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PROCEDURAL DUE PROCESS IN THE EXPULSION OF ALIENS UNDER INTERNATIONAL, UNITED STATES, AND EUROPEAN UNION LAW: A COMPARATIVE ANALYSIS

Won Kidane^{*}

ABSTRACT

Liberal democracies aspire to respect minimum standards of individual liberty and due process to all. They structurally limit their powers with respect to how they treat all persons—including noncitizens, also known as “aliens.” Nonetheless, the exact scope and nature of the limitations imposed by international and domestic legal regimes for the expulsion of noncitizens still remains uncertain and is in a constant state of evolution in multiple directions. Indeed, a mix of situational progression and regression characterizes these regimes. The proper balance between personal liberty, due process, and equal protection on the one hand—and security, economic and related governmental and other common societal interests on the other, has proven elusive. This Article attempts to identify the minimum international standards that apply to the expulsion of aliens in times of war and peace, and measure these international standards against those that apply in the United States and European Union. By so doing, it intends to highlight the congruity and disjuncture between the international standards and the standards that apply in the United States and European Union, and extricate the best practices that they could learn from each other.

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INTRODUCTION

Under international law and many domestic jurisdictions, the term “alien”¹ is commonly used to refer to a person who is not a citizen or a national of the country of his residence.² The alien-citizen dichotomy is as old as the emergence of the nation-state itself³ and always operates to legitimize exclusion, and, at times, subordination.⁴ The jurisprudential importance of this distinction is enduring. In the United States, some aliens are not considered part of “We the People” for purposes of certain constitutional rights.⁵

¹ See, e.g., Immigration and Nationality Act (INA) of 1952 § 101(a)(3), 8 U.S.C. § 1101 (2006) [hereinafter INA] (“The term ‘alien’ means any person not a citizen or national of the United States.”).

² There are other examples of the common usage of “alien” in international sources. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 35, 38, 41, 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force August 12, 1949) [hereinafter Geneva Convention IV] (setting forth minimum standards of treatment for “aliens in the territory of a party to the conflict”); see also International Covenant on Civil and Political Rights art. 13, *opened for signature* Dec. 19, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] (setting forth minimum standards of treatment of aliens in times of peace). See generally Special Rapporteur on the Expulsion of Aliens, *Sixth Rep. on Expulsion of Aliens*, Int’l Law Comm’n, U.N. Doc. A/CN.4/625/Add.1 (May 28, 2010) (by Maurice Kamto) [hereinafter *Sixth Report on the Expulsion of Aliens*] (assessing the state of international law on the expulsion of aliens, mainly in peace time).

³ According to the United States Supreme Court, “Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar.” *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950).

⁴ Professor Tayyab Mahmud notes, “The sovereignty impulse locates citizens within firm territorial boundaries, constitutes individual and collective identities, privileges a homogenous subjectivity eligible for political recognition, and posits identities of ineligible others.” Tayyab Mahmud, *Migration, Identity, & the Colonial Encounter*, 76 OR. L. REV. 633, 636–37 (1997).

⁵ The jurisprudence in this area is complicated but consider the following passage from Justice Brennan’s dissenting opinion in *United States v. Verdugo-Urquidez*:

According to the majority, the term “the people” refers to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *The Court admits that “the people” extends beyond the citizenry, but leaves the precise contours of its “sufficient connection” test unclear.* At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop “substantial connections” with our country. At other junctures, the Court suggests that an alien’s presence in the United States must be voluntary and that the alien must have “accepted some societal obligations.” At yet other points, the majority

Similarly, in the European Union,⁶ “third-country nationals”⁷ possess rights inferior not only to citizens of the country they find themselves in but also to persons from other E.U. Member States.⁸

implies that respondent would be protected by the Fourth Amendment if the place searched were in the United States.

United States v. Verdugo-Urquidez, 494 U.S. 259, 282–83 (1990) (Brennan, J., dissenting) (emphasis added) (footnotes omitted) (citations omitted) (quoting Verdugo-Urquidez, 494 U.S. at 265, 271, 273).

In the United States, a century-old jurisprudence effectively establishes a hierarchy of aliens, but the rights-based alien-citizen/national distinction is evident. For a discussion of the hierarchy, see VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 82–84 (2005); Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L.J. 89, 148–49 (2010); and David A. Martin, *Graduated Application of Constitutional Protection for Aliens: The Real Meaning of Zadvydas v Davis*, 2001 SUP. CT. REV. 47, 96–97 (2001).

⁶ The European Union has been in a constant and rapid state of transformation over the last several decades. A complex web of treaties, regulations, and directives define its nature, structure, competences, and functioning. The legal instruments which are currently most important are: Consolidated Version of the Treaty on the European Union, Mar. 30, 2010, 2010 O.J. (C83) 13 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C83) 47 [hereinafter TFEU]; and Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 27 O.J. (C 306) 1 (entered into force Dec. 1, 2009) [hereinafter Treaty of Lisbon]. A comprehensive set of information about all aspects of the European Union’s existence, including the texts of all of the treaties, is available on the official website. EUROPA, http://europa.eu/index_en.htm (last visited Feb. 5, 2013). The most notable regularly updated treatise on this subject is P.S.R.F. MATHUSEN, *A GUIDE TO EUROPEAN UNION LAW AS AMENDED BY THE TREATY OF LISBON* (10th ed. 2010) (providing a comprehensive review of current E.U. law).

⁷ The free movement of persons is one of the fundamental principles of the European Union. Persons who are not nationals of an E.U. Member State are called “third-country nationals.” See TFEU art. 79. They do not enjoy the full freedom of movement and are subject to certain sets of regulations. See *id.* The Treaty of Lisbon has modified the legal basis for the Union’s law-making in the areas of immigration and asylum. EU IMMIGRATION AND ASYLUM LAW: COMMENTARY ON EU REGULATIONS AND DIRECTIVES 1–9 (Kay Hailbronner ed., 2010) [hereinafter E.U. IMMIGRATION AND ASYLUM LAW]. This may have some significance in the future, but some basic common rules and regulations are already in effect. The most relevant provisions of the TFEU that apply to third-country nationals are articles 67–89. TFEU arts. 67–89. Entry, residency, and expulsion are also governed by a set of subsidiary sources of regulations and directives. Some notable ones include Council Regulation 539/2001, Annex 1, 2001 O.J. (L 81) 1, 5–6 (EC) (listing the countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement); Council Regulation 562/2006, art. 1, 2006 O.J. (L 105) 1, 3 (EC) (establishing Community Code (Schengen Borders Code) on the rules governing the movement of persons across borders); and Council Directive 2004/83, art. 1, 2004 O.J. (L 304) 12, 14 (EC) [hereinafter E.U. Directive on Minimum Standards for Qualification] (creating minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted). Finally, the standards that are most relevant for purposes of the movement of third-country nationals are contained in Directive 2008/115, art. 1, 2008 O.J. (L 348) 98, 100 [hereinafter E.U. Directive on Common Standards of Return]. The texts of all of these and other related E.U. regulations and directives on the movement on third-country nationals are available on the E.U. official website. EUROPA, *supra* note 6. For a detailed commentary, see E.U. IMMIGRATION AND ASYLUM LAW, *supra*, at 1–9.

⁸ Under the TFEU, the nationals of Member States of the Union are considered citizens of the Union with a wide range of some fundamental rights including non-discrimination, freedom of movement and

In modern times, the old justification for disparate treatment of foreign nationals⁹ has been replaced by the more credible notion of national sovereignty.¹⁰ Contemporary notions of sovereignty and political independence now provide the political and jurisprudential justification¹¹ for the exclusion,¹²

residence, and political representation. See TFEU arts. 19–25. For a comprehensive discussion of the free movement of E.U. citizens and nationals of third countries, see MATHIJSEN, *supra* note 6, at 238–364.

⁹ Tayyab Mahmud explains:

Liberalism and colonialism developed alongside each other. With rare exceptions, liberals approved of colonialism and provided it with a legitimizing ideology. If eligibility for universal rights was conditioned upon recognized subjectivity, claims to these rights could be denied if the subjectivity of some was erased. By resting such an erasure on pre-social, biological grounds, one could say with confidence that ‘higher races are inherently more qualified for both political and individual liberty than the lower.’ Liberal discourses of rights, inclusion, and equality could be reconciled with colonial policies of exclusion and discrimination by positing essential differences between different types of individuals and subjectivities.

Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1222 (1999) (footnote omitted) (quoting Robert Knox, *Race Legislation and Political Economy*, 13 ANTHROPOLOGICAL REV. 113, 126 (1866)).

¹⁰ The most fundamental principle that underpins the post-World War II world order is the principle of sovereign equality and non-interference. It gained its most authoritative expression in the Charter of the United Nations. This principle now serves as the foundation of contemporary international law and world order. See U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of sovereign equality of all its Members.”). For a discussion of the role of sovereignty in shaping the jurisprudence involving aliens in the United States, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987). Henkin discredits the use of sovereignty as an excuse to deny due process and equal protection to aliens, and arguing that it is incompatible with modern notions of due process and equal protection. *Id.* at 863. Indeed, Henkin is reported to have advocated the banishment of the term sovereignty from the legal lexicon because it is so loose a concept. See Lori Fisler Damrosch, *In Memoriam, Louis Henkin (1917–2010)*, 105 AM. J. INT’L L. 287, 300 (2011).

¹¹ See, e.g., *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (holding that sovereign states have unrestricted power to exclude aliens). Although the *Chinese Exclusion Case* was decided more than a century ago, it still provides the justification for the distinct treatment of aliens on the basis of the sovereign’s unlimited right to exclude and regulate the conditions of aliens. See Henkin, *supra* note 10, at 862–63. For related commentary discussing alternative ways that the Court has taken in mitigating the harshest consequences of the *Chinese Exclusion Case* jurisprudence, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

¹² Exclusion generally refers to the denial of entry or admission. In both the United States and European Union, those who are seeking to gain entry and those who have already entered and are present in the territory are subject to different standards of treatment including in the procedures of return or removal. These concepts are often accompanied by legal fictions that consider persons who are already inside the territory for certain periods of time as seeking admission or entry. See INA §§ 235–36, 239–40, 8 U.S.C. §§ 1225–26, 1229–30 (2006); E.U. Directive on Common Standards of Return, *supra* note 7, art. 2(2)(a), at 101 (“Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to refusal of entry . . .”).

inferior treatment,¹³ and expulsion¹⁴ of aliens.¹⁵ These are fundamental concepts and are elaborated in various sections below.

Notwithstanding such justifications, in contemporary liberal societies, maturing notions of human rights and civil liberties constrain the crude exercise of sovereign power.¹⁶ At the most general level, liberal democracies

¹³ Aliens generally are not eligible to participate in the political process. Their economic rights are also limited. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 80, 83 (1976) (upholding the federal government's power to make a distinction between lawful resident aliens and citizens for purposes of public benefits on the basis of the length of their stay).

¹⁴ In international law and many domestic jurisdictions, various terminologies are employed to designate the process leading up to and the actual physical removal of the alien. These terminologies include expulsion, removal, deportation, return, et cetera. The Secretariat of the United Nations, in a memorandum on the expulsion of aliens submitted to the International Law Commission (the "ILC") in 2006 made a clear distinction between expulsion, which refers to the process leading up to the final order of removal, and deportation, which signifies the actual physical removal of the alien. *See* U.N. Secretariat, *Expulsion of Aliens: Memorandum by the Secretariat*, para. 91, Int'l Law Comm'n, U.N. Doc. A/CN.4/565 (July 10, 2006) [hereinafter ILC Expulsion Memorandum]. However, many domestic jurisdictions do not adhere to these designations. For example, in the United States, the proceedings are called "removal proceedings" and the actual deportation is called "removal." *See* INA §§ 239–41. In the European Union, the preferred term is "return," which refers to both the process and the actual deportation. *See, e.g.,* E.U. Directive on Common Standards of Return, *supra* note 7. The term "expulsion" is used in this Article to signify both the process and the actual deportation or removal. No particular effort is made to adhere strictly to terminology and some of these terms are sometimes used interchangeably. Their meaning should be clear from the context.

¹⁵ States are generally entitled to remove aliens from their territories. Certain restrictions apply. The nature and scope of these restrictions are the central focus of this Article and elaborated in various sections in detail.

¹⁶ In the wake of the Second World War, the community of nations recognized that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that the "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" and promised each other to respect the fundamental rights of all individuals without regard to "race, color, sex, religion, political or other opinion, national or social origin, property, birth or other status." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmb., art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; *see also* ICCPR, *supra* note 2, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). These basic principles are now presumably the bedrock of the Bill of Rights of the constitutions of most members of the United Nations, which are bound by these principles as a matter of international law. *See, e.g.,* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also* Charter of the Fundamental Rights of the European Union, art. 21(1)–(2), Mar. 30, 2010, 2010 O.J. (C 83) 389, 396 ("Any discrimination based on any ground such as sex, language, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited . . . Within the scope of application of the Treaties establishing [the European Community and of the Treaty on European Union] and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."). The Charter is incorporated into the Treaty of Lisbon by reference. Treaty of Lisbon art. 6(1).

subscribe to certain minimum standards, which structurally limit their powers in how they treat all persons—including aliens.¹⁷ Nonetheless, the exact scope and nature of the limitations imposed by international and domestic legal standards still remain uncertain and are in a constant state of evolution in multiple directions. Indeed, they are characterized by a mix of situational progression and regression.¹⁸ The proper balance between personal liberty, due process, and equal protection on the one hand—and security, economic and related governmental and other common societal interests on the other—has always proven elusive.¹⁹ However, the ambitions of this Article are limited to identifying the minimum international standards that apply to the expulsion of aliens in times of war and peace,²⁰ and to measuring these standards against those that apply in the United States and the European Union. By so doing, this Article intends to highlight the congruity and disjuncture between the international standards and the standards that apply in the United States and European Union, and to extricate the best practices that one could learn from the other.

¹⁷ Several good recent example of this are the U.S. Supreme Court's checks on the Bush administration's measures against "war on terror" detainees at Guantanamo Bay. *See Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (holding that certain procedures contained in some Congressional Acts unconstitutionally suspended habeas corpus by failing to provide an adequate substitute for habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (holding that trial by a military commission violated the Geneva Conventions, in particular, Common Article 3, which requires trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people" (quoting Geneva Convention IV, *supra* note 2, art. 3(1)(d))); *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004) (limiting habeas jurisdiction to the district of confinement); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that enemy aliens detained in Guantanamo Bay have a statutory right to contest the legality of their detention by habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that a U.S. citizen held as an enemy combatant must be given a reasonable opportunity to contest his designation before a neutral decision-maker).

¹⁸ *See* DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 85 (2003) ("The pattern of selectively sacrificing noncitizen's fundamental rights reflected the government's response to the attacks of September 11 has a lengthy pedigree in American history Ultimately, when a sufficient number of citizens are affected, the political and legal processes react, and only then are the measures seen as mistakes.").

¹⁹ *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956 (2002) ("When a democratic society strikes that balance in ways that impose the costs and benefits uniformly on all, one might be relatively confident that the political processes will ultimately achieve a proper balance. Since September 11, we have repeatedly done precisely the opposite.").

²⁰ It does so notwithstanding the criticism that international standards are often disregarded in the domestic arena because the reality is that contemporary societies seem to pay close attention not only to international standards but also to what their peers are doing, hence the importance of comparative studies. For an example of the classic expression of the disregard of international standards, see Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995).

The Article is divided into two main parts. Part I surveys the various sources of international law that define the scope of a state's right to expel aliens and the limitations thereof, both in times of war and peace. Because wartime rules are mainly international, that part of the discussion will not have a direct comparative component. It is included to provide perspective on the limitations of state power to expel aliens even in times of war as a benchmark for the rules that apply in times of peace.²¹ The discussion of the international standards that apply in peacetime in Part I will be followed by a comparative analysis of the U.S. and E.U. rules on the expulsion of aliens in Part II. In particular, Part II measures the respective peacetime rules against the international standards and identifies peculiar advantages and disadvantages of each one of the two systems. It also highlights the lessons that the two systems could learn from one another so as to better the treatment of foreign nationals in their own respective societies.

I. THE EXPULSION OF ALIENS IN INTERNATIONAL LAW

States regularly assert their right to expel aliens.²² However, "[i]rrespective of the existence or non-existence of an unlimited right to expel foreigners, their-ill treatment, abrupt expulsion, or expulsion in an offensive manner is a breach of the minimum standards of international law with which their home States may expect compliance."²³ There is no disagreement in the literature

²¹ I OPPENHEIM'S INTERNATIONAL LAW 941 (Robert Jennings & Arthur Watt eds., 9th ed. 1996) ("Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable.").

