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## "Federalizing" Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration

### Cover Page Footnote

Senior Managing Attorney, Guantanamo Global Justice Initiative, Center for Constitutional Rights, New York City; J.D., Yale, 1994. The views expressed herein are not those of the author's employee, nor, if later proven incorrect, of the author. Much of the discussion of the retroactivity cases in Part I of this piece and the substantive international law standards in Part III derives from briefs the Center submitted in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), *Gordon v. Mule*, 153 F. App'x 39 (2d Cir. 2005), and *Lake v. Gonzales*, Nos. 05-4204-ag & 05-4403-ag, (2d Cir.), consolidated on appeal with *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), and cases of four other petitioners. Those briefs were the product of the collective labors of attorneys and law students at the Center--Jennifer M. Green, Claire Tixeire, Rachel Meeropol, Maria Couri LaHood, and Lara Rabiee--as well as various wonderful attorneys we have worked with on a regular basis: Claudia Slovinsky, Beth Stephens, William Aceves, and the late John D.B. Lewis.

# “FEDERALIZING” IMMIGRATION LAW: INTERNATIONAL LAW AS A LIMITATION ON CONGRESS’S POWER TO LEGISLATE IN THE FIELD OF IMMIGRATION

*Shayana Kadidal\**

## INTRODUCTION

Immigration is almost always a good thing for countries.<sup>1</sup> The economic case is the easiest one to make: most conservative scholars will tell you that even uncontrolled illegal immigration is an unalloyed benefit for the economies of the countries that take in immigrants.<sup>2</sup> That is particularly

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1. See, e.g., Alexander Tabarrok, *Economic and Moral Factors in Favor of Open Immigration*, INDEP. INST., Sept. 14, 2000, <http://www.independent.org/issues/article.asp?id=486> (“Virtually all economists agree that immigration increases the wealth of the United States. For example a group of economists all of whom had been either president of the American Economic Association or a member of the President’s Council of Economic Advisors, were asked ‘On balance, what effect has twentieth century immigration had on the nation’s economic growth.’ 81% of these prominent economists answered ‘very favorable,’ 19% said slightly favorable, not a single one said slightly or very unfavorable.”).

2. See, e.g., PHILIPPE LEGRAIN, IMMIGRANTS: YOUR COUNTRY NEEDS THEM 19 (2007) (“The World Bank reckons that if rich countries allowed their workforce to swell by a mere 3 per cent by letting in an extra 14 million workers from developing countries between 2001 and 2025, the world would be \$356 billion a year better off, with the new migrants themselves gaining \$162 billion a year, people who remain in poor countries \$143 billion, and natives in rich countries \$139 billion.”); JULIAN L. SIMON, IMMIGRATION: THE DEMOGRAPHIC AND ECONOMIC FACTS, EXECUTIVE SUMMARY (1995), [http://www.cato.org/pubs/policy\\_report/pr-immig.html](http://www.cato.org/pubs/policy_report/pr-immig.html) (“Immigrants do not increase the rate of unemployment among native Americans, even among minority, female, and low-skill workers. The effect of immigration on wages is negative for some of these special groups and positive for others, but the overall effects are small. Total per capita government expenditures on immigrants

true for developed countries, where reproductive rates generally drop as the average income rises, a trend that tends to raise the average age of the native population and to correspondingly reduce the ratio of workers to retirees, which in turn strains retirement systems (both private and public) and weighs down public finances. Immigrants tend to be younger than average when they arrive, and tend to have more children, helping counter the demographic impact of an increasingly aged native population. The increase in population in absolute terms also helps nations avoid the “French Disease” whereby negative population growth makes it impossible to keep pace with rival nations’ total GDP.<sup>3</sup> Not all of the benefits are exclusive to modern, developed societies; perhaps the best evidence of this is that the Founders, in the Declaration of Independence, faulted the King for discouraging migration to the colonies.<sup>4</sup>

Despite this, immigration law in the United States has for the last several decades been characterized by a one-way downward spiral, as citizen-voters in federal elections consistently approve ever more draconian laws aimed at keeping immigrants from coming here in the first place or kicking those already here out. A pair of laws enacted in 1996 under President William J. Clinton’s signature, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), marked a sea-change in immigration law for noncitizens in deportation proceedings. Notably, the IIRIRA in particular repealed schemes that had previously allowed immigration judges to grant, on a case-by-case basis, discretionary relief for almost half of all otherwise-deportable aliens. Prior to 1996, one of the more common triggers for such discretionary relief was the presence of family connections that deportation would rend asunder—connections to spouses or children who would be left behind in the United States. For large categories of removable aliens, that form of discretionary relief disappeared with AEDPA and the IIRIRA. We can expect little better in the future from federal legislators, as aliens form a convenient electoral target, absorbing blame for everything from unemployment to social disorder and crime to declining schools.

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are much lower than those for natives, no matter how immigrants are classified. . . . Natural resources and the environment are not at risk from immigration.”); Tabarrok, *supra* note 1.

3. See James F. Hollifield, *Immigration and Republicanism in France: The Hidden Consensus*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 145 (Wayne A. Cornelius et al. eds., 1st ed. 1994) (“To sustain the surge in economic growth during the belle époque . . . French industrialists needed access to additional supplies of labor, which they had great difficulty finding at home. . . . French population growth slowed dramatically during the first half of the nineteenth century and never really recovered until the post-World War II period.”).

4. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) (“He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.”).

Assuming aliens continue to be denied the most basic of political rights—voting<sup>5</sup>—there are two solutions one can envision to the dilemma presented by the fact that a majority of citizen voters at the federal level consistently back repressive legislation denying other basic rights to aliens. First, one might transfer power *down* a level of sovereignty, to the states. Alternately, one could go *up* a level, appealing to a higher level of law than national government. (In some sense, the civil rights movement of the 1960s is a model of this latter sort of approach—seeking to transcend repressive state laws by evoking transcendent (and legally superior) national standards of equality to trump them.)

There may be significant benefits to be had from devolving immigration power (especially over admissions, that is, issuance of visas) to the states,<sup>6</sup> replacing the “downwards spiral” with the “race to the bottom” as states compete with each other to reap the benefits of increasingly permissive immigration. If we assume that there is some localization of the most visible benefits of immigration (for instance, in areas with high-technology industries dependent on a steady influx of highly skilled workers from abroad) and that political empathy with noncitizens is strongest in these areas as well (either because many citizens in these areas are first- or second-generation immigrants themselves (e.g., New York or California) or are of older vintage but have a strong cultural identification as a group formerly subject to immigration discrimination (e.g., Irish or Italian Americans in Boston)), then citizen-voters in some states might be more likely to open the gates of their states to immigrants. Those states better equipped to absorb and benefit from immigrants could open their doors without being inhibited by the marginal political resistance added at the national level by voters in less-receptive states. If the economic benefits of immigration predicted by theory were then verified empirically in the “laboratories” of those states implementing permissive immigration policies, other states might follow the lead of liberalizing states.

However, topic of this essay is the opposite “federalizing” approach: the appeal to the higher power of international law, in particular as a limitation on draconian legislation aimed at making it easier to deport aliens. (Obviously, international law will have less to say about wholesale

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5. Although voting, as the most fundamental of political rights, is typically considered exclusive to the citizenry—“the most common form of tyranny in human history,” as Michael Walzer puts it, see MICHAEL WALZER, SPHERES OF JUSTICE 62 (1983)—there is, of course, no reason to assume that aliens must be denied the right to vote. Indeed, throughout most of the history of the United States (from the founding onward), aliens voted in local, state, and even federal elections, although the practice rapidly vanished by the 1920s. See RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 15–40 (2006).

6. For instance, one proposal set forth by Davon Collins would have the federal government set an annual national quota but then allocate visas to state governments (perhaps by population, perhaps based on past rates of immigration to those states) and then let the states experiment with different arrangements for parsing them out—or not using them at all. See Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL’Y REV. 349 (2007).

immigration policy—the setting of immigrant visa policy—than it will about the rights of aliens already here to remain here.) There have been a small handful of examples in the last decade of judges looking to international law to find limitations on the power of immigration authorities to deport aliens.<sup>7</sup> In those cases, however, the lever for introducing international law into the discussion has been some latent ambiguity in the statutes themselves; the courts, analyzing the ambiguity, have attempted to resolve it by interpreting the statute so as not to violate norms of international law.

