NON-REFOULEMENT IN THE ILC ARTICLES ON EXPULSION OF ALIENS AND ITS PRACTICAL VALUE FOR U.S. IMMIGRATION LAW

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I. INTRODUCTION

With increased flows of migrant children crossing the U.S.-Mexico border,[1] "heated debate over . . . refugees among presidential

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candidates,"[2] and states taking controversial actions against noncitizens,[3] immigration has dominated U.S. public discourse in recent years. Further, since September 11, 2001, significant anti-immigrant bias exists in the United States,[4] and immigrants' rights advocates face an uphill battle.[5] This struggle is perhaps most acutely felt by attorneys representing aliens seeking asylum, who have encountered claims by opponents that aliens are engaging in fraud and abusing the asylum system.[6]

Controversy surrounding immigration is certainly not unique to the United States, with States across the globe grappling with the influx of migrants. Against this backdrop, in 2014 the International Law Commission (ILC) released its Articles on the Expulsion of Aliens (ILC Articles).[7] The ILC Articles represent a recent effort to codify and progressively develop international rules regarding a States' ability to expel aliens. While acknowledging that expulsion is a sovereign right,[8] the ILC considered the rights of aliens during any expulsion process.[9] Importantly, the ILC Articles address the international obligation of *non-refoulement*, which undergirds international protections for vulnerable

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1 *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016,* U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016 (last updated Oct. 18, 2016).

2. *See* Siqi Steve Xu & Stephen Yale-Loehr*, The 2016 Presidential Candidates: Their Views on Refugees*, 21 BENDER'S IMMIGR. BULL. 72, 72 (2016).

3. *See, e.g.*, Arizona v. United States, 132 S.Ct. 2492, 2497 (2012).

4. Lesley Wexler, *Human Rights Impact Statements: An Immigration Case Study*, 22 GEO. IMMIGR. L.J. 285, 290 (2008) ("Similarly, many at the bottom of the socioeconomic ladder view migrants as threats to their livelihoods[,] . . . [t]he post-September 11th security panic has magnified such concerns and biases.").

5. *See* David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 656 (2006) ("Advancing immigrants' rights in the United States has never been an easy task.").

6. *See generally Asylum Fraud: Abusing America's Compassion?: Hearing Before the H. Subcomm. on Immigr. and Border Sec. of the H. Comm. on the Judiciary,* 113th Cong. (2014) (discussing the struggles and legal frustrations dealt with in the immigration process, often by immigration attorneys.).

7. *See* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 11–17 (2014) [hereinafter 2014 Report].

8. *Id.* at 12.

9. *See id.* at 16–17.

migrants.[10] The ILC Articles consolidate various formulations of *non-refoulement*, providing States with a comprehensive guide to the considerations they must consider in expulsion cases.

Are the ILC Articles relevant to U.S. implementation of *non-refoulement*? Can attorneys rely on the ILC Articles in U.S. Immigration Court? Should advocates for enhanced protections for those seeking refuge in the United States rely on the ILC Articles when urging reform of the U.S. immigration law? Hostility toward international law held by some in the United States[11] would seem to indicate that invoking global norms – either in a courtroom or campaign for reform – might not be an obvious strategy. Yet, those seeking greater rights for vulnerable migrants should rely on the ILC Articles to advance their goals, because U.S. legal protections for those fleeing harm are strongly grounded in international law.[12] Moreover, Immigration Judges (IJs) already refer to international materials when making removal decisions.[13]

This paper analyzes the ILC Articles' treatment of *non-refoulement*, arguing specifically that ILC Article 23(1) has practical value to U.S. immigration law. Part II of the paper discusses the ILC's codification of

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10. *See* Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law, in* HUMAN RIGHTS AND IMMIGRATION 19, 20 (Ruth Rubio-Marín ed., 2014).

11. *See generally* JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW (2015) (discussing U.S. resistance to international law and international institutions, particularly in the aftermath of 9/11).

12. *See* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1061–62 (2011) ("Not only has the United States ratified the core international refugee law treaty, but Congress, in passing the Refugee Act of 1980, has adopted implementing legislation with the explicit purpose of bringing U.S. law into conformity with the nation's international obligations under the treaty.") (internal citations omitted).

13. *The Handbook on Procedures and Criteria for Determining Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR Handbook), published by the United Nations High Commissioner for Refugees, has been found to provide "significant guidance" in the interpretation of U.S. immigration law. INS v. Cardoza-Fonseca, 480 U.S. 421, 437–39 n.22 (1987). At least one appellate court has vacated an asylum denial partly because the IJ ignored a requirement by the UNHCR Handbook that events of persecution be viewed cumulatively. *See* Poradisova v. Gonzales, 420 F.3d 70, 79–81 (2d Cir. 2005). Therefore "[a]rguments that immigration statutes should also be construed to avoid clashes with international human rights law should therefore sound familiar to judges deciding immigration cases." Cole, *supra* note 5, at 647.

the customary international law norm of *non-refoulement.* Part III explores the ways attorneys can employ legal arguments based on the ILC Articles in Immigration Court. Given the strong relationship between immigration law and international law, coupled with IJs' familiarity with international legal materials, it makes perfect sense for attorneys to draw upon the ILC Articles to craft persuasive legal arguments to prevent their clients' removal. However, reform of U.S. immigration regime is necessary to ensure consistent compliance with the international obligation of *non-refoulement*. Part IV of the paper discusses the road to toward such reform, urging use of the ILC Articles as a model for regulatory reform.

II. THE ILC'S TREATMENT OF *NON-REFOULEMENT*

The ILC is a United Nations body, created by the General Assembly, composed of "persons of recognized competence in international law,"[14] whose mandate is to promote "the progressive development of international law and its codification."[15] The thirty-four members[16] of the ILC are selected by the UN General Assembly for five-year terms[17], and work on topics of international law whose codification or progressive development is "necessary and desirable."[18] The ILC studies international legal developments, creating instruments it forwards to the General Assembly.[19] While the form of the ILC's output may vary, publication of draft articles on a particular topic has "emerged as the dominant vehicle for the [ILC's] work."[20]

"[T]he [ILC] decided to include the topic Expulsion of Aliens in its program[] of work" in 2004.[21] In 2012, the ILC "adopted on first reading

14. G.A. Res. 174 (II), Establishment of the International Law Commission, at 105 (Nov. 21, 1947).

15. *Id.*

16. G.A. Res. 36/39, at 18–19 (Nov. 18, 1981).

17. G.A. Res. 985 (X), at 45 (Dec. 3, 1955).

18. G.A. Res. 174 (II), *supra* note 14, at 108.

19. *See id.* at 107–09.

20. Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product*, *in* RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE 29, 32 (Maurizio Ragazzi ed., 2013).