²² Perhaps the most classic expression of the sovereign right to expel is the U.S. Supreme Court's statement in what is commonly called the *Chinese Exclusion Case*:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . . the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

²³ ILC Expulsion Memorandum, *supra* note 14, at 172 n.504 (quoting Georg Schwarzenberger, *The Fundamental Principles of International Law*, in 87 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 290, 309–10 (1955)). This quote presents it in the context of the alien's state's right to complain, which is a useful perspective in international law. See LOUIS HENKIN ET AL., PRINCIPLES OF INTERNATIONAL LAW, CASES AND MATERIAL 596 (5th ed. 2009) ("Long ago, we know, a government which offended a citizen of Rome offended Rome."); see also *Nottebohm (Liech. v. Guat.)* 1955 I.C.J. 4, 24 (Apr. 6) ("[B]y taking up the case of its subjects and by resorting to diplomatic action or international judicial

that certain basic, minimum standards constrain a state's rights to expel aliens from its territory.²⁴ The restrictions are more pronounced in the area of procedural due process.²⁵ However, as United Nations Special Rapporteur on the Expulsion of Aliens, Maurice Kamto, noted, "Strictly speaking, there are no detailed rules in international law establishing expulsion proceedings and reconciling the rights of the individual subject to expulsion with the sovereign rights of the expelling State."²⁶ There are, however, several scattered rules of international law that set some minimum standards of treatment of aliens in a variety of contexts. The following Subpart discusses such rules, dividing them into wartime rules and peacetime rules.

A. The Expulsion of Aliens in Times of War in International Law

Although this Article focuses on procedural due process as applied in times of peace, it is important to highlight the idea that under international law, even in times of war, the sovereign's power to expel aliens is limited.²⁷ It must accord them procedural due process whenever it may justifiably expel them.²⁸ Indeed, nations must keep in mind that although special rules of international humanitarian law²⁹ apply in times of armed conflict, application of those rules

proceedings on his behalf, a state is in reality asserting its own rights—its right to ensure, in the person of its subject, respect for the rules of international law.") (internal quotation marks omitted).

²⁴ "In principle, the alien is entitled to treatment no less favorable than the 'minimum standard' required by international law. His expulsion arbitrarily or without good cause may well amount to treatment below that minimum standard." ILC Expulsion Memorandum, *supra* note 14, at 172 n.505 (quoting RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 460 (2d ed. 1988)).

²⁵ *Sixth Report on the Expulsion of Aliens*, *supra* note 2, para. 48, at 19.

²⁶ *See id.*, para. 1, at 3.

²⁷ ILC Expulsion Memorandum, *supra* note 14, para. 105, at 39.

²⁸ *Id.*

²⁹ The term "international humanitarian law," also known as "*jus in bello*," represents in its current usage all rules of international law designed to govern the treatment of human persons, civilian, or military, active, inactive, sick, or wounded in armed conflict. Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 WIS. INT'L L.J. 1, 1 (2007). It is "a cohesive body of law, but a category of separate legal proscriptions." *See* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 441 (1996) (citing Hans-Peter Gasser, *International Humanitarian Law*, in HANS HAUG, HUMANITY FOR ALL 1, 3 (1993)). Most rules of current importance are contained in the Four Geneva Conventions of 1949. *See* Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 33 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 4. The two Additional Protocols of 1977 provide additional rules: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125

is also limited.³⁰ According to the International Court of Justice, “[T]he protection offered by human rights conventions does not cease in case of armed conflict save through the effect of provisions for derogation”³¹ Although exigencies of war often justify measures that would not be allowed in peacetime, international humanitarian law impose certain limits on the behavior of belligerents towards civilian populations, including aliens present in their respective territories. The primary sources of law for the treatment of aliens in the territory of a belligerent are the Geneva Convention IV and Additional Protocol I,³² both of which are examined below.

Over the ages, the law pertaining to the treatment of enemy aliens has evolved “from enslavement to the securing of human rights through modern international humanitarian law.”³³ At the most basic level under contemporary international humanitarian law, aliens within the territory of the adverse party to the conflict, often called “enemy aliens,”³⁴ enjoy the general protection of receiving humane treatment just like any civilian person³⁵ who falls into the hands of a belligerent.³⁶

U.N.T.S. 4 [hereinafter Protocol I]; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 610 [hereinafter Protocol II]. This also comprises a set of rules formerly known as the Laws of War contained in the Hague Conventions of 1907. The Hague Conventions are reprinted in DOCUMENTS IN THE LAWS OF WAR 67–137 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). More recent instruments include the U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 163. This set of rules is distinct from a body of rules governing the legitimacy of the resort to force, often referred to as the *jus ad bellum*, which is essentially based on Article 2 and Chapter VII of the United Nations Charter. See U.N. Charter art. 2, para. 4. See generally FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (1987).

³⁰ See KALSHOVEN & ZEGVELD, *supra* note 29, at 83–84.

³¹ Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 106 (July 9).

³² Some subsidiary sources are discussed in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 280 n.57 (Dieter Fleck ed., 1995) [hereinafter HUMANITARIAN LAW HANDBOOK].

³³ *Id.* at 279–80.

³⁴ The concept of “enemy aliens” has many dimensions and has in recent times attracted significant attention in scholarly literature. For a good review of the various aspects of the concept under international law and U.S. domestic history and jurisprudence linked to the “war on terror,” see generally Cole, *supra* note 19. For an elaborate version, see COLE, *supra* note 18.

³⁵ Under international humanitarian law, these civilian persons are called “protected persons.” Protected persons include “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Geneva Convention IV, *supra* note 26, art. 4.

³⁶ See *id.* arts. 13–26.

Save for justifiable national security reasons, belligerent nations generally respect the freedom of movement of enemy aliens. For example, under Article 35 of Geneva Convention IV, “All protected persons [including aliens] who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State.”³⁷ More importantly, the same provision guarantees procedural due process. It provides that “[t]he applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible.”³⁸ Moreover, “[i]f any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.”³⁹

This provision is fundamentally about respecting the wishes of protected persons, especially their right to movement, but its emphasis is obviously on departure, which is often the most serious challenge for enemy aliens trapped in an enemy state. However, as the official commentary of the International Committee of the Red Cross notes, “The words ‘who may desire to leave the territory’ show quite clearly that the departure of the protected persons concerned will take place only if they wish to leave.”⁴⁰ It further notes, in fact, that “[t]he International Committee’s original draft laid down that no protected person could be repatriated against his will” and concludes that “the same idea is implicit in the text actually adopted.”⁴¹ This means the forcible repatriation of aliens to their countries of origin is prohibited.⁴² Geneva Convention IV also prohibits the transfer of aliens to an occupying power’s own territory,⁴³ to third

³⁷ *Id.* art. 35; *see also supra* note 35 (defining “protected persons”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Int’l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 235 (1958).

⁴¹ *Id.*

⁴² Note, however, that the commentary further states that, “While forced repatriation—that is, sending a person back to his country against his will—is prohibited, the right of expulsion has been retained. For example, if France were to break off diplomatic relations with Germany, she would not be entitled to send German nationals under escort to the German frontier against their will; she could, however, decree their deportation and send them under escort to the Belgian, Spanish, or Swiss frontiers.” *Id.* at 235 n.1.

⁴³ The transfer of populations to the territories of the occupying power is called deportation and is considered a grave breach, and as such it is strictly prohibited unless it is justified for security reasons. *See* Geneva Convention IV, *supra* note 2, arts. 45, 49, 147. *See also* Protocol I, *supra* note 29, art. 85 (characterizing the deportation of civilians to the territories of the occupying power as a grave breach of international humanitarian law). The same principle is also enshrined in the statutes of the various international criminal tribunals. *See, e.g.,* Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

countries not bound by the Convention,⁴⁴ as well as to any country where the aliens may face persecution.⁴⁵

Undeniably, there is some uncertainty in international humanitarian law regarding the exact scope of the prohibition on the expulsion of aliens in times of war. The classic International Humanitarian Law Handbook asks: "If aliens, at the outbreak of a conflict, find themselves in the territory of a party to that conflict, is it permissible for the authorities simply to put them on an aircraft or to set them down at the border of the neighboring state against their will?"⁴⁶ No express language in the texts of the Geneva Conventions or Protocols answers this question. However, the answer is not as difficult as it may appear. Article 38 of Geneva Convention IV provides that, except for some restrictions that are justified because of wartime exigencies,⁴⁷ "the situation of protected persons shall continue to be regulated, in principle, by provisions concerning aliens in time of peace."⁴⁸ Predicated on this and in answering the question it raised about expulsion of aliens, the Handbook describes:

Certainly persons may not be deported to a country where they can expect to be persecuted because of their political opinions and religious convictions In this connection attention is drawn to Article 13 of the International Covenant on Civil and Political Rights, which stipulates an orderly procedure for expulsion of aliens and in particular enabling the persons concerned to present their own case."⁴⁹

Despite the uncertainty of the exact scope of the substantive prohibition, one rule is consistently clear: The belligerent must accord aliens procedural due process. The standards for such process ordinarily come from human rights law applied in peacetime, which is discussed below.

⁴⁴ See Geneva Convention IV, *supra* note 2, art. 45 ("Protected persons shall not be transferred to a Power which is not a party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or their return to their country of residence after the cessation of hostilities.").

⁴⁵ This is a classic statement of the principle of non-refoulement, although the grounds appear to be limited to political opinion and religious belief. See *id.*

⁴⁶ HUMANITARIAN LAW HANDBOOK, *supra* note 32, at 287.

⁴⁷ See Geneva Convention IV, *supra* note 2, arts. 27, 41 (allowing certain necessary measures of control in the interest of security).

⁴⁸ See *id.* art. 38.

⁴⁹ See HUMANITARIAN LAW HANDBOOK, *supra* note 32 at 287.

B. The Expulsion of Aliens in Times of Peace in International Law

The principal branch of international law that applies to the expulsion of aliens in peacetime is international human rights law.⁵⁰ Numerous recognized human rights are relevant to the expulsion of aliens, as the measures affect not only the person who is subject to the expulsion process, but also his or her family members.⁵¹ As such, some of the substantive rights might include the rights of the family and children.⁵² Because the focus of this Article is procedural due process, the related substantive rights⁵³ are not discussed.

As far as procedural due process is concerned, the most important multilateral treaties that set minimum standards are: The International Covenant on Civil and Political Rights (“ICCPR”);⁵⁴ Convention Relating to the Status of Refugees (“Refugee Convention”);⁵⁵ Convention Relating to the Status of Stateless Persons (“Stateless Persons Convention”);⁵⁶ Convention Against Torture and Other Cruel and Inhumane or Degrading Treatment or Punishment (“CAT”);⁵⁷ and the International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families (“Migrant Workers Rights Convention”).⁵⁸ Relevant regional instruments include the

⁵⁰ In principle, “the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live.” General Assembly Declaration on Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, Annex, para. 7, U.N. Doc. A/RES 40/144 (Dec. 13, 1985). This Article does not go into the details of the problems associated with the enforcement of international human rights law. The standards are discussed here to show what is expected of signatory states. For a good discussion of the role of international human rights law in the area of immigration and associated real and perceived problems of enforcement, see generally Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359 (2007).

⁵¹ See, e.g., G.A. Res. 40/144, *supra* note 50, art. 5.

⁵² See ILC Expulsion Memorandum, *supra* note 14, paras. 253–54.

⁵³ See *id.* paras. 253–57 (discussing the state of international law in the area of substantive rights afforded to aliens).

⁵⁴ ICCPR, *supra* note 2.

⁵⁵ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (lifting the temporal and geographic limitations of the Refugee Convention of 1951).

⁵⁶ Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter Stateless Persons Convention].

⁵⁷ Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (incorporated into U.S. law by the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 (2006)) [hereinafter CAT].

⁵⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter Migrant Workers Rights Convention].

American Convention on Human Rights (“ACHR”),⁵⁹ and the European Convention for the Protection of Human Rights and Fundamental Freedom (“ECHR”).⁶⁰

Collectively, these instruments set certain minimum standards on the treatment of aliens and call for fair procedures for expulsion when such can be lawfully carried out. The ICCPR contains two relevant provisions pertaining to the rights of aliens, one of which directly addresses expulsion: Article 12 and Article 13. Article 12 guarantees the rights of aliens to free movement within the state where they are lawfully resident.⁶¹ As far as expulsion is concerned, Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom 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, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.⁶²

While leaving the determination of the lawfulness of the alien’s presence to the discretions of the State Party,⁶³ this provision sets several minimum standards in the expulsion process. Significantly, it requires procedural due process, including a meaningful opportunity to be heard and to have recourse for review.⁶⁴ Most importantly, it also requires the provision of representation during the expulsion process.⁶⁵

⁵⁹ Organization of American States, American Convention on Human Rights, Nov. 22 1969, 1144 U.N.T.S. 123 [hereinafter ACHR] The United States signed the ACHR, but never ratified it. *Multilateral Treaties: American Convention on Human Rights*, ORG. OF AM. STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Mar. 23, 2013).

⁶⁰ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 as amended by subsequent protocols [hereinafter ECHR]. The Council of Europe is designated only with international cooperation in mind, and it does not transfer or merge the sovereign rights of its Member States. KLAUS-DIETER BORCHARDT, *THE ABC OF EUROPEAN UNION LAW* 10–11 (2010).

⁶¹ ICCPR, *supra* note 2, art. 12.

⁶² *Id.* art. 13.

⁶³ Article 13 also suggests that less favorable procedures might apply to aliens unlawfully within the territory of the state and recognizes the reality that states sometimes apply inferior sets of procedures to aliens unlawfully within their territory.

⁶⁴ ICCPR, *supra* note 2, art. 13.

⁶⁵ *Id.*

The rules of the Refugee Convention are specific to persons who face persecution, but they are still instructive. The Refugee Convention contains the classic expression of the substantive principle of non-refoulement (non-return).⁶⁶ It also contains a provision guaranteeing procedural due process.⁶⁷ It reads in relevant part:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.⁶⁸

The minimum standards of due process are stated in almost identical terms in the Refugee Convention and in the ICCPR. The ICCPR suggests that procedural due process is not limited to refugee status determination, but that it is a general guarantee in all situations where a set of rules needs to be applied to a set of disputed facts. To reiterate, the procedural guarantees are: the right to be heard and present evidence, appellate review and, most importantly, the right to be represented.

The Stateless Persons Convention sets forth the requirement of procedural due process, including the right to representation, in identical language as the Refugee Convention.⁶⁹ CAT and the Migrant Workers Rights Convention impose similar conditions on the expulsion of certain category of aliens.⁷⁰ The

⁶⁶ See Refugee Convention, *supra* note 55, art. 33(1) (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”).

⁶⁷ *Id.* art. 33(1)–(2).

⁶⁸ *Id.*

⁶⁹ See Stateless Persons Convention, *supra* note 56, art. 31.

⁷⁰ See CAT, *supra* note 57, art. 3 (“1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”); see also Migrant Workers Rights Convention, *supra* note 58, art. 22(2) (“Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.”).

bearers of the fundamental obligation not to return essentially retain the discretion to prescribe their own procedures. However, the substantive obligations they assume naturally require them to accord appropriate procedural guarantees, which is the only way that they can carry out their obligations. The minimum standards are set forth in the ICCPR, which is of general applicability.⁷¹ Such standards are also reiterated in the Refugee Convention and the Stateless Persons Convention in almost identical terms.⁷² Again, the key guarantees are the right to be heard, appellate review, and the right to representation throughout the proceedings.⁷³

The relevant American and European regional instruments also have the same effect. The ACHR's basic principle of non-refoulement states that: "An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law."⁷⁴ Although short on details, "pursuant to law" assumes certain fundamental due process considerations.

The ECHR does not on its own terms contain the principle of non-refoulement, nor does it make express provisions on expulsion. However, the European Court of Human Rights interpreted the prohibition against torture and inhumane treatment contained in Article 3 of the Convention as enshrining the principle of non-refoulement.⁷⁵ Moreover, the Court has also ruled that the application of the principle of non-refoulement requires procedural due process.⁷⁶ A good example is the Court's rejection of Turkey's imposition of a five-day limit on persons who entered the country illegally to submit their asylum claim or forgo their rights.⁷⁷ Rejecting such a requirement as unreasonable, the Court noted: "The automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of fundamental value embodied in Article 3 of the Convention."⁷⁸

⁷¹ See ICCPR, *supra* note 2.

