

Asylum and Terrorism: The Death of Human Rights Law?

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In *Matter of A-H*, a case concerned with whether an alien was entitled to asylum protection despite his participation in terrorist-related organization in his native country of Algeria, then-Attorney General John Ashcroft declared that “[t]he United States has significant interests in combating violent acts of persecution and terrorism wherever they may occur.”¹ “[I]t is,” he added, “inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence.”² And so, Ashcroft concluded, the Attorney General can exercise discretion to deny protection, “even where the applicant is otherwise eligible for asylum.”³

Referring back to this decision, authors Hon. Alberto R. Gonzales and Patrick Glen in their Article, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, emphasize that since Ashcroft drew on his Attorney General’s review authority as the “primary interpreter of the immigration laws,” then his decision carries an important “policy-making and error-correction dynamic.”⁴ The essence of this policy, they conclude, is that “terrorist affiliation and relation to political violence” serves as a “key component[]” for a “discretionary denial” of asylum in the US.⁵ This denial, they insist, in words that echo Ashcroft, “state[s] a general policy,” namely that:

the United States will not be a haven for terrorists or members of other violent organizations and that discretionary asylum should not be extended to such individuals⁶

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1. A-H-, 23 I. & N. Dec. 774, 782 (Attorney Gen. 2005).

2. *Id.*

3. *Id.* at 780.

4. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney-General’s Review Authority*, 101 IOWA L. REV. 841, 867 (2016).

5. *Id.*

6. *Id.* Note, however, that while the United States may not grant discretionary asylum, it may still not return the individual to a place of harm. The United States ratified the Convention

That is all fairly straightforward.

But what happens when these cases involving individuals who otherwise satisfy the conditions for asylum and related protections because they are at a serious risk inside their home state, but who have connections to terrorism in another state, reach human rights courts and other quasi-judicial bodies? What happens, in other words, when a human rights court must decide between the right of an individual not to be sent back a place where he is faced with critical threats to safety and dignity, and the obligation of a host state to maintain security and order for its citizens?

For the United States, not much; these questions do not reach human rights courts. The United States has incorporated into domestic law two types of non-refoulement: asylum and protection against torture. In 1980, it enacted into domestic law guarantees of safety and dignity for a person who qualifies for asylum until and unless the threat in his home state is eradicated.⁷ But the 1951 Refugee Convention,⁸ the international law from which this domestic obligation derives, does not hold dignity as an absolute right; it exempts non-refoulement protection—or the obligation not to send back⁹—on grounds of national security or public order.¹⁰ While, moreover, the United

Against Torture (“CAT”) and incorporated into its domestic law the CAT art. 3 prohibition on “expel[ling], return[ing]” (“refouler”), or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 3 (entered into force June 26, 2987) [hereinafter CAT]. In accordance with CAT art. 3, the United States enacted statutes and regulations to prohibit the transfer of aliens, even those who pose a national security risk, to countries where they would be tortured, including the Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. (1998); chapter 113C of the United States Criminal Code, 8 U.S.C. § 2340 (2012); and certain regulations implemented and enforced by the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State.

7. United Nations Convention relating to the Status of Refugees, art. I (C)(5), *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]. The Refugee Convention has been complemented by the Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1966, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

8. Refugee Convention, *supra* note 7. Note, however, that the United States never signed the Refugee Convention—just the Protocol.

9. For a definition, see Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT’L J. REFUGEE L. 443, 444 (2011) (“The obligation on states not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm . . .”).