21. *See* 2014 Report, *supra* note 7, at 10.

a set of 32 draft articles on the expulsion of aliens, together with commentaries thereto."[22] On August 5, 2014, after the Drafting Committee reported on the Special Rapporteur's ninth report, along with the observations of State governments and debate in the plenary, the ILC adopted the articles, along with commentaries thereto.[23] The ILC recommended the General Assembly "take note" of the Articles, "encourage their widest possible dissemination[, and] [t]o consider, at a later stage, the elaboration of a convention" based on the Articles.[24]

A. Status under International Law of the Principle of *Non-refoulement* Prior to Completion of the ILC Articles

The principle of *non-refoulement* is based on the notion that a State must not return a non-national to any country where she is likely to face specified kinds of ill-treatment, such as persecution or torture.[25] The international community first widely accepted the principle when crafting a response to major population displacements created by World War II.[26] The adoption of the 1951 Convention relating to the Status of Refugees (Refugee Convention)[27] represents the most comprehensive international effort for regulation of treatment of refugees,[28] and the first codification of *non-refoulement*. Article 33(1) of the Refugee Convention states, "[n]o 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."[29] By its terms, the prohibition against *refoulement* in Article 33 applies only to "refugees," defined as any person who

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22. *Id.*
23. *See id.* at 10–11.
24. *Id.* at 11.
25. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 201 (3d ed. 2007).
26. *See* Sadako Ogata, *Foreword* to PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 4 (Paul Weis ed., 1995).
27. *See generally* U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].
28. Ogata, *supra* note 26, at 4.
29. Refugee Convention, *supra* note 27, art. 33.

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[30]

The Refugee Convention limits application of Article 33 to individuals whose well-founded fear of persecution is based solely on events occurring in Europe prior to January 1, 1951.[31] The 1967 Protocol relating to the Status of Refugees (1967 Protocol) removed this temporal limitation, which allowed signatories the option of eliminating the geographic limitation[32] and made all other substantive provisions of the Refugee Convention binding on signatories.[33] Though the 1967 Protocol makes the prohibition against *refoulemen*t applicable to more individuals, it still applies only to "refugees."[34] *Non-refoulement* under international refugee law therefore excludes many migrants. In particular, economic migrants or those fearing generalized violence do not qualify for protection under the Refugee Convention.[35] Regional multilateral instruments employ different definitions of "refugee,"[36] but

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30. *Id.* art. 1.

31. *Id.*

32. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter 1967 Protocol].

33. *See id.*

34. *Id.*

35. *See, e.g.*, B.S. Chimni, *Who is a Refugee?*, *in* INTERNATIONAL REFUGEE LAW: A READER 6 (B.S. Chimni ed., 2000) ("The 1951 [Refugee] Convention does not . . . mandate protection for those whose socio-economic rights are at risk.").

36. *See, e.g.*, Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, Sept. 10, 1969, 1001 U.N.T.S. 45, 3 (adopting Refugee Convention definition of "refugee" and also including "external aggression, occupation, foreign domination or events seriously disturbing public order" as potential bases for refugee status); Cartagena Declaration on Refugees, *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/Ser.L/II.66/doc.10, rev. 1, at 190–93 (Oct. 10, 1985) ("[which] includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.").

the Refugee Convention and the 1967 Protocol remain the primary international instruments related to refugee protection.[37]

Non-refoulement, as expressed under international refugee law, seems most relevant to immigration, but the norm also applies in other international legal contexts.[38] Notably, international law's prohibition against torture has a *non-refoulement* component often germane in expulsion cases. The 1984 UN Convention against Torture (CAT) prohibits return of an individual "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[39] CAT applies not only to refugees, but to all individuals facing expulsion.[40] As discussed below, *non-refoulement* under CAT has been incorporated as part of U.S. immigration law.[41]

Even before release of the ILC Articles, most scholars believed the obligation of *non-refoulement* to be part of customary international law.[42] While this proposition is not universally accepted,[43] some commentators believe *non-refoulement* is not only customary international law, but *jus cogens*, a peremptory norm from which international law allows no

37. GOODWIN-GILL & MCADAM, *supra* note 25, at 37.

38. *See, e.g.*, U.N. Convention Against Corruption art. 44(15), Oct. 31, 2003, T.I.A.S. No. 06-1129 (prohibiting granting of extradition requests "if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons"); 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation art. 14, Sept. 10, 2010 (not yet in force) ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article 1 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, Ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.").

39. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 113.

40. *Id.*

41. *See infra* Section III.

42. *See* GOODWIN-GILL & MCADAM, *supra* note 25, at 345–58.

43. *Id.* at 354.

derogation.[44] Debates about the nature and scope of non-*refoulement* continue, with particular dispute over whether the obligation applies in cases of "mass influx,"[45] and also as to whom States owe the duty of *non-refoulement*.[46] Yet, some scholars frame "*[n]on-refoulement* as a non-derogable right possessed by all migrants[,]" [47] and there has been general acceptance following adoption of the Refugee Convention that international law prohibits return of certain migrants.[48]

B. *Non-refoulement* under the ILC Articles

The ILC Articles contain rules governing States' treatment of "any alien facing any phase of the expulsion process."[49] The ILC addresses *non-refoulement* in at least three articles.[50]

1. Non-Refoulement of Refugees and of Those Who Would Be Tortured

The ILC addresses *non-refoulement* for refugees in Article 6, and those who would be tortured in the State of destination in Article 24. Article 6's regulation of the expulsion of refugees is "without prejudice to the rules of international law relating to refugees, as well as to any

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44. *See, e.g.*, Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533, 533–34 (2001).

45. AGNÈS HURWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 207–08 (2009).

46. *See* Susan Kneebone, *Introduction: Refugees and Asylum Seekers in the International Context – Rights and Realities*, *in* REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 1, 14 (Susan Kneebone ed., 2009).

47. *See International Migrants Bill of Rights, With Commentary*, 28 GEO. IMMIGR. L.J. 23, 70 (2013).

48. GOODWIN-GILL & MCADAM, *supra* note 25, at 345.

49. 2014 Report, *supra* note 7, at 18.

