & Alasia Nuti, *A Nation's Right to Exclude and the Colonies*, 44 POL. THEORY 541 (2016); Dirk Kohnert, *African Migration to Europe: Obscured Responsibilities and Common Misconceptions*, (GIGA Working Paper, Paper No. 49, 2007), https://papers.ssrn.com/abstract=989960; Gurminder K. Bhambra, *The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism*, 23 EUR. L.J. 395 (2017); Lucy Mayblin, *Colonialism, Decolonisation, and the Right to Be Human: Britain and the 1951 Geneva Convention on the Status of Refugees*, 27 J. HIST. SOCIO. 423 (2014).

exilic predicament at the heart of the human experience of flight, dislocation and identity loss. It can thus also be a critical rejoinder to human rights themselves, at the intersection of bare life and citizenship, stasis and movement, or individual and communal life.