10. There are a number of Articles from the Refugee Convention that could come into play here. See e.g., Refugee Convention, *supra* note 7, at art. 33(2) (“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”). For a detailed discussion of this exception, see JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 342–55 (2005). Hathaway writes: “In cases that fall under Art. 33(2), the asylum country is authorized to expel or return even refugees who face the risk of extremely serious forms of persecution.” *Id.* at 344. In addition, Refugee Convention, *supra* note

States has signed other human rights treaties that have deemed the right to dignity inalienable such that non-refoulement applies regardless of whether or not the individual threatens security and public order, it did not consent to the jurisdiction of the human rights bodies that enforce these treaties.¹¹ Likewise, when the United States signed the Convention Against Torture (“CAT”),¹² it incorporated the non-refoulement obligation into domestic law but did not consent to the jurisdiction of the U.N. This leaves cases that touch on CAT adjudicated by national, not international, courts.¹³

Surprisingly, however, while the United States is generally viewed as exceptional in its refusal to sign onto international human rights treaties,¹⁴ it is not an outlier in this case.

My first point in this Response is that even those states that consented to the jurisdiction of human rights enforcement bodies that construe dignity as a core non-negotiable right, are, in fact, unlikely to toe the line. They, much like the United States, will refuse to provide safe haven to individuals involved in acts of terrorism and violence, regardless of their human rights commitments. Second, and related, this political reality leaves human rights courts and quasi-judicial institutions in an intractable situation: an impossible choice between a decision that is politically unsustainable and one that is normatively unjustifiable. In this Response, I do not argue in favor of either position. Ra-

7, at art. 1(f), could also be used because provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (1) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (2) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (3) he has been guilty of acts contrary to the purposes and principles of the United Nations.

11. The United States never signed the Optional Protocol of the International Covenant of Civil and Political Rights (“ICCPR”) empowering the United Nations Human Rights Committee (“UNHRC”) to entertain individual complaints against it, nor did it recognize the jurisdiction of the Inter American Court of Human Rights to decide individual complaints concerning human rights violations. See *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R (last visited Sept. 3, 2016), <http://indicators.ohchr.org>. For more on the working on the UNHRC, see RUTH MACKENZIE ET AL., *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 415–30 (2d ed. 2010). As of 2010, the number of State-parties to the ICCPR that have accepted the jurisdiction of the UNHRC to receive individual communications was more than double the number subject to the jurisdiction of any regional courts. *Id.* at 426–27. But note that decisions of the UNHRC are more expressively political and have a weaker compliance pull as compared to the European Court of Human Rights (“ECtHR”) whose jurisdiction is binding. *Id.* at 416.

12. CAT, *supra* note 6, at art. 3.

13. See *supra* text accompanying note 6.

14. For discussion, see generally AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff, ed., 2009). See also, e.g., Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 146–97 (Michael Ignatieff ed., 2009) (stating that “the U.S. aversion to formal acceptance and enforcement of international human rights norms . . . poses a paradox”).

ther, I contend that it is important to be honest and realistic about the political limits of the law, especially as such cases that bear on both terrorism and asylum become ever more prevalent.

Let me explain.

I begin with a familiar tension between two international doctrinal traditions that bear on immigration control.¹⁵ I present them in their absolute ideal type. In other words, I take each tradition to its ultimate end point.¹⁶

The first originates with the state and we might call it the statist tradition. It locates rights in notions of sovereignty and the consent of the state.¹⁷ According to this doctrine, a state and its members have the right to determine their own political community, including how to allocate membership and substantive resources.¹⁸ As a normative matter, this prerogative to decide who is admitted into the community exists by virtue of being a sovereign state; the core of self-determination is having discretion over inclusion and exclusion.¹⁹ Legally, this tradition derives from state consent-based treaty obligations and government-prescribed forms and conditions for entry.²⁰ The state, in matters of immigration, is the “master of its own house.”²¹ Pushed to its end conclusion, this statist position means that the state is free to decide who may enter its domain, under what conditions, and with what legal consequences.²² As a

15. On the tension between concreteness/normativity in international law, see generally DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURE* (1987); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge U. Press, 2005). For a typology of positions on this tension, see KOSKENNIEMI, *supra* note 15, at 184–85 (laying out four variants of the combination of the normative and the concrete in international law: (1) the “rule-approach” emphasizing power politics; (2) the “policy-approach” that sees all (governmental or non-governmental) global processes as part of international law; (3) the “idealistic position”; and (4) the “skeptical position”).

