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DEPORTING DREAMERS AS A CRIME AGAINST HUMANITY

*William Thomas Worster**

INTRODUCTION

Much has been written about the “DREAMers” (Dreamers) and their moral claim to a right to remain in the United States and the legal mechanisms by which such a moral right might be realized. What has not been explored is whether their removal from the United States might implicate international law, and, specifically, whether it would constitute a crime against humanity. On its face, it seems to be an outrageous claim: that deporting non-citizens from a state would be a criminal act. International law protects a State’s ability to remove unlawfully present aliens. This is not in debate. The argument is, however, far narrower. Specifically, the forcible, arbitrary deportation of Dreamers with an intent to permanently remove them from their residence, which is protected under international law, would be criminal.

This Article will first consider the current law on the crime against humanity of deportation. The crime, which has a considerable pedigree, prohibits individuals from pursuing deportation of persons in certain situations. Among the key considerations is that the crime does not only apply to the forcible removal of citizens, but also to non-citizens in some circumstances. The distinction is whether the person is lawfully present in the state and that the removal is unlawful. As befitting an international crime, both of these standards are measured by international law, not domestic law, so whether the persons are lawfully present or their removal is unlawful under domestic law is not determinative.

The Article then considers the case of the Dreamers. While it is true that they do not have U.S. nationality or other authorized status, and thus a right to remain in the United States under domestic law, they do have strong enough ties to consider the United States their “own country,” a wider concept than nationality. Once an individual has an “own country,” he or she

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may not be arbitrarily removed from that State under international human rights law, unless the removal can be justified as non-discriminatory, necessary and proportionate to the risk to society. Further, under international human rights law, permissible cases of removal are very few. The removal of a non-criminal minor from the United States with a long-standing home there cannot be justified as necessary and proportionate. Provided that the possible future removal was by force, in pursuit of a policy as such, committed with intent, and that the removals were widespread and systematic, then the removal would be a crime against humanity.

I. BACKGROUND ON THE “DREAMERS”

Dreamers are a group of approximately 1.8 million individuals¹ who do not have authorized status to live in the United States. They were brought to the United States as children and have lived in the United States for a substantial period of their lives. Some Dreamers were not even aware that they were not U.S. citizens until their status was discovered. Some only speak English. The majority hail from Mexico, but a range of other countries are also represented. The name “Dreamers” comes from the Development, Relief, and Education for Aliens Minors (DREAM) Act,² which was introduced in 2001 but never adopted by Congress. Twenty-eight percent of the Dreamers were under fifteen years of age at the time the policy was announced.³

On June 15, 2012, the Obama administration decided to exercise its prosecutorial discretion and refrain from removing Dreamers in a program called Deferred Action for Childhood Arrivals (DACA).⁴ Formally, DACA

¹ See Jeanne Batalova & Michelle Mittelstadt, *Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy*, FACT SHEET (Migration Pol’y Inst., Washington, D.C.), Aug. 2012, <https://www.migrationpolicy.org/research/DACA-deferred-action-DREAMers>; AM. IMMIGR. COUNCIL, *Who and Where the DREAMers Are, Revised Estimates: A Demographic Profile of Immigrants Who Might Benefit from the Obama Administration’s Deferred Action Initiative* (Immigr. Pol’y Ctr., Washington, D.C.) Oct. 16, 2012, <https://www.americanimmigrationcouncil.org/research/who-and-where-dreamers-are-revised-estimates>.

² See Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001); DREAM Act, S. 729, 111th Cong. (2009); Dream Act of 2017, S. 1615, 115 Cong. (2017).

³ See Batalova & Mittelstadt, *supra* note 1; AM. IMMIGR. COUNCIL, *supra* note 1.

⁴ See Caitlin Dickerson, *What Is DACA? Who Are the Dreamers? Here Are Some Answers*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/us/daca-dreamers-shutdown.html>; see also Memorandum from, Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter Napolitano].

“confer[red] no substantive right, immigration status or pathway to citizenship,” as “[o]nly the Congress, acting through its legislative authority, can confer these rights.”⁵ If Dreamers registered as DACA recipients, then they would have their removal deferred,⁶ receive social security numbers⁷ and employment authorization,⁸ and through that authorization, have the ability to purchase health care insurance and other benefits such as access to education and eligibility for driving licenses. DACA further enabled registered Dreamers to travel abroad and return to the United States without a visa (advance parole).⁹ The program did not include access to U.S. citizenship¹⁰ nor did it provide access to federal welfare programs or student financial aid,¹¹ although some aid in cases of medical emergencies was available.¹²

Individuals wishing to participate in the program would have to make an application, provide identifying information,¹³ and would only qualify if they had a degree of formal education and did not have any felony or serious misdemeanor convictions or more than two misdemeanor convictions. DACA status was valid for two years and could be renewed. At least 800,000 people registered.¹⁴

On September 5, 2017, the new administration froze the DACA program and initiated its reversal.¹⁵ The Attorney General argued that DACA had been “effectuated by the previous administration through executive action, without proper statutory authority and . . . after Congress’ repeated rejection of proposed legislation that would have accomplished a similar result,” and that “[s]uch an open-ended circumvention of immigration laws was an unconstitutional exercise

⁵ See *NAACP v. Trump*, 298 F. Supp. 3d 209, 216 (D.D.C. 2018) (citing then-Secretary of Homeland Security Janet Napolitano’s “DACA Memo”).

⁶ See *id.*

⁷ See 8 C.F.R. § 1.3(a)(4)(vi).

⁸ See 8 C.F.R. § 274a.12(a)(11).

⁹ See 8 C.F.R. § 212.5.

¹⁰ See Napolitano, *supra* note 4.

¹¹ See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> (last visited May 11, 2018) [hereinafter *Consideration of DACA*].

¹² See 8 U.S.C. §§ 1611(b)(1), 1621(b)(1).

¹³ See *Consideration of DACA*, *supra* note 11.

¹⁴ See DACA Performance Data, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf (last visited Mar. 31, 2017); *Trump*, 298 F. Supp. 3d. at PINCITE.

¹⁵ See Dickerson, *supra* note 4.

of authority by the Executive Branch.”¹⁶ New applicants and renewals are no longer possible, although existing grants will remain valid until the normally expired at the end of the two-year validity period. Some DACA beneficiaries began losing their status in March 2018, and unless a new remedy is developed, all will be phased out of the program by March 2020. The Department of Homeland Security (DHS) Secretary has announced that DACA participants will not be a deportation priority unless they commit crimes,¹⁷ but then, of course, they would no longer be eligible for DACA anyway if they committed crimes.¹⁸ Notwithstanding the statements of the DHS Secretary, U.S. Immigration and Customs Enforcement (ICE) has already begun deportation proceedings against non-criminal DACA recipients,¹⁹ and both former and current acting-Directors have stated that any undocumented person will be removed.²⁰ On April 24, 2018, the U.S. District Court for the District of Columbia ruled that the decision to abolish DACA was “arbitrary and capricious”²¹ and that the question of DACA’s legal authority was not the

¹⁶ See *Trump*, 298 F. Supp. 3d at 209.

¹⁷ See Carlos Ballesteros, *What Happens If DACA Ends? Deporting Dreamers Won't Be a Priority*, *Homeland Secretary Says*, NEWSWEEK (Jan. 16, 2018), <http://www.newsweek.com/what-happens-if-daca-ends-dreamers-deported-homeland-782290> (“Homeland Security Secretary Kirstjen Nielsen insisted Tuesday that federal agencies will not prioritize deporting immigrants brought illegally into the United States as children . . . these immigrants will remain a low priority ‘in perpetuity,’ but noted that if any of them commit a crime, ‘we will enforce the law.’”).

¹⁸ See Napolitano, *supra* note 4.

¹⁹ See e.g. Jenny Jarvic, *Mississippi ‘Dreamer’ Daniela Vargas Released from Detention but Deportation Order Stands*, L.A. TIMES (Mar. 10, 2017), <https://www.latimes.com/nation/la-na-mississippi-dreamer-20170310-story.html>.

²⁰ See Clio Chang, *ICE Chief Is Having a Great Time Waging Terror Against Immigrants*, SPLINTER (Jan. 31, 2018), <https://splinternews.com/ice-chief-is-having-a-great-time-waging-terror-against-1822601052>. (quoting former Acting Director Thomas Homan that all unlawfully present persons in the United States should be “worried” and “looking over their shoulders”). Thomas’s successor Acting Director Ronald Vitiello, was proposed to replace Homan, however, his nomination was later withdrawn when the administration decided to take an even tougher stance on immigration enforcement, see Eileen Sullivan, Zolan Kanno-Youngs & Maggie Haberman, *Seeking ‘Tougher’ Direction for ICE, Trump Withdraws His Nominee*, N.Y. TIMES (Apr. 5, 2019) (“‘Ron’s a good man, but we’re going in a tougher direction,’ Mr. Trump said to reporters”) <https://www.nytimes.com/2019/04/05/us/politics/ronald-vitiello-ice.html>. Within days, Vitiello had announced his resignation from ICE, see Dep’t Homeland Sec., *Message from Secretary Kirstjen M. Nielsen on the Resignation of ICE Acting Director Ronald D. Vitiello* (Apr. 10, 2019) <https://www.dhs.gov/news/2019/04/10/message-secretary-kirstjen-m-nielsen-resignation-ice-acting-director-ronald-d>. The agency is now lead by his successor, Acting Director Matthew T. Albence. Albence was the author of a memorandum, while he was head of Enforcement and Removals Operations (ERO) of ICE, in which he stated “effective immediately, ERO officers will take enforcement action against all removable aliens encountered in the course of their duties.” See Marcelo Rochabrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty* (July 7, 2017) <https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants-encountered-while-on-duty>.

²¹ See *Trump*, 298 F. Supp. 3d at 215 (“The Court further concludes that, under the APA, DACA’s rescission was arbitrary and capricious because the Department failed adequately to explain its

relevant question; the relevant question was “whether or not DHS made a reasoned decision to rescind DACA based on the Administrative Record.”²² The future status of DACA and the Dreamers remains uncertain at the time of this writing,²³ although current ICE policy, light of the court order, is to continue renewing requests for protection under DACA, but not register new admissions to the program.²⁴

II. THE CRIME AGAINST HUMANITY OF DEPORTATION

The crime against humanity of deportation has a long history.²⁵ It was considered a crime against humanity at least as far back as the Nuremberg²⁶ and Tokyo Tribunals,²⁷ as well as the Control Council ten tribunals.²⁸ The crime was also included in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY),²⁹ International Criminal Tribunal for Rwanda (ICTR),³⁰ Special Court for Sierra Leone,³¹ Extraordinary

conclusion that the program was unlawful. Neither the meager legal reasoning nor the assessment of litigation risk provided by DHS to support its rescission decision is sufficient to sustain termination of the DACA program.”)

²² *Id.*

²³ *See id.*; *see also* Casa De Md. v. U.S. Dep’t of Homeland Sec., 284 F. Supp. 3d 758, 779 (D. Md. 2018); Vidal v. Nielsen, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec., 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018).

²⁴ *See Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, ICE, <https://www.ice.gov/daca> (updated July 24, 2018) [hereinafter *Deferred Action for DACA and DAPA*].