50. Not all of the ILC Articles prohibiting expulsion implicate *non-refoulement*. Article 7 strictly limits a State's ability to expel a stateless person, but the article "does not contain a parallel provision . . . which refers to the obligation of *non-refoulement*. Stateless persons, like any other alien subject to expulsion, are entitled to the protection recognized by draft articles 23 and 24 below, which apply to aliens in general." 2014 Report, *supra* note 7, at 32. Similarly, articles 8–12, which contain rules on prohibited expulsions, are not discussed here because they do not specifically address *non-refoulement*. *See id.* art. 8–12.

more favourable rules or practice on refugee protection."[51] The ILC indicates that the definition of "refugee" should take into account not only the Refugee Convention and 1967 Protocol, but also "subsequent developments in the matter, including the practice of the Office of the United Nations High Commissioner for Refugees (UNHCR)."[52] The ILC's commentaries also reference the refugee definition adopted by the Organization of African Unity, as well as "relevant customary rules."[53] Such rules are not specifically enumerated, but this vagueness seems purposeful, given that, "[i]n addition to the rules of international law, national practice in this area is of particular importance in that it can be the source of important rights for refugees."[54]

Thus, Article 6 is largely based on the Refugee Convention. Subparagraph (a) "reproduces the wording of article 32, paragraph 1, of the [Refugee] Convention,"[55] and subparagraph (b) "combines paragraphs 1 and 2 of article 33 of the [Refugee] Convention."[56] Article 6 subparagraph (a) prohibits expulsion of refugees, except on grounds of national security or public order.[57] While subparagraph (b) prohibits *refoulement* of refugees with a well-founded fear of persecution, on account of the protected grounds listed in Article 33 of the Refugee Convention, unless they have been convicted of a particularly serious crime or constitute a danger to the community.[58] Article 6 therefore codifies the obligation of *non-refoulement* of refugees. However, acknowledging the role of State and regional practice, the ILC allows for development of the concept of "refugee," rather than speaking to the scope of the principle of *non-refoulement* of refugees itself.

ILC Article 24 contains the "[o]bligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[59] The article is inspired by CAT Article 3, which prohibits *refoulement* where an alien would be subjected

51. 2014 Report*, supra* note 7, at 12.
52. *Id.* at 29.
53. *Id.*
54. *Id.* at 30.
55. *Id.*
56. *Id.* at 31.
57. *Id.* at 28.
58. *Id.*
59. *Id.* at 16.

to torture.[60] Article 24 broadens this prohibition, covering not only situations where an alien would be subjected to torture, but also those where the alien faces "cruel, inhuman or degrading treatment or punishment."[61] Both the UN Human Rights Committee and regional human rights systems have recognized this broader formulation of *non-refoulement*.[62] By affirming trends in human rights jurisprudence, Article 24 therefore legitimizes an expanded scope of *non-refoulement*. Such expansion is noteworthy, given that the prohibition against torture is accepted as a rule of *jus cogens*.[63] The ILC seemingly believes prevention of cruel, inhuman or degrading treatment or punishment is just as important as prevention of torture. By obliging States to consider the risk that an alien—even if not a "refugee"—may face varying levels of mistreatment in the State of destination, Article 24 represents a baseline evaluation all States must make in any expulsion case.

Despite their importance, ILC Article 6, because it applies only to refugees, and Article 24, because it applies only where harm is inflicted by a public official or person acting in an official capacity,[64] are limited in practical value. Conversely, Article 23(1), which applies to all migrants facing harm inflicted by both public and private actors, seems to be the ILC's most widely applicable formulation of *non-refoulement*.

2. ILC Article 23(1)[65]

Article 23 obliges States "not to expel an alien to a State where his or her life would be threatened."[66] Article 23(1) codifies this international

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60. *Id.* at 60.

61. *Id.*

62. *Id.* at 60–61.

63. Questions Relating to Obligation to Prosecute or Extradite (Belgium v Senegal), Summary, 2012 I.C.J. 1, 12 (In the Court's opinion, "the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).").

64. Indeed, "the [ILC] preferred not to address, in the text of draft article 24, situations where the risk of torture or cruel, inhuman or degrading treatment or punishment emanated from persons or groups of persons acting in a private capacity." *See* 2014 Report, *supra* note 7, at 63.

65. Article 23(2) relates to States not applying capital punishment. Given that the United States does apply the death penalty, Art. 23(2) is not relevant here. *Id.* at 16.

66. *Id.*

legal prohibition against *refoulement* and lists the grounds on which an alien's life must be threatened in the State of destination such that expulsion is prohibited.[67]

Article 23(1) consolidates the various formulation of *non-refoulement* from international legal instruments. The ILC believed that "the list of [protected] grounds contained in article 33 of the [Refugee] Convention was too narrow for the present draft article, which addresses the situation not only of persons who could be defined as 'refugees,' but of aliens in general, and in a wide range of possible situations."[68] Article 23(1)'s protected grounds thus mirror the more expansive list found in Article 14, which obliges States to not discriminate during the expulsion process and is modeled on Article 2 of the International Covenant on Civil and Political Rights.[69] Article 23(1)'s protected grounds include, "race colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law."[70]

The ILC specifically excluded sexual orientation as a protected ground in Article 23(1) because the prohibition against discrimination on sexual orientation "is not universally recognized."[71] Implicit in this exclusion is that those grounds that are included in Article 23(1) are universally recognized. Evidently then, sex, a ground not recognized in the Refugee Convention, but recognized in *non-refoulement* provisions of other international instruments, has become part of the customary international law prohibition against *refoulement*.[72]

The ILC therefore amalgamates protected grounds accepted under international law and consolidates them in Article 23(1). Recognition of an expanded list of protected grounds represents the ILC's approach to expulsion as not merely a State prerogative, but an action implicating individual rights.

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67. *Id.*
68. *Id.* at 59.
69. *Id.*
70. *Id.* at 16.
71. *Id.* at 59.
72. The ILC states that Article 23(2) is progressive development. *See* 2014 Report, *supra* note 7, at 60. The lack of a corresponding mention in commentary to Article 23(1) therefore implies that it is codification of customary international law, suggesting that sex is a protected ground recognized as part of the international norm of *non-refoulement*.

III. THE ROLE OF THE ILC ARTICLE 23(1) IN REMOVAL PROCEEDINGS

There has been much legal scholarship discussing the applicability of international law, particularly international human rights norms, in U.S. courts.[73] Some have argued for greater emphasis on international human rights in immigration cases in particular, given that immigration law is strongly grounded in international legal principles.[74] However, arguments for expanded rights for immigrants based on international law have proven largely unsuccessful,[75] with scant examples of judges relying on international human rights norms to prohibit removal of aliens from the United States.[76]

Nevertheless, international law is not irrelevant in U.S. immigration proceedings. As explained above, ILC Article 23(1) codifies customary international law, and it can therefore assist attorneys in making arguments that, while influenced by international norms, remain confined to forms of relief from removability available under U.S. law. This section provides an overview of U.S. removal proceedings and U.S. implementation of *non-refoulement*, discussing two contexts in which Article 23(1) may assist attorneys representing aliens in Immigration Court.

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73. *See, e.g.*, Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

74. Shayana Kadidal, "*Federalizing*" *Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501, 527 (2008) ("As the fount of Congress's supposedly 'plenary' power over aliens, international law also provides fundamental limitations on that power . . . .").

75. *See* Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 164 (2008) (discussing general acceptance of the idea that "the United States Government and the American public do not respond to arguments based on international human rights law.") (internal citations omitted).

76. Angela M. Banks, *The Trouble With Treaties: Immigration and Judicial Review*, 84 ST. JOHN'S L. REV. 1219, 1250 (2010) ("Noncitizens have not been successful challenging deportation decisions based on human rights treaties.").