I believe that there is a much more fundamental level on which international law can be brought to bear against repressive immigration legislation—even in the absence of statutory ambiguity. In the remainder of this piece, I sketch out a theory for how international law may fundamentally limit the power of Congress to legislate in the field. That theory can be summarized in a single sentence: Congress's power to regulate immigration is not enumerated anywhere in the text of the U.S. Constitution; instead, the U.S. Supreme Court has consistently characterized it as a power “inherent in sovereignty,” created by—and therefore limited by—international law. As international law norms emerge over time, they may diminish Congress's power (so often described as “plenary”) to act in this field.

I also argue that *existing* international law norms regarding the right to family integrity and association—the right to live together as a family—already provide significant protections to aliens facing deportation who have strong family ties to the United States. The right to family integrity in international law subsumes at least two norms: a prohibition against arbitrary family separation—without a hearing or possibility of discretionary relief—and a requirement of proportionality between the state interest underlying the separation and the hardship to the affected individuals.

#### I. THE RETROACTIVITY CASES: STATUTORY AMBIGUITY AS AN ENTRÉE FOR INTERNATIONAL LAW

As noted above, there have been two recent cases where a federal court has found that international law places limitations on the ability of immigration officials to remove aliens, notwithstanding a statute that arguably removes official discretion to do otherwise. Both cases—*Maria v.*

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7. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) (discussed in detail *infra* text accompanying notes 11–28); *Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999).

The district court reached a similar conclusion in *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd in part on other grounds and question certified sub nom.* *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998). For a discussion of the background and procedural history of *Mojica*, see Sara A. Rodriguez, *Exile and the Not-So-Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 495–96 (2006).

*McElroy*<sup>8</sup> and *Beharry v. Reno*<sup>9</sup>—were first decided before Judge Jack Weinstein in the U.S. District Court for the Eastern District of New York.

At issue in these cases was the continued availability of discretionary relief from deportation for aliens who were rendered removable by dint of their criminal convictions. Prior to 1996, the immigration statutes provided broad leeway for immigration judges to consider individual circumstances and grant relief from deportation at the judge's discretion, even when the statute allowed for removal of the alien.<sup>10</sup> However, aliens rendered deportable by dint of their convictions for "aggravated felonies" were excluded from the possibility of such "compassionate" hearings and discretionary relief. The 1996 Acts expanded the definition of "aggravated felony," sweeping in many drug crimes and other crimes that had not previously been considered "aggravated" for purposes of foreclosing several categories of discretionary relief.

Theft offenses had, prior to 1996, been considered "aggravated" if they resulted in a sentence of five years or more. The 1996 Acts changed the threshold to one year. Don Beharry, the petitioner in *Beharry*, was one of the many affected by this change.<sup>11</sup> Beharry was a Trinidadian national who came to the United States as a child; he had a young daughter who, born in the United States, was a U.S. citizen. Beharry's criminal conduct took place in July 1996, before the passage of the laws that redefined his crime as an "aggravated felony," but his sentence was passed down in November 1996, after the acts had passed into law.<sup>12</sup> His case thus raised retroactivity questions that were not clearly answered by the text of the 1996 statutory amendments or by the usual sources of interpretation to which one would turn to resolve such mysteries.<sup>13</sup> The Supreme Court had

8. 68 F. Supp. 2d 206.

9. 183 F. Supp. 2d 584.

10. See *INS v. St. Cyr*, 533 U.S. 289, 293–97 (2001) (recounting history of section 212(c) of the Immigration and Nationality Act).

11. Full disclosure: Don Beharry was also a client of the Center for Constitutional Rights, which argued his case before the U.S. Court of Appeals for the Second Circuit.

12. See *Beharry*, 183 F. Supp. 2d at 586.

13. The legislative history of the 1996 Acts is generally unenlightening. The 1996 Acts—the Antiterrorism and Effective Death Penalty Act (AEDPA), enacted first, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—were notable for the great speed with which they were drafted and rushed into law. See Claudia Wilner, Note, "*We Would Not Defer to That Which Did Not Exist*": *AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1458 (2002) ("AEDPA was a hastily drafted statute, enacted as part of a highly politicized legislative response to the Oklahoma City bombing in 1995."); Alexander Rundlet, Comment, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 704 (1999) ("The result [of AEDPA's rushed drafting], as the cases reveal, has been sloppy legislation . . ."); Jacqueline P. Ulin, Note, *A Common Sense Reconstruction of the INA's Crime-Related Removal System: Eliminating the Caveats from the Statue of Liberty's Welcoming Words*, 78 WASH. U. L.Q. 1549, 1558 n.50 (2000) ("As other commentators have noted . . . the [IIRIRA] legislation is sloppy." (internal quotation marks omitted)). Interestingly, an examination of the legislative history of the relevant statutes indicates not only that Congress did not intend to violate international law, but also that Congress remains committed to family unification, which had long been a central

announced in *INS v. St. Cyr* that where the conviction predated the 1996 statutory amendments, aliens would be entitled to a hearing under section 212(c) of the Immigration and Nationality Act (INA) if the statute as it existed prior to the 1996 amendments would have permitted section 212(c) relief at the time of conviction. However, Beharry's convictions were after the passage of the 1996 Acts. His eligibility for relief under another discretionary relief provision of the immigration statute<sup>14</sup> remained, in Judge Weinstein's view, ambiguous,<sup>15</sup> and on the lever of statutory ambiguity the force of international law came to bear on the retroactivity question.

Courts are accustomed to the idea of interpreting ambiguous statutes so as to avoid meanings that would raise serious questions as to the statute's constitutionality—the doctrine of “constitutional doubt.” Similarly commonplace in the law is an avoidance doctrine based on international law rather than constitutional law. In both instances, the touchstone is statutory ambiguity.

The Supreme Court has long held that courts must interpret statutes to avoid conflict with international law whenever possible, first enunciating this principle in *Talbot v. Seeman*.<sup>16</sup> In *Talbot*, the Court considered the application of a statute regulating the salvage payable on “ships and goods . . . re-taken from the enemy.”<sup>17</sup> The Court found that the statute would conflict with international law if applied to *all* ships taken from the enemy. Although “[t]he words of the act would certainly admit of this construction,”<sup>18</sup> the Court interpreted the statute to apply only to the narrower category of captures permitted by international law. In the words of Chief Justice John Marshall, “the laws of the United States ought not . . . be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”<sup>19</sup> “By this construction,” the Chief Justice concluded, “the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.”<sup>20</sup> Similarly, in *Murray v. Schooner*

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principle of our immigration policy. The House report for the IIRIRA declares that “[t]he preservation of the nuclear family . . . should continue to be a cornerstone of U.S. immigration policy.” H.R. REP. NO. 104-469, pt. 1, at 134 (1996). Congress intended to give “highest priority in the immigration system to unification of the nuclear family.” *Id.* at 171.

14. The central provision at issue in *Beharry* was section 212(h), which allowed waiver of deportation under special circumstances for aliens whose deportation would result in substantial hardship to a citizen spouse or child.

15. The Second Circuit had announced in a pre-*INS v. St. Cyr* case that, where crimes predated the change in law but the convictions did not, section 212(c) relief would be foreclosed. *See Domond v. INS*, 244 F.3d 81 (2d Cir. 2001). Judge Jack Weinstein's opinion seemed to indicate that he believed *Domond v. INS* might be overturned. *See Beharry*, 183 F. Supp. 2d at 589, 605.

16. 5 U.S. (1 Cranch) 1, 43–45 (1801).

17. *Id.* at 43.

18. *Id.*

19. *Id.*

20. *Id.* at 44.

*Charming Betsy*,<sup>21</sup> the Supreme Court interpreted a statute that on its face authorized seizure of neutral vessels in violation of customary international law. The Court nevertheless held the statute invalid. Writing for the Court, Chief Justice Marshall elaborated the doctrine of statutory construction that affirmed the importance of international law as a guide to statutory construction by declaring that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."<sup>22</sup>

The modern Court has frequently turned to international law to assist in the interpretation of congressional enactments, including the INA.<sup>23</sup> The notion that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," often referred to as the "*Charming Betsy* rule," has led to a corollary "clear statement" rule: statutes should be presumed to conform to international law unless Congress has expressed a clear intent to the contrary. The *Charming Betsy* Court itself said as much, and the position is reflected in the modern Restatement.<sup>24</sup>

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21. 6 U.S. (2 Cranch) 64 (1804).