²⁵ *See* Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 473 (Int’l Crim. Trib. For the for the Former Yugoslavia Mar. 15, 2002).

²⁶ *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Agreement]; United States v. Goring, Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945-1 OCTOBER 1946 171, 227, 244, 297, 317–19, 329, (1947).

²⁷ *See* Charter of the International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, as amended Apr. 26, 1946, T.I.A.S. No. 1589.

²⁸ *See* Control Council Law No. 10, art. II(1)(c), *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 XVI (1947), https://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf; United States v. Milch, (“Milch Case (Luftwaffe)”), Case No. 2, Judgment (Mil. Trib. II under Ctrl CI Law No. 10, Apr. 16, 1947), *reprinted in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 773 (1947) (Phillips, J. concur. Op., 860, 865); United States v. Krupp (“Krupp Case (Industrialist)”), Case No. 10 (Mil. Trib. III under Ctrl CI Law No. 10, July 31, 1948), 9(2) *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1327, 1432–33 (1947).

²⁹ *See* S.C. Res. 827, para. 5(d), U.N. Doc. S/RES/827 (May 25, 1993).

³⁰ *See* S.C. Res. 955, para. 3(d), U.N. Doc. S/RES/955 (Nov. 8, 1994).

³¹ *See* S.C. Res. 1315, para. 2(d), U.N. Doc. S/RES/1315 (Aug. 14, 2000).

Chambers in the Courts of Cambodia,³² and Kosovo Specialist Chambers.³³ It can be found in the International Law Commission (ILC) Principles of International Law Recognised in the Charter of the Nuremberg Tribunal,³⁴ the 1954 Draft Code of Offences against the Peace and Security of Mankind,³⁵ and in the most recent Draft Articles on Crimes Against Humanity.³⁶ It is also considered a war crime when committed in the context of an armed conflict,³⁷ and the elements are largely the same whether it is a war crime or crime against humanity.³⁸ More recently, it was listed in the Rome Statute of the International Criminal Court (ICC).³⁹

A. Jurisdiction

The initial question is where such a crime can be prosecuted. This question is critical because the precise requirements of the offense can differ among jurisdictions. Most importantly, before the ICC, the prosecution

³² See Law on the Establishment of the Extraordinary Chambers, Oct. 24, 2004, art. 5, (Cambodia).

³³ See Law on Specialist Chambers and Specialist Prosecutor's Office (No. 05/L-053), art. 13(d) (Kos.).

³⁴ See *Report of the International Law Commission to the General Assembly*, [1950] II Y.B. Int'l L. Comm'n 377, U.N. Doc. A/CN.4/34.

³⁵ See *Report of the International Law Commission to the General Assembly*, [1954] II Y.B. Int'l L. Comm'n 149–50, U.N. Doc. A/CN.4/88.

³⁶ See Sean D. Murphy, Special Rapporteur for Crimes Against Humanity), *First Rep. on Crimes Against Humanity*, ¶¶ 157, 177, U.N. Doc. A/CN.4/680 (Feb. 17, 2015).

³⁷ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 49, 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Relating to the Protection of Victims of International Armed Conflicts art. 85(4)(a), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

³⁸ See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 315 (1999). For this reason, some of the elements for the crime against humanity of deportation will be interpreted by relying on practice applying the war crime of deportation.

³⁹ See Rome Statute of the International Criminal Court, art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute] (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . Deportation or forcible transfer of population . . .”). “‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.” *Id.* at art. 7(2)(d).

The perpetrator deported or forcibly [footnote 12 - The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment] transferred, [footnote 13 - “Deported or forcibly transferred” is interchangeable with “forcibly displaced”.] without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

Elements of Crimes, OR Assembly of States Parties, 1st sess., New York, 3-10 Sep. 2002, ICC-ASP/1/3 part II.B, art. 7(1)(d), (Sept. 9, 2002).

needs to prove the additional element of a state policy.⁴⁰ The particular elements will be discussed further after this section on jurisdiction.

There are some possibilities for the ICC to exercise jurisdiction. The ICC would have jurisdiction over actions taken against the Dreamers if any of the expelling agents were nationals of a state party to the Rome Statute,⁴¹ but it is not apparent that anyone involved is a dual national, with the other nationality being a state party to the Rome Statute.

The ICC also has jurisdiction over crimes that take place on the territory of a state party.⁴² The United States is not a party to the Rome Statute.⁴³ However, there may be a solution. Just recently the ICC Prosecutor decided to inquire about a case involving the deportation of Rohingya people.⁴⁴ The Rohingya people were expelled from Myanmar, which is not a state party to the Rome Statute.⁴⁵ However, the prosecution is arguing that the people were expelled into Bangladesh,⁴⁶ which is a state party. In order for the Court to have jurisdiction, it would have to find that the expulsion to another state was part of the offense, and thus, part of the crime occurred on the territory of a state party.⁴⁷

The same reasoning could be applied to the expulsion of Dreamers. Although the United States is not a party to the Rome Statute, Mexico is.⁴⁸ If it could be argued that the expelled persons were removed to Mexico which is a state party to the Rome Statute, there is a possibility that this aspect of the crime would take place on the territory of a state party. The Court would then have jurisdiction unless the United States was careful enough only to expel individuals to a state that is not a party to the Rome Statute. Granted,

⁴⁰ See Rome Statute, *supra* note 39, art. 7(1), 7(2)(a); Elements of Crimes, *supra* note 39, art. 7(1)(d).

⁴¹ See Rome Statute, *supra* note 39, art. 12(2)(b) (“The State of which the person accused of the crime is a national.”).

⁴² See *id.*, art. 12(2)(a) (“The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.”).

⁴³ See *The States Parties to the Rome Statute*, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited May 11, 2018).

⁴⁴ See Prosecutor’s Request for a Ruling on Jurisdiction under Art. 19(3) of the Statute ¶ 15, ICC-RoC46(3)-01/18-1, Application under Reg. 46(3) (Apr. 9, 2018) [hereinafter Prosecutor’s Request].

⁴⁵ See *id.*; *The States Parties to the Rome Statute*, *supra* note 43.

⁴⁶ See Prosecutor’s Request, *supra* note 44.

⁴⁷ See Rome Statute, *supra* note 39, art. 12(2)(a) (“The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.”); Prosecutor’s Request, *supra* note 44.

⁴⁸ See *The States Parties to the Rome Statute*, *supra* note 43.

the United States would not have the freedom to expel persons to states where they are not nationals or otherwise have a right to enter.

In addition to having jurisdiction, the ICC needs to have its jurisdiction triggered.⁴⁹ ICC jurisdiction can only be triggered by a referral from a state party to the Rome Statute⁵⁰ or the United Nations Security Council, taken under Chapter VII.⁵¹ In some limited cases, the prosecutor might commence a case *proprio motu*, but would remain under close supervision of the pre-trial chamber.⁵² It seems highly unlikely that the U.N. Security Council would refer the situation to the ICC, but Mexico could. And, of course, the prosecutor could seek leave from the pre-trial chamber to commence prosecution *proprio motu* as well.

If the ICC does not have jurisdiction, then the crime against humanity of deportation could still be prosecuted by any state, since it is an international crime under customary international law for which there is universal jurisdiction.⁵³

B. Contextual Elements

Moving onto the elements of the crime, the contextual element in the crime against humanity of deportation is that the unlawful conduct takes part in and forms a part of a widespread or systematic attack of comparable offenses.⁵⁴ Initially, deportation and other crimes against humanity were only criminal in the context of armed conflict,⁵⁵ though that condition was quickly dropped.⁵⁶ It is understood that crimes against humanity can also

⁴⁹ See Rome Statute, *supra* note 39, art. 13.

⁵⁰ See *id.*, art. 13(a).

⁵¹ See *id.*, art. 13(b).

⁵² See *id.*, art. 13(c).

⁵³ However, there is no treaty on crimes against humanity as such, so the existence of universal jurisdiction is not definitively established outside of customary international law. The ILC is currently working on Draft Articles on Crimes Against Humanity, based on customary international law, that contemplate universal jurisdiction. See Murphy, *supra* note 36, ¶ 120 (Jan. 21, 2016) (“Each State shall also take the necessary measures to establish its jurisdiction over the offences [of crimes against humanity] when the alleged offender is present in any territory under its jurisdiction or control, unless it extradites or surrenders the person . . .”).

⁵⁴ See Rome Statute, *supra* note 39, art. 7(2); Elements of Crimes, *supra* note 39, art. 7(1)(d)(4) (“The conduct was committed as part of a widespread or systematic attack directed against a civilian population.”). “The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.” *Id.* at 7(1)(d)(5).

⁵⁵ See London Agreement, *supra* note 26; Charter of the Int’l Military Tribunal art. 6(c), Jan. 19, 1946, T.I.A.S. No. 1589.

⁵⁶ See Control Council Law No. 10, *supra* note 28, art. II(1)(c).

occur in peacetime,⁵⁷ provided there is a widespread and systematic attack⁵⁸ against a civilian population.⁵⁹ There is no minimum number of deported victims in order for the deportation to rise to an international crime.⁶⁰ Instead, the deportations merely need to be a part of a larger pattern of attack against a civilian population. Thus, a single victim by an accused will suffice, provided the act of the accused forms part of a larger widespread or systematic attack by others.⁶¹ This element helps explain why a deportation campaign of only a single individual, even if contrary to international human rights law, is not a crime against humanity. It is only when the criminal expulsion takes place within a wider practice of massive similar criminal expulsions that it becomes contrary to international law. Thus, an expulsion becomes criminal under international law only if expulsions are replicated on a scale that appears to be a part of a larger widespread and systematic effort against a civilian population.

Focusing on the nature of the civilian population, it is important to keep in mind that the attack need not be military as long as it involves some “form of violence against a civilian population.”⁶² Per usual, “civilian population” describes individuals who are not members of the armed forces or who otherwise qualify as combatants.⁶³ Nationality, ethnicity, and other characteristics are not relevant.⁶⁴ The subject population need not be

⁵⁷ See *Prosecutor v. Kunarać*, Case No. IT-96-23 & 23/1-A, Judgment, ¶ 83 (Int’l Crim. Trib. for the Former Yugoslavia, June 12, 2002); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

⁵⁸ See Rome Statute, *supra* note 39, art. 7(2); *Elements of Crimes*, *supra* note 39, art. 7(1)(d)(4); Murphy, *supra* note 36, ¶¶ 125–32.

⁵⁹ See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶¶ 102–16, 135–39 (Int’l Crim. Trib. for the Former Yugoslavia, July 29, 2004); *Kunarać*, *supra* note 57, ¶ 100; Murphy, *supra* note 36, ¶¶ 133–37.

⁶⁰ See *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgment, ¶ 108 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 17, 2009); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 685 (Int’l Crim. Trib. for the Former Yugoslavia, July 31, 2003).

⁶¹ See *Krajišnik*, *supra* note 60, ¶ 309 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 17, 2009); *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 924 (Int’l Crim. Trib. for Rwanda, Nov. 28, 2007); *Prosecutor v. Deronjić*, Case No. IT-02-61-A, Judgment on Sentencing Appeal, ¶ 109 (Int’l Crim. Trib. for the Former Yugoslavia, July 20, 2005); *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Judgment, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 17, 2004); *Blaškić*, *supra* note 59, ¶ 101; *Kunarać*, *supra* note 57, ¶ 96.

