

# A New ‘Baxter Paradox’? Does the Work of the ILC on Matters Already Governed by Multilateral Treaties Necessarily Constitute a Dead End? Some Observations on the ILC Draft Articles on the Expulsion of Aliens

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In December 2014, the General Assembly of the United Nations (“UNGA”) was unable to endorse, or even take note of, the draft articles adopted in August 2014 by the ILC on the expulsion of aliens<sup>1</sup> (the “Draft Articles”)—a topic on which the Commission had been working for more than ten years. Departing from a general, well-established practice, the UNGA only took “note of the recommendation of the International Law Commission contained in paragraph 42 of its report on the work of its sixty-sixth session, and decides that the consideration of this recommendation shall be continued at the seventy-second session of the General Assembly” in 2017.<sup>2</sup>

Opposition to the Draft Articles seemed to derive partly from policy considerations, with a number of States reluctant to make any development of international law in the very sensitive field of migrations.<sup>3</sup> However, legal factors also played an important role. One of the reasons the majority of UN Member States were reluctant to take any action on the Draft Articles is the ambivalent relationship between codification and progressive development of international law and existing multilateral treaties—mainly human rights treaties. During the 2014 debate of the UN Sixth Committee on the Draft Articles, many States expressed concerns about the difficulty in reconciling the Draft Articles with existing multilateral treaties at both a universal and regional level.

This serious concern is not specific to the Draft Articles. The great expansion of treaty law since 1945 has resulted in a fruitful yet conflicting interplay between customary international law and treaty law.<sup>4</sup> On the one hand, treaty law and customary law support each other. As the Drafting Committee of the ILC recently acknowledged, notably relying on the case law of the ICJ, conduct in connection with treaties may be relied on as a form of State practice, or at least as possible evidence to establish the existence or content of customary international law.<sup>5</sup> In addition, treaties may be relied on evidence for not only establishing customary international law (codification) but also progressively developing it. As the Secretariat of the ILC observed in a

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<sup>1</sup> Int’l Law Comm’n, Draft Articles on the Expulsion of Aliens, with Commentaries (2014)

[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [<https://perma.cc/CZ4U-9XLA>]

<sup>2</sup> See G.A. Res. 69/119 § 3 (Dec. 10, 2014). The ILC Draft Articles and their commentaries are included in the 2014 Report of the ILC to the UNGA. See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, para. 45 (2014).

<sup>3</sup> See e.g., U.N. GAOR, 69th Sess. U.N. Doc. A/C.6/69/SR.19, (Nov. 17, 2014) (United Kingdom); see also Sean D. Murphy, *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission*, 109 AJIL 125, 130 (2015) (pointing out “a central difficulty with the project, namely, that it attempts to codify a series of rules in an area where states already have long-standing, detailed, divergent, and ever-changing national laws and regulations that touch upon sensitive national security concerns.”).

<sup>4</sup> On this interplay, see Michael Wood (Special Rapporteur on the Identification of Customary International Law), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 (Mar. 27, 2015).

<sup>5</sup> See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/CN.4/L.869 at 3–4 (2015) <http://legal.un.org/docs/?symbol=A/CN.4/L.869> [<https://perma.cc/4BHA-NQS2>].

study published in 2013, “the Commission has, on several occasions, recognized that treaties may contribute to the crystallization or development of a rule of customary international law.” Indeed, the Secretariat provided examples of draft articles of the Commission based on multilateral conventions.<sup>6</sup> On the other hand, according to the famous “Baxter Paradox,” the development of multilateral treaty law can also hinder, rather than stimulate, the development of customary international law. As Baxter put it, “as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.”<sup>7</sup> As such, State practice driven by the treaty should not count as State practice motivated by customary international law.

Whatever the merits of the paradox, which can be more apparent than real,<sup>8</sup> it may also affect (under a different form) the work of the ILC on matters already regulated by multilateral treaties. To paraphrase Baxter’s equation, as the number of parties to a multilateral treaty increases, it could in fact become more difficult to codify and progressively develop international law; the inscription of international rules on the marble of multilateral treaties could hinder any further development of international law.<sup>9</sup> From that perspective, one can ask whether it is wise or even appropriate for the Commission to propose draft articles on topics which are already governed by a large number of multilateral treaties. The added value of the codification exercise could be, at best, limited (since most States are already bound by treaty obligations) and, at worst, harmful to existing treaties. It is also possible that the ILC’s authority could be undermined if its draft articles were seen by States as illegitimately expanding their existing obligations.