⁷² See Refugee Convention, *supra* note 55, art. 32(2); Stateless Persons Convention, *supra* note 56, art. 32(2).

⁷³ See ICCPR, *supra* note 2, art. 13.

⁷⁴ ACHR, *supra* note 59, art. 22(6).

⁷⁵ See E.U. IMMIGRATION AND ASYLUM LAW, *supra* note 7, at 15–17.

⁷⁶ See *Jabari v. Turkey*, 2000-VIII Eur. Ct. H.R. 151, 162.

⁷⁷ See *id.*

⁷⁸ *Id.* at 8.

Although expulsion or deportation (or removal, as it is often called in some domestic jurisdictions) is not strictly considered punishment,⁷⁹ the above described body of international law and the practice of states⁸⁰ suggest that procedural guarantees commensurate with the severity of the measure remain at all times relevant. Indeed, the ILC has begun the process of drafting basic common procedures on the expulsion of aliens. The *Sixth Report on the Expulsion of Aliens* was recently submitted by the Special Rapporteur, Maurice Kamto, to the Commission in August of 2010.⁸¹ Although this is still a work in progress, certain basic principles have started to emerge.⁸² Particularly relevant are the draft procedural rules. They are described in brief as follows.

Draft article B1 states that “[a]n alien [lawfully]⁸³ in the territory of a State may be expelled therefrom only in pursuance of a decision reached according to law.”⁸⁴ This seemingly simple provision contains some very fundamental guarantees that Special Rapporteur’s report outlined based on exiting international law and practice of states. What does “conformity with the law”

⁷⁹ Although the characterization of deportation as a civil sanction has always prevailed in judicial decisions, it has never gained overwhelming support in the jurisprudence. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 730 (1893). As early as 1788, James Madison said: “If a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” James Madison, *Madison’s Report on the Virginia Resolutions*, in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE CONVENTION AT PHILADELPHIA IN 1787*, at 546, 555 (Jonathan Elliot ed., 1891). For an analysis of the jurisprudence relating to deportation as punishment in the context of U.S. law, see Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 *GEO. IMMIGR. L.J.* 115 (1999). For a similar analysis, see Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 *HASTINGS CONST. L.Q.* 383 (2007).

⁸⁰ See ILC Expulsion Memorandum, *supra* note 14, paras. 186–202, 209–20.

⁸¹ *Sixth Report on the Expulsion of Aliens*, *supra* note 2.

⁸² Chairman of the U.N. Drafting Comm., *Progress Report on the Topic “Expulsion of Aliens,”* Int’l Law Comm’n (July 23, 2010) (adopting some basic provisions).

⁸³ The Special Rapporteur’s Sixth Report to the Commission provides a detailed discussion of the distinction that states often make between aliens who are lawfully and unlawfully within their territories. States sometimes accord lesser procedural guarantees to those who are unlawfully in their territories, although long-term residents are almost always accorded better rights regardless of their illegal presence. See *Sixth Report on the Expulsion of Aliens*, *supra* note 2, paras. 1–40. While the relevant Draft Article A1 recognizes the States’ discretion to apply less favorable rules in the process of expulsion of aliens who are not lawfully present, it nonetheless suggests that they may apply the required higher procedural guarantees to all regardless of their status. See *id.* para. 40 (“Scope of [the present] rules of procedure: 1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State. 2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.”).

⁸⁴ *Id.* para. 64.

mean? At the most basic level, “a logical rule holds that if a State has the right to regulate the conditions for immigration into its territory it must nevertheless do so without . . . infringing any rule of international law, [and] in conformity with the rules which it has adopted or to which it has agreed [on the matter]”⁸⁵ In other words, international human rights treaties provide the basic benchmark. More specifically, the Rapporteur relied on Article 8 of the Universal Declaration of Human Rights, which states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁸⁶ This is one of the most basic and the most fundamental human rights. The key phrase is, of course, “effective remedy.” The ICCPR gives this provision some shape and content. It states: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom 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, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”⁸⁷

Having surveyed relevant multinational and regional instruments as well as the practices of states, the Special Rapporteur identified some fundamental guarantees that give these provisions concrete shape and character. They are: “[T]he right to a judge; the right to a trial in the presence of all parties; the right to assistance by counsel; and the right to an appeal with suspense effect”⁸⁸ In other words, aliens have the right to fair hearing and a reasoned decision.

Draft article C1 neatly summarizes the appropriate procedural rights:

1. An alien facing expulsion enjoys the following procedural rights:
 - a. The right to receive notice of the expulsion decision.
 - b. The right to challenge the expulsion [the expulsion decision].
 - c. The right to a hearing.

⁸⁵ Special Rapporteur on the Expulsion of Aliens, *Preliminary Rep. on the Expulsion of Aliens*, para. 23, A/CN.4/554 (June 2, 2005) (footnote omitted).

⁸⁶ See UDHR, *supra* note 16, art. 8.

⁸⁷ See ICCPR, *supra* note 2, art. 13.

⁸⁸ *Sixth Report on the Expulsion of Aliens*, *supra* note 2, para. 67 (recognizing that “these safeguards were being considered within the framework of newly developing European citizenship, but they could serve to inspire rules of more universal application”).

- d. The right of access to effective remedies to challenge the expulsion decision without discrimination.
 - e. The right to consular protection.
 - f. The right to counsel.
 - g. The right to legal aid.
 - h. The right to interpretation and translation into a language he or she understands.
2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.⁸⁹

These may rightfully be considered the most contemporary international standards. The following Part measures the procedural rules of the European Union and United States against these standards and against each other, and identifies the best practices as well as the shortcomings.

II. PROCEDURAL DUE PROCESS IN THE EXPULSION OF ALIENS IN A COMPARATIVE PERSPECTIVE: THE EUROPEAN UNION AND THE UNITED STATES

Weighing in on the enduring debate of the limitations on the state's right to expel aliens and expected level of procedural due process, Ian Brownlie introduced the notion of *diligentia quam in suis* into the equation.⁹⁰ The English equivalent of *diligentia quam in suis* is "national treatment but on the basis of the standard *ordinarily* observed by the particular state in its own affairs."⁹¹ The concept allows for some relativity within the confines of some basic standards. According to Brownlie, "*Diligentia quam in suis* would allow for the variations in wealth and educational standards between the various states of the world and yet would not be a mechanical national standard, tied to equality."⁹² He also recognized that "there are certain overriding rules of law including the proscription of genocide which are clearly international standards."⁹³

Although Brownlie's suggestion is discomfiting in some ways, it is perhaps a recognition of the sad reality that expectations are often linked to the stage of economic development. Embedded in the notion of *diligentia quam in suis* are certain reasonable expectations that hold similarly situated countries to

⁸⁹ *Id.* para. 126.

⁹⁰ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 504 n.35 (6th ed. 2003); ILC Expulsion Memorandum, *supra* note 14, at 172 n.502).

⁹¹ See BROWNLIE, *supra* note 90, at 504; see also ILC Expulsion Memorandum, *supra* note 14, at 172 n.502.

⁹² BROWNLIE, *supra* note 90, at 504.

⁹³ *Id.*

similar standards. Predicated on this notion, this section provides a comparative analysis of the nature of procedural due process relating to the expulsion of aliens in the European Union and United States. It also identifies the shortcomings of each and identifies the best practices.

A. E.U. Expulsion Standards

The 2010 edition of a reputable treatise on the European Union is welcoming to the newcomer of the study of E.U. law. The Lisbon Treaty of 2009 has altered preexisting E.U. law—mainly regarding institutions—in some fundamental ways.⁹⁴ The history of E.U. law and institutions is long and complicated.⁹⁵ This Article does not attempt to provide a detailed description of the evolution of the laws and the institutions, which has been done very well elsewhere.⁹⁶ First, it is important to situate the applicable E.U. migration rules in the structural hierarchy of E.U. law generally.

The Treaty for the Functioning of the European Union (“TFEU”) is the principal source of law on the free movement of persons within, to, and from the Union.⁹⁷ It makes rules for various categories of persons,⁹⁸ but the focus

⁹⁴ See MATHUSEN, *supra* note 6, at ix–xi. At a more technical level, the numbering of the provisions of the pre-existing treaties were altered, which makes the study that much more laborious.

⁹⁵ Consider some of the familiar terms that have become associated with the process of European unification efforts and the European Union’s operations over the years: “European Community,” “European Communities,” “European Economic Community,” “Common Market,” “Internal Market,” “Treaty on European Union,” “Treaty on the Functioning of the European Union,” “Maastricht Treaty,” the “Amsterdam Treaty,” the “Treaty of Nice,” the “European Council,” the “European Commission,” “The European Parliament,” and finally the “Treaty of Lisbon.” Mathijisen’s treatise uses these terms to show the complexity. See MATHUSEN, *supra* note 6, at 3–4. Under existing law, i.e., the TEU as modified by the Treaty of Lisbon, six primary and several other institutions make up the institutional framework of the European Union. See, e.g., TEU, *supra* note 6; TFEU, *supra* note 6. Among the primary institutions is the European Council, which is an assembly of heads of state and government and sets the general directions and priorities of the Union, but it has no legislative power. See TFEU arts. 235–36. A second institution is the European Parliament, which is an elected representative of the citizens of the Union. It has legislative power within the competence of the Union. See *id.* arts. 223–34. A third institution is the Council of the European Union, which is a council of national ministers and shares legislative authority with the E.U. Parliament. See *id.* arts. 237–43. A fourth institution is the European Commission, which is the executive arm of the Union and enforces E.U. laws along with the Court of Justice. See *id.* arts. 244–50. Fifth, there is the Court of Justice, which is the principal judicial organ of the European Union. It interprets E.U. laws and settles disputes. See *id.* arts. 251–81. Lastly, there is the Court of Auditors, which audits E.U. finances. See *id.* arts. 285–87. Mathijisen also adds the European Central Bank to the list of principal E.U. institutions. See MATHUSEN, *supra* note 6, at 59. The relevant TFEU provisions on the European Bank are Articles 282 through 284.

⁹⁶ See, e.g., MATHIJSEN, *supra* note 6, at 1–213.

⁹⁷ See *id.* at 238–39.

⁹⁸ This includes students, workers, and other temporary and permanent residents. See TFEU, *supra* note 6, arts. 45–55 (discussing the free movement of persons, services, and capital).

here is mainly on citizens of the European Union⁹⁹ and third-country nationals.¹⁰⁰

According to the European Union's official statement, the European Union "is not a federation like the United States. Nor is it simply an organisation for cooperation between governments, like the United Nations. . . . Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level."¹⁰¹ To carry out these functions, the European Union has empowered its institutions to legislate in various common areas.¹⁰² At the more practical level, the European Parliament shares legislative power with the Council of the European Union, as if they were two chambers of a legislative body.¹⁰³ The Commission also has its own share of legislative power.¹⁰⁴ The European Union officially calls this joint legislative process "co-decision" or "the ordinary legislative procedure."¹⁰⁵ Through this joint process, the European Union enacts various sets of rules. The rules, called "legal acts,"¹⁰⁶ have various nomenclatures, which speak to their hierarchy, procedures of their adoption, and their implementation. The listed ones are: regulations, directives, decisions, recommendations, and opinions.¹⁰⁷ The principal source of regulatory authority in the area of immigration and residence is Article 79 of the TFEU.¹⁰⁸

Regulations are of general applicability and "shall be binding in [their] entirety and directly applicable in all Member States" without the need for implementing legislation.¹⁰⁹ Directives are also binding, but they would require a national incorporation through domestic legislative or administrative

⁹⁹ See *id.* arts. 20–25 (discussing non-discrimination and citizens of the Union).

¹⁰⁰ *Id.* arts. 77–80 (discussing the policies of Border Checks, Asylum, and Immigration).

¹⁰¹ EUROPEAN COMM'N, HOW THE EUROPEAN UNION WORKS 3 (2006).

¹⁰² See *id.* at 4.

¹⁰³ See *id.* (referring to the relationship between the Commission, Parliament, and Council as an "institutional triangle").

¹⁰⁴ See, e.g., TFEU art. 294 (governing the "ordinary legislative procedure for the adoption of an act" for the Commission, the European Parliament and the European Council); EUROPEAN COMM'N, *supra* note 101, at 4 (discussing the "institutional triangle" where "it is the commission that proposes new laws, but it is the Parliament and Council that enact them"); see also MATHIJSEN, *supra* note 6, at 65–74.

¹⁰⁵ See *EU Institutions and Other Bodies*, EUROPA, <http://europa.eu/about-eu/institutions-bodies> (last visited Jan. 30, 2013).

¹⁰⁶ See TFEU pt. 6, tit. I, ch. 2 (entitled "Legal Acts of the Union").

¹⁰⁷ See *id.* art. 288.

¹⁰⁸ *Id.* art. 79.

¹⁰⁹ See *id.* art. 288.

action.¹¹⁰ While decisions are binding on the parties to whom they are specifically addressed, recommendations and opinions do not have the force of law.¹¹¹ For purposes of this Article, the most important sets of rules are: (1) Directive 2004/38/EC,¹¹² and (2) Directive 2008/115/EC.¹¹³ These standards were preceded by non-binding guidelines known as Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return of 2005.¹¹⁴ These twenty guiding principles are applicable in all forty-seven Member States of the Council of Europe,¹¹⁵ which includes all twenty-seven members of the European Union.¹¹⁶ However, in this Article's discussion of binding directives, reference will occasionally be made to these guidelines as supplemental and subsidiary sources.

Before a detailed discussion of the directives on return or expulsion, it is important to have a brief look at the fundamentals of E.U. citizenship and third-country nationals in order to place the directives in context.

1. *E.U. Citizens*

One of the principal accomplishments of the European Union is the creation of European Union citizenship.¹¹⁷ TFEU states that "[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national

¹¹⁰ *Id.*; see also MATHIJSEN, *supra* note 6, at 32–33 ("It is clear from the settled case law that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise they may be relied upon before the national courts by individuals against the Member State where it has failed to implement the directive correctly.").

¹¹¹ See TFEU art. 288.

¹¹² Council Directive 2004/38, 2004 O.J. (L 158) 1 (EC) [hereinafter E.U. Directive on the Return of E.U. Citizens].

This title does not seem to reflect the actual content of the Directive, which is primarily concerned with the rights of families of E.U. citizens working in other countries.

¹¹³ E.U. Directive on Common Standards of Return, *supra* note 7, at 98.

¹¹⁴ See Comm. of Ministers, *Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons*, COUNCIL EUR. (May 20, 2005), [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2005\)40&Language=lanEnglish&Ver=addfinal](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)40&Language=lanEnglish&Ver=addfinal) [hereinafter *Twenty Guidelines*]. These were adopted on May 4, 2005, at the 925th Meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe and made final on May 20, 2005. *Id.* See generally E.U. IMMIGRATION AND ASYLUM LAW, *supra* note 7, at 1–9 (for a discussion of the legal basis of immigration and asylum rules).

¹¹⁵ *Twenty Guidelines*, *supra* note 114 ("The Guidelines apply to procedures leading to the expulsion of non-nationals from the territory of members states of the Council of Europe.").

¹¹⁶ The constitutive treaties, the institutional structure, and the hierarchy of laws of the E.U. are briefly discussed in the following Parts. See *infra* Part II.A.2–B.1.

¹¹⁷ See TFEU art. 20(1) ("Citizenship of the Union is hereby established.").

citizenship.”¹¹⁸ Citizens of the Union enjoy rights and privileges of citizenship without discrimination on the basis of their nationality.¹¹⁹ These include the right to free movement and residence in any Member State,¹²⁰ the right to elect and be elected to the European Parliament,¹²¹ diplomatic protection by any member State in a third country,¹²² and protection of rights by E.U. institutions.¹²³ Significantly, “[e]very citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.”¹²⁴ All of these rights are, however, subject to certain restrictions. For example, Article 72 of TFEU allows Member States to impose certain restrictions on access and even expel E.U. citizens for security, public health, and other public policy reasons.¹²⁵ As indicated above, the principal instrument that sets the minimum standards for the right of residence of E.U. citizens in a Member State is Directive 2004/38.¹²⁶ Its standards will be discussed in comparison with the directive on the expulsion of third-country nationals in Part II.A.3. Before that, a brief note on third-country nationals is warranted.

¹¹⁸ *Id.*

¹¹⁹ *Id.* art. 18.

¹²⁰ *Id.* art. 20(2)(a). Note, however, that residence for a period of more than three months requires a showing of sufficient resources to support oneself and one’s family, including health insurance. See MATHIJSEN, *supra* note 6, at 239–40 (citing Case C-499/06, *Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, 2008 E.C.R. I-3993 (2008)).