⁶² See *Elements of Crimes*, *supra* note 39, art. 7(Intro.)(3), 7(1)(d); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-3436-tENG, Judgment pursuant to art. 74 of the Statute, ¶ 1101.

⁶³ See *Katanga*, *supra* note 62, ¶ 1102; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 78 (Int’l Crim. Ct., Tr. Ch. II, June 15, 2009); *Kunarać*, *supra* note 57, ¶ 425.

⁶⁴ See *Katanga*, *supra* note 62, ¶ 1103; *Bemba Gombo*, *supra* note 63, ¶ 76; *Prosecutor v. Kunarać*, Case Nos. IT-96-23-T & 23/1-T, Judgment, ¶ 423 (Int’l Crim. Trib. for the Former Yugoslavia, Feb. 22, 2001); *Tadić*, *supra* note 57, ¶ 635.

exclusively civilian, but “primarily civilian.”⁶⁵ Furthermore, the attack must have as its intended target the civilian population,⁶⁶ which can be assessed by examining:

[T]he means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.⁶⁷

In the case of the Dreamers, an attempt to expel all or a significant part of them could amount to an attack on a civilian population. Firstly, regarding their status, non-U.S. citizens are largely forbidden from serving in the U.S. Armed Forces, with only a few rare exceptions.⁶⁸ As a result, the vast majority of Dreamers are civilians and are not serving in the military.⁶⁹ The question of whether the expulsions amount to an attack depends on the manner of the deportations. Again, it is not necessary for the military to be involved in order for the measures to constitute an attack. A passive approach of removing only those individuals who come to the notice of immigration authorities due to crime would not constitute an attack. But an active effort, such as targeting individuals—perhaps by tracing the personal information they provided to qualify for DACA, the use of aggressive police tactics in creating a potential for almost one million persons to be targeted, and any human rights abuses in the processes (e.g., the form and nature of detention), could elevate a normal removal to an attack.

⁶⁵ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 582 (Int’l Crim. Trib. for Rwanda, Sept. 2, 1998); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 128 (Int’l Crim. Trib. for Rwanda, May 21, 1999); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 284 (Int’l Crim. Trib. for the Former Yugoslavia, Jan. 31, 2005); *Kunarać*, *supra* note 57, ¶ 90; *Kunarać*, *supra* note 57, ¶ 425; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 54 (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 14, 1999); *Tadić*, *supra* note 57, ¶¶ 638–39.

⁶⁶ See Prosecutor v. Katanga, *supra* note 61, ¶ 1104; Prosecutor v. Bemba Gombo, *supra* note 62, ¶¶ 76, 97–98; Prosecutor v. Stakić, *supra* note 59, ¶ 624; Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 33 (Int’l Crim. Trib. for the Former Yugoslavia, Tr. Ch. II, Nov. 29, 2002); *Kunarać*, *supra* note 57, ¶¶ 91–92.

⁶⁷ See *Kunarać*, *supra* note 57, ¶ 91.

⁶⁸ See Gregory Korte, Alan Gomez, & Kevin Johnson, *Trump administration struggles with fate of 900 Dreamers serving in the military*, USA TODAY (Sep. 7, 2017) <https://eu.usatoday.com/story/news/politics/2017/09/07/trump-administration-struggles-fate-900-dreamers-serving-military/640637001/> (reporting that 900 Dreamers currently serve in the military under the pilot program “Military Accessions Vital to the National Interest”, out of 800,000 in the DACA program, amounting to 0.1% of all Dreamers)

⁶⁹ See *id.*

Before we examine the substantive elements of deportation, we should note that this Article will not discuss expulsion as persecution. Where the specific elements of deportation are not proved, the same acts could alternatively be charged as “persecution” when there is a discriminatory element.⁷⁰ Substantive arbitrariness in expulsion can also occur as a result of the application of discriminatory classifications in expulsion procedures.⁷¹

As mentioned above, the jurisdiction of the ICC over crimes against humanity is more limited than that provided under customary international law.⁷² In order to prosecute a person for a crime against humanity at the ICC, the act must be part of a widespread or systematic attack against a civilian population and must also be undertaken “pursuant to or in furtherance of a State or organizational policy.”⁷³ If this case was prosecuted under customary international law, the element of state or organization policy would not apply as it would before the ICC. However, for purposes of a complete analysis, this Article will include the policy requirement in its analysis here.

With regard to a state or organization’s policy, the prosecution must prove that the existence of the policy is connected to a state or organization⁷⁴ and that the acts forming the pattern of practice were undertaken in pursuance of the policy.⁷⁵ A policy need not be a formal design or plan, nor completely thought through in advance,⁷⁶ but can also be an intention, unfolding throughout, to conduct an attack.⁷⁷ It can be based on deliberate action or omission.⁷⁸ Moreover, not every criminal act must be connected to the policy in order for it to be a policy.⁷⁹ The existence of the policy can be inferred from “repeated actions occurring according to a same sequence, or

⁷⁰ See Guido Acquaviva (Chef de Cabinet, Special Tribunal Leb.), U.N. High Comm’r for Refugees, *Forced Displacement and International Crimes*, U.N. Doc. PPLA/2011/05 (June 2011).

⁷¹ See Hum. Rts. Comm’n Gen. Comment No.15: The Position of Aliens Under the Covenant, ¶ 10, U.N. Doc. INT/CCPR/GEC/6625 (Apr. 11, 1986) (“Discrimination may not be made between different categories of aliens in the application of article 13.”).

⁷² See *Elements of Crimes*, *supra* note 39; see also WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: COMMENTARY ON THE ROME STATUTE* 150–52 (Oxford Univ. Press, 1st ed. 2010).

⁷³ See Rome Statute, *supra* note 39, art. 7(1)(chapeau), 7(2)(a); *Elements of Crimes*, *supra* note 39, art. 7(Intro.) (3), 7(1)(d); *Katanga*, *supra* note 62, ¶ 1097; Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-717, Dec. of the Confirm. of the Charges, ¶ 398 (Int’l Crim. Ct., Pre-Trial Ch., I, Sept. 30, 2008); *Tadić*, *supra* note 57, ¶ 644.

⁷⁴ See *Katanga*, *supra* note 62, ¶¶ 1097, 1106; Murphy, *supra* note 36, ¶¶ 138–44.

⁷⁵ See *Katanga*, *supra* note 62, ¶ 1115.

⁷⁶ See *id.*, ¶ 1110.

⁷⁷ See *id.*, ¶ 1108.

⁷⁸ See *id.*, ¶ 1107; *Elements of Crimes*, *supra* note 39, arts. 7(intro.) n.6, 7(1)(d).

⁷⁹ See *Katanga*, *supra* note 62, ¶ 1115.

the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation.”⁸⁰ While the nature of an actor being a state is generally straightforward, whether the actors developing the policy is an “organization” could be more problematic. This analysis will not examine which actors qualify as organizations. Also, the state or organization must “actively promote or encourage” the attack.⁸¹ In addition, for the pattern of actions to be undertaken pursuant to the policy, it is not necessary for them to be conducted by the agents of the same state or organization that produced the policy.⁸²

For the Dreamers, whether their removal would amount to a state-directed policy would depend on the plan that appeared after DACA protections were terminated. If there was a directed pattern of actions in which a maximum number of Dreamers were captured and expelled, the practice would appear to be a qualifying policy. However, if the practice were instead passive, meaning only that the DACA protections were lifted but there was no policy in place to attempt to remove them solely due to their status, then it is harder to see this as a policy for purposes of crimes against humanity. Again, the policy need not be formally drafted or promulgated, but rather must form a coherent pattern of practice.

Next, the prosecution must establish that the attack was either widespread⁸³ or systematic.⁸⁴ Whether an attack is widespread is a question of its large-scale nature⁸⁵ and number of victims.⁸⁶ Whether the attack is systematic is a question of whether it is “organized”⁸⁷ or falls into “non-accidental” patterns.⁸⁸ Any attack that has some organization will be, in a sense, systematic and thus backed by a policy.⁸⁹ However, an attack is defined as systematic when it demonstrates a pattern of acts intended to produce a consistent form of suffering, distinct from a collection of random,

⁸⁰ See *id.*, ¶ 1109.

⁸¹ See *Elements of Crimes*, *supra* note 39, art. 7(intro.).

⁸² See *Katanga*, *supra* note 62, ¶ 1116.

⁸³ See *id.* ¶ 1098.

⁸⁴ See *id.*; *Elements of Crimes*, *supra* note 39; Rome Statute, *supra* note 39, art. 7(2).

⁸⁵ See *Katanga*, *supra* note 62, ¶ 1098.

⁸⁶ See *Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) & Ali Muhammad Ali Abd-al-Rahman (Ali Kushayb)*, Case No. ICC-02/05-01/07-1-Corr, ¶ 62 (Int'l Crim. Ct., Tr. Ch. I, Apr. 27, 2007).

⁸⁷ See *Katanga*, *supra* note 62, ¶ 1123; See generally Harun & Kushayb, *supra* note 84.

⁸⁸ See *Katanga*, *supra* note 62, ¶ 1123; *Katanga & Chui*, *supra* note 71, ¶ 397; *Akayesu*, *supra* note 65, ¶ 580; *Nahimana*, *supra* note 61, ¶ 920; *Kordić*, *supra* note 61, ¶ 94; *Blaškić*, *supra* note 59, ¶ 101; *Kunarac*, *supra* note 57, ¶ 94.

⁸⁹ See *Katanga*, *supra* note 62, ¶ 1111.

unrelated acts.⁹⁰ In order to be systematic, the acts must not “not spontaneous or isolated.”⁹¹ The Court will look at the “similarities in criminal practices, continual repetition of a same *modus operandi*, similar treatment meted out to victims or consistency in such treatment across a wide geographic area.”⁹²

For this element, the resulting actions against Dreamers would need to be either organized with a focus on Dreamers, rather than on any unlawfully present person, or covering a large area within the United States. The forms of the coercion would also need to be similar, which would be satisfied if the actions were all comparable arrests, detention and expulsion. The precise modalities of each expulsion would not have to be identical as long as they were generally of the same nature.

If the expulsions were passive, in the sense that Dreamers would only be removed if they brought themselves to the attention of law enforcement by committing a crime, then it is harder to see that they are being targeting as a group. Also, if the deportation is served by mailed notifications, without coercive action, it is hard to view the removal as an attack. On the other hand, if the expulsion is carried out by enforcement officers using coercive force to overcome resistance, perhaps armed with weapons, on a large enough portion of the 800,000 persons, then there is stronger argument that the deportation amounted to an “attack.”

C. *Actus Reus*

Turning from the contextual element to the substantive elements, the crime of deportation involves the forced displacement of individuals from the area in which they are lawfully present across and international border without grounds permitted under international law.”⁹³ There is no

⁹⁰ See *Harun & Kushayb*, *supra* note 84, ¶ 62.

⁹¹ See *Katanga*, *supra* note 62, ¶ 1123; *Katanga & Chui*, *supra* note 71, ¶ 397; *Akayesu*, *supra* note 65, ¶ 580.

⁹² *Katanga*, *supra* note 62, ¶ 1111.