16. In reality, most states are somewhere between these two extremes.

17. For discussion of the tradition that takes consent of states as the ultimate source of international law, see KOSKENNIEMI, *supra* note 15, at 304–05.

18. I borrow here from Lassa Oppenheim: “Every State is, and must remain, master in its own house, and this is of special importance with regard to the admittance of aliens. . . . in strict law every State is component to exclude foreigners from its territory.” 1 LASSA OPPENHEIM, *OPPENHEIM’S INTERNATIONAL LAW: PEACE* 467, 489 (Robert Jennings & Authur Watts eds., 9th ed. 2009). Oppenheim continues: “State can expel even domiciled aliens without so much as giving the reason” *Id.* at 499–500; see 2 A DIGEST OF INTERNATIONAL LAW § 206 (John Bassett Moore & Francis Wharton eds., 1906) (“This government cannot contest the right of foreign governments to exclude, on police or other grounds, American citizens from their shores.”).

19. For possibly the best articulation of the power over admission policy as an essential part of the state’s sovereignty, including its identity and autonomy, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 39 (1983) (stating that a country is a membership community with shared “ways of life” which its members are entitled to preserve. Thus members of the national community must have the right to “control and sometimes restrain the flow of immigrants”).

20. See KOSKENNIEMI, *supra* note 15.

21. See *supra* note 18.

22. This power of the state was established by treaty law and constitutional law. For summary of relevant treaties, see SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF*

corollary, strangers who reach a state's shores can have no claims against the state for rights that the state does not consent to,²³ even if these strangers face significant harm if denied entry.²⁴

As for the case of an individual who satisfies the conditions for asylum but who has participated in terrorism, this legal tradition and its reasoning produces a similar outcome to that in *Matter of A-H*. Here, a human rights court or a quasi-judicial body would acknowledge the right of a state to control admission to the state, regardless of the safety of the individual, and would deny asylum. The court could defer to Article 32(1) of the Refugee Convention (permitting the expulsion of a refugee lawfully present on grounds of national security or public order),²⁵ or Article 33(2) (allowing the refoulement of an individual to a place of harm when there are reasonable grounds for regarding the person as a danger to state security or order).²⁶ Similarly, it could also defer to Article 1(f) of the Convention.²⁷

GLOBALIZATION 65–66 (1996); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 MELB. J. INT'L L. 392, 401–09 (2013); Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL'Y J. 405 (2011).

23. For an extreme example of a state's position on immigration in the context of the United States, see *Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

24. The United States Supreme Court captured this position in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 183 (1993) (stating that international treaties “cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”). In contrast, see Harold Koh's article arguing that foreign courts were bound by “principles of comity, sanctity of treaty, and respect for human rights that must form the bedrock of any new world order” Harold Hongju Koh, *Reflections on Refoulement and Haitians Centers Council*, 35 HARV. INT'L L.J. 1, 20 (1994). Again, this is an ideal type. In reality, there are some obligations that might nonetheless apply. See CAT, *supra* note 6, at art. 3 (describing the prohibition on “expelling, returning (‘refouler’) or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”).

25. Refugee Convention, *supra* note 7, at art. 33(2) (“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”). For a detailed discussion of this exception, see HATHAWAY, *supra* note 10, at 342–55. Hathaway writes: “In cases that fall under Art. 33(2), the asylum country is authorized to expel or return even refugees who face the risk of extremely serious forms of persecution.” *Id.* at 344.

26. Refugee Convention, *supra* note 7, at art. 33(2).

27. *Id.* at art. 1(f) (exempting protection in cases dealing with individuals who have committed crime against peace, a war crime, or a crime against humanity, or a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, or acts contrary to the purposes and principles of the United Nations).