¹²¹ TFEU art. 20(2)(b).

¹²² *Id.* art. 20(2)(c).

¹²³ *Id.* art. 20(2)(d); see also *id.* art. 21.

¹²⁴ *Id.* art. 22(1).

¹²⁵ See *id.* art. 72; see also E.U. IMMIGRATION AND ASYLUM LAW, *supra* note 7, at 5 (“Art. 72 . . . is based upon the recognition that law and order and internal security cannot be fully determined by uniform European standards leaving no scope of discretion to the EU member States.”).

¹²⁶ E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 7. Concepts such as national security and public interest are always subjects of great controversy and generate significant case law. See, e.g., MATHIJSEN, *supra* note 6, at 253 (citing an older case, Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219). In fact, this is one of the most fundamental limitations that give member States a wide range of legislative and regulatory leeway. For example, the central provision on this, Article 72 of TFEU, reads, “This Title [Area of Freedom, Security, and Justice] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” TFEU art. 72. See E.U. IMMIGRATION AND ASYLUM LAW, *supra* note 7, at 3–6 (briefly discussing on the formulation of the public order exception).

2. *Third-Country Nationals*

The TFEU provisions that apply to E.U. Citizens are under Title II, Part Two: “Non-discrimination and Citizenship of the Union.”¹²⁷ However, the provisions that apply to the third-country nationals are under Title V: “Area of Freedom, Security and Justice.”¹²⁸ These provisions set the general principles in many areas, including the need to ensure free movement within the Union, and the establishment of common asylum and immigration policy as well as common standards of removal of third-country nationals.¹²⁹ Predicated on this mandate, many regulations and directives were passed.¹³⁰ As indicated above, the focus here is on the return directives,¹³¹ which will be analyzed in detail below.

3. *E.U. Directives on Common Procedural Standards of Expulsion*

The two sets of relevant procedural rules are (1) E.U. Directive on the Return of E.U. Citizens, and (2) E.U. Directive on Common Standards of Return. They are discussed in turn below.

a. *Standards for the Expulsion of E.U. Citizens*

More than anything else, what the E.U. Directive on the Return of Citizens makes clear is that E.U. citizenship is not full-fledged citizenship. This is due mainly to the restrictions on residence and the possibility of expulsion from any member state except the state of the person’s nationality. The restrictions

¹²⁷ See TFEU arts. 18–25.

¹²⁸ See *id.* arts. 67–80.

¹²⁹ See *id.* arts. 77–80.

¹³⁰ See generally E.U. IMMIGRATION AND ASYLUM LAW, *supra* note 7, at 1–7 (compiling and commenting on most of the important Regulations and Directives). Harmonization in the area of asylum appears to be more advanced than that other areas. Important directives in this area include: Council Directive 2005/85, 2005 O.J. (L 326) 13; E.U. Directive on Minimum Standards for Qualification, *supra* note 7; Council Directive 2003/9, 2003 O.J. (L 31) 18; Council Directive 2001/55, 2001 O.J. (L 212) 12 (EC); Council Regulation 343/2003, 2003 O.J. (L 50) 1; Those directives pertaining to entry of third-country nations and their residence include: Council Directive 2009/52, 2009 O.J. (L 168) 24; Council Directive 2009/50, 2009 O.J. (L 155) 17; Council Directive 2005/71, 2005 O.J. (L 289) 15; Council Directive 2004/114, 2004 O.J. (L 375) 12; Council Directive 2004/81, 2004 O.J. (L 261) 19; Council Directive 2003/109, 2003 O.J. (L 16) 44; Council Directive 2003/86, 2003 O.J. (L 251) 12; Council Regulation 539/2001, *supra* note 7; Commission Regulation 562/2006, *supra* note 7 (Schengen Border Code).

¹³¹ See, e.g., E.U. Directive on Common Standards of Return, *supra* note 7, art. 1 (“This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals”); see also E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 1 (“This Directive lays down: (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members”).

on residence are not insignificant. Residence without conditions and formalities in an E.U. member state other than the residents own country is limited to a period of three months.¹³² Residence for longer periods requires justification in the form of work or education.¹³³ These limitations are intended to avoid burdening the social assistance systems of member states.¹³⁴ Thus, financial security, including health insurance, is a prerequisite for long-term residency.¹³⁵ In legal terms, member states have retained the discretion to impose restrictions for reasons of public health, public order, and security.¹³⁶ These are broad discretions that manifest themselves not only in the context of denial of admission or restriction on residence,¹³⁷ but also in forcible expulsion of certain categories of E.U. citizens.¹³⁸ Moreover, member states have also retained very broad discretion to “adopt the necessary measures to refuse, terminate, or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriage of convenience.”¹³⁹

These broad discretions are constrained by the principle of proportionality, a fundamental jurisprudential underpinning that runs across almost every part of E.U. immigration law and policy.¹⁴⁰

Expressions of the principle are contained in Articles 27 and 35 of the Directive. Article 27 states: “Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.”¹⁴¹ Defining the scope of proportionality in strict language, the same provision states:

Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the

¹³² E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 6.

¹³³ *Id.* art. 7.

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *See id.* art. 27 (“Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of the Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health.”).

¹³⁷ *See id.* art. 27(1).

¹³⁸ *See id.* art. 28.

¹³⁹ *Id.* art. 35.

¹⁴⁰ *Id.* arts. 27(2), 35. The jurisprudence of the European Court of Justice also seems to suggest that the notion of proportionality serves as a check against unlimited exercise of these kinds of broad exceptions. *See* E.U. IMMIGRATION AND ASYLUM LAW, *supra* note 7, at 4 (citing Case T-157/79, Regina v. Pieck, 1980 E.C.R. 2171).

¹⁴¹ E.U. Directive on Return of E.U. Citizens, *supra* note 112, art. 27(2).

individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.¹⁴²

Hence, in the admission and exclusion context, the principle of proportionality limits public policy and public order based restrictions to genuine and present danger “affecting one of the fundamental interests of the society.”¹⁴³ In other words, Member States’ laws and policies are subjected to some kind of strict scrutiny.

Member states also retain the right to expel Union citizens on “serious grounds of public policy or public security.”¹⁴⁴ These broad discretions are also subject to the principle of proportionality contained in Article 27.¹⁴⁵ Article 28 provides more guidance on the applicability of the principle of proportionality in the context of expulsion.¹⁴⁶

Three levels of proportionality inquiry are envisioned under this provision. The first level of inquiry pertains to measures taken “on serious grounds of public policy,”¹⁴⁷ which may presumably apply to all categories of E.U. citizens. In that case, all the considerations of age, health, family and social and economic integration are examined.¹⁴⁸ The second level of inquiry pertains to Union citizens who are permanent residents. They may not be expelled “except on serious grounds of public policy or public security.”¹⁴⁹ The third level of scrutiny pertains to Union citizens who have resided in the host state more than ten years and those who are minors regardless of the length of residency.¹⁵⁰ In these two cases, expulsion decision may not be passed unless “imperative grounds of public security” so demand.¹⁵¹

While the substantive measures themselves are subject to these levels of proportionality scrutiny, each Union citizen facing expulsion has individualized due process. The nature of due process that the Directive

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* art. 28(2).

¹⁴⁵ Compare *id.*, with *id.* art. 27.

¹⁴⁶ *Id.* art. 28.

¹⁴⁷ *Id.* art. 28(2).

¹⁴⁸ *Id.* art. 28(1).

¹⁴⁹ *Id.* art. 28(2).

¹⁵⁰ See *id.* art. 28(3).

¹⁵¹ See *id.* art. 28(3).

mandates is contained in Article 31. Procedural due process is the central focus of this Article.¹⁵²

This provision defines the basic parameters of the due process that individuals subject to expulsion must have, but it is short on detail. It skips the primary decision-making process and focuses on review. It does not restrict the review process to judicial determination; it allows administrative review. There is no indication that judicial review of the administrative decisions is required.¹⁵³ It does not require the appeals themselves to have a suspensive effect unless the appeals are accompanied by some intermediate motion to suspend the expulsion while the appeal is pending.¹⁵⁴ When such a motion is made, however, the actual removal must be suspended until the authorities rule on the motion, with some exceptions (i.e., a previous judicial access and imperative security reasons).¹⁵⁵

Most notably, the review procedure must allow the examination of both facts and law,¹⁵⁶ although the standard of review is not spelled out. Moreover, the review must also ensure that the measure is not disproportionate.¹⁵⁷ This notion of proportionality is central and seems to have been designed to rectify errors of fact and law and also to measure the justice of the outcome with more objective criteria.

Finally, the procedures must guarantee the right to be heard in person unless that is likely to cause “serious troubles” to security or public policy.¹⁵⁸ Again, that might in itself be subject to the proportionality inquiry.

The directive provides no detail on the actual proceeding, both at the primary and review stages. Due process requirements such as the right to counsel, legal aid, and translation, are omitted.¹⁵⁹ Presumably, these directive standards are interpreted in light of the various human rights and due process commitments of the member states. All members of the European Union are also members of the Council of Europe. As indicated above, the Council of Europe’s Twenty Guidelines on Forced Return¹⁶⁰ provide additional guidance

¹⁵² *Id.* art. 31.

¹⁵³ *See id.* art. 31(1).

¹⁵⁴ *See id.* art. 31(2).

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* art. 31(3).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* art. 31(4).

¹⁵⁹ *See generally id.*

¹⁶⁰ *See generally Twenty Guidelines, supra* note 114.

and presumably serve as subsidiary sources. Because the guidelines are also applicable in the expulsion of third-country nationals, those standards are discussed after the discussion of the rules that apply to third-country nationals in the next section.

b. Standards for the Expulsion of Third-Country Nationals

The Directive on Common Standards of Return¹⁶¹ is more recent than all the other standards discussed above. It is also more elaborate, covering almost every aspect of procedural due process. The preamble outlines the fundamental principles that the directive enshrines.¹⁶²

Member states do retain the power to return illegally staying third-country nationals.¹⁶³ Member states must have a fair and efficient procedure for the adjudication of asylum claims and the avoidance of the violation of the principle of non-refoulement.¹⁶⁴ Where return becomes necessary, they should offer voluntary departure, including providing return assistance.¹⁶⁵ They should provide legal aid where the third-country nationals are unable to pay for their representation,¹⁶⁶ and they should respect the principle of proportionality,¹⁶⁷ taking account of the rights of the child and of the family as enshrined in the pertinent legal instruments.¹⁶⁸ With these basic guiding principles, the directive outlines some specific rules that member states should follow. The most important features are discussed below.

¹⁶¹ See E.U. Directive on Common Standards of Return, *supra* note 7.

¹⁶² See *id.*

¹⁶³ *Id.* pmbl., para. 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* pmbl., para. 10 (“Member States should provide for enhanced return assistance and counseling and make best use of the relevant funding possibilities offered under the European Return Fund.”). For the details of the E.U.’s Return Fund, see Decision 575/2007, 2007 O.J. (L 144) 45.

¹⁶⁶ See E.U. Directive on Common Standards of Return, *supra* note 7, pmbl., para. 11 (“A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary.”).

¹⁶⁷ See *id.* pmbl., para. 16.

¹⁶⁸ See *id.* pmbl., para. 22 (“In line with the 1989 United Nations Convention on the Rights of the Child, the ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.”).

The scope of application of the directive is limited to third-country nationals who are illegally present in a member state.¹⁶⁹ Although the member states do have the discretion to apply the minimum standards that the directive sets forth to all categories of third-country nationals, they may subject at least three categories of third-country nationals to less favorable treatment. These categories are: those refused entry or intercepted by the authorities while trying to cross by land, sea, or air and failed to gain regularization of their status;¹⁷⁰ those who are subject to removal because of criminal convictions;¹⁷¹ and those who are subject to extradition procedures presumably pursuant to applicable extradition treaties.¹⁷²

While the scope of its application vis-à-vis whom may be covered appears clear, the directive contains a serious technical confusion with respect to the issue of illegal presence. The directive first states that “Member States shall issue a return decision to any third-country national staying illegally on their territory”¹⁷³ Apparently, the minimum standards that the directive sets forth do not necessarily apply to the decision-making process that determines the legality of the presence because the scope of application is limited to “third-country nationals staying illegally.”¹⁷⁴ However, the directive also states that the “Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision” as long as the procedural safeguards are met.¹⁷⁵ A related provision reads: “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate,

¹⁶⁹ *Id.* art. 2(1).

¹⁷⁰ *Id.* art. 2(2)(a). U.S. law makes a similar distinction between exclusion of arriving aliens and deportation of those who are already in the territory. The procedural due process accorded to the first category is inferior to the procedural due process accorded to those in the second category. Specific rules define each category and the transition from the first stage to the second. For a discussion of these notions, see *infra* Part II.C.1.f.

¹⁷¹ *Id.* art. 2(2)(b). The exact language is those who “are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law.” *Id.* This suggests that some states impose removal, return or deportation—whatever it is called, as a criminal sanction. The second prong is more common. Domestic systems often deport non-citizens who are convicted of crimes. An argument is sometimes made that that is double jeopardy. See, e.g., Kidane, *supra* note 79, at 432–45 (making this argument in the context of the deportation of refugees for criminal conviction).

¹⁷² E.U. Directive on Common Standards of Return, *supra* note 7, art. 2(2)(b).

¹⁷³ *Id.* art. 6(1).

¹⁷⁴ See *id.* art. 2(1).

¹⁷⁵ *Id.* art. 6(6).

humanitarian or other reasons to a third-country national staying illegally in their territory. In that event, no return decision shall be issued.”¹⁷⁶

These provisions confuse four different possible procedures, which in turn confuse the scope of application of the directive’s standards. Ordinarily, there should first be a proceeding to determine whether the particular individual’s presence is illegal. That requires the application of the relevant domestic laws to the particular facts of that individual. A simple threshold inquiry is whether the individual in question is indeed a third-country national. If a Member State wants to do that in a separate procedure, it is unclear whether the directive applies to that portion of the procedure unless, of course, the state chooses to do so. The second possible procedure involves the termination of lawful residency for a variety of reasons. That also requires the application of the relevant laws to particular acts. A good example is a criminal conviction or national security grounds of termination of lawful residency. Here again, it is unclear whether the directive applies to this procedure. The third possible procedure determines whether the illegally present person must be forcibly removed.¹⁷⁷ The last possible procedure seeks to determine if the person who is determined to be staying illegally and ordered removed, is eligible for some kind of affirmative relief. One possibility is the application of the principle of non-refoulement (i.e., if he/she will face persecution).¹⁷⁸

The cumulative reading of the above provisions suggests that the drafters might have confused the various stages of this process. It is unclear to which one of these four processes that the provisions of the directive mandatorily apply. Unfortunately, it appears that the directives apply to the least clear and the least important procedure, which is the third procedure mentioned above—i.e., as the title to the directive itself suggests, to “illegally staying third-country nationals.”¹⁷⁹ That means it does not mandatorily apply to the process of determination of the illegality of the residence, the termination of illegal

¹⁷⁶ *Id.* art. 6(4).

¹⁷⁷ This third procedure may be confused with the second and fourth procedure discussed below, but read in light of article 6(6) quoted above, the definition of “removal” as contained in the directive suggests that there might be a separate procedure to determine whether the illegally staying person must be forcibly removed. *See id.* art. 3(5) (“‘[R]emoval’ means the enforcement of the obligation to return, namely the physical transportation out of the Member State.”); *see also id.* art. 3(4) (“‘[R]eturn decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.”).

¹⁷⁸ *See id.* art. 5.

¹⁷⁹ *See id.*

residence, or the awarding of affirmative relief.¹⁸⁰ This technical glitch continues to pervade the rest of the provisions. Still, the minimum standards that it sets are clear. They are discussed below.

The directive sets forth some very basic principles that all member states must follow. First, it states the underlying operating principles as: “When implementing this Directive, Member States shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.”¹⁸¹

Although it is not clear during which one of the above-mentioned four possible procedures that the member state must consider these factors, it is evident that they must consider them sometime before they actually remove the third-country national.¹⁸² These are very important principles. The fact that considerations of family, health, and best interests of the child¹⁸³ are given the same level of importance in the same provision as the principle of non-refoulement¹⁸⁴ is remarkable.