⁹³ See Fourth Geneva Convention, *supra* note 37, art. 49; Rome Statute, *supra* note 39, art. 7(2)(d); Prosecutor v. Ruto, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) & (b) of the Rome Statute, ¶ 243 (Jan. 23, 2012); Prosecutor v. Prlić, IT-04-74-T, Judgment, ¶¶ 47, 300 (May 29, 2013); *Krajišnik*, *supra* note 60, ¶¶ 304–08; *Stakić*, *supra* note 60, ¶¶ 276–308; Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 540 (Sept. 1, 2004); Prosecutor v. Simić et al., Case No. IT-95-9-T, Judgment, ¶¶ 121–22 (Oct. 17, 2003); Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T ¶ 670 (Mar. 31, 2003); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment ¶ 218 (Sept. 17, 2003) [hereinafter Krnojelac 2003]; Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment ¶¶ 474–76 (Mar. 15, 2002) [hereinafter Krnojelac 2002]; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment ¶¶ 521, 531–32 (Aug. 2, 2001); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 679 (July 31, 2003); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Separate

requirement about the identity of the victims. When deportation is charged as a war crime, the persons must be “protected persons,”⁹⁴ but when charged as a crime against humanity, there is no such requirement.⁹⁵

1. *Forcible Expulsion*

The first requirement is that the expulsion must be forcible.⁹⁶ This means that the expulsion must be induced by a coercive act such that leaving the state by crossing a border is involuntary.⁹⁷ The removal need not be conducted by the military, as long as it involves force.⁹⁸ The kinds of acts that might qualify are the more obvious acts of arrest and transportation,⁹⁹ but circumstances of fear, duress, or other oppression that leave the person with no real alternative but to leave also qualify.¹⁰⁰ The particular type of act is not significant¹⁰¹ provided it produces an effect that the victim must flee.¹⁰² Whether the person cooperates with the expulsion, or even facilitates or requests the expulsion, is not material.¹⁰³ While the *Naletilić* trial chamber

Opinion of Judge Schomburg, ¶ 15 (Sep. 17, 2003); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment ¶ 521 (Aug. 2, 2001); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 234 (Mar. 3, 2000); Int'l L. Comm'n, First Rep. on the Crimes Against Humanity, U.N. Doc. A/CN.4/680 ¶ 177, Draft art. 2(1)(d) (2015) [hereinafter Crimes Against Humanity].

⁹⁴ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 122–23 (2d ed., Oxford University Press 2008).

⁹⁵ See Prosecutor v. Gotovina, Case No. IT-05-87-PT, Decision on Several Motions Challenging Jurisdiction, ¶¶ 24–26 (Mar. 19, 2007).

⁹⁶ Fourth Geneva Convention, *supra* note 37, art. 49; Elements of Crimes, *supra* note 39; *Ruto*, *supra* note 91, ¶ 243; Prosecutor v. Popović et al., Case No. IT-05-88-T, ¶ 896 (June 10, 2010); *Stakić*, *supra* note 60, ¶ 279; *Krnjelac 2003*, *supra* note 91, ¶ 233; *Krnjelac 2002*, *supra* 91, ¶ 475; *Krstić*, *supra* note 91, ¶ 528; Crimes Against Humanity, *supra* note 91, ¶ 159; JEAN S. PICTET, COMMENTARY, IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 279 (Jean S. Pictet ed., 1958) [hereinafter GC IV COMMENTARY].

⁹⁷ See *Ruto*, *supra* note 91, ¶ 244; *Stakić*, *supra* note 60, ¶ 279; *Brdanin*, *supra* note 91, at ¶ 543; *Simić*, *supra* note 91, ¶ 125; *Stakić*, *supra* note 60, ¶ 682; *Naletilić & Martinović*, *supra* note 91, ¶ 519; *Krnjelac 2003*, *supra* note 91, ¶ 233; *Krnjelac 2003*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶ 528; Crimes Against Humanity, *supra* note 91, ¶ 157; GC IV COMMENTARY, *supra* note 94, at 277–83.

⁹⁸ See *State Parties to the Rome Statute*, *supra* note 43.

⁹⁹ See *Stakić*, *supra* note 60, ¶ 281; *Krnjelac 2002*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶ 529.

¹⁰⁰ See *Popović*, *supra* note 91, ¶ 896; Prosecutor v. Milutinović et al. (“Kosovo Six”), Case No. IT-05-87-T, Judgment ¶ 164 (Feb. 26, 2009); *Stakić*, *supra* note 60, ¶¶ 279–82; *Simić*, *supra* note 91, ¶¶ 125–6; *Naletilić & Martinović*, *supra* note 91, ¶ 519; *Krnjelac 2003*, *supra* note 91, ¶ 229; *Kunarać*, *supra* note 57, ¶ 129; *Krnjelac 2002*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶¶ 147, 529; Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 11 (July 6, 2000).

¹⁰¹ See *Ruto*, *supra* note 91, ¶ 244.

¹⁰² Compare *Ruto*, *supra* note 91, ¶ 245 (“acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim.”) with Rankin & U.S. v. Iran, Case No. 10913, Award, 17 IUSCTR 135 (Iran-US Cl. Trib., Ch. 2, Nov. 3, 1987) (regarding constructive expulsion).

¹⁰³ *Prlić*, *supra* note 91, ¶ 51; *Stakić*, *supra* note 91, ¶ 279; *Krnjelac 2003*, *supra* note 91, ¶ 229.

held that a genuine wish to leave the area on the part of the victim would preclude a conviction for deportation,¹⁰⁴ other trial chambers have held that consent to the removal does not make it lawful.¹⁰⁵ The distinction being that while genuine consent might make their removal lawful, the use of force would prevent genuine consent.¹⁰⁶ Generally, the expulsion measure can constitute any act, not only formal deportation procedures, provided it seeks the removal of the person from the state's territory.¹⁰⁷ What is critical is that the person must have had no real choice in leaving.¹⁰⁸

As noted above, for the removal of Dreamers to amount to an international crime, their removal must be by coercive force. ICE could opt to simply inform the Dreamers by mail or other notification that their status has expired and request that they remove themselves. If the removal effort was elevated to arrest and forcible expulsion, then the element would be satisfied. There is already some evidence that physical force might be used against Dreamers.¹⁰⁹ The greater difficulty is whether other efforts in between these extremes might create a situation of fear or duress that would make it impossible to stay. Revoking social security numbers, employment authorization, and travel authorization, and terminating health care insurance, education status, and driving licenses, might collectively—especially for someone who has come to depend on such benefits under DACA—make life extraordinarily difficult and trigger “self-deportation.”¹¹⁰ If the person really had no choice but to leave, then the action could be considered coercive.¹¹¹ If ICE degrades the Dreamers' condition of life to

¹⁰⁴ *Popović et al.*, *supra* note 94, ¶ 896; *Stakić*, *supra* note 60, ¶ 279; *Šimić et al.*, *supra* note 91, ¶ 125; *Naletilić & Martinović*, *supra* note 91, ¶ 519.

¹⁰⁵ *Prlić*, *supra* note 91, ¶ 51.

¹⁰⁶ *Id.*; *Šimić et al.*, *supra* note 91, ¶ 125; *Krnojelac 2002*, *supra* note 91, ¶ 475 n. 1435; *Krstić*, *supra* note 91, ¶ 530.

¹⁰⁷ JEAN MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 109 (Martinus Nijhoff, 1995) (discussing how expulsion is “an act, or a failure to act, by an authority of a State with the intention and with the effect of securing the removal of a person or persons against their will from the territory of that State”); Eur. Consult. Ass., *Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 8, E.T.S. No. 117 (1985) (explaining expulsion as “any measure compelling the departure of an alien from the territory”).

¹⁰⁸ *Prlić*, *supra* note 91, ¶ 50; *Popović*, *supra* note 94, ¶ 896; *Krajišnik*, *supra* note 60, ¶ 319; *Stakić*, *supra* note 60, ¶¶ 279–82; *Brdanin*, *supra* note 91, ¶ 543; *Šimić et al.*, *supra* note 91, ¶ 125; *Stakić*, *supra* note 60, ¶ 707; *Krnojelac 2002*, *supra* note 91, ¶¶ 229, 233; *Krnojelac 2002*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶ 147; *Kunarać*, *supra* note 57, ¶¶ 127–28, 460.

¹⁰⁹ See Jarvie, *supra* note 19.

¹¹⁰ *Cf. Yeager (U.S.) v. Iran*, Case No. 10199, Award No. 324-10199-1, Partial Award, 17 I.L.S. 92 (Iran-U.S. Cl. Trib., Ch. 1, Nov. 2, 1987) (finding that the measures taken amounted to a constructive expulsion, notwithstanding that there was no official expulsion order).

¹¹¹ See *id.*

the point that they leave the United States, the coercive element would be satisfied. Given the comments of the acting-Director of ICE regarding a desire to instill fear in Dreamers, this may be a possible outcome.¹¹²

2. *Expulsion Out of a State*

Secondly, the expulsion must be from one state into another state.¹¹³ In most of these legal provisions, the crime of deportation is paired with that of forcible transfer; however, it is a separate offense.¹¹⁴ Both protect the same underlying values. The key distinction is that forcible transfer involves any forced expulsion of persons within a state, while deportation involves the forced expulsion of persons out of a state.¹¹⁵ There is a split of opinion in the jurisprudence over whether a *de jure* border must be crossed¹¹⁶ or whether a *de facto* border will suffice.¹¹⁷ The ILC Draft Code only requires that the expulsion be “from the national territory.”¹¹⁸ The Fourth Geneva Convention and Security Council resolutions provide that deportation from occupied

¹¹² See Clio Chang, *ICE Chief Is Having A Great Time Waging Terror Against Immigrants*, SPLINTER (Jan. 31, 2018), <https://splinternews.com/ice-chief-is-having-a-great-time-waging-terror-against-1822601052>.

¹¹³ Elements of Crimes, *supra* note 39, art. 7(1)(d); *Prlić*, *supra* note 91, ¶ 55; Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 278, 289, 300 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 22, 2006); *Stakić*, *supra* note 60, ¶ 679; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 234 (Int’l Crim. Trib. for the Former Yugoslavia, Tr. Ch., Mar. 3, 2000).

¹¹⁴ See Elements of Crimes, *supra* note 39, art. 7(1)(d); Appl. under Reg. 46(3), ICC. Doc. ICC-RoC46(3)-01/18-1, Prosecutor’s Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute ¶ 19 (Apr. 9, 2018); Antonio Cassese, *Crimes Against Humanity*, in 1 CASSESE, GAETA, & JONES, EDS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 373–74 (2002).

¹¹⁵ See *Prlić*, *supra* note 91, at ¶ 47; *Krajišnik*, *supra* note 60, ¶ 304; *Stakić*, *supra* note 111, ¶¶ 278, 300, 302, 317; *Krnojelac 2002*, *supra* note 91, ¶ 474; *Krstić*, *supra* note 91, ¶¶ 521, 531; United States v. Milch (“Milch Case (Luftwaffe)”), Case No. 2, Judgment, (Mil. Trib. II under Ctrl CI Law No. 10, Apr. 16, 1947), reprinted in 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 773 (1947) (Phillips, J. concur. Op., 860, 865); United States v. Flick (Flick Case), Case No. 5 (Mil. Trib. IV under Ctrl CI Law No. 10, Dec. 22, 1947), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1187 (1947); United States v. Krupp, Case No. 10, Mil. Trib. III under Ctrl. CI Law No. 10, (July 31, 1948), 9(2); TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1327, 1432–33 (1947).