A. Overview of Removal Proceedings and U.S. Implementation of *Non-Refoulement*

U.S. law provides at least four ways in which aliens[77] may be removed from the United States; expedited removal,[78] administrative removal,[79] and reinstatement of removal[80] all result in an alien's deportation from the United States. However, these proceedings are limited to special classes of aliens only.[81] Most aliens face expulsion through proceedings in U.S. Immigration Court termed "removal proceedings."[82] Immigration Judges (IJs) preside over removal proceedings, and an IJs' orders that an alien be removed may be appealed, first to the Board of Immigration Appeals (BIA),[83] and then to the Federal Court of Appeals in the circuit in which the IJ rendered the decision.[84]

While the United States has long admitted individuals who are fleeing their homeland,[85] the United States first assumed the obligation of *non-*

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77. An "alien" is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012). Under the ILC Articles, "'alien' means an individual who does not have the nationality of the State in whose territory that individual is present." 2014 Report, *supra* note 7, at 12. This paper considers "aliens" as defined under U.S. law, to be equivalent to "aliens" as defined in the ILC Articles. Furthermore, this paper considers the expulsion of aliens from the United States to be limited to the Immigration Court proceedings.

78. *See* 8 U.S.C. § 1225 (2012).

79. 8 U.S.C. § 1228(b) (2012).

80. 8 U.S.C. § 1231(a)(5) (2012).

81. Expedited removal proceedings apply only to those aliens attempting to enter the country unlawfully. *See* 8 U.S.C. § 1225 (2012). Administrative removal is the procedure for removal of those aliens who are not lawful permanent residents who have been convicted of serious crimes deemed "aggravated felonies." *See* 8 U.S.C. § 1228(b) (2012). Reinstatement of removal is the procedure allowing for removal of those aliens previously removed from the United States who have reentered unlawfully. *See* 8 U.S.C. § 1231(a)(5) (2012).

82. *See* 8 U.S.C. § 1229(a) (2012).

83. *See* 8 C.F.R. § 1003.1(b) (2012).

84. *See* 8 U.S.C. § 1252(b)(2) (2012).

85. Stephen H. Legomsky, *Refugees, Asylum and the Rule of Law in the USA*, *in* REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 122, 124 (Susan Kneebone ed., 2009).

refoulement by ratifying the 1967 Protocol.[86] Only with passage of the Refugee Act of 1980[87] did the United States enact laws allowing for the granting of asylum and implementing the obligation of *non-refoulement*.[88] Asylum is one of three forms of protections available, under U.S. law, to aliens fearing return to their homelands, and it "is by far the most desirable."[89] Asylum provides a pathway to permanent legal status, employment authorization, and rights of family reunification.[90] Asylum may only be granted to those aliens satisfying the U.S. definition of "refugee,"[91] which bears a "striking similarity" to the term as defined by the Refugee Convention.[92] Asylum is a discretionary form of relief from removal, and aliens may qualify for a grant of asylum by showing a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion"—the same protected grounds found in Article 33 of the Refugee Convention.[93] A well-founded fear may be established by

86. Some argue U.S. implementation of *non-refoulement* does not satisfy international law. *See, e.g.*, *id.* at 161–65 (suggesting that the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*, 599 U.S. 155 (1993), that *non-refoulement* obligations do not extend beyond U.S. territory violates international law); Kathleen M. Keller, Note, *A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 204–06 (1999) (arguing exceptions to *non-refoulement* for aliens with criminal histories goes far beyond exceptions envisioned in the Refugee Convention). This section focuses not on U.S. compliance with international law, but on how the ILC Articles may be used by attorneys representing aliens in U.S. Immigration Court.

87. "An Act to amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes." Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

88. *See* Keller, *supra* note 86, at 194.

89. *See* Patricia J. Freshwater, Note, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of its Citizens?*, 19 GEO. IMMIGR. L.J. 585, 589 (2005).

90. *Id.*

91. 8 U.S.C. § 1158(b)(1)(A) (2012); 8 U.S.C. § 1101(a)(42) (2012).

92. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 1 (1997).

93. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

showing something less than a 50 percent probability of persecution in the State of destination.[94]

Another U.S.-law-based *non-refoulement* protection is withholding of removal, [95] which bears a "close resemblance"[96] to the language prohibiting *refoulement* in the Refugee Convention. Withholding of removal is available only to aliens that establish that their "life or freedom would be threatened" on the protected grounds found in the Refugee Convention.[97] Withholding of removal is a mandatory form of relief from removal, requiring that an alien meet a higher burden of proof than asylum.[98] Accordingly, an Immigration Judge must grant an alien withholding of removal if she demonstrates a clear probability of persecution in the State of destination on account of one or more protected grounds.[99] Withholding of removal is strongly disfavored by immigration practitioners,[100] because it affords fewer benefits than asylum and does not prohibit removal to a third country that does not pose the same threat of persecution.[101]

Aliens may also seek relief from removal based on the U.S. obligation of *non-refoulement* under CAT.[102] Protection under CAT does not require an alien to show a fear of harm on account of any protected grounds; an alien must instead show that it is more likely than not she would suffer torture upon removal.[103]

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94. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) ("One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

95. 8 U.S.C. § 1231(b)(1)(3) (2012).

96. Fitzpatrick*, supra* note 92, at 1.

97. 8 U.S.C. § 1231(b)(3) (2012).

98. *See* INS v. Stevic, 467 U.S. 407, 426–430 (1984) (discussing the difference in standards between asylum and withholding of deportation cases).

99. *Id.* at 413.

100. Jason Dzubow, *I Hate Withholding of Removal. Here's Why.*, THE ASYLUMIST (Dec. 10, 2015), http://www.asylumist.com/2015/12/10/i-hate-withholding-of-removal-heres-why/.

101. Freshwater*, supra* note 89, at 590.

102. *See* 8 C.F.R. §§ 208.12–.18 (2012).

103. 8 C.F.R. § 208.16(c)(2) (2012).

B. The Use of the ILC Articles in Removal Proceedings

Although the ILC Articles are a set of non-binding principles, and notwithstanding that ILC did not adopt a recommendation that States take appropriate measures to ensure that the rules in the Articles are taken into account when expelling aliens, [104] the ILC Articles provide a useful guide as to customary international law norms relevant in U.S. immigration cases.

1. International Law as a Basis to Challenge Removal Generally

The ILC Articles are unlikely to provide relief from removal directly. Not only are the Articles not a treaty, but they have not been implemented into U.S. law.[105] As argued above, ILC Article 23(1) codifies customary international law, which is "part of our [U.S.] law."[106] Yet, reliance on custom in immigration cases has proven controversial and unsuccessful. Courts have refused to decide immigration matters on customary international law grounds, given the existence of the comprehensive legislative and regulatory schemes in place.[107] Moreover, though federal courts can decide international law-based claims when reviewing immigration decisions,[108] IJs only possess authority to

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104. *See* Sean D. Murphy, *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission*, 109 AM. J. INT'L L. 125, 132 (2015).