22. *Id.* at 118.

23. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–41 (1987) (international law used as a guide to the construction of Refugee Act of 1980 and the INA); see also *Weinberger v. Rossi*, 456 U.S. 25, 32–33 (1982) (construing statute so as not to abrogate preexisting executive agreements); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (construing labor relations statute so as not to violate customary rules of maritime jurisdiction); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (applicability of statute determined by customary maritime law in the absence of clearly expressed congressional intent to the contrary); cf. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe."). See generally Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

24. See *Charming Betsy*, 6 U.S. (2 Cranch) at 119 ("extraordinary intent" of Congress to violate the law of nations must be "plainly expressed" to be given effect by the courts); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.").

The Supreme Court has often invoked a "clear statement" rule of construction with regard to statutes that would otherwise contradict earlier-in-time *treaty* obligations, even though statutes are often said to stand at parity with treaties. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."); *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); *Chew Heong v. United States*, 112 U.S. 536, 559–60 (1884) (creating exception to a statutory scheme in order to avoid a conflict with an *earlier* internationally binding treaty; Court would not deem a treaty abrogated "unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature").

In Beharry's case, Judge Weinstein found that Congress failed to adequately express in the 1996 statutes whether it intended the amendments to apply retroactively to people like Beharry, whose conviction occurred after passage but whose crime occurred before it. Under section 212(h) of the INA, Beharry might have qualified for a discretionary waiver of deportation if he could have shown that his deportation would result in a substantial hardship to his citizen child. If the 1996 bars on discretionary relief did apply, they would foreclose relief. Turning to international law, Judge Weinstein found—from a variety of sources, including both treaties and customary international law—an international law norm against arbitrary separation of families,<sup>25</sup> which he interpreted to be violated by a rule that demanded deportation automatically for persons thrust into the “aggravated felon” category by Congress in 1996, with no consideration whatsoever for the hardship on an innocent citizen child or the equities for the parent facing removal. Invoking the *Charming Betsy* doctrine, Judge Weinstein interpreted the statute to leave open the possibility of discretionary relief for the “small subset of . . . aliens who would otherwise be ineligible for section 212(h) relief” because they were “convicted of an ‘aggravated felony’ as defined after they committed their crime, but . . . not so categorized when they committed the crime.”<sup>26</sup> “It would be a violation of international law to categorically deny to all members of this group” any possibility of relief.<sup>27</sup> Accordingly, he ordered that Beharry was “entitled to a hearing at which a broad discretion to exclude may be exercised by the INS,” but at which relief would at least be available.<sup>28</sup>

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25. See *infra* Part III.

26. *Beharry v. Reno*, 183 F. Supp. 2d 584, 605 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

27. *Id.* at 604–05.

28. *Id.* at 605. The “compassionate hearing” ordered by Judge Weinstein never took place. *Id.* at 604. The Second Circuit eventually overturned the judgment on other grounds, finding that Beharry had failed to exhaust his remedies by raising these international-law-based arguments in his administrative proceedings, and thus that the district court lacked subject-matter jurisdiction. See *Beharry*, 329 F.3d 51. The Center for Constitutional Rights moved the panel for reconsideration on a variety of grounds. Due to an administrative error, the court of appeals did not realize that a petition for rehearing had been filed for several weeks. Eventually, it issued a revised opinion, adding a single footnote asserting that it would have been an abuse of discretion for Beharry to prevail on these facts. Oddly, because of the delay engendered by the administrative error, the bound hardcover volume of the Federal Reporter does not include the footnote; the reissued opinion, which is available on LEXIS, is the only one that contains it. Cf. *Beharry v. Ashcroft*, No. 02-2171, 2003 U.S. App. LEXIS 8279, at \*3 n.1 (2d Cir. May 1, 2003, revised July 24, 2003) (“But even if the exhaustion requirement here is not jurisdictional, we believe that it would be an abuse of discretion on the facts of this case for the district court to exercise jurisdiction.”).

In an unpublished opinion, a panel of the Second Circuit eventually rejected similar arguments made by a similarly (though not identically) situated petitioner. See *Gordon v. Mulé*, 153 F. App'x 39, 41 n.1 (2d Cir. 2005) (*Gordon*—in contrast to *Beharry*—may not have qualified for section 212(h) relief at the time of conviction in any event because his conviction involved the sale of heroin).

## II. BEYOND STATUTORY AMBIGUITY: DOES CONGRESS HAVE THE POWER TO LEGISLATE IN THE IMMIGRATION FIELD IN VIOLATION OF INTERNATIONAL LAW?

The sort of argument presented in *Beharry* was useful only because immigration law has seen its share of ambiguities in the last decade-plus—especially as to retroactive application of absolute bars to discretionary relief. (Anyone who clerked in the federal courts from about 1996 to 2000 is intimately familiar with the problems created by those ambiguities.) But the approach predicated on statutory ambiguity is of limited long-term utility to advocates—all the more so as 1996 drifts increasingly farther back into history, and fewer immigration cases involving pre-1996 convictions find their way into the federal courts.<sup>29</sup>

There is, however, a much more fundamental argument—one thoroughly anticipated by Judge Weinstein's opinion in *Beharry*<sup>30</sup>—for asserting that international law places limits on congressional power to create oppressive deportation standards. As set forth above, the *Charming Betsy* canon places limitations on the ease with which legislation will be read to violate international law, but it does not suggest that Congress cannot break derogable tenets of international law, should that be Congress's clearly stated intent. In contrast, the argument on which I would like to focus suggests that international law affects not the way in which we should

29. The exhaustion requirement hesitantly implied in *Beharry*'s Second Circuit panel opinion would, if it were actually read as binding and enforced by the courts, further reduce the usefulness of these arguments, though it did not stop at least one enterprising petitioner—Alfien Gordon—from raising, pro se, the arguments made in *Beharry* during his administrative appeals. See Brief for the Petitioner-Appellant at 4–6, 6 n.4, *Gordon v. Mulé*, No. 02-2051 (2d Cir. Apr. 28, 2005).

30. Judge Weinstein's opinion in *Beharry* turned on statutory ambiguity and the *Charming Betsy* canon. However, the following argument was set forth in the opinion:

Like admiralty, immigration law is founded on international law. The Supreme Court has repeated that the basis for Congress's extremely broad power over aliens comes not from the Constitution itself, but from international law. "*It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.*" It is because of international norms that Congress has such broad authority:

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.

Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

The *Harisiades* court further noted that "a State can expel even domiciled aliens without so much as giving the reasons." As authority for this proposition, the Court cited to Oppenheim's 1920 treatise (3d ed.) on international law. That treatise has, of course, been superceded . . .

Since [C]ongress's power over aliens rests at least in part on international law, it should come as no shock that it may be limited by changing international law norms.

*Beharry*, 183 F. Supp. 2d at 598 (citations omitted) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 587–88 (1952); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

interpret Congress's acts after the fact, but rather that it curtails Congress's very power to legislate, at the root rather than the branch.

Most discussions of Congress's powers begin with the text of Article I. It is a commonplace of legal education to assume that there are no federal powers that are not specifically enumerated in the Constitution.<sup>31</sup> If that were true, however, we might have no federal immigration law—because the power to regulate immigration generally<sup>32</sup> is nowhere described in the Constitution's text. There is a Naturalization Clause, allowing Congress to set uniform standards for naturalization<sup>33</sup>—but there is no corresponding immigration clause.

Given today's pervasive control of immigration by the federal government, this simple point seems astonishing to most students (and lawyers!) who encounter it for the first time. Keep in mind that until 1875 there was really almost no direct federal regulation of immigration. At the time of the founding, as alluded to in the introduction, the federal government generally encouraged free immigration.<sup>34</sup> Throughout our first century of nationhood, some states regulated migration through fees and rare exclusion provisions for paupers or criminals.<sup>35</sup>

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31. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.”).

32. Of course, the Slave Migration Clauses are an exception to the *general* absence of an immigration power in the Congress. U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”)

33. *Id.* art. I, § 8, cl. 4 (“The Congress shall have power . . . [t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”).

34. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 98–99 (2002) (“Federal activity in the immigration area was minimal during the pre–Civil War period. The federal government’s express policy was to encourage settlement in the new nation, and naturalization was extended to free white residents. Federal legislation was adopted to ensure the health and safety of passengers and to grant duty-free admission to their personal and professional possessions. No meaningful federal restrictions on immigration were imposed.” (footnotes omitted)); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) (“[T]he myth [that the borders of the U.S. were *legally* open prior to the 1870s] has a substantial foundation in fact: U.S. legal policy warmly welcomed certain kinds of immigration, and restrictive laws were often poorly enforced. Neither Congress nor the states attempted to impose *quantitative* limits on immigration.” (footnote omitted)).

35. See Neuman, *supra* note 34, at 1841 (“State opposition to the immigration of persons convicted of crime continued a longstanding dispute of the colonial period. The sentencing of felons to transportation to America and their shipment to the colonies as indentured servants had sparked repeated protests, including Benjamin Franklin’s famous proposal to ship rattlesnakes to England in return. Several colonies attempted to pass restrictive legislation, but after the enactment of the Transportation Act of 1718 such legislation was frequently vetoed by the British government. Independence released the states from that control, but also widened the field by tempting other European nations to dump their

The question whether Congress had power over immigration under the Commerce Clause—a question tied up as much with the debates over slavery as with concerns over general immigration—was for a long time unresolved. One of the early cases touching on the issue was *New York v. Miln*,<sup>36</sup> a challenge to a New York State statute requiring reporting of all foreign passengers on board ships brought into the port of New York.<sup>37</sup> The state defended the law as a valid exercise of the police powers, claiming that to invalidate it would affect many southern states' restrictions on entry and passage of free blacks. George Miln, a ship captain, argued that the reporting requirement affected foreign commerce, a field where Congress held exclusive power. The Court rejected this "dormant" international Commerce Clause argument.<sup>38</sup> However, a decade later, a sharply divided Supreme Court held by a five-to-four vote—with no majority opinion, and several lengthy concurrences—that state head taxes<sup>39</sup> trespassed on dormant federal Commerce Clause powers (and/or other dormant federal powers, based in the Taxation, Migration, or Naturalization Clauses as well) in a field Congress had occupied with legislation.<sup>40</sup> As late as 1884, federal head taxes were upheld on Commerce Clause grounds.<sup>41</sup>

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convicts in the United States."). Limitations on the migration of slaves—and of free blacks as well—were imposed by many states as well. See Cleveland, *supra* note 34, at 98.

36. 36 U.S. (11 Pet.) 102 (1837).

37. "New York was receiving 60,500 immigrants annually, and . . . argued that it should not be required to bear the cost of the Western states' demand for 'emigrati' by supporting those who entered and became a burden on the city." Cleveland, *supra* note 34, at 100.

38. *Miln*, 36 U.S. (11 Pet.) at 136–37 ("But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce . . ."). In the *Passenger Cases*, Justice James Moore Wayne later argued that this language did not enjoy the support of a majority of the Court. See *The Passenger Cases*, 48 U.S. (7 How.) 283, 410–11 (1849) (Wayne, J., concurring).

39. The majority all agreed that nothing they said limited the ability of states to exclude blacks. See *The Passenger Cases*, 48 U.S. (7 How.) at 406 (McLean, J., concurring); *id.* at 426, 428 (Wayne, J., concurring); *id.* at 457 (Grier, J., concurring).

40. *Id.* at 408 (McLean, J., concurring) (arguing that passengers are the subjects of commerce and that Congress has exclusive power to regulate them); *id.* at 426 (Wayne, J., concurring) (arguing that state immigration laws are inconsistent with the Naturalization Clause); *id.* at 440–42 (Catron, J., concurring) (concluding that "Congress has covered, and has intended to cover, the whole field of legislation over this branch of commerce").

41. See *The Head Money Cases*, 112 U.S. 580, 600 (1884) ("[C]ongress [has] the power to pass a law regulating immigration as a part of [the] commerce of this country with foreign nations . . ."). Previous cases had come to the same result, finding that Congress had exclusive power over the field under the Commerce Clause. See *People v. Compagnie Générale Transatlantique*, 107 U.S. 59, 60, 63 (1883) (holding that "[i]t has been so repeatedly decided by this court that such a tax . . . is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress," and that the "legislation [at issue] covers the same ground as the New York statute, and they cannot coexist"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 270 (1875) ("[T]he transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches

Curiously, perhaps, the federal government—which until the *Head Money Cases* had never been party to an immigration case before the Supreme Court<sup>42</sup>—chose not to defend its power to legislate over the field of immigration on the ground that this power was part of the Commerce Clause. As Professor Sarah H. Cleveland's exhaustively thorough research into the briefing of the early federal immigration cases demonstrated, the government instead relied on the theory that the federal power over immigration was part of a set of powers inherent in sovereignty—that is, the power to regulate immigration of aliens was

implied in [the] very existence of independent government anterior to the adoption of a constitution . . . .

It cannot be a valid objection [to the statute] that . . . it does not come within any phrase in the . . . Constitution. . . . As to foreign Governments and non-resident foreigners the United States is not of merely enumerated powers. . . . As to them, it has all the powers which according to international law any sovereign society possesses . . . .<sup>43</sup>

While the Supreme Court declined to rely on this argument in the *Head Money Cases*, the Court showed its willingness to rely on the notion of “powers inherent in sovereignty” in other cases of this era that grew out of challenges to the expansion of national powers in the wake of the Civil War.<sup>44</sup> At the same time, the Court was paring back the scope of the federal government's Commerce Clause powers over areas other than immigration.<sup>45</sup> Within the course of a decade, the Court would make a permanent turn away from grounding federal immigration power in the Commerce Clause, instead finding that it was among those powers that “according to international law any sovereign [nation] possesses.”

The Chinese Exclusion Cases marked this turn. In a series of cases decided between 1889 and 1893, the Court rejected the notion that the

of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country . . . .”; *id.* at 272–74 (“[T]his whole subject has been confided to Congress by the Constitution . . . .”);

42. Cleveland, *supra* note 34, at 110.

43. *Id.* at 111 (first, third, fourth, and fifth alterations in original) (emphasis added) (footnotes omitted) (internal quotation marks omitted).

44. *Juilliard v. Greenman*, 110 U.S. 421, 450 (1884) (Congress could exercise “powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution”); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555–56 (1870) (Bradley, J., concurring) (“The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. . . . [I]t is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.”).

45. *See, e.g.*, *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (holding that the Sherman Antitrust Act did not allow the federal government to prevent the formation of a monopoly in the manufacture of sugar via merger of five Pennsylvania companies); *Kidd v. Pearson*, 128 U.S. 1 (1888) (holding that the Commerce Clause did not preempt Iowa law prohibiting manufacture of alcohol, even if intended for export out of state).

immigration power was part of the Commerce Clause power and instead held that Congress's power over immigration derived from "powers inherent in sovereignty." In the first of these cases, *Chae Chan Ping v. United States*,<sup>46</sup> "the United States made no effort to defend the federal action"—retroactive termination of a right to reenter the United States for a Chinese national who had been a resident here before the change in law—"under the Commerce Clause."<sup>47</sup> But unlike in the *Head Money Cases*, the Court took up the gambit and held unanimously that Congress's power over immigration was rooted in the inherent powers of sovereign nations:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . .

. . . [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . .

. . . .

. . . [Such power is] too clearly within the essential attributes of sovereignty to be seriously contested.<sup>48</sup>

"In sum, the power [to exclude aliens] derived from international law."<sup>49</sup> (Indeed, as a source of international law (for the practice of other nations), *Chae Chan Ping* itself would be cited by a court in the United Kingdom two years later as a ground for a power to exclude returning aliens.)<sup>50</sup>

Three years later, *Nishimura Ekiu v. United States*<sup>51</sup> reached the Court. Speaking for an eight to one majority, Justice Horace Gray spelled out in the clearest possible words what had been implicit in *Chae Chan Ping*—the principle that Congress's power over aliens was an incident of international law:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see

46. 130 U.S. 581 (1889).

47. Cleveland, *supra* note 34, at 126.

48. *Chae Chan Ping*, 130 U.S. at 603–04, 607.

49. Cleveland, *supra* note 34, at 132.

50. *Id.* at 132–33, 133 n.910 (citing *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272 (P.C.) (appeal taken from Sup. Ct. of Vict.)).