¹¹⁶ See *Stakić*, *supra* note 111, ¶ 299; *Brdanin*, *supra* note 91, ¶ 540; *Simić et al.*, *supra* note 91, ¶¶ 122–23; Naletilić & Martinović, *supra* note 91, ¶ 670; *Krnojelac 2003*, *supra* note 91, ¶¶ 214–15; *Krnojelac 2002*, *supra* note 91, ¶¶ 474, 476, 198, n.1429; *Krstić*, *supra* note 91, ¶¶ 521, 531.

¹¹⁷ See Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Judgment, ¶ 532 (Int’l Crim. Trib. for the Former Yugoslavia, Appls. Ch., Jan. 27, 2014); *Prlić*, *supra* note 91, ¶ 55; *Krajišnik*, *supra* note 60, ¶ 304; *Stakić*, *supra* note 111, ¶¶ 288–303.

¹¹⁸ See *Stakić*, *supra* note 111, ¶ 295; Int’l L. Comm’n, *Report of the International Law Commission on the Work of Its Forty-Third Session (Apr. 29 – July 19, 1991)*, art. 21 ¶ 11, U.N. Doc. A/46/10.

territory would also qualify.¹¹⁹ The dominant view is that the persons must be expelled across a *de jure* international border.¹²⁰

This view does not necessarily mean that the physical presence in the new state's territory must be proved to establish the crime. While some case law has suggested that arrival abroad might be required, that conclusion was defining the *actus reus*, so it is not certain that arrival abroad is necessary.¹²¹ Certainly presence outside the border is the logical consequence,¹²² but a person might be expelled onto the high seas or into outer space. While there must be an expelling act, arrival in a foreign state need not be proved. It remains unclear whether an attempt to expel persons across a border would then suffice since there is no need to prove the arrival abroad. After all, another way to view the requirement of arrival abroad is as a causation element of the act.¹²³ For purposes of this Article, it is not necessary to reach a conclusion on this precise point.

For the situation of the Dreamers, this element would be satisfied if they were crossing the border. While arrival in the foreign state does not appear to be a necessary element, leaving the state is. Therefore, if Dreamers were able to continue living in the United States, then no deportation would have taken place. Criteria for expulsion would only be satisfied if massive numbers of Dreamers were expelled.

3. *Expulsion Unlawful Under International Law*

The expulsion must be unlawful.¹²⁴ However, this requirement has two elements, the precise relationship of which is unclear: (1) lawful presence of the victims and (2) the unlawful removal of the victims in violation of international law.¹²⁵ It could be two sides of the same element, meaning that

¹¹⁹ See Fourth Geneva Convention, *supra* note 37, art. 49; S.C. Res. 469 (May 20, 1980); S.C. Res. 484 (Dec. 19, 1980); S.C. Res. 607 (Jan. 5, 1988); S.C. Res. 608 (Jan. 14, 1988); S.C. Res. 636 (July 6, 1989); S.C. Res. 641 (Aug. 30, 1989); S.C. Res. 681 (Dec. 20, 1990); S.C. Res. 694 (May 24, 1991); S.C. Res. 726 (Jan. 6, 1992); S.C. Res. 799 (Dec. 18, 1992); G.A. Res. 40/161, annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); *Stakić*, *supra* note 111, ¶ 300.

¹²⁰ See *Brđanin*, *supra* note 91, ¶ 542; *Krnojelac 2002*, *supra* note 91, ¶¶ 474, 198 n.1429.

¹²¹ See *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, ¶ 893 (Int'l Crim. Trib. for the Former Yugoslavia, Tr. Ch. II, June 10, 2010).

¹²² See *Popović et al.*, *supra* note 94, ¶ 892.

¹²³ See *id.*, ¶ 893.

¹²⁴ See *Brđanin*, *supra* note 91, ¶ 543; *Simić et al.*, *supra* note 91, ¶ 124; *Krnojelac 2002*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶ 524.

¹²⁵ See London Agreement, *supra* note 26, art. 6(c); *Krnojelac 2002*, *supra* note 91, ¶ 473; BASSIOUNI, *supra* note 38, at 179.

any person who is lawfully present cannot be removed. Nevertheless, for purposes of this analysis, we will assume that we need to prove two separate elements: that the victims must be both (1) lawfully present and (2) that their removal must violate international law.

a. Alien Lawfully Present

Looking first at lawful presence, prosecutions for deportation, initially, were limited to deportations by perpetrators of fellow nationals from their shared state.¹²⁶ Some tribunals have suggested that the victims simply should not be “forced to become refugees . . . to live in a foreign State, subjected to foreign laws and authorities, and with no role in the political decision-making process,” which suggests that the test for lawful presence might be nationality.¹²⁷ After all, removal to one’s state of nationality would not be a “foreign” place where a person would qualify as a “refugee.” However, nationality as such was not specifically required, which suggests that the more vague meaning of “foreign” was simply a different state from the one the person lived in. Nationality is therefore not the test.

The more precise requirement of lawful presence—although missing from the ILC Draft Code—emerges over time. In the case of deportation as a war crime, the International Committee of the Red Cross (ICRC) study on customary international humanitarian law only requires that the deportees be a “civilian population.”¹²⁸ In the *Simić* case, the ICTY Trial Chamber held only that the deportation constituted the forcible removal of people “from the territory in which they reside” and made no mention of whether the residence of the victims was lawful.¹²⁹ Subsequent case law clarified that while nationality was not required, the victim must be “lawfully present.”¹³⁰

¹²⁶ See London Agreement, *supra* note 26, art. 6(c); *Krnjelac 2002*, *supra* note 91, ¶ 473; BASSIOUNI, *supra* note 38, at 179.

¹²⁷ See *Dorđević*, *supra* note 115, ¶¶ 533–36; *Prlić*, *supra* note 91, ¶ 47; *Popović et al.*, *supra* note 94, ¶ 892; *Stakić*, *supra* note 111, ¶ 300; see also [*In re* Deportation of the Rohingya People from Myanmar to Bangladesh], ICC-RoC46(3)-01/18-1, Decision on Prosecutor’s Request for a Ruling on Jurisdiction Under Art. 19(3) of the Statute, ¶16 (Apr. 9, 2018) [hereinafter *In re* Rohingya People].

¹²⁸ See 1 INT’L COMM. RED CROSS, J.-M. HENCKAERTS & L. DOSWALD-BECK, EDS., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES Rule 129 (2005); *Stakić*, *supra* note 111, ¶ 296.

¹²⁹ See *Simić et al.*, *supra* note 91, ¶ 121; *Krstić*, *supra* note 91, ¶ 521.

¹³⁰ See *Popović et al.*, *supra* note 94, ¶¶ 899–900; see also Rome Statute of the International Criminal Court, July 17, 1998, art. 7(2)(d), 2187 U.N.T.S. (No. 38544) (entered into force July 1, 2002); Elements of Crimes, *supra* note 39 (“Such person or persons were lawfully present in the area from which they were so deported or transferred.”).

In addition, the lawfulness of their residence was not defined exclusively by domestic law, but by international law.¹³¹ Lawful presence under international law is difficult to establish because international law does not have clear and consistent migration laws that determine whether presence is lawful. Under the International Covenant on Civil and Political Rights (ICCPR), the question of whether an alien is “lawfully” present is informed by domestic law, but only insofar as domestic law conforms to a state’s international obligations.¹³² The Human Rights Committee has held specifically that once an unlawfully present alien has his or her status regularized, that the alien is then considered lawfully present.¹³³ At that point, the alien should be treated in ways comparable to a national, and any distinction between nationals and aliens would need to be justified.¹³⁴

However, the practice of criminal prosecutions has applied an even less demanding approach. Rather than looking at domestic immigration law or drawing analogies with international human rights law to identify lawfulness

¹³¹ See Prosecutor v. Đorđević, Case No. IT-05-87/1-T, Judgment, ¶¶ 1616, 1640 (Int’l Crim. Trib. for the Former Yugoslavia, Appls. Ch., Feb. 20, 2011); *Popović et. al.*, *supra* note 94, ¶ 900.

[W]hether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant. Rather, what is important is that the protection is provided to those who have, for whatever reason, come to “live” in the community—whether long term or temporarily. . . . In the view of the Trial Chamber, the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for “residency” to be demonstrated as a legal standard[.]

Simić et al., *supra* note 91, ¶ 125; *Krnojelac 2002*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶¶ 524, 526.

¹³² See Hum. Rts. Comm., Gen. Comm. No. 27: Article 12 (Freedom of Movement), at ¶ 4, CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999)

Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations.

¹³³ See *id.* (finding that an alien without authorized status in the state, but whose status has been “regularized,” may be considered lawfully present); *Celepli v. Sweden*, Communication 456/1991, Human Rights Committee, ¶ 9.2, U.N. Doc. CCPR/C/51/D/456/1991 (July 26, 1994)

The Committee notes that the author’s expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party.

¹³⁴ See Gen. Comm. No. 27, *supra* note 130, ¶ 4.

of immigration status, the approach of some tribunals has been to focus on the integration into a community. Some cases identified the removal of the person from “a particular culture, society, language, set of values, and legal protections.”¹³⁵ The court did not demand any evidence of integration into the society or culture, although the mention of language could imply a degree of integration. Several courts have concluded that the purpose of the criminalization is to protect individuals’ right to “live in their communities and homes.”¹³⁶ Speaking in the context of any forced displacement, whether deportation or transfer, the ICTY defined the act as “abandoning one’s home.”¹³⁷ It could be that the test would then require a certain degree of lengthy time to establish presence in a home and community.¹³⁸

But length of residency and level of integration appear only to emphasize why the crime might exist, and not be formally part of the test. Other tribunals have held that the test for lawful presence is not the degree of integration but simply whether the person has “come to ‘live’ in the community—whether long term or temporarily.”¹³⁹ By applying this test, it would still be a criminal act to remove internally displaced persons or refugees from temporary homes they occupy after fleeing from danger.¹⁴⁰ If the requirement is participation in society and culture, yet with a more narrow focus on home and community, then the culture, society, language, etc. required need not be the ones practiced in the state at large, but only the ones existing at a community level.

It might be that participation in a local minority community-based language would even suffice. Following from this jurisprudence, the ICTY in *Popović* held that “the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or

¹³⁵ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 13(2) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 12, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR]; *In re Rohingya People*, *supra* note 126, ¶ 17.

¹³⁶ See *In re Rohingya People*, *supra* note 125, ¶ 17; *Prlić*, *supra* note 91, ¶; *Popović*, Case No. IT-05-88-T, at ¶ 890; *Stakić*, *supra* note 60, ¶¶ 277, 677; *Simić et al.*, *supra* note 91, ¶ 130.

¹³⁷ See *Simić et al.*, *supra* note 91, ¶ 123; *Krstić*, *supra* note 91, ¶ 523; Prosecutor v. Kupreškić, et al., Case No. IT-95-16-T, Judgment, ¶ 566 (Int’l Crim. Trib. for the Former Yugoslavia, Tr. Ch., Jan. 14, 2000).