105. As discussed above, the ILC recommended the General Assembly "take note" of the Articles, "encourage their widest possible dissemination [and] [t]o consider, at a later stage, the elaboration of a convention" based on the Articles. 2014 Report, *supra* note 7, at 10–11. There has been no U.S. legislation based on the Articles as yet.

106. The Paquete Habana, 175 U.S. 677, 700 (1900).

107. *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1446, 1447–48 (11th Cir. 1986) (finding that a later-in-time statute regulating U.S. immigration trumped customary international law rules prohibiting arbitrary detention); *see also* Oliva v. U.S. Dep't of Just. 433 F.3d 229, 236 (2d Cir. 2005) (denying claim for relief from removal partially because the INA's provision for cancellation of removal trumps customary international law).

108. *See* J. Ryan Moore, Note, *Reinterpreting the Immigration and Nationality Act's Categorical Bar to Discretionary Relief for "Aggravated Felons" in Light of International Law: Extending Beharry v. Reno*, 21 ARIZ. J. INT'L & COMP. L 535, 572 (2004). Yet, in only a very few instances have federal courts have accepted international

adjudicate claims for relief under the Immigration and Nationality Act (INA).[109]

However, the ILC Articles do have interpretative value in Immigration Court. As a matter of statutory construction, courts should interpret domestic statutes, including the INA, in accordance with international law whenever possible.[110] The ILC Articles restate customary international law, so attorneys representing clients in Immigration Court should not shy away from relying on the ILC Articles "as a guide to the formulations of the domestic guarantees"[111] under the INA. Moreover, invoking international law to argue for specific interpretations of the INA should prove less controversial than reference to international law in other contexts, given the strong relationship between immigration and international law.[112] The section below provides suggestions for ways in which attorneys can invoke the ILC Articles in Immigration Court.

2. The ILC Articles in Immigration Court

Of the three forms of relief from removal that implement the obligation of *non-refoulement*, asylum and withholding of removal are most strongly linked to international refugee law, with Convention against Torture CAT protections evolving out of the international legal

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law arguments to prevent an alien's removal. *See e.g.*, Maria v. McElroy, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999) (ICCPR protection of family life may bar removal); Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on jurisdictional grounds*, 329 F.3d 51, 53 (2d Cir. 2003) (finding eligibility for relief based on international law where criminal conviction that formed basis for removal charge pre-dated changes to removability statute allowing for removability based on certain criminal offenses).

109. 8 C.F.R. § 1240.1(a) (2012). In addition, the Board of Immigration (BIA) has held that customary international law does not create a remedy from removal that aliens may seek beyond the provisions of the INA. *In re* Medina, 19 I. & N. Dec. 734, 734 (B.I.A. 1988).

110. *See* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .").

111. Cole, *supra* note 5, at 651.

112. *See id.* at 646 ("[U]sing international human rights to inform interpretation of immigration law raises far fewer concerns about judicial activism than allowing parties to bring tort suits directly under customary international law.").

prohibition against torture.[113] As torture is a specialized form of harm that must be inflicted by individuals acting in an official capacity[114] – and thus presumably applies in fewer cases – this section focuses on asylum and withholding of removal as the U.S. forms of relief from removal with the greatest potential for influence by the ILC Articles. Specifically, this section discusses how ILC Article 23(1) may be particularly helpful for attorneys in formulating particular social groups (PSGs) and overcoming the one-year filing deadline in asylum cases.

a. Formulating Particular Social Groups

The ILC's recognition of protected grounds not recognized in the INA most obviously bears on the issue of nexus, i.e., why an applicant has been or will be targeted for ill-treatment. Until ILC Article 23(1) is incorporated into U.S. law, IJs will not grant aliens relief from removal when they face harm inflicted on account of "colour, sex, language . . . other opinion . . . ethnic or social origin, property, birth or other status, or any other ground impermissible under international law,"[115] unless such claims fit into the protected grounds recognized by the INA. The most obvious way for attorneys to argue for such a fit is to use ILC Article 23(1)'s expanded list of protected grounds as a guide to formulating PSGs.

The INA's inclusion of membership in a particular social group as a protected ground "comes directly from the [1967] Protocol."[116] Neither the Refugee Convention, the 1967 Protocol, nor the INA define "particular social group," but commentators have "suggested that the notion of a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee."[117] To be granted asylum or withholding of removal based on membership in a PSG, aliens must show they suffered, or fear suffering, persecution inflicted because

113. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

114. 8 C.F.R. § 208.18(a)(1) (2012).

115. 2014 Report, *supra* note 7, at 16.

116. *In re* Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).

117. *Id.*

of such membership.[118] Further, membership must be to a group whose members "share a common, immutable characteristic, defined with particularity, and socially distinct within the society in question."[119]

Just as courts hearing immigration cases have recognized that the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* is useful in interpreting the U.S. asylum provision,[120] they should also acknowledge the relevance of the ILC Articles. Like the UNHCR, the ILC is a U.N. institution, and it possesses expertise in international law. IJs should therefore consider the ILC Articles when making removal decisions. Further, as discussed above, U.S. courts should seek to interpret U.S. statutes in accordance with international law under the *Charming Betsy* canon of statutory construction.[121] Given that ILC Article 23(1) codifies the international norm of *non-refoulement*,[122] IJs should interpret the INA provisions of asylum and withholding of removal—including "membership in a particular social group"—in light of the ILC Articles.

Therefore, attorneys should incorporate customary international law as reflected in Article 23(1) into their PSG formulations. ILC Article 23(1)'s recognition of "colour, sex, language . . . other opinion . . . ethnic or social origin, property, birth or other status, or any other ground impermissible under international law"[123] as protected grounds provides a means through which attorneys can explain their clients' defining characteristic(s). For example, though PSGs based on wealth were rejected prior to release of the ILC Articles,[124] the ILC articles should encourage attorneys to propose wealth-based PSGs again. Depending on

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118. *In re* W-G-R-, 26 I. & N. Dec. 208, 223 (B.I.A. 2014).

119. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

120. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 437–39 (stating that the UNHCR Handbook provides significant guidance).

121. *See supra* Section III.

122. *See supra* Section II.

123. 2014 Report, *supra* note 7, at 16.