51. 142 U.S. 651 (1892).

fit to prescribe. In the United States this power is vested in the national government . . . .<sup>52</sup>

The petitioner in *Nishimura Ekiu* was an alien without prior connection to the United States—she was arriving for the first time, seeking out her husband who was here. In May of 1892, the draconian Geary Act was passed, mandating that previously lawful Chinese residents carry a certificate of residency, register, or be subject to expulsion. “[T]he first expulsion measure adopted since the 1798 Alien Act,” it provoked massive civil disobedience, and the test cases that went before the Supreme Court<sup>53</sup> divided the Justices. Notwithstanding its polarization over the judgment, the Court reaffirmed *Nishimura Ekiu*’s holding that Congress’s power over immigration was rooted in the law of nations—in those provisions of international law outlining the powers of sovereign nations.

That holding was never rejected by the twentieth-century Court; indeed, it was restated explicitly in *Harisiades v. Shaughnessy*.<sup>54</sup> Federal power over immigration, then, is derived from powers inherent in sovereignty, and those powers inherent in sovereignty are defined by and grounded in international law. But the law of nations is (and always has been) flexible, susceptible to change, as new norms emerge. As Judge Weinstein put it in *Beharry*, “Since [C]ongress’s power over aliens rests at least in part on international law, it should come as no shock that it may be limited by changing international law norms.”<sup>55</sup> The inquiry as to how international law might limit the ability of today’s Congress to legislate in the field of immigration thus necessarily depends on the current-day state of international law governing the rights of states and aliens, a topic to which I now turn.

### III. INTERNATIONAL LAW NORMS PLACING LIMITS ON CONGRESSIONAL POWER OVER IMMIGRATION

Having established that international law is the foundation stone of Congress’s immigration power, what sorts of limitations on that power might we find in international law? This question finally brings me back to the theme of our Symposium panel: the role of international bodies in influencing United States policy. American courts typically look to a diverse set of sources to ascertain emergent norms of international law: the practice of nations, works of jurists, and, of course, judicial decisions from transnational and municipal courts alike. Despite the fact that the United States leads the developed world in immigration—no country but Canada

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52. *Id.* at 659 (citations omitted).

53. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

54. 342 U.S. 580, 587–88 (1952) (describing the “traditional power of the Nation over the alien,” “confirmed by international law”); *see also* *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (“ancient principles of the international law of nation-states” justify measures against excludible aliens); *Tiaco v. Forbes*, 228 U.S. 549, 556 (1913) (“It is admitted that sovereign states have inherent power to deport aliens . . .”).

55. *Beharry v. Reno*, 183 F. Supp. 2d 584, 598 (E.D.N.Y. 2002).

really comes close to our experience, in terms of volume of immigration—most of the interesting law on international law norms affecting aliens is coming from elsewhere, particularly the European Union and the European Court of Human Rights.

A variety of international law instruments recognize a right to family integrity and association. While that right is recognized as fundamental and nonderogable, it is not immediately obvious how it should translate into practice in terms of specific restrictions on national power. The most significant principle that has emerged in the European jurisprudence is what I would call the "proportionality principle": that family separation is so burdensome to the individuals involved that the state may justify it only with the strongest of countervailing interests. In application, the proportionality principle means that courts must weigh the public interest asserted by the state to make sure it is proportional to the hardship entailed in an individual case.

Another right that has been asserted on behalf of a number of noncitizens whose appeals have reached the U.S. Court of Appeals for the Second Circuit—Don Beharry, Alfien Gordon, Frederic Lake—is a procedural right against arbitrary interference with the right to family integrity and association. In practice, this means that states cannot *arbitrarily* interfere with the right of immigrants to live together with their family—typically, with citizen children or spouses—by deporting them without at least a hearing allowing individualized consideration of the hardship this would present to their families.

Some amount of individual discretion is a theme connecting these two principles. (That common theme is one reason the two principles are mingled in the sources of international law discussed below, including the case law.) This is particularly significant since the *removal* of discretion has been the trend running through much of immigration law since 1996—roughly half of deportable aliens got some form of discretionary relief before the Republican Congress began to create vast categories of removable aliens for whom discretion was unavailable—"aggravated felons" and so forth.

#### A. *The Right to Family Integrity Is a Fundamental and Nonderogable Human Right Recognized by Customary International Law*

The right to family life, and more specifically rights to family integrity and association—that is, the right to live together as a family—are well-established fundamental rights recognized in international law. As the International Court of Justice affirmed in 1989, "[t]he integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law but from

general principles of law recognized by civilized nations.”<sup>56</sup> Indeed, as the subsequent section will demonstrate, the right to family life is widely recognized and all states are bound to respect it.

The Universal Declaration of Human Rights (UDHR),<sup>57</sup> unanimously adopted by the General Assembly of the United Nations (U.N.) in 1948, expressly states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State,”<sup>58</sup> and that “[n]o one shall be subjected to arbitrary interference with his . . . family.”<sup>59</sup> Although the declaration is not a treaty, its provisions have been widely recognized as binding customary international law,<sup>60</sup> and courts have treated it as such.<sup>61</sup>

The International Covenant on Civil and Political Rights (ICCPR),<sup>62</sup> a treaty ratified by the United States,<sup>63</sup> is today one of the most well established and widely subscribed to treaties in the international law canon. Adopted by the U.N. General Assembly on December 16, 1966, the ICCPR is the product of a multinational effort under the auspices of the United Nations to codify the rights of the Universal Declaration in treaty form. The ICCPR reiterates the principle that family is the “natural and

56. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, 210–11 (Dec. 15) (separate opinion of Judge Evensen) (internal quotation omitted).

57. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

58. *Id.* art. 16(3).

59. *Id.* art. 12.

60. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, reporters’ note 6 (1987) (“[T]he Declaration has become the accepted general articulation of recognized rights.”).

61. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

62. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force for the United States Sept. 8, 1992).

63. The United States ratified the ICCPR in 1992. See OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (2004) [hereinafter STATUS OF RATIFICATIONS], available at <http://www.unhcr.ch/pdf/report.pdf>. The Covenant is a binding treaty obligation and is indicative of customary international law. Even if its provisions are found to be non-self-executing, the Covenant is still relevant for purposes of determining the status of customary international law. In proceedings before the Human Rights Committee, the U.S. Representative indicated that U.S. courts “could refer to the Covenant and take guidance from it even though it was not self-executing.” U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America*, ¶ 8, U.N. Doc. CCPR/C/SR.1405 (Nov. 28, 1995).

The U.S. ratification of the Covenant, coupled with President William J. Clinton’s Executive Order, No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998), suggest that the United States is fully committed to the protection and promotion of human rights. According to section 1(a) of the executive order, “[i]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the [Covenant].” *Id.* That executive order and its commitment to the values espoused by the Covenant has not been repealed or superseded by any executive order issued by succeeding administrations.

fundamental group unit of society," entitled to protection by the state,<sup>64</sup> and firmly prohibits "any arbitrary or unlawful interference" with individuals' right to family life.<sup>65</sup>

The American Convention on Human Rights (American Convention),<sup>66</sup> adopted in 1969, was signed by the United States in 1977. While not directly binding on the United States, the American Convention is indicative of customary international law.<sup>67</sup> Article 11 of the American Convention states that "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, [or] his home . . . . Everyone has the right to the protection of the law against such interference or attacks." Article 17(1) further states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state." The Inter-American Commission on Human Rights, which adjudicates petitions alleging violations of the American Convention, has stated that the right to family life "is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances."<sup>68</sup>

The 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)<sup>69</sup> was also implemented in order to encourage collective enforcement of the fundamental human rights recognized by the UDHR. It has been recognized by federal courts to be one of the "principle sources of fundamental human rights," along with the ICCPR.<sup>70</sup> Article 8 of the European Convention provides that "[e]veryone has the right to respect for his private and family life" and the European Court of Human Rights (ECHR) has explained that this right includes the right of family integrity and association—that is, the right to live together as a family.<sup>71</sup> Article 8 states that this right may not be interfered with unless necessary to further one of a number of compelling state interests. The ECHR has elaborated this to mean that any interference must be "justified

64. ICCPR, *supra* note 62, art. 23(1).

65. *Id.* art. 17.

66. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/english/treaties/b-32.html>.

67. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 883–84 (2d Cir. 1980) (citing American Convention and European Convention as sources of customary international law); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) ("Two other principle sources of fundamental human rights are the *European Convention for the Protection of Human Rights and Fundamental Freedoms* . . . and the *International Covenant on Civil and Political Rights* . . .").