¹³⁸ See *Popović et al.*, *supra* note 94, ¶ 899; *Simić et al.*, *supra* note 91, ¶ 130; *Krstić*, *supra* note 91, ¶ 523; INT’L COMM. RED CROSS, YVES SANDOZ, CHRISTOPHE SWINARSKI & BRUNO ZIMMERMAN, EDS., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1473, ¶ 4847 (1987) [hereinafter AP COMMENTARY].

¹³⁹ See *Popović et al.*, *supra* note 94, ¶ 900.

¹⁴⁰ See *id.* (“Clearly the protection is intended to encompass, for example, internally displaced persons who have established temporary homes after being uprooted from their original community.”). Therefore, it would also be a crime to expel internally displaced persons.

premises unlawfully or illegally and not to impose a requirement for ‘residency’ to be demonstrated as a legal standard.”¹⁴¹ This finding means that integration with and enjoyment of a particular community is part of the protected interest, but not the legal test. The test would be whether the victim is lawfully living in the home or is an occupier or squatter without any color of law. Other cases have identified the loss of property as a part of the concern with deportation, meaning that homeownership could establish lawful residence.¹⁴² Thus, “lawful presence” is not a test for compliance with domestic immigration laws, but it is—at its most basic level—a test of lawful residence in a home, i.e., excluding persons who have made a home against the right of the homeowner or landlord. This presence would then, as a factual matter, result in enjoyment of the local community, and integration into that community is not required. Integration will, however, come up again in the section below.

The Dreamers would qualify for lawful presence under any one of these various tests. Surely, Dreamers qualify under the “home” test. These people are not squatting in their homes; they may be renting or owning their homes lawfully. Removal would mean loss of their property or rental rights of enjoyment. However, even if the above analysis about the precise test for lawful presence is incorrect, and the test is actually the more demanding one of integration into a community, many Dreamers would still qualify. Many are integrated by participating either in a local society, perhaps as narrow as their language community, or in a wider society. One would imagine that arrival as a child and spending formative years in the state would make integration even more substantial, even though this is not a formal requirement for “lawful presence” for purposes of the crime of deportation. In fact, even if the test for lawful presence is authorized status under domestic immigration law, Dreamers would still qualify. Under DACA, one could argue that Dreamers had their status regularized. They did not become citizens, but their residence was authorized under certain conditions. By creating a program of tolerating the presence of Dreamers under DACA, those people were given some form of lawful presence under domestic immigration laws with rights to participate in the local labor force, education, etc. But, as mentioned above, the better understanding of the test for lawful presence is the “home” test, and the Dreamers certainly qualify on this point.

¹⁴¹ *See id.*

¹⁴² *See Simić et al.*, *supra* note 91, ¶ 123; *Krstić*, *supra* note 91, ¶ 523; *Kupreškić*, *supra* note 135, ¶ 566.

b. Right to Reside in One's "Own State"

Thus, the next question is when the expulsion of aliens is lawful under international law.¹⁴³ Surely the normal deportation of unlawfully present persons cannot be criminal, even if it involves large numbers of individuals and even if it means that they must leave their home and community. If this were the case, then the vast amount of deportations all over the world would be criminal. This cannot have been the intention of the drafters of the Rome Statute, and it has not been the practice of any international criminal tribunal. One of the critical differences between criminal deportation and normal, permissible deportation hinges on the removal being wrongful under international law.¹⁴⁴ Human rights law generally permits the expulsion of aliens; however, international law places limitations on that power, creating the possibility of removal being unlawful.¹⁴⁵

Under human rights law, an individual may not be arbitrarily expelled from or refused admission to his or her "own country."¹⁴⁶ This rule applies to any form of state action, whether it is by legislation, judicial decision, administrative regulation or any other measure.¹⁴⁷ The Universal Declaration of Human Rights states that "[e]veryone has the right to leave any country, including his own, and to return to his country."¹⁴⁸ This provision functions as a fundamental rule of human rights because it essentially prohibits exile, and prohibits a state from depriving a person of such a significant aspect of their identity.¹⁴⁹ The International Convention on Civil and Political Rights

¹⁴³ See Rome Statute, *supra* note 39, art. 7(2)(d); *Elements of Crimes*, *supra* note 39, art. 7(1)(d).

¹⁴⁴ See *Popović et al.*, *supra* note 94, ¶ 891; *Krajišnik*, *supra* note 60, ¶ 304; *Stakić*, *supra* note 111, ¶¶ 278, 317; *Prosecutor v. Milutinović (Kosovo Six)*, Case No. IT-05-87-T, Judgment, ¶ 164 (Int'l Crim. Trib. for the Former Yugoslavia, Tr. Ch., Feb. 26, 2009); *Brđanin*, *supra* note 94, ¶ 544; *Krnjelac 2002*, *supra* note 91, ¶ 475; *Krstić*, *supra* note 91, ¶ 524.

¹⁴⁵ See *Eritrea v. Ethiopia*, 26 R.I.A.A. 195, 225 Partial Award, (Perm. Ct. Arb. 2004), ¶¶ 79–82 (finding that a state has the right to expel aliens, provided it is not an arbitrary expulsion); *Maal v. Venez.*, 10 R.I.A.A. 707, 730 (June 1, 1903) (finding that states have a right to expel aliens that present a danger or are otherwise prejudicial to the state, i.e., that there must be cause for the expulsion).

¹⁴⁶ See Gen. Comm. No. 27, *supra* 130, ¶¶ 19, 21 ("The right of a person to enter his or her own country recognizes the special relationship of a person to that country. . . . In no case may a person be arbitrarily deprived of the right to enter his or her own country.").

¹⁴⁷ See *id.*, ¶ 21 ("The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.").

¹⁴⁸ See UDHR, *supra* note 133, art. 13(2) ("Everyone has the right to leave any country, including his own, and to return to his country.").

¹⁴⁹ See ICCPR, *supra* note 133, arts. 12, 26; *Tunis & Morocco Nationality Decrees*, Advisory Opinion, 1923 P.C.I.J. (Ser. B) No. 4, at 24; Int'l Law Comm'n, Vaclav Mikulka, Spec. Rapp., *Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons*, U.N. Doc. A/CN.4/474 (1996); Bill

(ICCPR) operationalized this aspirational right into a binding norm when it provided that “[n]o one shall be arbitrarily deprived of the right to enter his own country.”¹⁵⁰ Similarly, the Convention on the Elimination of All Forms of Racial Discrimination sets out the same rule.¹⁵¹ Other binding law for situations of armed conflict set out rules prohibiting expulsions of protected persons and for the return of protected persons to their homes after the armed conflict ends.¹⁵²

The question is the scope of “own country” and whether it applies to certain categories of aliens. Initially, some thought the rule only applied to nationals.¹⁵³ Others thought that it would cover any person who resides in the state or relies on the state to function as the person’s home.¹⁵⁴ The terms of the ICCPR are applicable to all persons, because the relevant article of the ICCPR, Article 12, was not limited to nationality, as the other of the ICCPR articles were.¹⁵⁵ Nationality was a requirement for other provisions of the ICCPR, so the fact that it was not made a requirement for “his own country” means it is not the test for that status. In fact, early drafts of the ICCPR used the expression “country of which he is a national” but were deliberately changed to “his own country.”¹⁵⁶ Some authorities have sought meaning in the use of the term “country” rather than the more formal “state,” and that the use of country must mean a place with a genuine connection.¹⁵⁷

Frelick, *The Right of Return*, 2 INT’L J. REFUGEE L. 442, 444 (1990).

¹⁵⁰ See ICCPR, *supra* note 133, art. 12(4).

¹⁵¹ See International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

¹⁵² See Fourth Geneva Convention, *supra* note 37, arts. 49, 77.

¹⁵³ See HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 59 (1987); Goralczyk, *Governing Rules Project: Review and Discussion on the Movement of Persons Across Borders*, 85 PROC. AM. SOC. INT’L L 51, 56–57 (1991).

¹⁵⁴ See HANNUM, *supra* note 152, at 59; Donna E. Arzt & Karen Zughaib, *Return to Negotiated Lands: The Likelihood and Legality of a Population Transfer Between Israel and a Future Palestinian State*, 24 NYU J. INT’L L. & POL. 1399, 1445 (1992); Frelick, *supra* note 148, at 442; Goralczyk, *supra* note 152, at 56–57.

¹⁵⁵ See Gen. Comm. No. 27, *supra* note 130, ¶ 20 (“The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (‘no one’). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase ‘his own country.’”); Human Rights Comm., Gen. Comm. No. 15, *The Position of Aliens under the Covenant*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 11, 1986) [hereinafter Gen. Comm. No. 15] (“Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. . . . Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens.”); Hum. Rts. Comm., Views of the Human Rights Committee concerning Communication No. 538/1993: Stewart v. Canada, ¶¶ 12.2–12.5, U.N. Doc. CCPR/C/58/D/538/1993 [hereinafter Stewart v. Canada].

¹⁵⁶ See MARK J. BOSSUYT, *GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 261 (1987).

¹⁵⁷ See M. Knisbacher, *Aliyah of Soviet Jews: Protection of the Right of Emigration under International Law*, 14 HARV. INT’L L.J. 89, 96–97 (1973).

Certainly nationality falls under the umbrella of “his own country,”¹⁵⁸ but the Human Rights Committee has found that certain links other than nationality will also qualify.¹⁵⁹ A person has a bond with “his own country” when that person has a “special relationship” with the state.¹⁶⁰ In essence, the question is whether the person is a “mere alien” or has “special ties or claims in relation to the country.”¹⁶¹ Once a person has formed this special relationship, he or she has the right to return to his or her own country and the implicit right not to be expelled from it.¹⁶² This finding makes sense. Consider, for example, a state might simply declare that a person never established his or her nationality, or, even more grave, might revoke the person’s nationality, rendering the person an alien in his own state.¹⁶³ This reading is consistent with the larger practice of rights under the ICCPR. The Covenant does not, generally, limit state discretion over who is admitted,¹⁶⁴ and under what conditions.¹⁶⁵ It does, however, prohibit a state from excluding aliens in a way that violates other rights in the Covenant, such as non-discrimination, protections against inhuman treatment and right to maintain family life.¹⁶⁶

In terms of establishing the special relationship that makes a state one’s “own country,” a variety of factors are considered. This link is meant to be tested by international law, not domestic law.¹⁶⁷ The Committee gave a non-exhaustive list of examples of aliens having the requisite connection.¹⁶⁸ It

¹⁵⁸ See Gen. Comm. No. 27, *supra* note 130, ¶ 20 (“The scope of ‘his own country’ is broader than the concept ‘country of his nationality’ It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral”); BOSSUYT, *supra* note 155, at 262; GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 255 (1978); Karl Doehring, *Aliens, Expulsion and Deportation*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 111 (Rudolf Berhardt ed., 1992); John Fisher Williams, *Denationalization*, 8 BRIT. Y.B. INT’L L. 45, 61 (1927).

¹⁵⁹ See *Stewart v. Canada*, *supra* note 154.

¹⁶⁰ See Gen. Comm. No. 27, *supra* note 130, ¶ 19 (“The right of a person to enter his or her own country recognizes the special relationship of a person to that country.”).

¹⁶¹ See *id.* (“[I]t embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.”).

¹⁶² See *id.*, ¶ 19.