There is, however, an alternative legal tradition that derives rights from a wholly different set of considerations, namely, from notions of universal humanity and the equal dignity of every individual. We can call this ideal type the human rights or universalist tradition.²⁸

In this tradition, every individual has the right to a minimum threshold of personal dignity. Normatively, this right exists by virtue of being human.²⁹ It derives from notions of common humanity, as the Universal Declaration of Human Rights (“UDHR”) puts it, the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”³⁰ Legally, this second tradition grows out of internationally-recognized human rights norms that are external to the state and that operate in the conventional sense of constraining state policy within the sphere of sovereignty.³¹ It recognizes in individuals fundamental rights, not simply the chance to receive

28. For the roots of this tension, see text relating to temporary sojourn in IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* 21 (Filiquarian Publishing 2007) (1795) (“It is not the right to be a permanent visitor that one may demand. A special beneficent agreement would be needed in order to give an outsider a right to become a fellow inhabitant for a certain length of time. It is only a right of temporary sojourn, a right to associate, which all men have.”).

29. For a classic authority, see LOUIS HENKIN, *THE AGE OF RIGHTS* 32 (1990) (stating that human rights are “human in that they are universal, for all persons in all societies”).

30. Universal Declaration of Human Rights, G.A. Res. 217A (III) at pmbl. (1948). Indeed, most of the central international human rights instruments link human rights with human dignity. See International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 U.N.T.S. 171 (1967) (“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of 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 . . .”); International Covenant on Economic, Social and Cultural Rights, pmbl., Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360, 993 U.N.T.S. 3 (1967) (“Recognizing that these rights derive from the inherent dignity of the human person . . .”); UN Charter pmbl. (“[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small[.]”). For more on this tradition, see SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM* 15–16 (Robert Post, ed. 2006) (asserting that, since the Universal Declaration of Human Rights, “we have entered a phase in the evolution of global civil society, which is characterized by a transition from *international* to *cosmopolitan* norms of justice.”). Benhabib also observes that “[c]osmopolitan norms of justice . . . accrue to individuals as moral and legal persons in a worldwide civil society. Even if cosmopolitan norms arise through treaty like obligations . . . their peculiarity is that they endow *individuals* rather than states and their agents with certain rights and claims.” *Id.* at 16; see also SASSEN, *supra* note 22, at 2; Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 520 (2009); Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 J. GLOBAL LEGAL STUD. 519, 528 (2000) (noting that “[t]he human rights framework deals with citizens within nation-States and undermines older notions of sovereignty articulated in international law, whereby matters within a country were solely for its own determination”). Multiple sources suggest that human rights derive much of their moral power from the belief that they are universal: all humans deserve to enjoy certain fundamental rights because they are humans. See generally JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989); Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007).

31. For a summary of this position, see generally Jack Donnelly, *State Sovereignty and Human Rights*, 28 ETHICS & INT’L AFF. 225 (2014).

“mere gifts or favors, motivated by love or pity.”³² Pushed to its ultimate conclusion, rights exist regardless of the individual’s immigration status.³³ And they exist regardless of whether the individual brings benefit or danger to society.³⁴

In the case of an individual who took part in terrorist related activities, but would have otherwise qualified for asylum, following this tradition would lead to an outcome opposite to that in *Matter of A-H*. In this approach, a human rights body would recognize the individual’s dignity, and privilege it over the state’s interest in security and public order. Even if the individual poses a direct danger to the security and order of the state, the right not to be returned to a place of persecution is absolute.³⁵

To support this decision, such a court could refer to the European Court of Human Rights (“ECtHR”). Its position is that the prohibition on degrading treatment is a core human right that is inalienable; it “makes no provision for exceptions and no derogation from it is permissible.”³⁶ Or the court could turn to the United Nations Human Rights Committee (“UNHRC”),³⁷ which, much like the ECtHR, has declared that an individual’s right not to suffer degrading treatment is non-negotiable; it “allows of no limitation.”³⁸ In fact, even in times “of public emergency which threatens the life of the nation,” no

32. JOEL FEINBERG, *SOCIAL PHILOSOPHY* 58–59 (1973) (“Rights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response. . . . A world with claim-rights is one in which all persons . . . are dignified objects of respect, both in their own eyes and in the view of others.”).