68. *X & Y v. Argentina*, Case 10.506, Inter-Am. C.H.R., Report No. 38/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 96 (1996).

69. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *European Convention*].

70. *Fernandez*, 505 F. Supp. at 797; see also *Filartiga*, 630 F.2d at 883–84.

71. *Scozzari & Giunta v. Italy* 2000-VIII Eur. Ct. H.R. 471, 503, 524; see also *Johansen v. Norway* 1996-III Eur. Ct. H.R. 966, 1001–02 ("[T]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and . . . domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8.").

by a pressing social need and . . . proportionate to the legitimate aim pursued."<sup>72</sup>

The right to family life is nonderogable; it cannot be subject to selective application depending on the immigration status of an individual. The U.N. General Assembly has declared that it applies to citizens and noncitizens equally.<sup>73</sup> The U.N. Human Rights Committee (the international body overseeing implementation of the ICCPR's provisions by its states parties) in its General Comment 15 held, "[T]he rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. . . . [T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."<sup>74</sup>

### B. Proportionality

International law demands that interference with family integrity and association<sup>75</sup> cannot be arbitrarily imposed. Familiar concepts of due process equate arbitrariness with a lack of formal rules, laid out in advance, and a lack of basic procedural protections, particularly notice and opportunity to be heard and to present and challenge evidence. Procedurally, arbitrary deportation violates international law, as is recognized by scholars<sup>76</sup> and by the ICCPR provisions forbidding arbitrary expulsion generally (discussed in Part III.C, below). However, there is a substantive component as well as a procedural component to the arbitrariness inquiry.<sup>77</sup> Courts addressing the issue have found it not sufficient that interference with family life simply pass a threshold of procedural regularity. Rather, they have held that a state's interference with

72. *Ciliz v. Netherlands*, 2000-VII Eur. Ct. H.R. 267, ¶ 52.

73. See Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, Annex, art. 5(1), U.N. Doc. A/RES/40/144 (Dec. 13, 1985) (aliens enjoy right to family).

74. U.N. Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶¶ 1-2 (Nov. 4, 1986) [hereinafter *General Comment No. 15*], available at <http://www.unhcr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument>.

75. The U.N. Human Rights Committee has opined that the deportation of a person from a country where close members of his or her family are living constitutes an interference with that individual's right to his or her family life. See *Aumeeruddy-Cziffra v. Mauritius*, U.N. Human Rights Comm., Comm'n No. 35/1978, ¶ 9.2(b)(2)(i)(2), U.N. Doc. CCPR/C/12/D/35/1978 (1981).

76. Thus the Oppenheim treatise states, "[D]iscretion . . . to expel aliens . . . is not absolute. Thus, by customary international law [the state] must not abuse its right[s] by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion." 1 OPPENHEIM'S INTERNATIONAL LAW 940 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

77. "The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of [the ICCPR] . . ." U.N. Human Rights Comm., *General Comment No. 16: The Right to Respect of Privacy, Family, Home, and Correspondence, and Protection of Honour and Reputation (Art. 17)*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1 (Mar. 23, 1988).

an individual's right to family life is legitimate only when it is a response to a lawful state interest and when the interference with the individual's rights is outweighed by that state interest. The reasonableness and proportionality of measures interfering with family integrity and association have to be evaluated on a case-by-case basis.

### 1. European Court of Human Rights

The ECHR, which has produced the most developed body of international human rights jurisprudence on this subject, has issued a number of opinions that address the tension between immigration law and noncitizens' fundamental right to family integrity and association. In the past, U.S. federal courts have relied on the European Convention and ECHR rulings as an authoritative source of international human rights law and as "indicative of the customs and usages of civilized nations."<sup>78</sup>

Article 8 of the European Convention mandates application of a proportionality test to the expulsion of noncitizens with strong family ties to the deporting nation and/or very few links to the country to which they would be sent. The standard applied by the court assesses whether deportation is justified by a "pressing social need" and whether the interference with family life is disproportionate with respect to the public interest to be protected.<sup>79</sup>

In *Moustaquim v. Belgium*,<sup>80</sup> the European Court held that it was disproportionate to deport a Moroccan national who had arrived in Belgium when he was two years old and had lived there with all of his immediate family including his parents and seven siblings until age twenty-one. Despite Abderrahman Moustaquim's lengthy record of petty criminality,<sup>81</sup> because of the fact that he had almost no links to Morocco and had been educated entirely in the French language, the court, applying the proportionality test, found that the balance of equities weighed against deportation given his strong family ties to Belgium and lack of ties elsewhere.<sup>82</sup> This reasoning was upheld in several other ECHR cases.<sup>83</sup>

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78. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *see also Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), and subsequent decisions of the ECHR); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 & n.16 (2d Cir. 1980) (recognizing that judicial decisions constitute a source of customary international law and citing a decision issued by the ECHR); *Beharry v. Reno*, 183 F. Supp. 2d 584, 597 (E.D.N.Y. 2002).

79. *Berrehab v. Netherlands*, 138 Eur. Ct. H.R. (ser. A) 15–16 (1988) ("[T]he legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life."); *see also Ciliz v. Netherlands*, 2000-VIII Eur. Ct. H.R. 265, 284.

80. 193 Eur. Ct. H.R. (ser. A) (1991).

81. *Id.* at 10.

82. *Id.* at 19–20.

83. *See, e.g., Yildiz v. Austria*, 36 Eur. H.R. Rep. 553 (2003) (noting that a violation of the right to family life where deportation imposed for shoplifting and traffic offenses on father with small child born in Austria); *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119

Finally, in *Slivenko v. Latvia*,<sup>84</sup> the ECHR found a violation of Article 8 despite the fact that the state interest cited touched on national security. The case involved a Russian family resident in Latvia for many years. The husband was posted to Latvia as a Soviet military officer in 1977; he married in Latvia and raised his child there.<sup>85</sup> Although the Latvian government asserted a national security interest in expelling all former military personnel of the occupying Soviet army upon independence, the court held that to do so, given the family's ties, violated its right to family life.<sup>86</sup>

## 2. United Nations Human Rights Committee

The U.N. Human Rights Committee has examined the implications of deportation on the right to family life in several cases. It has determined that a state must make a reasonable determination whether the interference with family life is proportionate to the state's interests in removing a specific individual.<sup>87</sup> For example, in *Aumeeruddy-Cziffra v. Mauritius*,<sup>88</sup> the Mauritian government had amended its immigration law so that "alien husbands of Mauritian women lost their residence status in Mauritius" and

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(finding that, despite a robbery conviction, petitioner did not pose a danger to society proportionate to the hardship of removing him after eight years of marriage to a Swiss woman who was unlikely to be able to follow him to Algeria); *Mokrani v. France*, 40 Eur. H.R. Rep. 123 (2003), available at <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2003/ottobre/bollettino-ecre-10-03.html> (translated summary) (concluding that, since drug trafficker lived his entire life in France, was seriously involved with a French woman, and had no ties with his country of origin other than his nationality, his expulsion was disproportionate to the legitimate state interest); *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959 (barring deportation of Algerian national whose parents, brothers, sisters, wife, and three minor children were all French citizens). National courts have reached similar conclusions. See *Beldjoudi v. France*, 234 Eur. Ct. H.R. (ser. A) 3 (1992) (noting that the presence of Algerian national's spouse, parents, and four siblings in France and lack of any links to Algeria outweighed state interest in removal, despite serious criminal convictions); PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, HUMAN RIGHTS COMM'N, DEPORTATION AND THE FAMILY: A REPORT ON THE COMPLAINTS OF MRS. M. ROTH AND MR. C.J. BOOKER, REP. NO. 8, PARLIAMENTARY PAPER NO. 272/1984, (1984) (Declaration of the Rights of the Child and ICCPR Article 23 violated by order separating noncitizen from long-term cohabitant and her children).

84. 2003-X Eur. Ct. H.R. 229.

85. *Id.* at 237-38.

86. *See id.* at 258-67.