Second, it emphasizes the preference¹⁸⁵ for voluntary departure and sets a limit of seven to thirty days unless considerations of security and public policy dictate otherwise.¹⁸⁶ Given the emphasis on the preference for voluntary departure, the shortness of the required time is notable. The directive links voluntary departure to a ban on entry. In fact, it mandates the entry of return decision to be accompanied by an entry ban: “(a) if no period of voluntary departure has been granted, or (b) if the obligation to return has not been complied with.”¹⁸⁷ This is an interesting provision because it requires member states denying voluntary departure to also impose an entry ban, presumably because the reasons for denying voluntary departure are mainly security and public order reasons.¹⁸⁸ It limits the re-entry ban to five years unless security and public policy reasons require otherwise. It also rewards the compliant

¹⁸⁰ Through many rounds of use and refinement, the INA now avoids this kind of confusion by merging the various procedures while at the same time multi-furcating the subsets. These procedures are discussed in Part II.B.

¹⁸¹ E.U. Directive on Common Standards of Return, *supra* note 7, art. 5.

¹⁸² *See id.* art. 1.

¹⁸³ *Id.* art. 5.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* para. 10.

¹⁸⁶ *Id.* art. 7(1), (4).

¹⁸⁷ *Id.* art. 11.

¹⁸⁸ *See id.* arts. 7(4), 11(1).

third-country national by requiring the member state to “consider withdrawing or suspending the entry ban.”¹⁸⁹

Third, it makes several provisions relating to procedural due process. It requires the return decisions, including decisions on entry ban to be communicated to the third-country national in writing, which must state the law and facts and advise the individual of available remedies.¹⁹⁰ Although the directive requires the member states to provide the written decision in a language that the individual would understand, it allows member states to ignore this requirement if the third-country national has entered the member state illegally.¹⁹¹ Indeed, it allows the use of standard forms in such circumstances.¹⁹²

While the vagrancies that the above provision makes possible are clear, the directive requires a very serious review procedure.¹⁹³

Some of the basic due process rules are far-reaching; as such, most notable: (1) it emphasizes the importance of the decision maker’s impartiality as well as independence,¹⁹⁴ which are very important considerations because of the frequent use of executive-administrative agencies as decision makers; (2) it also emphasizes the reviewer’s power to suspend the actual removal while it reviews the legality of the order;¹⁹⁵ and (3) it requires the provision of representation, including at government expense.¹⁹⁶ If implemented properly, these standards could provide meaningful due process. Regrettably, however, for reasons that could not be explained by reasons of cost or efficiency, the directive reserves this kind of due process to the appellate stage only. As practitioners could attest, rectifying a case marred by irregularities at the trial level by appeal is a serious challenge, not to mention costly and inefficient. Viewed in this context, the directive’s choice appears almost strange. In any case, the standard at the appellate level being notably fair, it is difficult to

¹⁸⁹ See *id.* art. 11(3). This presumably benefits those who want to come back with some lawful status without having to wait until the entry ban expires, which could be as long as five years.

¹⁹⁰ *Id.* art. 12(1).

¹⁹¹ *Id.* art. 12(2), (3).

¹⁹² *Id.* art. 12(3).

¹⁹³ *Id.* art. 13. The referenced directive is Council Directive 2005/85, 2005 O.J. (L 326) 13 (EC). Although this directive is limited to refugee status determination and withdrawal, as the above-quoted provision shows, the E.U. Directive on Common Standards of Return incorporates the provisions relating to assistance of counsel by reference. E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(4).

¹⁹⁴ E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(1).

¹⁹⁵ *Id.* art. 13(2).

¹⁹⁶ *Id.* art. 13(3), (4).

reconcile it with the absence of the same at the primary level, which does not even recognize the right to be informed of the decision in a language the person subject to the proceeding understands—albeit limited to those who entered illegally.

Finally, other procedural safeguards that the directive mandates include juridical review of administrative decisions to detain and continued judicial supervision of prolonged detention,¹⁹⁷ as well as ensuring humane conditions of detention, especially for families and children, who may only be detained for the shortest period possible.¹⁹⁸

Because the application of all of these procedural rules affects some fundamental human rights, presumably they must be interpreted in light of various human rights commitments. The Council of Europe's Twenty Guidelines on Forced Return¹⁹⁹ may be used as expressions of the human rights standards applicable in Europe. Some of these standards, which would at least serve as interpretive tools, are highlighted below.

The guidelines are predicated on the assumption that persons subject to expulsion should have access to "a fair procedure in line with international law, which includes access to an effective remedy before a decision on the removal order is issued or executed."²⁰⁰ They emphasize the preference for voluntary return over forced removal and envision some programs of voluntary return that could probably assist the returnees.²⁰¹ The guidelines not only incorporate the principles of non-refoulement in its clearest expression but also prohibit the removal of individuals who may not qualify for non-refoulement if the authorities determine that the return decision violates the principle of proportionality, which aims to balance the government's legitimate interest in removing with the returnee's connectedness with the community, including "family and personal life."²⁰² This particular guideline aims at providing better due process to long-term residents. As indicated above, the notion of proportionality is the centerpiece of European jurisprudence. The jurisprudence

¹⁹⁷ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 15.

¹⁹⁸ See *id.* arts. 16–17.

¹⁹⁹ See *Twenty Guidelines*, *supra* note 114.

²⁰⁰ See *id.* pmbi.

²⁰¹ See *id.* Guideline 1.

²⁰² See *id.* Guideline 2 ("The removal order shall only be issued after the authorities of the host state, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.").

also highlights the need to respect the right to family unity. Although its implementation might vary, it is clear that it involves some kind of balancing of interests, which takes into account the length of the residence and family relations. This approach finds its jurisprudence basis in the several decisions of the European Court of Human Rights.²⁰³

Two more sets of guidelines are worth highlighting; they relate to remedy against removal and detention. The remedy guideline is perhaps the most central due process provision.²⁰⁴ This is a more or less satisfactory expression of due process, although—similar to the directives discussed above—it seems to limit it to the appellate process. The most notable features are the requirement of impartiality and independence of the decision makers and the right to have access to free legal counsel. Again, these requirements are predicated on the jurisprudence of the European Court of Human Rights.²⁰⁵

The guidelines on detention are relatively elaborate.²⁰⁶ The most important features are discussed as follows. First, detention has to be a measure of last resort.²⁰⁷ Second, the person subjected to detention must be informed of its basis and allowed to contact a lawyer and health care professional when needed.²⁰⁸ Third, detention may only be justified as long as removal proceedings are in progress. “If such arrangements are not executed with due diligence the detention will cease to be permissible.”²⁰⁹ These requirements are also based on the jurisprudence of the European Court of Human Rights.²¹⁰ A look at some of the cases suggests two types of restrictions: unreasonably long detention while removal proceedings are ongoing and any kind of detention after the removal order if there is no reasonable prospect of actual removal for any reason.²¹¹ Finally, detention must always be subject to judicial supervision and remedy, which shall be made accessible through the provision of legal

²⁰³ See, e.g., *id.* Commentary on Guideline 2 (citing *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 121, 121; *C. v. Belgium*, 1996-III Eur. Ct. H.R. 915, 922–23; *Nasri v. France*, 320 Eur. Ct. H.R. 11, 22–23 (1995); *Beldjoudi v. France*, 234 Eur. Ct. H.R. 3, 28 (1992); *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. 1, 18–20 (1991)).

²⁰⁴ *Id.* Guideline 5.

²⁰⁵ See *id.* Commentary on Guideline 5 (citing *Al-Nashif v. Bulgaria*, 4 Eur. Ct. H.R. (1999)).

²⁰⁶ See *id.* Guidelines 6–20.

²⁰⁷ See *id.* Guideline 6(1).

²⁰⁸ *Id.* Guideline 6(2).

²⁰⁹ See *id.* Guideline 7.

²¹⁰ See *id.* Commentary on Guidelines 6–7.

²¹¹ See *id.* Commentary on Guideline 7. The Commentary on Guideline 7 relies on cases from the European Court of Human Rights. See, e.g., *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1862–63; *Caprino v. United Kingdom*, App. No. 6871/75, 12 Eur. Comm’n H.R. Dec. & Rep. 14, 18–19 (1978).

aid.²¹² The emphasis on the availability of judicial remedy and the accessibility of the remedy are the notable features of these guidelines.

B. U.S. Expulsion Standards

The relevant body of law that governs the expulsion of aliens from the United States is the Immigration and Nationality Act (“INA”).²¹³ The INA makes separate provisions for expulsion of aliens who are considered inadmissible to the United States and those who need to be expelled after having been admitted or otherwise considered admitted.²¹⁴ Before the discussion of the relevant provisions is provided, it is important to add a note on the use of terminology and the structure of the relevant body of law.

Although the use of the terms has changed over the years, the INA technically still makes a distinction between exclusion and deportation. Exclusion refers to the decision to refuse entry or admission.²¹⁵ The term entry and admission are terms of art that are not synonymous. Under the INA, “The terms ‘admission’ or ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”²¹⁶ Although deportation is not defined under the INA, it refers to the removal of a person from the interior.²¹⁷ A 1996 amendment to the INA consolidated the two procedures into one single removal proceeding.²¹⁸ Despite the consolidation of the two proceedings, important substantive and procedural differences still remain. For example, the grounds of exclusion and the grounds of deportation still remain distinct, with the grounds of deportation being relatively more forgiving.²¹⁹

²¹² See *Twenty Guidelines*, *supra* note 113, Guidelines 8–9.

²¹³ INA § 101, 8 U.S.C. § 1101 (2006); see also *id.* § 240(a)(3) (“[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States.”). The regulations issued pursuant to the INA are codified under Title 8 of the Code of Federal Regulations. 8 C.F.R. §§ 101–1337 (2010).

²¹⁴ Compare INA, tit. II, ch. 4, with INA, tit. II, ch. 5.

²¹⁵ See *id.* § 212(a).

²¹⁶ *Id.* § 101(a)(13)(A) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 301, 8 U.S.C. § 1101(a) (2006)); see also *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963) (holding “innocent, casual and brief excursion” is insufficient to sever the ties and subject the alien to rules of entry).

²¹⁷ Various provisions of the INA still use the term “deportation.” See, e.g., INA § 237.

²¹⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 240, 8 U.S.C. § 1252a(b)(4) (2006).

²¹⁹ Compare INA § 212 (discussing the grounds of inadmissibility), with INA § 237 (discussing the grounds of deportability).

Because of the introduction of the concept of “admission” by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, persons who have physically been in the country for a long time may be considered persons who are seeking admission and be subject to grounds of inadmissibility rather than grounds of deportability.²²⁰ As such, the physical presence of the individual does not necessarily determine the applicable substantive provisions.²²¹ As far as procedures are concerned, however, the physical location and length of presence of the individual make significant difference.²²² The following section discusses the various procedures that apply to different categories of aliens and puts the U.S. procedural due process in perspective.

1. *Procedural Due Process in Context*

Theoretically, every alien is eligible for some type of due process.²²³ The extent of the procedural guarantees depends on various factors including the location of the individual, the length of stay and the applicable grounds of exclusion or deportation. There are at least four distinct procedures. This Subpart measures the nature of procedural due process under each one of these procedures.

a. *Expedited Removal of Inadmissible Arriving Aliens*

The term arriving alien is a deeply misleading technical term that refers not only to persons who have just arrived from abroad, but also to long-term residents who left the country for a period of more than six months or who left the United States after committing a crime that would make them inadmissible regardless of the length of their foreign stay.²²⁴ Arriving aliens are considered applicants for admission.²²⁵ Applicants for admission are required to be inspected by an immigration officer whether they arrive by air, sea, or land.²²⁶

²²⁰ For a discussion of the use of terminology and the changes that were made in 1996, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 514–16 (5th ed. 2009).

²²¹ For example, a person who has resided in the United States for twenty years without being inspected and admitted would still be subject to grounds of inadmissibility under INA § 212 rather than grounds of deportability under INA § 237.

²²² See *infra* Part II.C.1.

²²³ See G-, 20 I. & N. Dec. 764, 780 (BIA 1993) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)) (finding that administrative proceedings are subject to notions of fundamental fairness).

²²⁴ See INA § 101(a)(13)(C)(ii), (v).

²²⁵ See *id.* § 235(a)(1).

²²⁶ *Id.* § 235(a)(3).

Note that if an alien gains entry without inspection, he is still considered an applicant for admission when he encounters the authorities.²²⁷

If the inspecting officer determines that the alien who is seeking admission does not have the proper documentation, the officer “shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”²²⁸ The extent of due process that an arriving alien would get is limited to the particular officer’s own determination unless, of course, asylum is sought, in which case elaborate procedures may apply if the person can prove credible fear.²²⁹ Significantly, Congress has authorized the Attorney General to apply this swift procedure to aliens who have been in the country for up to two years as long as they entered without inspection.²³⁰

b. Expedited Removal of Criminal Aliens

Aliens convicted of certain types of crimes are required to be detained and put through expedited removal proceedings in immigration courts that are often located in the detention facility.²³¹ The Attorney General has also authorized an alternative procedure for criminal aliens who are not permanent residents.²³² The procedures must, however, meet certain due process requirements including reasonable notice, opportunity to defend, a privilege to be represented at no cost to the government, the maintenance of the record for judicial review, and a prohibition of adjudication by the same person who issued the charges.²³³ In practice, this alternative procedure is rarely used because the regular proceeding under INA § 240, which will be discussed

²²⁷ See *id.* § 235(a)(1).

²²⁸ See *id.* § 235(b)(1)(A)(i).

²²⁹ See *id.* § 235(b)(1)(A)(ii). This one-officer due process has consistently been held to be sufficient due process for arriving or excludable aliens. It has its genesis in *Nishimura v. United States*, 142 U.S. 651, 660–61 (1892) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.”).

²³⁰ See INA § 235(b)(1)(iii)(II). However, despite this authority, the Attorney General chose to apply this procedure only to those apprehended within fourteen days of their arrival within one hundred miles of the border. See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

²³¹ See INA § 238(a)(3).

²³² See *id.* § 238(b).

²³³ See *id.* § 238(b)(4).

below, more or less accomplishes the objective that INA § 238 seeks to accomplish.

c. Procedures Applicable to the Removal of Alien Terrorists

Alien terrorists are subject to special proceedings. Under INA § 236A(a)(3), the Attorney General may certify an alien as a terrorist if he has reasonable grounds to believe that the alien meets the definition of a terrorist under the INA.²³⁴ The Attorney General is required to either charge the certified terrorist with a criminal offense or put him in removal proceedings.²³⁵ The certified alien may seek judicial review of the detention by habeas corpus under limited circumstances.²³⁶ This certification procedure has never been used.

Another possible procedure in the book that has never been utilized is the “Alien Terrorist Removal Procedure,”²³⁷ which purports to establish the Alien Terrorist Removal Court (“ATRC”).²³⁸ It was supposed to provide a special forum for the adjudication of terrorism-related removal cases, especially when confidential evidence is used.²³⁹ Suspected terrorists brought before the ATRC have more due process rights than those put in the regular removal proceedings, which will be discussed next. Some of the important guarantees are the right to government-appointed counsel.²⁴⁰ As will be highlighted in the next Subpart, no such right exists in the regular removal procedures. Other rights include adequate notice,²⁴¹ an expeditious and public hearing,²⁴² and a reasonable opportunity to introduce evidence,²⁴³ including the use of

²³⁴ See *id.* § 212(a)(3)(B)(i), (iii). The definition of a terrorist under the INA is complex and it is outside the scope of this Article.

²³⁵ See *id.* § 236A(a)(5).

²³⁶ See *id.* § 236A(b).

²³⁷ See *id.* § 501–07.

²³⁸ See *id.* § 502. The ATRC was a result of the 1996 expansion of terrorism grounds of exclusion under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 354(a)(5), 110 Stat. 3009-546 (1996) as well as the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

²³⁹ See INA § 503.

²⁴⁰ See *id.* § 504(c)(1) (“The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien.”); see also *id.* § 502(e).

²⁴¹ See *id.* § 504(b).

²⁴² See *id.* § 504(a)(1)(2). Although the hearing is public, confidential evidence may be heard in camera. See *id.* § 504(d)(5), (e)(3)(A). Although the alien is denied access to classified information (except a summary), a specially appointed attorney can review the evidence. See *id.* § 504(e)(3)(F).

²⁴³ See *id.* § 504(c)(2).

subpoenas for the appearance of witnesses and records at government expense.²⁴⁴ The alien who loses at the ATRC level may appeal to the Court of Appeals for the District of Columbia.²⁴⁵ A petition for review would automatically stay the removal order.²⁴⁶ As will be discussed in the next Subpart, such is not the case in the regular procedures.

d. Regular Removal Procedures

The regular removal procedures are set forth under INA § 240. As the comparative analysis under Subpart C below focuses on the regular removal proceedings, these procedures are discussed here in some detail.