33. Again, here I am presenting both doctrinal traditions in their ideal type. In reality, some human rights permit derogations from the right to enter or remain under certain circumstances based on danger to society even if they do not permit derogations from other rights. Article 4 of the International Covenant on Civil and Political Rights, *supra* note 30, for example, differentiates between rights that are subject to derogation and those that do not. *Id.* (“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”).

34. See LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1990) (“Human rights enjoy a prima facie, presumptive inviolability, and will often ‘trump’ other public goods.”). For discussion of these rights, including rights stemming from the 1951 Refugee Convention and the ECtHR, see generally Ryan Liss, *A Right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR* 46 N.Y.U. J. INT’L L. & POL. 1097 (2014).

35. The five grounds are race, religion, nationality, membership in a particular social group, or political opinion. See Refugee Convention, *supra* note 7, at art. (1) (A) (2).

36. Soering v. United Kingdom, App. No. 14038/88, 161 Eur. H.R. Rep. (ser. A) at 7 (1989).

37. MACKENZIE ET AL., *supra* note 11, at 427.

38. Human Rights Committee, *General Comment* 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

“derogation . . . is allowed.”³⁹ Indeed “no justification or extenuating circumstances may be invoked to excuse a violation of [this right] for any reasons.”⁴⁰

As we have seen, cases that bear on asylum and terrorism stand at the nexus of two well-established international legal and moral traditions: the statist and the universal. These traditions—which I have described here in their purest incarnations—represent two prevailing normative outlooks, and both are valid. But they produce in this case radically different substantive outcomes. Nevertheless, neither one can be defended continuously. Each is vulnerable to criticism from the other tradition.

The statist tradition cannot be normatively justified when taken to its ultimate conclusion. If human rights courts and quasi-judicial bodies continue to defer to the security interests of the state as part of their immigration control policy, then an individual’s right to dignity will no longer be universal. It will depend on the assessment of the host state with respect to the nature of the individual’s conduct, and different people will be subject to different protective outcomes.⁴¹ This would violate the most basic human right: all human beings are equal and bear the same fundamental rights.⁴²

The second tradition, in turn, cannot be sustained as a matter of politics. It does not defer to the state’s will, need, and consent. Pushed to the extreme, it forces states to open their borders to individuals they view as posing a danger to their citizenry. But states will not accept such an encroachment on their sovereignty and on their ability to protect their own community. Some might even choose to opt out of international human rights courts and other quasi-judicial institutions altogether.

This is not an empty threat.

Take two recent cases that came before the ECtHR and the UNHRC and that raised facts that resemble, but are not identical to, *Matter of AH*.⁴³ Neither the International Covenant on Civil and Political Rights (“ICCPR”)⁴⁴ nor the European Convention on Human Rights (“ECHR”)⁴⁵ include a right to the nonrefoulement for refugees. But both enforcement bodies read a non-refoulement obligation into the right not to be subject to “torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁶ In doing so, they appear to have drawn from the CAT definition of non-refoulement rather than that

39. *Id.*

40. *Id.*

41. For a similar argument, see generally James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA.J. INT’L L. 1 (2008).

42. Universal Declaration of Human Rights, *supra* note 30, at art. 1 (“All human beings are born free and equal in dignity and rights.”).

43. *Othman (Abu Qatada) v. United Kingdom*, 1 Eur. Ct. H.R. 56 (2012); *Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

44. International Covenant on Civil and Political Rights, *supra* note 30, at 171.

45. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5.

46. International Covenant on Civil and Political Rights, *supra* note 30, at 171; *Id.* at art. 3.

under the Refugee Convention: the former is wider than the latter in terms of both the language of the treaty and the expansiveness of the obligation.⁴⁷ This reading means that the ECtHR and the UNHRC have imported *only* the right of non-refoulement in its wider articulation, *without* a qualification in cases that involve security and criminal threats to the State.⁴⁸ In addition, they have attached it to the non-derogatory nature of the right not to be subject to degrading treatment. Cases now revolve around this question: does a person who poses a terrorist risk to a host state qualify for non-refoulement, for the reason that he is likely to face degrading treatment in his home country precisely on account of his involvement in terrorism?