In light of these general remarks, it is no wonder that during the 2014 debate within the Sixth Committee on the Draft Articles, some countries challenged the necessity of a new instrument. They observed that they had, “[f]rom the outset of the Commission’s consideration of the topic . . . questioned the added value of draft articles in a field where detailed global and regional legal regimes already regulated the rights and obligations of States”<sup>10</sup> and that “the draft articles were an attempt to codify a set of rules in an area in which States already had long-standing, well-developed regulations.”<sup>11</sup> In addition, a number of States pointed out the risk of creating divergences or even conflicts between the proposed rules and existing treaty obligations:

- The view was expressed in particular that some of the Draft Articles went “beyond” or “far beyond” the rules reflected in established multilateral conventions;<sup>12</sup>
- The Draft Articles extend procedural guarantees to both lawful and unlawful aliens present in the expelling State, while existing treaties only address the rights of those lawfully present in the territory;<sup>13</sup>

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<sup>6</sup> Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc A/CN.4/659, *Formation and evidence of customary international law. Elements in the previous work of the ILC that could be particularly relevant to the topic*, at 33 – 34 (2013) (referencing the 1967 Draft Articles on special missions) <http://legal.un.org/docs/?symbol=A/CN.4/659> [<https://perma.cc/W73E-PE5Z>].

<sup>7</sup> R.R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 64 (1970).

<sup>8</sup> See JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW. GENERAL COURSE ON PUBLIC INTERNATIONAL LAW (2013) , at 90 *ff*.

<sup>9</sup> To the contrary, the absence of any relevant multilateral convention makes the work of the ILC particularly beneficial and useful. For example, the 1994 Draft Statute of the International Criminal Court became the Rome Statute of the ICC and its 1991-1999 Draft Articles on State immunity gave rise to the 2004 U.N. Convention.

<sup>10</sup> U.N. GAOR, 69th Sess. At 21, U.N. Doc. A/C.6/69/SR.19 at 11,(Nov. 17, 2014) (Nordic Countries).

<sup>11</sup> U.N. GAOR, 69th Sess. At 21, U.N. Doc. A/C.6/69/SR.20, at 7 (Nov. 10 2014) (Poland).

<sup>12</sup> *Id.* at 18 – 19. (United States of America).

<sup>13</sup> U.N. GAOR, 69th Sess. At 21, U.N. Doc. A/C.6/69/SR.19 at 13,(Nov. 17, 2014) (Russian Federation).

- The Draft Articles “contained standards drawn from a wide array of international and regional instruments that did not enjoy universal adherence;”<sup>14</sup>
- They “were not merely a codification of State practice but went beyond the currently applicable rules of international law on expulsion of aliens;”<sup>15</sup>
- “They lacked the support of general State practice and exceeded State obligations under treaty law; thus, they were likely to hamper relevant international cooperation and to result in impunity of criminals;”<sup>16</sup>
- They “might create confusion regarding the obligations of States under international law, particularly where the two regimes differed;”<sup>17</sup>
- While, according to other States, “the issue of the expulsion of aliens was best addressed through regional instruments tailored to the needs of the countries involved and the case law of international judicial and quasi-judicial bodies, rather than through the adoption of uniform rules at the universal level.”<sup>18</sup>

The debate in the Sixth Committee thus suggests that, according to UN member States, to be an admissible outcome, the Draft Articles should have, at least (putting aside the question whether on substance the Commission succeeded in striking the best possible balance between the rights of individuals and the rights of States), (i) prevented any conflict with existing treaties; and (ii) been of some added value compared to existing treaties. These two concerns need to be analyzed in turn to assess whether the ILC Draft Articles on the expulsion of aliens (the first real set of draft articles adopted so far by the Commission in the field of human rights) can be seen, retrospectively, as a useful and worthwhile exercise.

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<sup>14</sup> *Id.* at 17 (Canada).

<sup>15</sup> U.N. GAOR, 69th Sess. At 21, U.N. Doc. A/C.6/69/SR.20, at 3 (Nov. 10 2014) (Netherlands).

<sup>16</sup> *Id.* at 5 (China).

<sup>17</sup> *Id.* at 7 (Poland).

<sup>18</sup> U.N. GAOR, 69th Sess. At 21, U.N. Doc. A/C.6/69/SR.20, at 4 (Nov. 18 2014) (Greece).