124. *See, e.g.*, De Castro-Gutierrez v. Holder, 713 F.3d 375, 381 (8th Cir. 2013) (rejecting proposed PSG based on membership in wealth family of landowners in Colombia who have been victims of crimes); Escobar v. Holder, 698 F.3d 36, 39 (1st Cir. 2012) (rejecting proposed PSG of wealthy repatriated Guatemalans); Castillo-Enriquez v. Holder, 690 F.3d 667, 668 (5th Cir. 2012) (rejecting proposed PSG of wealthy Salvadorans subject to extortion).

the facts of a given case, wealth may represent an individual's birth, social origin, property, or other status – all protected grounds under ILC Article 23(1).[125] Attorneys can now re-propose wealth-based PSGs, arguing that rejection would be contrary to customary international law.[126] Attorneys might argue, for instance, that a wealthy individual from a developing country would be persecuted if returned, and that such persecution would be based on the individual's birth into a traditionally wealthy family. The individual's birth (or perhaps social origin) would thus be the basis upon which the individual would fear the persecution, and accordingly, ILC Article 23(1) suggests that the individual must not be returned. An attorney representing that individual in Immigration Court should therefore argue that the individual belongs to a PSG comprised of wealthy individuals in her home country. Provided that the attorney could show that the PSG satisfied the requirements of *Matter of W-G-R*[127] and *Matter of M-E-V-G*[128] to constitute a cognizable PSG under U.S. law, the attorney would also argue that, to interpret U.S. law in accordance with customary international law as required by *Charming Betsy*,[129] an IJ must grant the individual asylum. Such shoehorning of ILC Article 23(1)'s protected grounds into the U.S. *non-refoulement* framework vis-à-vis U.S. PSG jurisprudence should not be difficult for U.S. immigration attorneys, given that many likely already push the bounds of U.S. asylum law[130] by pursuing novel PSGs. Article 23(1) provides IJs with an international law imprimatur to grant relief.

Attorneys might also invoke the ILC Articles in cases involving gang activity. As with wealth-based claims, many courts prior to release of the ILC Articles rejected claims where applicants resisted gang recruitment,

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125. *See* 2014 Report, *supra* note 7, at 16.

126. IJs' decisions have no precedential value. *See* BANKS MILLER ET AL., IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 213 (2015). Only published decisions of the BIA are binding on IJs. *See* BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 8 (Nov. 12, 2015). Even when facing contrary precedent that may be binding in a case, release of the ILC Articles provides advocates with non-frivolous arguments that precedent should be reconsidered.

127. *In re* W-G-R-, 26 I. & N. Dec. 208, 223 (B.I.A. 2014).

128. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

129. *See* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 64 (1804).

130. Nathan Brooks, *In Praise of Creativity: Gang-Based "Social Group" Claims in Asylum Cases*, FED. LAW., Feb. 2009, at 26 (describing how creative attorneys use ambiguity in the meaning of PSG to craft arguments in gang-based asylum claims).

finding no nexus to any protected ground(s) under the INA.[131] Courts have explicitly held that anti-gang opinion, without more, is not a political opinion recognized under the INA.[132] Yet, the ILC Articles should allow attorneys to present cases where the harm feared is gang-based, employing a PSG framework that incorporates resistance to gangs as "[an]other opinion" recognized in Article 23(1). For example, an attorney could propose a PSG of "young males in County X resistant to gang membership because of their anti-gang opinion." Ostensibly, because the ILC Articles codify the customary international law recognition that aliens should be protected from harm inflicted on account of non-political opinions, attorneys should argue that PSGs encompassing holders of such opinions warrant protection under U.S. law. IJs should therefore reconsider such claims in light of Article 23(1).

Notwithstanding that ILC Article 23(1) requires that an alien show that his life "would be threatened,"[133]—similar to the standard required for withholding of removal—arguments for an interpretation of the INA that conforms to ILC Article 23(1) should be advanced in asylum cases as well. Not only is asylum a more desirable form of relief from removal, it is also discretionary. Therefore, even if they reject proposed PSGs that incorporate protected grounds recognized in ILC Article 23(1), IJs might formulate their own basis for granting asylum, i.e., by formulating a PSG they find satisfactory. Alternatively, harm-based arguments may persuade government attorneys to agree to terminate a removal case on

131. Aliens often seek to base claim in such cases on membership in a PSG. *See, e.g.*, *In re* E-A-G-, 24 I. & N. Dec. 591, 593–98 (B.I.A. 2008) (rejecting PSGs of "'persons resistant to gang membership'" and "'young persons who are perceived to be affiliated with gangs'"); *In re* S-E-G-, 24 I. & N. Dec. 579, 579 (B.I.A. 2008) (rejecting PSG of "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities"). *See also* Nicolás Rodríguez Serna, *Fleeing Cartels and* Maras*: International Protection Considerations and Profiles from the Northern Triangle*, 28 INT'L J. OF REFUGEE L. 25, 53 (2016) (discussing difficulty of gang-based asylum cases where "asylum adjudicators in the US . . . have become so ensconced in the discussion of the elements of 'particular social groups'").

132. *See In re E-A-G-*, *supra* note 128, at 596–97 (refusing to join gang and harm resulting from refusal is not, without more, a political opinion); Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 609 (3d Cir. 2011) (refusal to join a gang is not, without more, a political opinion).

133. 2014 Report, *supra* note 7, at 16.

grounds of prosecutorial discretion, thereby allowing an alien to remain in the United States.

Attorneys should thus formulate PSGs that incorporate ILC Article 23(1)'s expanded list of protected grounds to increase protections for those seeking refuge in the United States.

b. Overcoming the One-Year Filing Deadline

Article 23(1) can also provide arguments for attorneys whose clients may be facing a procedural barrier unique to asylum claims: the one-year filing deadline. An alien may not be granted asylum unless she demonstrates by clear and convincing evidence that she filed the asylum application within one year of her last arrival to the United States.[134] Exceptions may be permitted if the alien "demonstrates . . . either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application."[135] Changed circumstances can include changes in conditions in an alien's home country.[136]

Article 23(1) offers attorneys making changed-circumstances arguments a lens through which country conditions may be evaluated. As argued above, the protected grounds included in Article 23(1) not present in the INA can guide attorneys in forming arguments related to the formulation of PSGs. As such, changes related to the Article 23(1) grounds bear directly on an alien's eligibility for asylum. Specifically, developments in the State of destination affecting the risk an alien may be harmed on account of Article 23(1)'s protected grounds should be deemed changed circumstances. Aliens need only demonstrate that changed circumstances materially affect eligibility for asylum, not necessarily that they have a winning case.[137]

For example, passage of new laws in an alien's home country that make distinctions based on sex might implicate ILC Article 23(1). Even

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134. 8 U.S.C. § 1158(a)(2)(B) (2012).

135. *Id.* § 1158(a)(2)(D).

136. *See* Singh v. Holder, 656 F.3d 1047, 1052–53 (9th Cir. 2011) (remanding because IJ failed to properly consider arrest of alien's spouse in home country as a changed circumstance).