Both human rights enforcement bodies answered in the affirmative: in their decisions, they have privileged the universalist tradition. In *Othman (Abu Qatada) v. United Kingdom*,⁴⁹ the ECtHR barred the deportation order of a radical Islamic preacher, regarded as one of Al Qaeda's main inspirational leaders in Europe. The preacher was recognized as a refugee because he faced the real risk of ill-treatment and an unfair trial in his home country.⁵⁰ The Court based its decision on the finding that the applicant's trial in Jordan would be tainted by evidence obtained by torture.⁵¹ The judges also declared that the prohibition on torture "is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion."⁵² Similarly, in *Ahani v. Canada*,⁵³ the UNHRC reversed the deportation order of a person who, after he was accepted as a refugee, was identified as a trained assassin.⁵⁴ This reversal was issued on the grounds that, if he were sent back, the person would face torture and execution.⁵⁵ The UNHRC held that "the

47. The non-refoulement obligation under CAT's Article 3 specifically mentions "torture" and does not qualify protection to individuals who fall under one of the five familiar grounds for protection. CAT, *supra* note 6, at 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."). *Contra* Refugee Convention, *supra* note 7, at art. 32. Note, however, that the state action requirement of CAT is stricter than that of the Refugee Convention. For a useful discussion of CAT and the protection against torture, see generally Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287 (2008).

48. Refugee Convention, *supra* note 7, at art. 33(2).

49. *Othman (Abu Qatada) v. United Kingdom*, I Eur. Ct. H.R. 56, ¶ 139 (2012).

50. *Id.* ¶¶ 232–34.

51. *Id.* ¶ 267. And thus would "legitimize the torture of witnesses and suspects," and "result in a flagrant denial of justice." *See id.*

52. *Id.* ¶ 185; *see also* *Saadi v. Italy*, II Eur. Ct. H.R. 144, ¶ 139 (2008) ("The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived."); *Chahal v. United Kingdom*, V Eur. Ct. H.R. 413 (1996).

53. *Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

54. *Id.* ¶ 2.8.

55. *Id.* ¶¶ 6.5–6.6.

prohibition on torture . . . is an absolute one that is not subject to countervailing considerations.”⁵⁶

And the state’s response?

Following the *Abu Qatada* decision, the UK signed a treaty with Qatada’s home state that gave assurances that evidence extracted through torture would not be used against him at a retrial, thereby making his deportation more likely.⁵⁷ This ad hoc solution, however, was not the end. Referring back to the decision, then British Prime Minister David Cameron declared that the ECtHR leaves states with “[t]he problem . . . that you can end up with someone who has no right to live in your country, who you are convinced—and have good reason to be convinced—means to do your country harm. And yet . . . you cannot detain them and you cannot deport them.”⁵⁸ He then called for restrictions on the power of the Court to overrule national judgment.⁵⁹ Responsibility for such cases should be pushed back to the national system, Cameron insisted.⁶⁰ If this “proves to be impossible,” he warned, “then Britain must consider leaving . . . the flawed jurisdiction of the Strasbourg court.”⁶¹ And Canada? In *Ahani*, Canada did not even wait for the UNHRC decision; it deported the author of the communication before the Committee reached its determination.⁶²

The conflict I have just described between two doctrinal traditions, the statist and the human rights, is not unique to cases that involve non-refoulement and terrorism.⁶³ But the latter cases display this tension at its most intractable. They provide a direct clash between the individual’s most basic right not to be sent to a place where his or her very life may be at a serious peril, and, on the other hand, the very security of the state and its citizens.

56. *Id.* ¶ 10.10.

57. *Abu Qatada Deported from UK*, GUARDIAN, (July 7, 2013, 4:45 AM), <http://www.theguardian.com/world/2013/jul/07/abu-qatada-deported-from-uk>.