## I. PREVENTING ANY POSSIBLE CONFLICT WITH EXISTING TREATIES

Given the purpose of the Draft Articles, they necessarily overlap with existing human rights treaties. The ILC itself acknowledged the cumulative application of its Draft Articles and existing human rights treaties by inserting a second sentence into Draft Article 3, according to which, “Expulsion shall be in accordance with the present draft articles, without prejudice to *other* applicable rules of international law, *in particular* those relating to human rights.” The ILC stressed in the commentary of Draft Article 3 that “the specific mention of human rights is justified by the importance that respect for human rights assumes in the context of expulsion, an importance also underlined by the many provisions of the draft articles devoted to various aspects of the protection of the human rights of aliens subject to expulsion.”<sup>19</sup> As such, it was necessary to include a “without prejudice” clause, to reconcile the Draft Articles and existing treaties.

However, this “without prejudice” provision does not protect existing treaties. Its main purpose is to permit the *cumulative* application of the Draft Articles and existing treaties suggesting expulsion should comply with *both* sets of rules. This interpretation is confirmed by Draft Article 13, paragraph 2, which states that all aliens subject to expulsion “are entitled to respect for their human rights, including those set out in the present draft articles.”

To some extent, to put the Draft Articles and existing treaties on the same plane is an odd assertion since, according to the ILC, the Draft Articles “are both a work of codification of international law and an exercise in its progressive development. Some of the rules contained therein are established by certain treaty regimes or firmly established in customary international law, although some of them constitute progressive development of international law.”<sup>20</sup> In addition, the main challenge was not really to permit the cumulative application of both sets of rules but rather to guarantee that there would be no discrepancies or conflicts between them, if they both were to apply. Hence, the ILC felt compelled to complement Article 3 with other legal devices aimed at preventing or resolving any possible conflict between applicable rules by combining them as smoothly as possible.

The first device repeatedly used by the Commission consisted in paying lip service to the wording of existing treaties, so as to ensure that the language used in the Draft Articles did not depart (so far as possible) from the agreed language incorporated in existing treaties.<sup>21</sup> This drafting technique has long been identified. Treaties have a valuable role in the determination of customary international law. As written texts, they constitute reliable materials for the purpose of “articulating” the applicable rules. Due to their “relatively precise formulations,” treaties supply “a reservoir for the language of a possible rule.”<sup>22</sup> The Drafting Committee always looks closely at existing relevant multilateral treaties to ensure that they will not be too creative in their drafting and to maintain consistency between the ILC products and treaties (to the extent that it does not prevent any progressive development of international law that the ILC may be willing to recommend).<sup>23</sup> So far as expulsion of aliens is concerned, this technique was used in a number of

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<sup>19</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries at 6 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>20</sup> *Id.*

<sup>21</sup> On the use of this technique by the ILC, see Mathias Forteau, *Comparative International Law Within, Not Against International Law: Lessons from the International Law Commission*, 109 A.J.I.L. 498, 509–10 (2015)

<sup>22</sup> See Michael Wood (Special Rapporteur on the Identification of Customary International Law), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 at 17–18 (Mar. 27, 2015).

<sup>23</sup> On this last issue, see *infra*, Section II.

draft articles. For example, the requirement that expulsion must be in pursuance of a decision reached “in accordance with ‘the law’” was borrowed from a common provision of human rights treaties as interpreted by the ICJ in 2010 in the *Diallo* case.<sup>24</sup> Similarly, Draft Article 9 prohibits “collective expulsion,” a term which is drawn from a number of multilateral treaties cited by the ILC.<sup>25</sup> In addition, the Chairman of the Drafting Committee explained that, while the text adopted on first reading referred expressly to the prohibition of the collective expulsion of migrant workers and members of their families, it “has deemed preferable not to mention this category of aliens and to delete the express reference to it from the text of paragraph 2”, to be “more in line with the text of the various regional instruments on the matter”.<sup>26</sup> Furthermore, Draft Article 15, paragraph 2, according to which “in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration”, “reproduces”, as the ILC pointed out, “the wording of article 3, paragraph 1, of the Convention on the Rights of the Child.”<sup>27</sup> So far as Draft Article 18 is concerned, it states that the expelling State shall not interfere arbitrarily or unlawfully with the exercise of the right to family life of an alien subject to expulsion. Initially, this sentence was not included.<sup>28</sup> It was added during the second reading to be more faithful to the wording of Article 19 of the ICCPR, which focuses on the prohibition of *interferences* with privacy, family, home and correspondence.<sup>29</sup> In a similar fashion, the reference in Draft Article 19, paragraph 1 (b) to “exceptional circumstances” that could justify non-compliance with the right of an alien detained for the purpose of expulsion to be separated from persons sentenced to penalties involving deprivation of liberty has been, according to the Commission, “drawn from article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights”.<sup>30</sup>