Removal proceedings are set in motion when the Immigration and Customs Enforcement²⁴⁷ of the Department of Homeland Security²⁴⁸ files charges under INA § 239 alleging that the respondent must be removed either because he is inadmissible or because he is deportable.²⁴⁹ The charged individual is brought before an immigration judge who will conduct the hearing.²⁵⁰ The immigration judge is a designee of the nation's chief law enforcement officer, the Attorney General, and serves at his pleasure.²⁵¹

Under the INA § 240, “An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”²⁵² In particular, “[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.”²⁵³ The judge may also issue subpoenas and sanction practitioners by civil money penalty for contempt of court.²⁵⁴ And finally, “the immigration judge shall decide whether an alien is removable from the United States.”²⁵⁵

²⁴⁴ See *id.* § 504(d)(2) (“If the application for a subpoena by the alien also makes a showing that the alien is financially unable to pay for the attendance of a witness so requested, the court may order the cost incurred by the process and the fees of the witness so subpoenaed to be paid from funds appropriated for the enforcement of title II.”).

²⁴⁵ See *id.* § 505(c)(1).

²⁴⁶ See *id.*

²⁴⁷ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov> (last visited Feb. 15, 2013).

²⁴⁸ HOMELAND SECURITY, <http://www.dhs.gov> (last visited Feb. 15, 2013).

²⁴⁹ See INA § 239. Grounds of inadmissibility, which apply to persons seeking admission, are set forth under INA § 212(a) and grounds of deportability are set forth under INA § 237(a).

²⁵⁰ See *id.* § 240(a)(1).

²⁵¹ *About the Office*, U.S. DEP'T JUST. <http://www.justice.gov/eoir/orginfo.htm> (last updated Sept. 2010).

²⁵² INA § 240(a)(1).

²⁵³ *Id.* § 240(b)(1).

²⁵⁴ *Id.*

²⁵⁵ See *id.* § 240(c)(1)(A).

The nature of the due process that the alien gets is summarized in § 240 of the INA.²⁵⁶ Most notably, although the alien may be represented by counsel of his choosing, he does not have the right to legal aid or government-appointed counsel.²⁵⁷ The exercise of the rights that are included in this paragraph such as the right to cross-examine adverse witnesses naturally depends on the availability of counsel who could effectively assist the alien. If counsel is not available, the right is meaningless, especially because the proceedings are adversarial²⁵⁸ and the respondent bears the burden of proof at various stages. For example, if the alien is charged as inadmissible, the alien bears the burden of showing that he is “clearly and beyond doubt entitled to be admitted and is not inadmissible,”²⁵⁹ or “by clear and convincing evidence that [she] is lawfully present in the United States pursuant to a prior admission.”²⁶⁰ Only then will the burden shift to the government to show that, although the alien has been lawfully admitted, she is deportable because she falls under one of the many grounds of deportation. The government has the burden of proving deportability by the same standard, i.e., clear and convincing evidence.²⁶¹ If the government manages to carry the burden, the immigration judge enters an order finding the alien removable.²⁶² At that point, the alien is given the opportunity to plead one of several available forms of affirmative relief, which may include asylum and withholding of removal,²⁶³ adjustment of status,²⁶⁴ cancellation of removal,²⁶⁵ and relief under the CAT.²⁶⁶ The alien may also seek voluntary departure to avoid a reentry bar as a result of the deportation order.²⁶⁷ The respondent bears the burden of proving that he meets the

²⁵⁶ *Id.* § 240(b)(4).

²⁵⁷ The INA requires the judge to give the alien at least ten days to find his own representation. *See id.* § 239(b)(1). If the ten-day period lapses, the judge may continue to hear the case without representation. *See id.* § 239(b)(2). As a matter of fact, according to the American Bar Association, eighty-four percent of detained aliens defend their cases without representation. *See* REPORT BY THE ABA COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSAL TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 39 (2010).

²⁵⁸ *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641–45 (2010).

²⁵⁹ *See* INA § 240(c)(2)(A).

²⁶⁰ *See id.* § 240(c)(2)(B).

²⁶¹ *See id.* § 240(c)(3).

²⁶² *See id.* § 240(c)(1)(A).

²⁶³ *See id.* §§ 208, 241(b)(3).

²⁶⁴ *See id.* § 245.

²⁶⁵ *See id.* § 240A(a)–(b).

²⁶⁶ CAT, *supra* note 57, art. 3.

²⁶⁷ *See* INA § 240B.

statutory requirements and that he deserves the favorable exercise of discretion because these forms of relief are discretionary.²⁶⁸

The procedural due process that the alien gets in the adjudication of the application for relief is exactly the same as the due process that she gets in the first part of the proceeding, i.e., the proceeding adjudicating the inadmissibility or deportability.²⁶⁹

C. Comparative Analysis of the E.U. and U.S. Standards in Light of the International Standards

As indicated in Part I.B above, the United Nations' Special Rapporteur's draft on the standards of the expulsion of aliens provides a good summary of the consolidating international standards. The most important provision states:

1. An alien facing expulsion enjoys the following procedural rights:
 - a. The right to receive notice of the expulsion decision.
 - b. The right to challenge the expulsion [the expulsion decision].
 - c. The right to a hearing.
 - d. The right of access to effective remedies to challenge the expulsion decision without discrimination.
 - e. The right to consular protection.
 - f. The right to counsel.
 - g. The right to legal aid.
 - h. The right to interpretation and translation into a language he or she understands.
2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.²⁷⁰

²⁶⁸ *Id.* § 240(c)(4)(B) (“The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant’s application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant’s burden of proof.”); *see also id.* §§ 208, 240A, 245(a). The only form of relief that is not discretionary is withholding of removal, i.e., the principle of non-refoulement. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987); *INS v. Stevic*, 467 U.S. 407, 430 (1984). For a discussion of the affirmative reliefs, *see* LEGOMSKY & RODRIGUEZ, *supra* note 220, at 595–646.

²⁶⁹ *See* INA § 240(b)(4).

²⁷⁰ *Sixth Report on the Expulsion of Aliens, supra* note 2, at 47.

1. *The Eight Procedural Guarantees as Benchmarks*

The comparative analysis follows these eight categories of rights, as they could be considered the contemporary international standards.

a. *The Right to Receive Notice of the Expulsion Decision*

Notice is one of the most fundamental due process rights in any jurisdiction. Depending on how the removal procedures are structured, the expulsion decision may come in the form of final removal or deportation order with no possibility of relief or with a possibility of some type of affirmative relief.²⁷¹ The two E.U. directives discussed above as well as the INA contain provisions relating to notice.²⁷² Notice in itself is of little value if there is no possibility of challenging the order or seeking an affirmative relief from the actual expulsion. In that sense, it is a pre-condition for the right to challenge or seek relief. It is mainly because of what comes next that notice is important. That is not to understate the importance of notice even when there is no remedy. For example, in jurisdictions where no administrative decision to expel is required for the removal of persons illegally present, notice still puts the alien on notice that his tenure has expired and that he needs to leave to avoid penalty, which may include a reentry ban.²⁷³

In the United States, removal proceedings are commenced by issuing a document called Notice to Appear under INA Section 239.²⁷⁴ As indicated above, the document sets forth the charges and allows the respondent to answer the charges.²⁷⁵ However, there is no statutory requirement that this document be issued in a language that the respondent understands.²⁷⁶ Similarly, under E.U. directives, notice must be provided, but a translation is not required for those who have entered a member state illegally.²⁷⁷ Translation is a serious

²⁷¹ See E.U. Directive on Return of E.U. Citizens, *supra* note 112, art. 30.

²⁷² See INA § 239; E.U. Directive on Common Standards of Return, *supra* note 7, art. 12; E.U. Directive on Return of E.U. Citizens, *supra* note 112, art. 30.

²⁷³ An example of this is Germany, where “aliens who entered Germany illegally within the previous six months . . . can be expelled without prior injunction and without written notice.” See *Sixth Report on the Expulsion of Aliens*, *supra* note 2, para. 20. That is because “expulsion measures do not require a specific decision because expulsion is simply a way of executing the obligation of any illegal alien to leave the territory.” *Id.* para. 18.

²⁷⁴ See INA § 239.

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 12(3); E.U. Directive on Return of E.U. Citizens, *supra* note 112, art. 30.

problem that relates to the requirement of notice and will be discussed in more detail below in Subpart h.

Another aspect of notice is the right to be present during the proceedings. The E.U. directive on the return of E.U. citizens requires the presence of the alien save in instances of “serious troubles to public policy or security.”²⁷⁸ In the United States, the INA allows proceedings to take place “(i) in person, (ii) where agreed by the parties, in the absence of the alien, (iii) through video conference, or (iv) [subject to some exceptions], through telephone conference.”²⁷⁹ The notice may be mailed to the alien; however, if he fails to provide his address to the authorities, no written notice is required to be issued.²⁸⁰ If the alien fails to appear, he may be ordered removed in absentia.²⁸¹ The E.U. directives leave these kinds of details to national legislation,²⁸² but there is no indication in the directives themselves that such procedures would meet the due process notice requirement they envision.

b. The Right to Challenge the Expulsion Decision

The right to challenge the expulsion decision is expressed in many different ways at different levels. Regardless of the procedural steps involved, which will be included with the discussion of access in Part II.C.1.d, the idea is that the alien must have the opportunity to contest the factual and legal basis of the expulsion decision before an impartial and independent decision maker. There are at least two stages—a decision stage and a challenge stage. In the European Union, citizens have the right to challenge the decision to expel them. In particular, “[t]he redress procedures shall allow for an examination of the legality of the decision, as well as the facts and circumstances on which the proposed measure is based.”²⁸³ The safeguard that applies to third-country nationals appears to be even more elaborate: “The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return . . . before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.”²⁸⁴ The Council of

²⁷⁸ See E.U. Directive on Return of E.U. Citizens, *supra* note 112, art. 31(4).

²⁷⁹ See INA § 240(b)(2)(A).

²⁸⁰ See *id.* § 240(5)(B).

²⁸¹ See *id.* § 240(5)(A).

²⁸² See E.U. Directive on Common Standards of Return, *supra* note 7, art. 6.

²⁸³ See E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 31(3).

²⁸⁴ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(1).

Europe's Twenty Guidelines also contains an identical provision suggesting that this standard applies to all aliens.²⁸⁵

The emphasis here is on the adequacy of the review remedy. Significantly, where there is no strict requirement for a judicial remedy, the reviewer must be impartial and independent of the law enforcement officials. In the United States, the initial decision to expel or remove is subject to administrative review by an administrative appellate body, the Board of Immigration Appeals ("BIA"),²⁸⁶ which can consider both questions of law and fact,²⁸⁷ and a tertiary review by the appellate courts on questions of law.²⁸⁸ An enduring criticism of the administrative review process is the lack of decisional independence because both the initial decisions makers, i.e., immigration judges and the members of the BIA, serve at the pleasure of the Attorney General, which is the national's chief law enforcement official.²⁸⁹ It is doubtful that the existing structural set up in the United States meets the European Union²⁹⁰ and international standard of independence.

c. *The Right to a Hearing*

This international standard does not make a distinction between legal and illegal or short-term and long-term residents. It envisions a situation whereby every alien may be given a right to a hearing before she is expelled. Both the European Union and the United States dispense with the hearing requirement as far as newly arriving aliens are concerned.²⁹¹ The E.U. Directive on

²⁸⁵ See *Twenty Guidelines*, *supra* note 114, at Guideline 5.

²⁸⁶ *Board of Immigration Appeals*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/biainfo.htm> (last updated Nov. 2011).

²⁸⁷ See INA § 242 (providing the details of judicial review).

²⁸⁸ See *id.* § 242(a)(2)(D) (allowing the review of questions of law and constitutional claims in all cases).

²⁸⁹ See LEGOMSKY & RODRIGUEZ, *supra* note 220, at 744–51; Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1502–03 (2010) (expressing uncertainty about the outcome of a specialized court system); Legomsky, *supra* note 258, at 1672 (expressing concern about the Attorney General's role given that he is a law enforcement officer and the U.S. is often an opposing party in these cases); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651–54 (1981) (criticizing the Attorney General's role in the judicial process since he is a law enforcement official).

²⁹⁰ Although the E.U. member states have significant discretion to use administrative agencies to adjudicate and review cases, the E.U. Directive on Common Standards of Return requirement for impartiality and independence is clear. See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(1). If the domestic systems utilize the same kind of arrangement as the United States by placing the reviewing agency under a law enforcement agency, the domestic systems' compliance with directive's requirements of independence would be doubtful, particularly if the chief has the right hire and fire judges at-will, which is the case in the United States.

²⁹¹ See INA §§ 235, 238; E.U. Directive on Common Standards of Return, *supra* note 7, art. 2.

Common Standards of Return allows member states to subject three categories of aliens to an inferior procedure than the directive requires,²⁹² which may include the denial of a hearing. These categories are: (1) arriving aliens who are intercepted while trying to cross and are illegally present persons; (2) criminal convicts; and (3) those subject to extradition procedures.²⁹³ Most notable is the inclusion of all illegal entrants to the exception. Germany for example, considers those who have illegally resided in the country for up to six months as arriving aliens and expels them without a meaningful hearing.²⁹⁴ The directives create no obstacle to that as it allows excepting all illegal residents from the scope of application of the directive.²⁹⁵ E.U. member states are also allowed to dispense with a hearing or other due process requirements under the directive with respect to criminal aliens—presumably regardless of the nature of the crime and the severity of the penalty.²⁹⁶

The INA also subjects arriving aliens and criminal aliens to expedited procedures.²⁹⁷ In the case of an arriving alien, the only hearing he gets is the immigration officer's inspection, which is unreviewable.²⁹⁸ Note that a person is deemed an arriving alien if found within fifteen days of his arrival and within one hundred miles of the border.²⁹⁹ Although, theoretically, criminal aliens are subject to expedited proceedings, the actual hearing they get is more or less the same as the one given to long-term residents.³⁰⁰

Both the E.U. and U.S. rules that exclude certain categories of aliens from the requirement of a meaningful hearing fall short of international standards. However, by comparison, the U.S. rules are more favorable to arriving and criminal aliens because: (1) the meaning of an arriving alien is limited; and (2) criminal aliens are subject to expedited proceedings, but the expedited proceedings are not inherently inferior as they are governed by the same rules.

²⁹² See E.U. Directive on Common Standards of Return, *supra* note 7, art. 2(2).

²⁹³ See *id.*

²⁹⁴ See *Sixth Report on the Expulsion of Aliens*, *supra* note 2, paras. 18, 20 (citing Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Aufenth G] [Residence Act], July 30, 2004, BGBl. I at 84 [hereinafter Residence Act] (regarding the stay, employment and integration of aliens in the federal territory)).

²⁹⁵ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 2(2)(a).

²⁹⁶ See *id.* art. 2(2)(b).

²⁹⁷ See INA §§ 235, 238.

²⁹⁸ See *id.* § 235(b)(1)(A)(i).

²⁹⁹ See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004). Note also that the equivalent rule in Germany is six months. See *Sixth Report on the Expulsion of Aliens*, *supra* note 2, at para. 18.

³⁰⁰ See INA § 238.

The only distinction is often the fact that those in expedited proceedings are detained.³⁰¹

d. The Right of Access to Effective Remedies To Challenge the Expulsion Decision Without Discrimination

This rule emphasizes three interrelated due process rights: (1) the right to an effective remedy; (2) the right to have access to that remedy; (3) and finally, the right to have such access without discrimination. They are discussed in turn.

i. The Right to an Effective Remedy

Remedies could come in the form of rectification of a decision that has already been made or in the form of an affirmative relief. An effective remedy in the first instance would require observance of the whole range of due process rights associated with a meaningful review of the factual and legal basis of the decision to expel. In a way, it incorporates all the due process rights discussed in the previous Subpart, including notice and impartial and independent decision-making.

In the European Union, the right to effective remedy is stated clearly: "The third-country national shall be afforded an effective remedy to appeal against or seek review of decisions related to return . . . before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence."³⁰² Compliance with this rule would certainly ensure an effective remedy. As indicated above, the U.S. rules fall short of the independence prong.³⁰³

The second aspect of an effective remedy is the availability of affirmative relief. Both the E.U. and U.S. rules provide for the principle of non-refoulement as a final remedy against the execution of an expulsion order.³⁰⁴ It is a shared fundamental principle of international law, the substance of which needs no further commentary here, but the availability of the remedy itself is not sufficient unless the right procedures are in place, which make the remedy effective. Non-refoulement as a form of relief is closely linked to asylum. Both

³⁰¹ See *id.* §§ 238, 240.