58. Rowena Mason, *David Cameron: Human Rights Laws Stop Britain Protecting Against Terrorism*, TELEGRAPH, (Jan. 25, 2012, 3:56 PM), <http://www.telegraph.co.uk/news/politics/david-cameron/9038869/David-Cameron-human-rights-laws-stop-Britain-protecting-against-terrorism.html>

59. *Id.*

60. Stephan Castle, *Cameron Calls for European Court to Limit Its Reach*, N.Y. TIMES: EUROPE (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/world/europe/cameron-calls-for-european-court-to-limit-its-reach.html>.

61. *Strasbourg Question: Time To Quit Human Rights Court?*, THE WEEK: UK NEWS, (Jan. 25, 2012), <http://www.theweek.co.uk/uk-news/human-rights/44694/strasbourg-question-time-quit-human-rights-court>.

62. A senior Canadian public safety official said: “The concern was that he would possibly be used by them here as a resource for that purpose Therefore, in an act of prevention, he was moved out of the country.” Stewart Bell, *Echoes of Iran*, NAT’L POST, (Oct. 15, 2011, 9:09 AM), <http://news.nationalpost.com/news/echoes-of-iran>.

63. For a discussion, see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT’L L. (forthcoming 2016) (Stanford Public Law, Working Paper No. 2526521), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526521.

In any actual confrontation between these interests, the human rights enforcement institution appears naïve.

The United Kingdom and Canada, much like the United States in *Matter of A-H*, refused to offer a “safe haven” to non-citizens who have connections to terrorism and acts of violence and who pose a threat to the real needs and interests of its citizens. When faced with unconditional and inflexible human rights demands that left no legal recourse to deport these individuals, and under pressure from their political establishment to maintain security, they found solutions beyond the law. The United Kingdom, under the compulsory jurisdiction of the ECtHR, resorted to a political remedy: it secured a diplomatic assurance from Qatada’s home state that made his deportation legally kosher. Canada, which is not obliged to follow the UNHRC adjudications, simply ignored the Commission’s recommendation.⁶⁴ In the view of these states, the human rights enforcement bodies went too far: they imposed on them obligations that disregard the will and needs of the state, indeed their very security and that of their citizens. These obligations are not only indefensible under an international legal system that ties the state’s legal obligation to its consent, but also went beyond what they would be willing to comply with.

In reality, then, in these cases—involving individuals who otherwise satisfy the conditions for non-refoulement but who have connections to terrorism in another state—the United Kingdom and Canada ended up where the United States is already, even though their human rights obligations diverge significantly: the United Kingdom, but not the United States, is under the compulsory jurisdiction of a human rights court; Canada formally proclaims a much thicker acceptance and enforcement of international human rights norms than the United States. And so, while the *Abu Qatada* and *Ahani* decisions are based on CAT and the U.S. decisions on domestic law, Gonzales and Glen voice a political sentiment that applies much more generally than the United States: a country will not “be haven for terrorists or members of other violent organizations and that discretionary asylum should not be extended to such individuals”⁶⁵

Had the ECtHR and the UNHRC deferred to consent and to social context and supported state discretion in these cases to deport applicants, the two states would probably not have challenged their jurisdiction. But the human rights enforcement bodies would have lost their normative power. To act as an international legal bond, an obligation must derive its force and meaning

64. Note, however, that the UNHRC adjudications are not binding on states, but are highly significant recommendations. See *supra* note 11 and the accompanying text. For more on the working on the UNHRC, see MACKENZIE ET AL., *supra* note 11, at 415–31.

65. Gonzales & Glen, *supra* note 4, at 867. The political sentiment is uniform across the USA, UK and Canada. Note, again, that Gonzales and Glen are discussing asylum, and I am discussing non-refoulement.

from a source beyond a state's will.⁶⁶ And therein lies an intractable dilemma for human rights courts. Cases involving individuals who otherwise satisfy the conditions for non-refoulement, but who have connections to terrorism, force these enforcement bodies to make a decision that is either politically unsustainable or normatively unjustifiable. In other words, a dead end.

66. HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 189 (1933).