On a more substantive, systematic level, the ILC was also aware of the necessity not to alter existing conventions applicable to special categories of individuals. Hence, the insertion of specific provisions aimed at protecting these regimes both in the initial draft and in the course of the second reading of the Draft Articles. In the final version of the Draft Articles, Draft Article 1, paragraph 2, states that “The present draft articles do not apply to aliens enjoying privileges and immunities under international law” while Draft Articles 6 and 7 are without prejudice to the rules of international law applicable to refugees and to stateless persons.

One particularly important improvement to the Draft Articles between the first and the second readings resulted from the modification of the general framing of Draft Articles 6 and 7. These articles were initially framed as substantive provisions, not without prejudice provisions. The 2012 version of the Draft Articles, as adopted on first reading, read as follows:

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<sup>24</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 7 – 8 (2014). [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>25</sup> See *id.* at 14–15.

<sup>26</sup> Chairman of the Drafting Committee, *Statement of the Chairman of the Drafting Committee*, at 9 – 10 (June 6, 2014), [http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc\\_chairman\\_statement\\_expulsion\\_of\\_aliens.pdf](http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_expulsion_of_aliens.pdf&lang=E) &lang=E [https://perma.cc/2ECV-4V2M]

<sup>27</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 22 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>28</sup> See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/67/10, at 45 (2012).

<sup>29</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 23 – 24 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>30</sup> See *id.* at 26. See also, *id.* at 43 – 44.

*“Article 6. Prohibition of the expulsion of refugees*

1. A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.

2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State who has applied for recognition of refugee status, while such application is pending.

3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Article 7. Prohibition of the expulsion of stateless persons*

A State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

*Article 8. Other rules specific to the expulsion of refugees and stateless persons*

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.”

During the second reading of these articles, the fear was expressed that they may depart from the well-established rules embodied in the 1951 Geneva Convention on Refugees, or at least that they did not reflect them accurately or in their entirety. Indeed, the 1951 Convention does not limit the principle of *non-refoulement* but provides for some derogations or exceptions which were not inserted in the Draft Articles proposed by the Commission in 2012. As the Chairman of the Drafting Committee explained,

“It has been suggested by some governments, as well as in the plenary debate, that all references to refugees should be deleted, since the international law regime relating to the refugees was extremely complex, and that the draft articles might not always be consistent with that regime. (...) in order to address the possible discrepancies between the draft articles and the international law and practice and refugees on one hand, and to emphasize the special protection against expulsion they enjoy under international law, on the other hand, it was decided to adopt a new draft article 6 composed of two parts”.<sup>31</sup>

Draft Article 6 is now crafted as a without prejudice provision which, simultaneously enunciates (and then embodies) some core principles. This wording permitted the Commission to recall the importance of the *non-refoulement* principle while at the same time not prejudicing the legal regime applicable to the principle as it derives from the relevant rules on refugees. According to Draft Article 6,

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<sup>31</sup> Chairman of the Drafting Committee, *Statement of the Chairman of the Drafting Committee*, at 7 (June 6, 2014), [http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc\\_chairman\\_statement\\_expulsion\\_of\\_alien.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_expulsion_of_alien.pdf&lang=E) [<https://perma.cc/2ECV-4V2M>]

“The present draft articles are without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection, and in particular to the following rules:

- (a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;
- (b) a State shall not expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Such a provision (the framing of which is based on quite subtle articulation: “without prejudice to the rules...in particular to the following rules...”) is quite ingenious in terms of codification and progressive development policy. It provides a way to officially recall some fundamental principles while at the same time not adopting these principles as draft articles on their own. The same method was transposed to Draft Article 7, which now reads as follows: “The present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order”. To some extent, these two provisions are redundant with existing rules of international law but their merit is precisely to reaffirm the importance of the rules expressly included in the without prejudice provision.