87. *See, e.g., Winata v. Australia*, U.N. Human Rights Comm., Commc'n No. 930/2000, ¶ 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (2001) (finding that, in light of petitioners' fourteen-year residence in Australia and the Australian citizenship of their thirteen-year-old child, Australian government did not achieve a proper balance between its interest in the enforcement of immigration law and its duty to refrain from arbitrary interference with petitioners' family life); *Canepa v. Canada*, U.N. Human Rights Comm., Commc'n No. 558/1993, U.N. Doc. CCPR/C/59/D/558/1993 (1997); *Hopu & Bessert v. France*, U.N. Human Rights Comm., Commc'n No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (1997); *Stewart v. Canada*, U.N. Human Rights Comm., Commc'n No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996).

88. U.N. Human Rights Comm., Commc'n No. 35/1978, U.N. Doc. CCPR/C/12/D/35/1978 (1981).

could remain only at the grace of the Interior Minister.<sup>89</sup> Although the petitioners' husbands were not facing immediate deportation, the Human Rights Committee noted that "not only the future *possibility* of deportation, but the existing precarious residence situation of foreign husbands [constitutes] an interference . . . with the family life of the Mauritian wives and their husbands."<sup>90</sup> Accordingly, "the exclusion of a person from a country where close members of his family are living can amount to an interference [with the right to family integrity] within the meaning" of ICCPR Articles 17(1) and 23(1).<sup>91</sup>

### 3. The Proportionality Inquiry Must Take into Account the Best Interests of the Child

Since the pioneering work of Joseph Goldstein, Anna Freud, and their collaborators across various academic fields,<sup>92</sup> the "best interests of the child" has become the guiding principle underlying legislative policy making and adjudication in almost all matters concerning child welfare.<sup>93</sup> Laws touching on child welfare had historically been oriented toward adjudicating competing interests of parents. The "best interests" standard altered the focus, such that in custody cases, the state would now be expected to act paternalistically to protect the child's interests in cases where one or both parents were nominally the only parties. This principle made its first appearance in international law in the 1961 treaty on the protection of infants,<sup>94</sup> wherein, "[f]or the first time, a treaty adopted as a central principle the protection of the 'interests of the child,' a shift away from earlier conflicts rules that had been premised solely on the competing rights of parents."<sup>95</sup> Today the principle is ubiquitous in both municipal and international law.<sup>96</sup>

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89. *Id.* ¶ 1.2.

90. *Id.* ¶ 9.2(b)(2)(i)(3).

91. *Id.* ¶ 9.2(b)(2)(i)(2).

92. Joseph Goldstein was a law professor at Yale, and Anna Freud a renowned child and developmental psychologist. *See, e.g.,* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

93. *See* *Beharry v. Reno*, 183 F. Supp. 2d 584, 600 (E.D.N.Y. 2002); *see also* *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (noting that, in family law cases concerning abuse, "the child's welfare predominates over other interests"); 2 AM. JUR. 2D *Adoption* § 136 (1994) (noting that, in adoption by unmarried couples, the "best interests" of the child is the paramount consideration); 59 AM. JUR. 2D *Parent and Child* § 1 (1987) (noting that the general tenets of family law include the best interests of the child).

94. Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, *opened for signature* Oct. 5, 1961, 658 U.N.T.S. 143.

95. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 216–17 (2003).

96. *Id.* at 225.

a. *The Convention on the Rights of the Child*

The best interests principle is now principally embodied in international law in the U.N. Convention on the Rights of the Child (CRC).<sup>97</sup> As Judge Weinstein noted in *Beharry*, “[t]he CRC has been adopted by every organized government in the world except the United States.”<sup>98</sup> Notably, the United States does not disagree with the central provisions of the CRC; to the contrary, it has not yet ratified the CRC due to disputes over several specific issues relating to abortion, juvenile justice (especially in relation to capital punishment),<sup>99</sup> and juvenile military recruitment. “While the CRC is relatively new, it contains many provisions codifying longstanding legal norms.”<sup>100</sup> “Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as customary international law.”<sup>101</sup>

The CRC provides at Article 3(1), “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>102</sup> In Article 9(1), the Convention requires that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”<sup>103</sup> Article 9(2) further specifies that “all interested parties shall be given an opportunity to participate in the proceedings” pursuant to Article 9(1).<sup>104</sup>

The CRC provides that the best interests of the child must be of paramount concern in any “action[] concerning children.”<sup>105</sup> It thus requires at a minimum that the interests of any children of petitioners be

97. Convention on the Rights of the Child, G.A. Res. 44/25, art. 24(2)(e), U.N. Doc. A/44/49 (Nov. 20, 1989) (entered into force Sept. 2, 1990).

98. *Beharry*, 183 F. Supp. 2d. at 600. One hundred ninety-three nations have ratified, acceded to, or accepted the Convention on the Rights of the Child (CRC) or succeeded to such status. Only the United States and Somalia (which lacks a functioning government) have not. See Convention on the Rights of the Child, *supra* note 97.

99. David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161, 178–82 (1998). The United States became a signatory to the CRC on February 16, 1995, and the treaty awaits ratification by the Senate. See STATUS OF RATIFICATIONS, *supra* note 63, at 11; see also S. Res. 144, 104th Cong., 141 CONG. REC. S8400 (1995) (expressing the Senate’s disapproval of the CRC).

100. *Beharry*, 183 F. Supp. 2d at 600.

101. *Id.* at 601.

102. Convention on the Rights of the Child, *supra* note 97, art. 3, ¶ 1.

103. *Id.* art. 9, ¶ 1.

104. *Id.* art. 9, ¶ 2. Both the best interests principle and other norms relevant to this case are embodied in the CRC. See *id.* pmb1. (the child should grow up in a family environment); *id.* art. 7, ¶ 1 (each child shall have, “as far as possible, the right to know and be cared for by his or her parents”); *id.* art. 16, ¶ 1 (protecting children from “arbitrary or unlawful interference” with their family).

105. *Id.* art. 3.

taken into account as a primary consideration at some stage during the deportation process. This conclusion is not only supported as a matter of common sense, but also by regional human rights bodies,<sup>106</sup> foreign courts, and commentators who have recognized that deportation proceedings directed at a parent clearly amount to an "action concerning children," for purposes of Article 3(1) of the CRC.<sup>107</sup>

As noted above, once the best interests principle began to gain ascendancy in municipal child welfare law, cases where one or both parents were nominally the only parties were rendered more complex by the state's obligation to act paternalistically to protect the child's interests. Similarly, in immigration cases, the state must act affirmatively to protect each child's interests, rather than viewing deportation of parents as a stand-alone dispute between two parties (the alien parent and the government).

b. *Domestic and Foreign Case Law on Best Interests of the Child in the Context of Deportation*

The CRC is cited in case law for the proposition that in deportation decisions, the best interests of the child of the alien facing deportation are to be taken into account as a primary consideration. Moreover, the general principles embodied in the CRC have been relied on even when the Convention itself has not been ratified or implemented into municipal law through enabling legislation—that is, courts have recognized it as indicative of customary international law.

*Beharry*<sup>108</sup> and *Mojica v. Reno*<sup>109</sup>—both decided by Judge Weinstein—are the leading domestic cases relying on the best interests principle to invalidate summary deportation of persons with strong family ties to the

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106. See, e.g., African Charter on the Rights and Welfare of the Child, art. 19, ¶ 1, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999), available at [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf) ("No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.").

107. See, e.g., *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 289 (Austl.) ("A broad reading and application of the provisions in Art 3, one which gives to the word "concerning" a wide-ranging application, is more likely to achieve the objects of the Convention."); see also Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 172 (1998) ("The domestic courts of several States Parties have adopted a broad reading of the 'in all actions concerning children' phrase. Cases relating to the deportation of non-citizen parents of citizen children have been deemed to be 'actions concerning children' by some courts."); *id.* at 172 n.59 (listing cases from Australia and New Zealand).

108. 183 F. Supp. 2d 584 (E.D.N.Y. 2002) (finding that international law places limitations on the ability of immigration officials to remove aliens, notwithstanding a statute that arguably removes official discretion to do otherwise).

109. 970 F. Supp. 130 (E.D.N.Y. 1997).