137. Changed circumstances are those which "materially affect[] the applicant's *eligibility* for asylum." 8 C.F.R. § 208.4(a)(4)(i) (2009) (emphasis added).

though sex is not recognized as a protected ground in the INA, attorneys should use the new law and potential resulting harm to an alien as the basis of a changed-circumstances theory, arguing that protection for harm inflicted because of one's sex merits protection under customary international law as evidenced in Article 23(1). In the case of an alien already present in the United States for longer than a year when such a law was passed, an attorney could argue changed circumstances and advance a PSG argument based on sex, e.g., "females in country X unable to exercise rights to Y." An alien would still need to meet U.S. statutory eligibility requirements, but arguments that the changed-circumstances provision of U.S. law be interpreted in light of the customary international law as reflected in ILC Article 23(1) provides attorneys a non-frivolous argument. Moreover, given that aliens seeking asylum in removal proceedings also seek withholding of removal and CAT protection in the alternative,[138] a successful changed-circumstances argument could allow the alien the opportunity to pursue all U.S. forms of *non-refoulement*.

ILC Article 23(1) therefore offers a new framework through which attorneys may present changed-circumstances arguments. For aliens in removal proceedings ineligible for other forms of relief from removal, creative changed-circumstances arguments based on ILC Article 23(1) may be an attorney's only option for pursuing non-frivolous claims that can keep their clients in the United States.

IV. ILC ARTICLE 23(1) AS A MODEL FOR REFORM OF U.S. ASYLUM LAW

As argued above, attorneys should reference ILC Articles when representing aliens seeking *non-refoulement* protection in U.S. Immigration Court. Yet, there still exists a gap between *non-refoulement* protection as implemented by U.S. law and ILC Article 23(1). The best way to ensure consistent compliance with the international obligation of

138. *See* Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the Real ID* Act, 69 OHIO ST. L.J. 557, 563 (2008) ("A deportable alien trying to avoid removal may seek several forms of relief . . . . [D]eportable aliens who fear persecution on account of one of five protected categories if returned to their country of origin . . . can seek relief from removal in the form of asylum, withholding of removal, or protection under the U.N. Convention Against Torture.").

non-refoulement, reflected in the ILC Articles, is to incorporate the substantive provisions of Article 23(1) into U.S. law.

Congressional resistance to reforming U.S. immigration laws makes legislative reform a tricky proposition.[139] However, the regulatory process provides another option. Precedent for attempting to change to asylum-related regulations, along with regulatory implementation of the obligation of *non-refoulement* required by CAT, suggests that the regulatory process may offer a way to incorporate the expanded list of protected grounds from ILC Article 23(1) into U.S. law.

A. Gaps in U.S. Law & Need for Reform

Simply stated, ILC Article 23(1) includes more protected grounds than those listed in the Immigration and Nationality Act (INA).[140] The article therefore adds to the rights of aliens facing expulsion by obliging States to assess potential harm in a broader context. Legal reform is necessary to ensure that aliens facing removal from the United States are afforded protection consistent with that envisioned by the ILC.[141]

Some may argue the INA provides enough flexibility to allow for protection of those aliens falling within the broader protected grounds recognized in ILC Article 23(1), such that reform is unnecessary. Reference may be made to the evolution of jurisprudence allowing for the granting of asylum to victims of domestic violence. Starting in the 1990s, attorneys began pursuing complex PSG claims for victims of domestic violence.[142] Yet, despite seeming agreement from government attorneys that victims of domestic violence could constitute a cognizable PSG,[143] after "twenty years of legal limbo" aliens pursuing such claims

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139. *See* Chuck Todd, Mark Murray & Carrie Dann, *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014, 9:09 AM), http://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276.

140. *See* 8 U.S.C. § 1101(a)(42) (2012).

141. This paper only analyzes U.S. *non-refoulement* obligations that might arise in Immigration Court. *Non-refoulement* in other contexts, for example, in extradition requests, is outside the scope of this paper.

142. *See* Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2528–30 (2014).

143. *See id.*

still faced an uncertain path toward protection.[144] A recent precedential decision from the BIA recognized a PSG encompassing victims of domestic violence, but it "does not answer all of the questions that have caused inconsistency in the adjudication of domestic violence–based asylum claims,"[145] and "inconsistent and arbitrary decision-making in immigration courts"[146] continues. Rather than allow for slow, uncertain evolution of U.S. immigration law, legal reform is the best way to ensure that aliens can consistently rely on the rights recognized by the ILC.

B. Precedent for Regulatory Reform of Asylum Law

U.S. immigration law is largely administrative,[147] and legislative reform need not be the exclusive manner to reform the U.S. immigration system. Promulgation of administrative regulations can be a means of changing the U.S. immigration system. Moreover, there have been prior attempts to reform U.S. asylum using the regulatory process. Prior to the creation of the Department of Homeland Security (DHS), the Department of Justice (DOJ) was charged with administration and enforcement of U.S. immigration law.[148] In 2000, the DOJ proposed a rule amending U.S. asylum regulations.[149] The proposed rule, which has yet to be adopted, provided a definition of "particular social group." [150]

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144. *Id.* at 2557 (arguing for regulatory reform to "resolve ambiguity over the legal foundation for domestic violence asylum and contribute to greater consistency in the application of asylum law nationwide").

145. *Recent Adjudication: Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), 128 HARV. L. REV. 2090, 2090 (2015).

146. Blaine Bookey, *Gender-Based Asylum Post*-Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 19 (2016).

147. *See* 8 U.S.C. § 1103(b)(1) (2009); 8 C.F.R. § 2.1 (2012) (granting the Secretary of the Department of Homeland Security authority to promulgate regulations to administer and enforce U.S. immigration laws).

148. *See* Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10922, 10922 (Mar. 6, 2003) (discussing the "transfer of the Immigration and Naturalization Service of the Department of Justice to the Department of Homeland Security").

149. Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

150. It is unclear why this is so, but it may be partly the result of confusion and/or lack of cooperation brought about by the joint rulemaking authority split between DOJ and DHS. *See* Marsden, *supra* note 142, at 2548–50.

The DOJ attempted to define PSG because courts had "reluctantly and inconsistently"[151] applied the term, resulting in varying formulations of its meaning across federal circuits.[152] The DOJ sought to provide guidance to adjudicators on how claims, particularly those involving claims of persecution inflicted by an "individual non-state actor[]," could be "conceptualized and evaluated within the framework of asylum law."[153] The regulations specifically attempted to provide adjudicators with tools to evaluate cases involving domestic violence,[154] a "novel issue" that presented adjudicators with "difficult analytical questions about the interpretation of the refugee definition."[155] The proposed rules therefore sought to accommodate a factual development within the U.S. asylum framework. There is no reason to think that regulatory reform should not account for international legal developments, such as release of the ILC Articles. Indeed, the DOJ proposal stated that the U.S. definition of refugee is "almost identical" to that which is "internationally accepted,"[156] implying that international law considerations are relevant to the U.S. immigration regime.

Further, the U.S. has already used the regulatory process to implement international legal obligations, specifically that of *non-refoulement*. Passage of the Fiscal Year 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act made CAT part of U.S. law on October 21, 1998.[157] On February 19, 1999, the DOJ published regulations to implement CAT.[158] Included in these regulations is implementation of the obligation of *non-refoulement* in cases where an alien would be tortured in the State of destination.[159] Therefore, rulemaking has been used not only to change the U.S. asylum regime,

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151. Asylum and Withholding Definitions*, supra* note 149, at 76589.