The reasons why the ILC adopted without prejudice provisions (Draft Articles 1(2), 6 and 7) are quite equivocal however. The ILC explained in the commentary of Article 1 that:

“Paragraph 2 of draft article 1 excludes from the scope of the draft articles certain categories of aliens, namely, aliens enjoying privileges and immunities under international law. The purpose of the provision is to exclude aliens whose enforced departure from the territory of a State is governed by special rules of international law, such as persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State including, as appropriate, members of their families. In other words, such aliens are excluded from the scope of the draft articles because of the existence of special rules of international law governing the conditions under which they can be compelled to leave the territory of the State in which they are posted for the exercise of their functions.

On the other hand, some other categories of aliens who enjoy special protection under international law, such as refugees, stateless persons and migrant workers and their family members, are not excluded from the scope of the draft articles. It is understood, however, that the application of the provisions of the draft articles to those categories of aliens is without prejudice to the application of the special rules that may govern one aspect or another of their expulsion from the territory of a State. Displaced persons, in the sense of relevant resolutions

of the United Nations General Assembly, are also not excluded from the scope of the draft articles.”<sup>32</sup>

If the idea was to exclude from the scope of the Draft Articles any special rules, then it would have been sufficient to insert at the beginning or at the end of the Draft Articles a general without prejudice provision on *lex specialis*. Such a provision should have covered not only specific categories of persons, but also any special *rule* on expulsion of aliens (in particular, rules deriving from existing multilateral treaties, such as the ICCPR). However, if the *lex specialis* principle were to be applicable to the Draft Articles in their entirety, there was a risk that the articles would eventually be seen as a “hard law” instrument (either as a draft convention or as a pure exercise of codification of existing customary international rules) applicable alongside existing treaties and with the same legal value – hence the need for a *lex specialis* provision. The drafting of a “hard law” instrument was not – at least in the second reading – the sole purpose of the Draft Articles.<sup>33</sup> As the ILC clearly put it, practice “does point to trends permitting some prudent development of the rules of international law in this domain”<sup>34</sup> and many provisions of the Draft Articles are clearly not (yet) of a customary nature.<sup>35</sup>

The ambiguous nature of the Draft Articles, which makes their relationship with treaty law more complicated, is shown in particular by the absence of any derogatory provision, a common feature of human rights treaties. If the Draft Articles were an autonomous body of rules applicable together with treaties or even customary rules, they would have been expected to contain a provision on derogations. They do not. The ILC only stressed in the commentary of Draft Article 3 (according to which “Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights”) that:

“It should be emphasized in this connection that most of the obligations of States under these instruments are not absolute in nature, and that derogations are possible in certain emergency situations, for example, where there is a public emergency threatening the life of the nation. Draft article 3 thus preserves the possibility for a State to adopt measures that derogate from

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<sup>32</sup> See Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 3–4 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>33</sup> See Sean D. Murphy, *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the ILC*, 109 A.J.I.L. 125, 128 (2015), (“With respect to the packaging of this project, from the beginning it was developed as “draft articles,” with the general expectation that it could ultimately be the basis for a treaty. Yet during the debate in the Sixth Committee in the fall of 2012, twenty-two out of forty-two states that commented on the project addressed the issue of its final form, and, of those, sixteen states asserted that the project should not be completed as draft articles”); see also *id.* at 130 (“Overall, the tenor of such comments seems to be that repackaging the project as “guidelines” or “best practices” would be less suggestive of legal obligations than “articles”; and that the style of the former (perhaps containing “shoulds” rather than “shall”), and even the label itself, were important for maintaining the breadth of a state’s legally available options”)

<sup>34</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 2 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>35</sup> See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 11 (2014). (recommending to the UNGA to “take note of the draft articles on the expulsion of aliens in a resolution, to annex the articles to the resolution, and to encourage their widest possible dissemination” and to “consider, at a later stage, the elaboration of a convention on the basis of the draft articles”)



certain requirements of the present draft articles insofar as it is consistent with its other obligations under international law.”<sup>36</sup>

While it is true the Draft Articles preserve the application of *treaty* derogations, they do not include a provision regulating possible derogations *to the Draft Articles* as such – which, in fact, is quite logical since the Draft Articles are not binding in and of themselves. To that extent, the Draft Articles may be seen as extending existing treaty law by not expressly providing for derogations. More generally, the same is true of many other draft articles which, to a varying degree, expand the scope of the protection offered by existing treaties as a matter of progressive development of international law. In such a case, there is an inescapable divergence with existing treaty law. The intent of the Commission to progressively develop international law in that field necessarily means that the Draft Articles should go beyond existing treaty law. The relevant question is therefore not only whether it is possible to reconcile the Draft Articles with existing treaties (and how), but also, and perhaps more importantly, whether this progressive development is appropriate and whether it could have the unfortunate effect of undermining existing treaties.