¹⁶³ See Exec. Comm. on the Int’l Prot. of Refugees, Conclusion No. 40 (XXXVI), *Voluntary Repatriation*, U.N. Doc A/40/12/Add.1 (Oct. 18, 1985).

¹⁶⁴ See Gen. Comm. No. 15, *supra* note 154, ¶ 5, (“The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory”).

¹⁶⁵ See *id.*, ¶ 6.

¹⁶⁶ See *id.*, ¶ 5.

¹⁶⁷ See Gen. Comm. No. 27, *supra* note 130.

¹⁶⁸ See *id.*, ¶¶ 20–21 (“A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.”).

included (1) nationals whose nationality have been revoked in violation of international law, (2) individuals whose country of nationality has been incorporated into another state and whose nationality is not recognized, or (3) stateless persons arbitrarily prohibited from acquiring nationality in their state of residence.¹⁶⁹ Other strong ties might qualify as well,¹⁷⁰ such as a connection of history, family, ethnicity, religion, or other similar ties.¹⁷¹ The most important of these criteria might be habitual residence.¹⁷² Reflecting a similar understanding, the International Court of Justice in the *Nottebohm* case held that the formal bond between an individual and his or her state of nationality does not, as a state act, demand automatic acceptance in international relations.¹⁷³ In that case, the Court permitted a state to refuse to respect the formal bond of nationality when the individual's relationship to the state lacked a "genuine" connection, at least insofar as it related to diplomatic protection.¹⁷⁴ The corollary to this finding would be that an individual who does not enjoy the formal bond of nationality with a state might nonetheless have the substantive connection *de facto*, based on the degree to which the person has integrated his or her life with that of the state.

The question for Dreamers is whether they have sufficient genuine links or special ties to the United States to consider it their "own country." Since Dreamers have lived the majority, if not essentially the entirety, of their lives in the United States, they have a strong link of history, habitual residence, and potentially family as well.¹⁷⁵ Opinion polls consistently show that an overwhelming majority of Americans consider it cruel and unjust to expel Dreamers.¹⁷⁶ While an opinion poll is not determinative, it does show a

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*, ¶ 20 ("[O]ther factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country . . .").

¹⁷¹ See HANNUM, *supra* note 152, at 56.

¹⁷² See Johannes M. M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. L.J. 1, 12 (1991).

¹⁷³ See *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 23 (April 6, 1955).

¹⁷⁴ See *id.* at 26.

¹⁷⁵ Cf. *id.* (listing similar factors constituting a "genuine link" sufficient for nationality)

¹⁷⁶ See Steven Shepard, *Poll: Majority opposes deporting Dreamers*, POLITICO (Sept. 5, 2017) <https://www.politico.com/story/2017/09/05/poll-trump-deporting-daca-dreamers-242343>.

A majority of voters, 58 percent, think these undocumented immigrants, also known as Dreamers, should be allowed to stay and become citizens if they meet certain requirements—a sentiment that goes well beyond the existing DACA program. Another 18 percent think they should be allowed to stay and become legal residents, but not citizens. Only 15 percent think they should be removed or deported from the country. *Id.*

See also *Marist Poll Dec. 4–7, 2017*, POLLINGREPORT.COM, <http://www.pollingreport.com/immigration.htm> (last visited Mar. 26, 2019) (fifty-eight percent of Dreamers can "stay, become citizens"; twenty-three percent

reciprocal view of the American public that these persons are highly integrated and not mere aliens.

In making this determination of “own country” the rights of the child should be kept in mind. Dreamers were brought to the United States as children. Many have since become adults, but others are still under eighteen years of age. The U.N. Convention on the Rights of the Child (CRC) requires that states take additional steps to preserve a child’s identity.¹⁷⁷ As in the prohibition on arbitrary expulsion from one’s own country, the restriction on expulsion is partly aimed at protecting a person from being exiled from the place that serves as the focus of his or her social life.¹⁷⁸ Further the CRC demands that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”¹⁷⁹ Surely in interpreting the protection against arbitrary expulsion, and the criminalization of deportation as a crime against humanity, the requirements should be read to protect a child’s stability of home and community.

This Article submits that a person who was brought to the United States as a child, who has made the United States his or her home for the extent of their formative life, who may never have acquired the language of the origin country, and who is—for all substantive purposes a *de facto* national—has those special ties. Clearly, in cases where a person did not even realize that he or she was not a U.S. citizen due to their high level of integration, there are sufficient ties. Closer cases involve persons who might still understand the language of the origin state, who may have travelled to or resided in the origin state for substantial periods, and who were otherwise exercising rights they derived from their nationality in the origin state. Those persons have a harder claim to make that they have established the necessary special ties.

c. Arbitrary Expulsion

The next question is whether the deportation of persons with special ties would be so arbitrary such that the expulsion would be unlawful under international law. The rights in the ICCPR to remain in one’s own country

“stay, but not as citizens”); *Quinnipiac University Poll Sept. 21–26, 2017*, POLLINGREPORT.COM, <http://www.pollingreport.com/immigration.htm> (last visited Mar. 26, 2019) (seventy-six percent “support” granting Dreamers legal status and work permits).

¹⁷⁷ See Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁷⁸ See generally Jawad Fairooz, *Opening Comments*, in SEMINAR, ARBITRARY DEPRIVATION OF CITIZENSHIP, SEMINAR 7, 7 (Oct. 31 2016).

¹⁷⁹ See Convention on the Rights of the Child, *supra* note 176, art. 3.

can be abridged by the state, provided the state does not act arbitrarily.¹⁸⁰ That being said, the Human Rights Committee has held that instances in which an individual may be deprived of the right to return to one's own country are few.¹⁸¹

Arbitrariness has both procedural¹⁸² and substantive¹⁸³ aspects under international law, so acts of deportation must generally conform to the rule of law.¹⁸⁴ Procedurally, the act at issue must have been prescribed by law¹⁸⁵ and comport with basic notions of predictability.¹⁸⁶ This aspect generally prevents states from acting contrary to their own laws. Procedural arbitrariness could also include mass expulsions where there was no individualized assessment of qualification.¹⁸⁷ Another possibility is where it violates human rights, provided there is a fair and individualized assessment of each person's circumstances to evaluate, for example, claims of right to remain or non-refoulement.¹⁸⁸

Substantively, the act must be reasonable.¹⁸⁹ Under this requirement, measures by states must not be discriminatory on prohibited grounds¹⁹⁰ or wildly out of proportion to the problem they seek to address.¹⁹¹ This Article does not address whether removal of Dreamers is discriminatory, although the reader is invited to make his or her own conclusions on that point. In determining whether a measure is disproportionate, the act must serve some

¹⁸⁰ See ICCPR, *supra* note 133, art. 26.

¹⁸¹ See Gen. Comm. No. 27, *supra* note 130, ¶ 21.

¹⁸² See U.N. Secretary-General, *Arbitrary deprivation of nationality*, ¶ 61, U.N. Doc. A/HRC/10/34 (Jan. 26, 2009) [hereinafter *Arbitrary Deprivation*]; see generally Bronstein v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 95 (Feb. 6, 2011).

¹⁸³ See *Arbitrary Deprivation*, *supra* note 181.

¹⁸⁴ See Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 15, ¶ 128 (July 20, 1989).

¹⁸⁵ See Gen. Comm. No. 15, *supra* note 154, ¶¶ 8, 10; see Eritrea v. Ethiopia, 26 R.I.A.A. 195, 198, Partial Award, (Perm. Ct. Arb. 2004).

¹⁸⁶ See Hugo van Alphen v. The Netherlands, Communication No. 305/1988, ¶ 5(8), U.N. Doc. CCPR/C/39/D/305/1988 (1990).

¹⁸⁷ See Gen. Comm. No. 15, *supra* note 154, ¶ 10.

¹⁸⁸ See Becker v. Denmark, App. No. 7011/75, Eur. Comm'n H.R. Dec. & Rep. 215 (1975) (defining a prohibited collective expulsion of aliens as "any measure of the competent authority compelling aliens as a group to leave the country except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group").

¹⁸⁹ See Gen. Comm. No. 27, *supra* note 130; see U.N. Human Rights Committee (HRC), *CCPR Views under article 5* at 21–22, CCPR/C/58/D/538/1993 (Dec. 16, 1996) [hereinafter *CCPR Views Art. 5*].

¹⁹⁰ See CERD, *supra* 150, art. 5(d)(iii); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art. 9(1), Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁹¹ See *Arbitrary Deprivation*, *supra* note 181, ¶ 49; Gen. Comm. No. 27, *supra* note 130; *CCPR Views Art. 5*, *supra* note 188.

legitimate purpose¹⁹² and be the least intrusive way to achieve the legitimate result.¹⁹³

The deportation of Dreamers could be both procedurally and substantively arbitrary. From a procedural perspective, the withdrawal of the policy, on which DACA recipients have relied, is hardly predictable. The granting of DACA status and then rescission could violate the recipients' legitimate expectations on regularized status. Thus, pushing them back into irregular status, now with records of their presence, could be viewed as procedurally arbitrary. The U.S. District Court for the District of Columbia agreed that the termination of DACA was arbitrary.¹⁹⁴ From a substantive perspective, there needs to be strong justification for the removal and a proportionate response. It is unclear what has changed to make the previous decision that these persons were of low priority now more compelling, especially considering the remarks of the DHS Secretary confirming that DACA recipients were not a high priority.¹⁹⁵ One condition of participation in the DACA program is that persons cannot have a significant criminal records,¹⁹⁶ so it would be difficult to justify removal as a safety issue. However, if the removals were only of persons who came to the attention of law enforcement, there might be an argument that those individuals could be removed. Given the views of the Human Rights Committee that few derogations would be justifiable, it is difficult to see how there is a compelling government interest in removal of these persons specifically.¹⁹⁷

¹⁹² See *Eritrea v. Ethiopia*, 26 R.I.A.A. 195, 220, Partial Award, (Perm. Ct. Arb. 2004); *Stewart v. Canada*, *supra* note 151; U.N. Secretary-General, *Human rights and arbitrary deprivation of nationality*, ¶ 4, U.N. Doc. A/HRC/25/28 (Dec. 19, 2013) [hereinafter *Arbitrary Deprivation II*]; European Commission for Democracy Through Law, *Opinion on the Draft Constitutional Law on "Protection of the Nation" of France*, ¶¶ 25, 47, Doc. CDL-AD(2016)006 (Mar. 14, 2016).

¹⁹³ See *Arbitrary Deprivation II*, *supra* note 191.

¹⁹⁴ See *Trump*, 298 F. Supp. 3d at 215–16 (“The Court further concludes that, under the APA, DACA’s rescission was arbitrary and capricious because the Department failed adequately to explain its conclusion that the program was unlawful. Neither the meager legal reasoning nor the assessment of litigation risk provided by DHS to support its rescission decision is sufficient to sustain termination of the DACA program.”).

¹⁹⁵ See Carlos Ballesteros, *What Happens If DACA Ends? Deporting Dreamers Won't Be a Priority, Homeland*

Secretary Says, NEWSWEEK, (Jan. 16, 2018, 11:42 AM), <http://www.newsweek.com/what-happens-if-daca-ends-dreamers-deported-homeland-782290> (“Homeland Security Secretary Kirstjen Nielsen insisted Tuesday that federal agencies will not prioritize deporting immigrants brought illegally into the United States as children . . . these immigrants will remain a low priority ‘in perpetuity,’ but noted that if any of them commit a crime, ‘we will enforce the law.’”).