152. *See id.* at 76594.

153. *Id.* at 76589.

154. *See infra* Section IV.A. for greater discussion of the evolution of domestic violence-based asylum jurisprudence.

155. *See* Asylum and Withholding Definitions*, supra* note 149, at 76589.

156. *Id.* at 76588.

157. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G, Sub. B, Tit. XXI, § 2242 , 112 Stat. 2681–822 (1988).

158. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999); 8 C.F.R. §§ 208.16–.18 (2012).

159. *See* 8 C.F.R. § 208.16(c)(2) (2012).

but also to specifically prohibit return of those aliens who deserve protection under the international legal norm of *non-refoulement*.

A joint DOJ-DHS regulation seeking to clarify relevant standards relevant to U.S. implementation of *non-refoulement* standards is thus not entirely without precedent. Such a "regulation would have the same binding effect on [IJs] as a precedential BIA decision,"[160] and ostensibly allow IJs to grant relief from removal more consistently.

C. Proposed Regulation

U.S. asylum regulations should thus be amended to provide a definition of PSG that incorporates ILC Article 23(1)'s protected grounds. As discussed above, asylum is the most beneficial form of relief from removal, and reform of asylum law would therefore be most protective of aliens' rights. It is possible to both incorporate Article 23(1)'s additional protected grounds into a definition of PSG that both respects current U.S. asylum jurisprudence, and leaves flexibility for evolution of the meaning of the term.

The following regulation should be inserted at 8 C.F.R. § 208.13(b)(4):

> (4) Particular Social Group: A particular social group is composed of members who share a common, immutable characteristic, such as color, sex, language, opinion, ethnic or social origin, property, birth or other status, or any other characteristic recognized by international law as forming the basis of group membership, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. In addition, a cognizable particular social group must be defined by particularity and perceived as socially distinct within the society in question. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and country conditions information about the applicant's society.

160. *See* Marsden, *supra* note 141, at 2551.

The proposed regulation recognizes all the protected grounds listed in ILC Article 23(1) and incorporates the BIA's definition of PSG.[161] The regulation would require adjudicators to consider a broad range of evidence, as well as international legal developments related to *non-refoulement*. As discussed above, IJs already turn to international legal materials when deciding claims. Therefore, the proposed regulation provides the benefit of codification without necessarily requiring Immigration Courts to drastically change their approach to adjudications.

Regulatory reform, while certainly not guaranteed to succeed,[162] thus offers a potentially attractive alternative for those seeking to expand alien's rights and to ensure U.S. compliance with international legal standards.

V.CONCLUSION

The ILC Articles recognize States' rights to expel aliens from their territory,[163] but nevertheless frame expulsion as State action with potentially strong adverse effects on individual rights.[164] Indeed, some commentators questioned the wisdom of the ILC tackling a topic with such strong implications for human rights.[165] It is therefore unsurprising that the ILC Articles strongly contribute to the human rights of migrants, particularly in their treatment of the norm of *non-refoulement*. Prior to release of the ILC Articles, the norm was accepted as part of customary international law.[166] Nevertheless, the ILC Article 23(1) is a convenient codification of *non-refoulement* as recognized under international law, and it provides a useful tool to those representing the interests of aliens facing expulsion.

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161. *See in re* W-G-R-, 26 I. & N. Dec. 208, 213, 218–19, 221–24, 226 n.3 (B.I.A. 2014); *see also In re* M-E-V-G-, 26 I. & N. Dec. 227, 229–30, 234–35, 239, 242–46, 253 nn.12–13 (B.I.A. 2014).

162. The potential for an administrative law challenge to the proposed asylum regulation is beyond the scope of this paper.

163. *See* 2014 Report, *supra* note 7, at 12.

164. *Id.* at 17.

165. Christian Tomuschat, *The International Law Commission: An Outdated Institution?*, 49 GERMAN Y.B. INT'L L. 77, 101 (2006) (stating ". . . the question cannot be avoided whether the ILC provides the right forum for a topic which is strongly related to the field of human rights . . .").

166. *See* GOODWIN-GILL & MCADAM, *supra* note 25, at 345–58.

The ILC Articles have practical value for U.S. law in two ways. First, attorneys representing aliens in removal proceedings should rely on the ILC Articles when crafting legal arguments. In particular, attorneys should consult ILC Article 23(1) as they argue for their clients' eligibility for forms of relief from removal that implement the obligation of *non-refoulement*. The ILC Articles can serve as an interpretive guide, and attorneys can craft arguments grounded in U.S. law that also adhere to ILC Article 23(1). Reference to Article 23(1) can be particularly helpful in crafting creative PSGs and formulating arguments to overcome the one-year filing deadline in asylum cases. Many attorneys, specifically those working on gang-based asylum cases, likely are already proposing novel PSGs claims, using the discretionary nature of asylum to advocate for broader protections for aliens. ILC Article 23(1)'s formulation of *non-refoulement* provides an international law stamp of approval for such progressive arguments.

Second, the ILC Articles provide a model for reform of the U.S. asylum regime. The ILC Articles acknowledge the role States can play in the evolution of *non-refoulement*.[167] As such, they seem a natural guide for those advocating reform of domestic legal systems. Given the ILC's institutional competency, along with its legitimacy as a UN body, U.S. immigrants' rights advocates should draw on the work of such an entity. Furthermore, notwithstanding potential resistance to the ILC's work as a source of inspiration for U.S. immigration reform, immigrants' rights advocates would be remiss to ignore the ILC Articles, given that they advance human rights of those facing expulsion. Indeed, "human rights discourse offers tremendous normative power and potential for advancing social justice on behalf of foreign nationals in the United States. In some sense, it would be irresponsible not to explore that potential."[168] Regulatory reform might offer a particularly attractive option for incorporating ILC Article 23(1) into U.S. law. There is history of seeking to reform the U.S. asylum system through promulgation of administrative regulations, and there is also precedent for implementing the international legal obligation of *non-refoulement* under CAT using the regulatory process.[169]

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167. *See* 2014 Report, *supra* note 7, at 30.
168. Cole, *supra* note 5, at 629.
169. *See infra* Section IV.B.

Considering the well documented shortage of attorneys available to represent aliens in Immigration Court,[170] it is not surprising that those that do are often unable to keep abreast of each and every legal development, especially those occurring on the international level. Further, advocates for reform, facing strong opposition, must continuously look for novel approaches. This article has offered practical suggestions on how the ILC Articles can impact U.S. immigration. While not an obvious choice as a tool in the struggle for expansion of rights of noncitizens in the U.S., the ILC Articles should not be ignored—they can play an important role in an issue that will likely continue to dominate U.S. public discourse.

170. *See generally* Symposium, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, *New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 358, 360–61, 404–06 (2011) (describing "the immigrant representation crisis").