³⁰² See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13.

³⁰³ See *id.* art. 13(1).

³⁰⁴ See *id.* art. 5; see also INA § 241(b)(3).

the European Union and United States have elaborate asylum criteria distinct from the expulsion standards that are the subject of discussion here.³⁰⁵

The E.U. Directive on the Return of E.U. Citizens seems to insinuate that long-term residents may avoid expulsion due to reasons of public order or public policy,³⁰⁶ but the details are left to member states. In the United States, apart from asylum and non-refoulement, there is at least one effective form of relief that is potentially available for long-term residents—it is called cancellation of removal.³⁰⁷ Where it applies, it provides an effective remedy against expulsion. Cancellation of removal may be granted to aliens who have lived in the United States for more than seven years, five of which as lawful permanent residents, or ten years for those who never had lawful permanent resident status.³⁰⁸ Each form of relief is encumbered with more eligibility requirements such as the absence of conviction of certain types of crimes.³⁰⁹

The E.U. Directive on the Return of E.U. Citizens makes a remedy analogous to cancellation of removal available to E.U. citizens who are minors or those who have resided in the particular E.U. country for ten years.³¹⁰ While some E.U. member states may provide the same kind of remedy to third-country nationals, the Directive on Common Standards of Return does not make any reference to these kinds of relief, although it envisions that member states may do so for humanitarian and compassionate reasons.³¹¹ Whether the international standard for an effective remedy includes these types of relief on humanitarian and compassionate grounds is doubtful. In any case, while the substantive scope of their application remains subject to the discretion of states, wherever they are made available, the procedures of claiming them have to be fair and effective. In the United States, the procedures for claiming these forms of relief are the same as the procedures that determine the removability of the alien.³¹² Although the E.U. directives provide no guidance on this,

³⁰⁵ See, e.g., INA §§ 208, 241(b)(3); E.U. Directive on Minimum Standards for Qualification, *supra* note 7.

³⁰⁶ See E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 28(1).

³⁰⁷ See INA § 240A(a), (b). A related form of relief is called Registry; it offers amnesty to those who entered the United States before January 1, 1972. See *id.* § 249.

³⁰⁸ See *id.* § 240A(a), (b).

³⁰⁹ See *id.*

³¹⁰ See E.U. Directive on Return of E.U. Citizens, *supra* note 112, at art. 28 (“An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by the Member States, if they: (a) have resided in the host Member State for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interest of the child . . .”).

³¹¹ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 6(4).

³¹² See INA § 240(c)(4)(A).

presumably, the procedures that they set forth for the expulsion decision and non-refoulement would similarly apply to the adjudication of claims for these forms of relief. In any case, the U.S. standards and procedures are notable for their technical clarity.

ii. Access to the Remedy

The availability of the remedy itself is, of course, meaningless if it is not accessible for the supposed beneficiary. Several factors determine access to the remedy. Most notable are notice, the right to counsel, and the right to legal aid.³¹³

iii. Access to the Remedy Without Discrimination

Making effective remedies available and accessible to all aliens without discrimination is a problematic proposition for the European Union because of the ambiguous nature of E.U. citizenship. E.U. citizens are both aliens and citizens at the same time, i.e., aliens to all E.U. countries except their own but citizens of the Union. As aliens, they are subject to the immigration rules of the country where they find themselves, but as E.U. citizens, they are eligible for favorable treatment. An example of favorable treatment that comes in the form of a remedy is the provision that allows the cancellation of expulsion order for E.U. citizen minors and long-term residents.³¹⁴ The same kind of remedy is not mandated by the E.U. Directive on Return of Third-Country Nationals.³¹⁵ The procedural due process that is attached to this form of remedy also appears superior because it requires the examination of the proportionality of the expulsion decision with other factors, including long-term age and residence.³¹⁶ However, that being a function of the better status of Union citizens, such kind of favorable treatment appears inherent. Whether it violates the access-to-remedy-without-discrimination provision is doubtful precisely because these two groups are not similarly situated.

Traditionally, the United States has made a variety of situation-based remedies available to particular groups of aliens and restricted access to those

³¹³ This Article discusses notice in Part II.C.1. Because of the overlap and for the sake of completeness and clarity, the discussion of the right to counsel and legal aid is deferred to Part II.C.1.f. and Part II.C.1.g.

³¹⁴ See E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 28(3).

³¹⁵ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 6(1).

³¹⁶ See E.U. Directive on the Return of E.U. Citizens, *supra* note 112, art. 31(3).

remedies on the basis of nationality or country of origin.³¹⁷ These measures have mostly been taken to benefit certain categories of beneficiaries instead of discriminating against others; however, allegations of discrimination have never been uncommon. One particular such allegation relates to the favorable treatment of Cuban asylum-seekers over Haitian asylum-seekers.³¹⁸ To the extent that some of the disparately treated categories of aliens are similarly situated, there is a real possibility that the international principles of providing access to remedies without discrimination might be violated. Apart from these types of situation-dependent specific remedies, the procedures that the INA sets forth are not de jure discriminatory—although access always depends on the ability to pay, which will be discussed in some detail below.

e. The Right to Consular Protection

Consular and diplomatic protection of citizens is a basic sovereign function recognized under international law;³¹⁹ however, its limits are uncertain. Two issues in particular are subjects of controversy. One relates to the issue of whether it is an individual right or human right of the citizen who is located in another sovereign state.³²⁰ The second relates to the permissible scope of such interference in light of the competing principle of nonintervention under international law.³²¹ Despite these controversies surrounding the issue of consular protection, the draft international standard allows aliens to get consular protection against expulsion.

³¹⁷ *E.g.*, Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2006)).

³¹⁸ This issue is a subject of enduring scholarly inquiry; for good analysis of this and related issues of discrimination, see Malissia Lennox, *Refugees, Racism, and Repatriations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755 (2000).

³¹⁹ The most notable source of international law in this area is the Vienna Convention on Consular Relations. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

³²⁰ The notable International Court of Justice cases on this issue are *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27), and *Avena and Other Mexican Nationals* (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31). For a good commentary on the *LaGrand* case's distinction between individual rights and human rights, see Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 427–30 (2002).

³²¹ See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 6–8 (1989) (reciting the origin and development of the principle of non-intervention including related provisions in the UN Charter); see also Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345, 1359–62 (2007) (discussing the principle in the context of U.S.–Mexico relations vis-à-vis immigration issues).

Under the TFEU, E.U. citizens are eligible to receive consular and diplomatic protection by all E.U. member states as they are citizens of the Union.³²² Neither of the directives on return make note of the right to consular protection.³²³ Similarly, in the United States, no specific rules enumerate such right. Given the controversy surrounding consular notification even in detention and death penalty cases, and the chronic non-observance of the principle in that context,³²⁴ the fate of this principle in the European Union and the United States remains to be seen.

f. The Right to Counsel

Right to counsel is a key component of due process in any legal proceeding. Expulsion proceedings are often regulated by a complex set of rules that aliens are unable to navigate *pro se*. The recognition of the right to counsel in international law is firm; both the European Union and United States have rules to the same effect.

Although the E.U. Directive on the Return of E.U. Citizens does not provide the details of due process including the right to counsel, the Directive on Common Standards of Return clearly states: “The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic advice.”³²⁵ The equivalent U.S. rule reads: “[T]he alien shall have the privilege of being represented, at no cost to the Government.”³²⁶

The E.U. directive refers to the opportunity to obtain legal advice and representation as a right, but the U.S. rule presents it as a privilege³²⁷ to avoid confusion about the Sixth Amendment right to counsel in the United States Constitution.³²⁸ Neither of these constructions is particularly precise about the nature and scope of the right or privilege granted. The resulting uncertainty

³²² See TFEU art. 20.

³²³ See E.U. Directive on Common Standards of Return, *supra* note 7; E.U. Directive on the Return of E.U. Citizens, *supra* note 112.

³²⁴ See generally Fitzpatrick, *supra* note 320 (discussing non-implementation of the right of consular protection in the United States, even after the *LaGrand* decision).

³²⁵ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(3).

³²⁶ INA, § 240(b)(4), 8 U.S.C. § 1229a (2006); see also *id.* § 292.

³²⁷ Compare E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(4) (“Member states shall ensure that the necessary legal assistance and/or representation is granted . . .”) (emphasis added), with INA § 292 (“[T]he person concerned shall have the *privilege* of being represented . . .”) (emphasis added).

³²⁸ See Compean, 24 I. & N. Dec. 710, 716 (A.G. 2009) (finding no Sixth Amendment right to representation at deportation hearings because they are civil procedures, not criminal ones).

leads to controversy, particularly when determining what constitutes effective assistance of counsel. Effective assistance of counsel is most important at two stages. The first key stage is before expulsion proceedings, at legal proceedings that may impact the expulsion proceeding (such as a criminal proceeding). Issues relating to this stage are of significant importance in the United States because the Sixth Amendment guarantees a right to counsel relating to criminal proceedings.³²⁹ A recent Supreme Court decision that extended the criminal defendant's right to be informed of the immigration consequences of a plea deal has given the issue of right to counsel renewed momentum.³³⁰ Second, having effective counsel is also important at expulsion hearings. Here, the problem usually arises in the context of undoing decisions resulting in expulsion where counsel's deficient representation likely changed the result of the proceeding.³³¹

g. The Right to Legal Aid

The right to legal aid is directly related to access to effective remedy and the right to counsel discussed above. The availability of the right or the privilege is, of course, meaningless if it is not accessible. The rule in the United States has no ambiguity—there is a privilege of representation by counsel, but it is “at no cost to the Government.”³³² The right to appointed counsel or legal aid in the European Union is not without ambiguity. Both the Directive on Common Standards of Return³³³ and the Twenty Guidelines on Forced Return of the Council of Europe³³⁴ contain provisions purporting to guarantee legal aid to aliens who cannot afford to hire their own counsel. The relevant provision of the directive states: “Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/ or representation is

³²⁹ See *id.*

³³⁰ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486–87 (2010) (reversing enduring jurisprudence that held that lack of advice of immigration consequences of a plea agreement did not violate the Sixth Amendment right to counsel).

³³¹ See *Compean*, 24 I. & N. Dec. at 732–35 (setting forth the most recent criteria for determining the effectiveness of assistance).

³³² See INA § 240(b)(4), 8 U.S.C. § 1229a (2006). The only exception is in the ATRC proceedings, which is discussed with INA §§ 502–07, *supra* notes 234–46.

³³³ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(4).

³³⁴ See *Twenty Guidelines*, *supra* note 114, Guidelines 5(2), 9(2).

subject to conditions set out in [a related directive on asylum].”³³⁵ This provision is, of course, replete with permissive language and as such is not a firm commitment. First, it uses the term “shall ensure” not just “shall” suggesting at least one more step. Second, it must be granted in accordance with national legislation, which subjects the rule to national legislation which may add all sorts of limitations and restrictions. Third, it allows Member States to adopt the legal aid rules on asylum, the content of which is also uncertain. The content of the asylum legal aid directive is also restrictive for five reasons. First, it is only mandated for appellate level not for the initial proceeding where the record gets developed.³³⁶ Second, member states may even deny legal aid for national-level appeals in their domestic legislation as long as they provide it during a particular appellate process mandated by the directive.³³⁷ Third, they may restrict it to situations where “the appeal is likely to succeed.”³³⁸ Fourth, they may impose monetary or time limit on the grant.³³⁹ Finally, they may seek reimbursement from the alien when he is able to pay.³⁴⁰ These restrictions, cumulatively, make the E.U. rules on legal aid a more verbose restatement of the simple U.S. rule of “at no cost to the Government.” Hence, it is fair to conclude that the right to legal aid, as a progressive international standard, has not yet gotten concrete expression and recognition in either jurisdiction,³⁴¹ with the United States rejecting it with remarkable confidence.

h. The Right to Interpretation and Translation

In the United States, the administrative authorities are under no statutory obligation to issue the charges in a language the alien understands; however, courts have held that the lack of interpretation in the actual proceedings is a

³³⁵ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(4). The cross-cited Asylum Directive is Council Directive 2005/85, *supra* note 130.

³³⁶ See Council Directive 2005/85, *supra* note 130 (stating that free representation is given only “[i]n the event of a negative decision by a determining authority”).

³³⁷ See *id.* art. 15(3)(a).

³³⁸ See *id.* art. 15(3)(d). However the same provision notes that legal aid “must not be arbitrarily restricted.” *Id.*

³³⁹ See *id.* art. 15(5)(a).

³⁴⁰ See *id.* art. 15(6).

³⁴¹ Even the Twenty Guidelines state, “Where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given free of charge, in accordance with the relevant national rules regarding legal aid.” *Twenty Guidelines*, *supra* note 114, Guideline 5(2) (using the language “should” and “in accordance with”).

denial of due process.³⁴² As a result, respondents in removal proceedings are now provided with simultaneous interpretation. However, all the documents are filed in English³⁴³ and aliens receive no government-paid assistance outside of the courtroom.³⁴⁴

While the E.U. Directive on Common Standards of Return requires any relevant documents, particularly decisions, to be communicated in the language that the alien understands, it allows member states to ignore such requirement if the alien had entered the country illegally.³⁴⁵ In that case, they could use standard forms whether the alien understands it or not.³⁴⁶ Because the alien is eventually entitled to challenge the decisions against him by appeal, during which she may receive government-paid translation services,³⁴⁷ the lack of due process at the primary decision making level could presumably be rectified. However, there is a real risk that the lack of translation at the initial level would make it impossible for the alien to even think about an appeal. While the exact implementation of the E.U. standards in the domestic jurisdictions of the member states might vary, it appears that the lack of translation in that first instance is a more serious violation of the international standards relating to notice in the European Union than in the United States because in the United States, persons who have entered illegally, unless apprehended in border states within fifteen days of their arrival, are eligible for a removal hearing under INA § 240, during which they receive translation services. Again, while some E.U. member states may provide for similar or even better conditions, the directive allows them to issue documents to aliens who entered illegally in a language that they do not understand. In the United States, once an alien gets past the fourteen-day mark, only an immigration

³⁴² See, e.g., *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) (“Due process requires that an applicant be given competent translation services.”); *Augustin v. Sava*, 735 F.2d 32, 33, 37 (2d Cir. 1984) (affirming the right to adequate translation).

³⁴³ Compare Immigration Court Practice Manual Chapter 3: Filing with the Immigration Court at 41 (“All documents filed with the Immigration Court must be in the English language . . .”), with Rachael Pine, Note, *Toward a Meaningful Right to Counsel for Refugees in Exclusion Proceedings*, 11 N.Y.U. REV. L. & SOC. CHANGE 297, 310 (1983) (“The notice is printed in English and a few other major languages.”).

³⁴⁴ *Should I Bring an Interpreter to My Asylum Interview?*, U.S. CITIZENSHIP & IMIGR. SERVICES (Sept. 23, 2008), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=da55809c4410f010VgnVCM1000000ecd190aRCRD&vgnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD> (noting that no translator will be provided in non-judicial asylum hearings).

³⁴⁵ E.U. Directive on Common Standards of Return, *supra* note 7, art. 12(3).

³⁴⁶ See *id.*

³⁴⁷ See *id.* art. 13(3).

judge may order him removed.³⁴⁸ Courts have held that due process requires competent translation of the expulsion proceeding, which would also require a complete translation of the charge.³⁴⁹ In the E.U. member states, that possibility cannot be ruled out. A good example is Germany's jurisprudential approach to illegal entry and illegal presence. Under the Act of 30 July 2004, persons who are found within six months of illegal entry may be expelled without the need for any administrative proceeding because expulsion is viewed as "a way of executing the obligation of any illegal alien to leave the territory."³⁵⁰ Under this approach, the alien is under a continued obligation to leave, which means that he can be expelled without being informed of the grounds because the directive does not mandate translation of the charges and the decision to illegal entrants.

2. Variations on the Fundamental Assumptions and Substantive Prescriptions that Affect the Procedures

Ultimately, the approximation to contemporary international human rights of the quality of the due process that the E.U. and U.S. rules purport to accord is more or less the same. However, one aspect of their approaches is remarkably different, which gives the impression that the E.U. rules are more favorable to the protection of the due process rights of aliens, i.e., the European Union's ostensibly human rights-based approach and the United States' law enforcement-based approaches. This proposition may best be explained by example. First, the E.U. Directive on Return of Third-Country Nationals begins by stating the general principle as, "When implementing this Directive, Member States shall take due account of: (a) the best interest of the child; (b) family life; (c) the state of health of the third-country national concerned."³⁵¹ Although some of the same considerations may apply in the United States, they are embedded in some law enforcement-type provisions.³⁵²

Although similar notions of family unity and interest of the child dictate this provision, it is not exactly an expression of the internationally recognized

³⁴⁸ See INA § 240(a)(3), 8 U.S.C. § 1229a (2006) ("[U]nless otherwise specified in this Act, a proceeding under this section shall be the sole procedure for determining whether an alien may be . . . removed from the United States.").