¹⁹⁶ See *Consideration of DACA*, *supra* note 11.

¹⁹⁷ See Gen. Comm. No. 27, *supra* note 130, ¶ 21 (“[T]here are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.”).

d. *Mens rea*

Having established that the deportation of Dreamers could satisfy the *actus reus* of deportation, we finally turn to the *mens rea*. The *mens rea* requirement is that the person act with the intent to remove the individuals across a border with the knowledge that the removal forms part of a widespread or systematic attack.¹⁹⁸ As for the first part, the intent to remove, what remains contested is whether this intent must include the intent to *permanently* remove the individuals from the state.¹⁹⁹ The dominant view from the ICTY is that the intent need not be for permanent removal, only removal in that instant,²⁰⁰ across a border.²⁰¹ In keeping with the contextual element, the second part of the *mens rea* is that the perpetrator must also have the knowledge that the expulsion would form part of the widespread or systematic attack.²⁰² In the case of the Dreamers, both parts of this element will not be difficult to establish. Clearly, the effort is intended to remove the individuals from the United States. As long as the perpetrator also held the intent to participate in a larger, coordinated policy of removing these persons, then they would also intent to take part in a widespread and systematic practice. Provided that the individual that contributes to this offense holds the requisite *mens rea*, then that person could be charged with that crime.

¹⁹⁸ See Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 601 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); *Brđanin*, *supra* note 91, ¶ 545; *Simić et al.*, *supra* note 91, ¶ 134; *Naletilić & Martinović*, *supra* note 91, ¶ 520; *Krnjelac*, Separate Opinion of Judge Schomburg, *supra* note 91, ¶ 16.

¹⁹⁹ See *Popović*, *supra* note 94, ¶ 905; *Brđanin*, *supra* note 91, ¶ 206; *Stakić*, *supra* note 111, ¶¶ 278, 304–05, 307, 317; *Blagojević & Jokić*, *supra* note 197, ¶ 601; *Brđanin*, Case No. IT-99-36-T, at ¶ 545; *Simić et al.*, *supra* note 91, ¶¶ 132–34; *Naletilić & Martinović*, *supra* note 91, ¶ 520; *Krnjelac*, Separate Opinion of Judge Schomburg, *supra* note 91, ¶ 16; JEAN S. PICTET, INT'L COMM. OF THE RED CROSS, COMMENTARY VI, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 277–83 (1958).

²⁰⁰ See Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment, ¶¶ 57–58 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013); *Popović*, Case No. IT-05-88-T, at ¶ 904; Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, ¶ 304 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, ¶ 164 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); *Brđanin*, Case No. IT-99-36-A, at ¶ 206; *Stakić*, Case No. IT-97-24-A, at ¶¶ 307, 317; *Stakić*, Case No. IT-97-24-T, at ¶ 687.

²⁰¹ See *Prlić*, Case No. IT-04-74-T, at ¶ 58; *Milutinović*, Case No. IT-05-87-T, at ¶ 164; *Popović*, Case No. IT-05-88-T, at ¶ 904; *Stakić*, Case No. IT-97-24-A, at ¶¶ 278, 300, 307, 317.

²⁰² See Prosecutor v. Martić, Case No. IT-95-11-A, Judgment, ¶¶ 313–14 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008); Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

Lastly, there has to be a nexus both of action and knowledge between the widespread or systematic attack²⁰³ and the wrongful act of the accused.²⁰⁴ The nexus can be established by considering the nature of the charged offense, its aims, and the consequences.²⁰⁵ Acts that are clearly different or isolated cannot form part of the widespread or systematic attack.²⁰⁶ In addition, the Court must find that the accused participated in the widespread or systematic attack knowingly.²⁰⁷ This requirement does not mean that the individual knew all the details of the policy, or even that he or she shared the intent of the state or organization. It only means that the accused had knowledge that his or her acts would form part of the widespread or systemic attack.²⁰⁸

This final question will depend on the precise behavior of any accused who participates in the removal of Dreamers. Surely an immigration enforcement agent's actions would qualify where the officer was discharging his or her mandate to detain, with knowledge that these actions formed part of the overall policy and plan to remove Dreamers. Officers and agents at higher levels within the hierarchy might also share responsibility where they substantially contribute to the deportations and, again, know that they do so as part of the national policy.

e. Justifications for Deportation

Notwithstanding the above, there are some cases where the forced expulsion of persons is permitted, and the action is not a crime.²⁰⁹ People may be evacuated from situations of massive humanitarian crisis or armed

²⁰³ See *Elements of Crimes*, *supra* note 39, art. 7(1)(d)(4); Sean D. Murphy (Special Rapporteur), *First report on crimes against humanity*, ¶¶ 151–52, UN Doc. A/CN.4/680 (Feb. 17, 2015) [hereinafter *First Report on Crimes Against Humanity*].

²⁰⁴ See *Elements of Crimes*, *supra* note 39, art. 7(1)(d)(5) (“The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population”); Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment, ¶ 1099 (Mar. 7, 2014).

²⁰⁵ See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment & Sentence, ¶ 866 (Int’l Crim. Trib. for Rwanda Dec. 1, 2003); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment & Sentence, ¶ 326 (Int’l Crim. Trib. for Rwanda May 15, 2003); *Kunarać*, Case No. IT-96-23 & IT-96-23/1-A, at ¶ 99; Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 271–72 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

²⁰⁶ See *Katanga*, *supra* note 64, ¶ 1124.

²⁰⁷ See *id.*, ¶ 1125; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 99 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Prosecutor v. Blaškić, *supra* note 59, ¶ 124; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment & Sentence, ¶ 332 (Int’l Crim. Trib. for Rwanda May 15, 2003); *Kunarać*, *supra* note 57, ¶ 103; *First Report on Crimes Against Humanity*, *supra* note 203, ¶ 157.

²⁰⁸ See Prosecutor v. Martić, Case No. IT-95-11-A, Judgment, ¶¶ 313–14 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008); *Kunarać*, *supra* note 57, ¶ 85.

²⁰⁹ See *First Report on Crimes Against Humanity*, *supra* note 203, ¶ 157.

conflict²¹⁰ for their security due to imperative military reasons,²¹¹ or even epidemics or natural disasters,²¹² provided that the evacuated persons are returned home as soon as possible.²¹³ Of course, if the crisis is the fault of the state that wishes to expel the persons, then the exception is not applicable.²¹⁴ In addition, just having assistance from or participation of ICRC or other humanitarian agencies or peacekeepers, whether under the terms of a formal return or exchange agreement, does not make an unlawful removal become lawful.²¹⁵ After all, “[m]ilitary commanders or political leaders cannot consent on behalf of the individual.”²¹⁶ Thus this exception does not go to the consensual aspect of the forcible removal, but goes to the military necessity of the removal. In the case of the Dreamers, none of these exceptions appear to apply. Even if Mexico, or any other state in which they might have nationality, were to accept them and cooperate with the expulsion, the removal would not be made lawful by that act.

CONCLUSION

This Article questioned whether the expulsion of the Dreamers, beneficiaries of the DACA policy, would constitute the crime against

²¹⁰ See Geneva Convention Relative to the Treatment of Prisoners of War art. 19, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Fourth Geneva Convention, *supra* note 37, art. 49; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 17, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

²¹¹ See Third Geneva Convention, *supra* note 210, art. 19; Fourth Geneva Convention, *supra* note 37, art. 49; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 57(1–2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Additional Protocol II, *supra* note 210, art. 17; *Prlić*, *supra* note 91, ¶ 52; *Popović et al.*, *supra* note 94, ¶ 901; *Stakić*, *supra* note 111, ¶¶ 284, 287; *Blagojević & Jokić*, *supra* note 197, ¶ 598; *Krstić*, *supra* note 91, ¶¶ 524, 526; see, e.g., *United States v. List* (“Hostages Trial”) 8 LRTWC 69 (U.S. Mil. Trib., 1948); GC IV COMMENTARY, *supra* note 94, at 280; AP COMMENTARY, *supra* note 136, at 1473.

²¹² See *Popović et al.*, *supra* note 94, ¶ 903; *Krajišnik*, *supra* note 64, ¶ 308, fn.739; *Stakić*, *supra* note 111, ¶ 287; *Blagojević & Jokić*, *supra* note 197, ¶ 600; AP COMMENTARY, *supra* note 136, at 1473.

²¹³ See Fourth Geneva Convention, *supra* note 37, art. 49(2); *Stakić*, *supra* note 111, ¶ 284; *Popović et al.*, *supra* note 94, ¶ 901; GC IV COMMENTARY, *supra* note 94, at 280.

²¹⁴ *Prlić*, *supra* note 91, ¶ 53 (where the exception is not applicable); *Popović et al.*, *supra* note 94, ¶ 903; *Krajišnik*, *supra* note 60, ¶ 308, fn.739; *Stakić*, *supra* note 111, ¶ 287; Vincent Chetail, *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 29 LEIDEN J. INT’L L. 917, 925; see Fourth Geneva Convention, *supra* note 37, art. 49; Additional Protocol II, *supra* note 210, art. 17.

²¹⁵ See *Prlić*, *supra* note 91, ¶ 54; *Popović et al.*, *supra* note 94, ¶; *Stakić*, *supra* note 111, ¶ 286; *Prosecutor v. Simić et al.*, *supra* note 91, ¶ 127; *Naletilić & Martinović*, *supra* note 91, ¶ 523 (explaining that agreements between military commanders does not make the transfer lawful).

²¹⁶ See *Popović et al.*, *supra* note 94, ¶ 897; *Simić et al.*, *supra* note 91, ¶ 127; *Stakić*, *supra* note 60, ¶ 683.

humanity of deportation.²¹⁷ Any individual who effects a widespread and systemic removal of people from their lawful homes commits that crime under international law. This Article has argued that the qualifying victims of the crime against humanity of deportation can include aliens, even aliens unlawfully present under domestic law, provided that they have special ties to the state. The requirement of lawful residence for purposes of the crime of deportation determines residence under international law, not domestic law. While states generally have the right to expel unlawfully present aliens from their territory, they cannot—under international human rights law—expel aliens who have special ties with the state, even if the state considers those persons unlawfully present under domestic law. Dreamers have lived the bulk of their lives in the United States and many do not even realize that they are not U.S. citizens. Certainly, they have special ties to the state that are far more significant than the ties of a mere alien. Therefore, these people are lawfully present for purposes of international law, and their mass expulsion from their lawful homes would amount to the crime against humanity of deportation by the individuals that carry out any expulsion.

²¹⁷ This Article does not address the more than 250,000 individuals who are losing Temporary Protected status (TPS), although a similar argument might be made. It is somewhat more challenging to sustain the argument that they have special ties to the degree that Dreamers do, though more than 50,000 of them have been residents in the United States since 1999. See Nick Miroff, *Trump Administration Ends Protections for 50,000 Hondurans Living in U.S. Since 1999*, WASH. POST (May 4, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-will-end-protections-for-50000-hondurans-living-in-us-since-1999/2018/05/04/c05c7676-4fc1-11e8-b966-bfb0da2dad62_story.html?utm_term=.a12d6c57e4cf.