United States.<sup>110</sup> Judge Weinstein held that the categorical denial of hearings to aliens convicted of certain crimes would violate principles of customary international law which require balancing of equities and, where the noncitizen has a citizen child, of the best interests of that child as well.<sup>111</sup> In *Beharry*, Judge Weinstein looked to the CRC as evidence of customary international law.<sup>112</sup> In order to bring the INA into harmony with international law, Judge Weinstein remanded the cases to the Agency for hearings on the possibility of discretionary relief from deportation based on the hardship to the alien's families.<sup>113</sup>

Foreign courts have similarly applied the CRC to require that the best interests of the child be given primary consideration in the context of deportation. The European Court of Human Rights has stated that "it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child."<sup>114</sup> Canadian and Australian courts, relying on the CRC, have reached similar conclusions.<sup>115</sup>

The Inter-American Commission has also applied the best interests principle in the immigration context. In a 2000 report on the status of asylum seekers in Canada,<sup>116</sup> the Commission held that "the absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raised serious concerns."<sup>117</sup> While the state has the right and duty to maintain public order through immigration control, "that right must be balanced against the harm that may result to the rights of the individuals concerned in the particular case."<sup>118</sup>

### C. *The Right to Be Free from Procedurally Arbitrary Expulsion*

The right to be free from arbitrary expulsion is also independently recognized in several international instruments. Article 9 of the ICCPR

110. In *Mojica v. Reno*, one petitioner arrived in the United States at age twelve and lived here for nine years, had a large family in the United States (but had no children himself), and had no immediate family in his native Panama. *Id.* at 138. The other petitioner had lived here for twenty-five years, was married, and had two citizen children. *Id.* at 140.

111. See *Beharry*, 183 F. Supp. 2d at 604.

112. *Id.* at 601.

113. *Id.* at 604-05; *Mojica*, 970 F. Supp. at 182.

114. *Olsson v. Sweden*, 130 Eur. Ct. H.R. (ser. A) 33-34 (1988); see also *Scozzari & Giunta v. Italy*, 2000-VIII Eur. Ct. H.R. 471, 506 (quoting *Olsson*).

115. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶¶ 69-70, 76 (Can.) (reading statute in light of CRC to allow alien mother of four citizen children relief); *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 290-91 (Austl.) (administrative decisions must conform with CRC).

116. See Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L./VII.106, doc. 40 rev. (Feb. 28, 2000), available at <http://www.cidh.org/countryrep/Canada2000en/table-of-contents.htm>.

117. *Id.* ¶ 159.

118. *Id.* ¶ 166.

provides that "[n]o one shall be subjected to arbitrary arrest or detention [or exile]."<sup>119</sup> Furthermore, everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations.<sup>120</sup>

Article 13 of the ICCPR generally requires an individualized review before a state may expel a person legally present in its territory: "An alien . . . may be expelled . . . only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion* and to have his case reviewed by [a] competent authority."<sup>121</sup> The Human Rights Committee has concluded that Article 13 "is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise."<sup>122</sup> In both *Hammel v. Madagascar*<sup>123</sup> and *Giry v. Dominican Republic*,<sup>124</sup> the Human Rights Committee held that the Covenant had been violated because aliens were not afforded an opportunity to submit the reasons against their expulsion.

The European Convention similarly recognizes the right of lawfully resident aliens to submit reasons against their expulsion in fair proceedings.<sup>125</sup> Just as deportation without a hearing on the impact on family members would constitute arbitrary interference with family integrity, deportation without affording an opportunity to demonstrate a case for discretionary relief would violate the right against arbitrary expulsion in circumstances where the deportation would tear apart a family.

#### D. Conclusions

##### 1. Only the Strongest State Interests May Justify Family Separation

International law makes clear that family separation is so inherently burdensome to the individuals involved that the state may justify it only with the strongest of countervailing interests. In some cases this means that certain laws allowing deportation that would separate a noncitizen parent from a citizen child may not be permissible even where procedural protections (such as the opportunity for a hearing) are provided for in individual cases. Courts have consistently insisted on balancing the

119. ICCPR, *supra* note 62, art. 9.

120. *Id.* art. 14.

121. *Id.* art. 13 (emphasis added).

122. *General Comment No. 15, supra* note 74, ¶ 9.

123. U.N. Human Rights Comm., Commc'n No. 155/1983, ¶¶ 19.2, 20, U.N. Doc. CCPR/C/29/D/155/1983 (1987).

124. U.N. Human Rights Comm., Commc'n No. 193/1985, ¶ 5, U.N. Doc. CCPR/C/39/D/193/1985 (1990).

125. *See* Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art.1, Nov. 22, 1984, Europ. T.S. No. 117 (entered into force Nov. 1, 1998), *available at* <http://conventions.coe.int/treaty/en/Treaties/html/117.htm>; *cf.* European Convention, *supra* note 69, art. 3.

maintenance of public order and safety against the hardships expulsion entails for families, stating that family separation in such circumstances must be “justified by a pressing social need and . . . proportionate to the legitimate aim pursued.”<sup>126</sup> Legal scholars have similarly suggested that where the state asserts the right to separate families, “there should be a clear presumption that involuntary family separation violates international law,” that the state bears the burden of overcoming this presumption, and, against the interest in family integrity, the state must show that any “competing interest [is] compelling.”<sup>127</sup>

There may thus be circumstances in which deportation for individuals with citizen children, based on the fact of criminal convictions that fail to implicate a sufficiently compelling state interest in removal, would violate international law per se, regardless of whether a hearing was provided for.<sup>128</sup> European courts have repeatedly come to this conclusion in cases presenting such facts.

## 2. The Right to a Hearing Is a Minimum Requirement of International Law

“[T]he rights to be free from arbitrary interference with family life and arbitrary expulsion are part of customary international law.”<sup>129</sup> At a minimum, international law bars *arbitrary* interference with family integrity, and thus mandates that noncitizens cannot lawfully be expelled from the United States without an opportunity for a hearing to present evidence of the hardship that such an expulsion would inflict on their families.

This is the narrow holding reached by the court in *Beharry*.<sup>130</sup> That case simply held that *automatic* deportation would violate international law when applied to an alien who had resided in the United States for over seven years and who could plausibly argue “extreme hardship” to his family if deported.<sup>131</sup> The district court’s conclusion that a hearing was required is consistent with the conclusions of the numerous foreign and international jurists described above, as well as the opinions of respected legal scholars.<sup>132</sup> Where a family will be torn apart by a deportation, with no individualized consideration of the hardship this will cause on the deported person or those left behind, and with no opportunity to present evidence or be heard on this issue, these rights have been violated.

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126. *Ciliz v. Netherlands*, 2000-VIII Eur. Ct. H.R. 265.

127. Starr & Brilmayer, *supra* note 95, at 286.

128. Arguably, deportation should not be allowed at all if the child cannot follow the parent to his or her country of citizenship. “Some nations . . . as a general rule bar the deportation of aliens with citizen children; international law could reasonably be interpreted to require such a rule.” *Id.* at 267 (citations omitted).

129. *Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999).

130. 183 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2002).

131. *Id.* at 605.

132. Leading legal scholars have opined that the provisions of the IIRIRA and the AEDPA that allow for such summary deportation “violate the United States’ international obligations to protect families.” Starr & Brilmayer, *supra* note 95, at 259.

## CONCLUSION

No one can continue to work in the human rights field without being somewhat inured to the human impact of the law on our clients. By the same token, there are always cracks in even the most hardened professional façade. In my six-plus years at the Center, the most difficult cases I have had to deal with from a personal standpoint are these family separation cases—people who came to the United States before they were teenagers, facing deportation to some country where they cannot speak the language, have no family or social connections, and on top of all of that are to be separated from their children. One of the most poignant moments we have had in this office was the declassification of notes of a meeting with a client in Guantánamo who told one of my colleagues “tell my wife to remarry”—but that kind of situation occurs time and again here at home.

Sadly, these stories seem to have little impact on voters in most of the parts of the world that receive immigrants. Our own Constitution has several provisions designed to protect minority groups—both aliens and citizens—from oppression by the democratically expressed will of political majorities. It should not be surprising that international law provides similar protections. Those provisions of international law that provide a minimum baseline of rights for aliens serve much the same purpose as the Constitution did during the civil rights movement, allowing resort to a higher source for basic human rights that may be enforced against local political majorities—a way of moving up a tier of sovereignty, so to speak. As such, international law should serve as an important check generally on the power of democratic states to enforce oppressive immigration legislation against aliens. But the place of international law in our own system is a special one, since our own constitutional scheme relies on international law as the source of authority for Congress’s very power over the field. As the fount of Congress’s supposedly “plenary” power over aliens, international law also provides fundamental limitations on that power—limitations which we can expect will become more robust with time, and which, one hopes, federal courts will continue to see fit to enforce.

*Notes & Observations*