³⁴⁹ See, e.g., *He v. Ashcroft*, 328 F.3d 593, 597 (9th Cir. 2003).

³⁵⁰ *Sixth Report on the Expulsion of Aliens*, *supra* note 2, para. 18 (citing Residence Act, *supra* note 294, at 84).

³⁵¹ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 5.

³⁵² See, e.g., INA § 240A(b).

rights of family unity and the best interest of the child.³⁵³ Most notably, the extreme hardship has to be to a U.S. citizen or permanent resident child, spouse, or parent—not just any child, spouse, or parent, which is more restrictive than the E.U. standard. Also, the form of relief is granted at the pleasure of the chief law enforcement officer as it is completely discretionary.

The second example that highlights the difference in approaches is the prescriptions on voluntary departure. While both encourage voluntary departure, the European Union attempts to do it by rewarding the departing alien with monetary compensation to a certain degree,³⁵⁴ and the United States enforces it by threatening punishment, which makes it a purely punitive approach. The European Union has set up a voluntary departure fund to assist voluntarily departing aliens, although the amount of money seems limited.³⁵⁵ In the United States, voluntary departure is granted to aliens who are able to pay their own way back to their country. The only reward they could expect is the avoidance of a reentry ban, which a deportation order carries. The relevant rule states:

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4)(B).³⁵⁶

The third example relates to the principle of proportionality. The principle of proportionality balances competing interests and any legal decision is usually a balancing of competing interests. The European Union's use and expression of this principle throughout the directives adds some degree of clarity to the

³⁵³ *Cf.* *Mehemi v. France*, 1997-VI Eur. Ct. H.R. 1959, 1968, 1973 (holding that separation of a parent from a minor child is a disproportionate violation of the applicant's right to respect for his private and family life); 2 Rep. of the Hum. Rts. Comm., 72d sess., July 9–27, 2001, Annex X at 199, U.N. Doc. A/56/40; GAOR, 56th sess., Supp. No. 40 (2001) *Winata v. Australia*, Communication No. 930/2000, Hum. Rts. Comm., UN Doc. A/56/40, GAOR, 56th Sess., Supp. No. 40, Vol. II, 199, 201 (2001) (noting that the deportation of parents of an Australian child is an "interference" with the family and hence violates the ICCPR).

³⁵⁴ *See Return Fund*, EUR. COMMISSION, http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/return-fund/index_en.htm (last visited Mar. 23, 2013) (discussing how the European Union uses the Return Fund to provide special assistance for vulnerable persons).

³⁵⁵ *See id.* (referring to the E.U. Return Fund). For the details of the Return Fund, see E.U. Decision 575/2007, *supra* note 165, at 45.

³⁵⁶ *See* INA § 240(B).

limitations of the exercise of sovereign power.³⁵⁷ The term proportionality does not underpin the U.S. immigration rules. Perhaps the equivalent of the notion of proportionality is the concept of “hardship” or “extreme hardship” repeatedly used in the INA.³⁵⁸ The hardship inquiry is often very precise as to who must suffer it and how much.³⁵⁹ Extreme hardship as a concept appears to be more than a proportionality inquiry, which suggests a fair balance. Again, although the differences at the most practical level might not be as great as a comparison of these provisions make it seem, the difference in approaches is not insignificant and may ultimately impact the quality of the due process.

The final example that highlights the difference in the fundamental assumptions is the detention standards. Both sets of rules allow detention as a means of securing the expulsion of aliens. But again, the two sets of rules make the rights versus law enforcement approach clear.

The E.U. Directive on Common Standards of Return dedicates an entire chapter on detention.³⁶⁰ It allows the detention of aliens only if other less coercive measures are deemed ineffective and there is “a risk of absconding” and that the alien would hamper removal if released.³⁶¹ It also limits detention to the shortest possible period to effect removal. Moreover, the rules require “a speedy judicial review of the lawfulness of detention.”³⁶² The rules further require a periodic judicial review of detention including *ex officio*.³⁶³ In particular, detention may only last for as long as a reasonable prospect of removal exists; otherwise, “detention ceases to be justified and the person concerned shall be released immediately.”³⁶⁴ In any case, each state is required to limit the maximum period of removal-related detention to six months.³⁶⁵

³⁵⁷ See, e.g., E.U. Directive on Return of E.U. Citizens, *supra* note 112, art. 27(2) (“Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.”).

³⁵⁸ See, e.g., INA § 240(A)(b).

³⁵⁹ See, e.g., *id.* (establishing that removal may be cancelled where “removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”).

³⁶⁰ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 15.

³⁶¹ See *id.* art. 15(1).

³⁶² See *id.* art. 15(2)(a).

³⁶³ See *id.* art. 15(3).

³⁶⁴ See *id.* art. 15(4).

³⁶⁵ See *id.* art. 15(5). If the third-country national or his country of nationality fails to cooperate, detention may be extended for twelve more months under national laws. *Id.* art. 15(6).

The directive also sets forth conditions of detention and emphasizes the rights of the detainees. Some of the protections include separate facilities for immigration detainees, access to legal representation and visitation by family and international organizations, and health care.³⁶⁶ Special rules apply to the detention of minors and families. The animating principle is the best interest of the child.³⁶⁷ Detention of a minor is a measure of last resort and must only last for “the shortest possible period of time” during which time they should have access to education and recreational activities.³⁶⁸ The rules also make clear that families may only be detained in separate facilities that guarantee their privacy.³⁶⁹

The Council of Europe’s Twenty Guidelines, which are predicated on the jurisprudence of the European Court of Human Rights, also take the same approach and supplement these detention rules. The Guidelines emphasize the prohibition on unreasonably long detention while the removal proceedings are in progress or any detention once a determination is made that there is no reasonable prospect of removal.³⁷⁰ They also emphasize the need for a periodic judicial supervision and access to judicial remedy including through the provision of legal aid.³⁷¹

Although the nature, length and severity of the detention that aliens receive in the European Union and the United States may depend on a variety of interrelated factors and may only be judged case by case, the difference in the fundamental approaches is made clear by a brief look at the INA rules on detention. By contrast to the human rights approach that the above-discussed E.U. rules take, the INA rules take a quintessentially law enforcement approach. For example, § 236 of the INA, titled “Apprehension and Detention of Aliens,” states in part: “On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—may continue to detain the arrested alien; and (2) may release the alien on [bond].”³⁷² A related provision, titled “Detention of criminal aliens,” reads: “The Attorney General shall take

³⁶⁶ See *id.* art. 16.

³⁶⁷ See *id.* art. 17(5).

³⁶⁸ *Id.* art. 17(1), (3)–(4).

³⁶⁹ See *id.* art. 17(2).

³⁷⁰ See *Twenty Guidelines*, *supra* note 114, Guideline 7.

³⁷¹ *Id.* Guidelines 8–9.

³⁷² INA § 236(a), 8 U.S.C. § 1226(a) (2006).

into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2).”³⁷³ This particular rule requires the Attorney General to detain with no discretion to release.³⁷⁴ Related provisions of the INA provide for the circumstances where the Attorney General may release detained aliens as a matter of discretion,³⁷⁵ while expressly precluding judicial review of the Attorney General’s decision.³⁷⁶

The length of detention is a subject of immense jurisprudential inquiry. Two U.S. Supreme Court decisions provide the most current rule in two different contexts, i.e., possibility of indefinite detention when actual removal is impracticable, and detention while removal proceedings are in progress. In the landmark case of *Zadvydas v. Davis*,³⁷⁷ the Supreme Court held that indefinite detention of an alien where there is not reasonable prospect of removal violates the Due Process Clause of the Fifth Amendment.³⁷⁸ The Court also added that detention must always have reasonable justification, while at the same time making exceptions for national security and public safety reasons.³⁷⁹ However, the Court subsequently allowed the categorical detention of a certain class of aliens while removal proceedings are in progress, even if they are not personally determined to carry a risk of absconding or pose a security threat.³⁸⁰ It held in particular that “[d]etention during removal proceedings is a constitutionally permissible part of that process.”³⁸¹

The above-discussed four examples suggest that although the nature of due process that the E.U. and U.S. rules provide are more or less comparable, the fundamental assumptions that underpin the two rules appear different. While the E.U. rules appear to be driven by human rights principles and owe their articulation to international human rights instruments and the jurisprudence of the European Court of Human Rights, which emphasizes the rights of the child and of the family, the U.S. rules owe their articulation to considerations of law

³⁷³ *Id.* § 236(c)(1).

³⁷⁴ Other mandatory detention provisions include *id.* § 236(a) (“Mandatory Detention of Suspected Terrorists”).

³⁷⁵ *See id.* § 236(c)(2).

³⁷⁶ *See id.* § 236(e) (“The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”).

³⁷⁷ 533 U.S. 678 (2001).

³⁷⁸ *See id.* at 690.

³⁷⁹ *Id.* at 690–96.

³⁸⁰ *See Demore v. Kim*, 538 U.S. 510, 531 (2003).

³⁸¹ *Id.*

enforcement. This distinction in emphasis appears to make a difference in how the relationship between aliens and their host states are perceived, which may ultimately affect the quality of due process they get.

CONCLUSION

Sovereign states' right to expel aliens in times of war and peace is not unlimited. The various sources of international law discussed in Part I provide the legal limits that apply in the different contexts. The law is still in a state of development. In times of war, human rights norms do not cease to apply. Apart from the derogations that are permitted due to compelling exigencies of war, the legal limits on the expulsion of aliens in times of war are the same as those that apply in times of peace.³⁸²

The most contemporary expression of the limits under international human rights law is contained in the Sixth Report of the Special Rapporteur on the Expulsion of Aliens. Draft C1 summarizes the appropriate procedural due process that aliens facing expulsion must be accorded.³⁸³ These due process rights include notice, effective remedy, access to an effective remedy including through appointed counsel or legal aid, and the right to interpretation at every important stage.³⁸⁴

The E.U. and U.S. procedural rules attempt to approximate the international standards but fall short of providing effective remedy in most cases. First, both sets of rules deny illegal entrants any kind of due process because of their illegal entry.³⁸⁵ Although persons who could prove that they would face persecution are often given a chance to submit their claims, the denial of due process to entire groups of illegal entrants is a cause for concern. The U.S. rules on expedited removal are more forgiving than the E.U. rules, which allow the exclusion of all illegal entrants from the benefits of the directives on return³⁸⁶ because the U.S. rules on expedited removal only cover aliens who

³⁸² Cf. LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 457 (2d ed. 1999) (“[U]nlike the international agreements relative to the preservation of human rights in peacetime, the law of armed conflict lays down penal measures for those who offend gravely against human rights. It appears therefore, that, paradoxical though it may seem, there is more chance for the effective enforcement of human rights and punishment for offenses against them in time of armed conflict than there is during peacetime.”).

³⁸³ *Sixth Report on the Expulsion of Aliens*, *supra* note 2, at 47.

³⁸⁴ *Id.*

³⁸⁵ Compare *supra* Part II.A, with *supra* Part II.B.

³⁸⁶ E.U. Directive on Common Standards of Return, *supra* note 7, art. 2(2).

are apprehended within one hundred miles of the border within fifteen days of their arrival.³⁸⁷

Second, while both sets of rules require appropriate notice to be given, neither guarantees all categories of aliens the right to be properly notified at every stage of the process. The E.U. rules require translation services only at the appellate level.³⁸⁸ The U.S. requires government paid interpretation only in the actual court hearings.³⁸⁹ Under both sets of rules, aliens receive neither a translated version of the initial charging documents, nor interpretation services related to that initial stage. That indeed affects the effectiveness of whatever subsequent remedy they may have as the record will contain documents and other types of evidence developed without the alien's informed input. Damage done at the initial or trial level is often difficult to rectify at the appellate level.

Third, an important consideration of the effectiveness of the remedy is the impartiality and independence of the decision maker. The E.U. rules expressly recognize this, and as such appear to be in line with the international standards.³⁹⁰ Leaving aside the possibility that the member states may compromise this rule in their domestic laws in the interest of efficiency and other considerations, the E.U. rules contain a better expression of this rule than the U.S. rules, which are unequivocally law enforcement oriented. As discussed above in some detail, the issue of independence of the decision makers has been a subject of continued concern. Future reform efforts in the United States could benefit from the expressions of the international instruments as well as the E.U. rules.

Fourth, while the right to counsel as an important due process right is clearly expressed in both sets of rules, the United States unequivocally rejects any notion that the government should assist in legal representation. Indeed, there is no mention of the right to legal aid at all.³⁹¹ The E.U. rules mention legal aid in many places, but a closer look makes it clear that the recognition of this right is replete with many exceptions and discretions.³⁹² In any case, the European Union is clearly ahead on the issue of the right to legal aid. The

³⁸⁷ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004).

³⁸⁸ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(3).

³⁸⁹ See *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) ("Due process requires that an applicant be given competent translation services."); *Augustin v. Sava*, 735 F. 2d 32, 33, 37 (2d Cir. 1984) (affirming the right to adequate translation).

³⁹⁰ See E.U. Directive on Common Standards of Return, *supra* note 7, art. 13(1).

³⁹¹ INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(a) (2006).

³⁹² See E.U. Directive on Common Standards of Return, *supra* note 7, pmb., para. 11.

United States will hopefully follow that trend and comply with contemporary international standards, especially because the U.S. expulsion proceedings are adversarial³⁹³ in which the unrepresented alien would have little chance of prevailing.

Finally, a closer look at the E.U. and U.S. rules suggests there is one fundamental lesson that each can learn from the other. The European Union's rules are predicated on basic human rights instruments and jurisprudence. It emphasizes the rights of the child and of the family and relies on the principle of proportionality. These principles would appear to add humanity to the expulsion process, which is a very severe measure.³⁹⁴ The U.S. rules are quintessentially law enforcement rules and could be ameliorated through the use of some of the basic human rights principles. Such is particularly true in two contexts: The first one is voluntary departure. In the United States, the only reward that a voluntarily departing individual could expect is the avoidance of a penalty in the form of reentry ban.³⁹⁵ In the European Union, at least theoretically, it is designed to facilitate the alien's departure and possible reintegration in the home country. The second is the use of detention. In the United States, detention is the regular means of enforcing the law and is often mandatory.³⁹⁶ In the European Union, again, at least theoretically, it is considered a means of last resort and for a limited purpose.³⁹⁷ Moreover, regardless of the actual practice, the E.U. rules emphasize the human rights of the detainees, particularly the rights of children and the family.

On the other hand, by comparison, the U.S. rules have better technical clarity that the E.U. rules could learn from. Indeed, as indicated above, the E.U. directives suffer from a very serious technical glitch with respect to the scope of application. The directives do not sufficiently identify the appropriate procedural stage during which the rules are supposed to apply.³⁹⁸ The directives are supposedly designed to govern procedures after an expulsion order has been issued; however, several of its provisions suggest that procedures before and after the actual expulsion order may also be governed

³⁹³ Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169, 169–70 (2010).

³⁹⁴ Recall what James Madison said: "[I]f a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." Madison, *supra* note 79, at 555.

³⁹⁵ See INA § 212(a)(9)(B).

³⁹⁶ See DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

³⁹⁷ See *Twenty Guidelines*, *supra* note 114, Guideline 6.

³⁹⁸ See *supra* note 176–93 and accompanying text.

by the directives.³⁹⁹ A look at the U.S. procedures could give the E.U. rules some technical clarity. As discussed in some detail above, INA § 240 removal proceedings combine the determination of removability with the adjudication of affirmative relief, which may include non-refoulement. In other words, an alien who is found removable, which the E.U. directives consider illegally staying, may seek a form of relief in the same proceeding. The due process rules would ideally apply to both stages of the removal process.

This Article has identified the appropriate international legal standards that apply in the expulsion of aliens in times of war and peace and conducted a comparative study of the E.U. and U.S. rules on expulsion vis-à-vis the international standards. While both jurisdictions attempt to approximate the international standards of due process, they have some significant shortcomings of their own. As they refine and develop their due process standards, they also have many lessons that they could learn from each other. This Article has highlighted some of the shortcomings and the lessons that they could learn from the international standards and from each other for the betterment of the aliens in their midst and, as such, their own respective societies.

³⁹⁹ See *supra* note 176–193 and accompanying text.