## II. DEVELOPING INTERNATIONAL LAW WITHOUT UNDERMINING EXISTING TREATIES

At first glance, it seems fair to say that the Draft Articles develop international law without affecting existing treaties. There is no doubt that the intent of the ILC was not to create new rules *against* existing treaty rules, but rather to *develop* them by, for example, filling any gaps and establishing more favorable rules. As the ILC observed, “the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature,” hence the need to draft a global and integral instrument, covering all international law aspects of expulsion of aliens.<sup>37</sup> This explains why the ILC envisaged existing treaty rules as a starting point for the progressive development of international law in this area.

To a large extent, the ILC did not rely on treaty law as an element of State practice in the field of expulsion of aliens to establish the existence of customary rules.<sup>38</sup> Indeed, in the commentaries of the Draft Articles references to State practice are limited.<sup>39</sup> The Commission typically referred to existing treaties as a source of inspiration, without assessing whether they reflected or were supported by State practice and *opinio juris*. This methodology contrasts with that applicable to the identification of customary international law according to which “Treaty texts alone cannot serve as conclusive evidence of the existence or content of rules of customary international law: whatever the role that a treaty may play vis-à-vis customary international law (...), in order for the existence in customary international law of a rule found in a written text to be established, the rule must find support in external instances of practice coupled with acceptance as law.”<sup>40</sup> In preparing the Draft Articles, the ILC used the language and substance of existing treaties as a starting point before expanding, where necessary, the scope of these rules to progressively

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<sup>36</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 6 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>37</sup> *Id.* at 2.

<sup>38</sup> As it did in the past: see the examples referred to in the 2013 Study of the Secretariat, *op. cit.*, 15-16, fn. 55.

<sup>39</sup> See e.g., Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 23, 26, 28 – 30, 39 - 40 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>40</sup> Michael Wood (Special Rapporteur on the Identification of Customary International Law), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 at 18 (Mar. 27, 2015).

develop international law. It did so either by framing the rule as applicable to any State, and not only to the Parties to the relevant treaties (extension *ratione personae*), or by adding new elements to the rule thus broadening the protections granted to individuals (extension *ratione materiae*). For the ILC to take such decisions forms part of its mandate to progressively develop international law. Admittedly, in some instances, it may be said that the ILC did not really develop international law but merely codified pre-existing rules of customary international law.<sup>41</sup> Since the 19<sup>th</sup> Century, there have been customary principles which were in some ways more open (but also perhaps less refined) than existing treaties concerning the protection of the aliens subjected to expulsion. This is reflected in particular in the commentary of Draft Article 30 which refers to a large number of arbitral awards of the nineteenth and the first part of the twentieth centuries.<sup>42</sup> On the other hand, other provisions constitute development of international law.

To take a few examples, Draft Article 4 on the obligation to expel an alien “only in pursuance of a decision reached in accordance with law” has been derived from a number of multilateral treaties (according to the ILC, “the requirement is well established in international human rights law, both universal and regional”<sup>43</sup>) but, as the ILC incidentally observes in the commentary of Draft Article 4,<sup>44</sup> most of these treaties limit the requirement to aliens lawfully present in the territory of the expelling State. The ILC therefore proposed that “The requirement for conformity with law must apply to any expulsion decision, irrespective of whether the presence of the alien in question in the territory of the expelling State is lawful or not”, even though it conceded that “It is understood, however, that domestic legislation may provide for different rules and procedures for expulsion depending on the lawful or unlawful nature of that presence.”<sup>45</sup>

Similarly, Draft Article 14 on the prohibition of discrimination is, according to the Commission, “set out, in varying formulations, in the major universal and regional human rights instruments.”<sup>46</sup> But, as the ILC put it in paragraph 3 of the commentary of this draft article, “The list of prohibited grounds for discrimination contained in draft article 14 is based on the list included in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of ‘ethnic origin’ and a reference to ‘any other ground impermissible under international law.’” This reference to “any other ground impermissible under international law” is meant, according to the Commission, to “[preserve] the possible exceptions to the obligation not to discriminate based on national origin” and in particular “the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.”<sup>47</sup> However, it is also meant, to “[make] it possible to capture any legal development concerning

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<sup>41</sup> See *id.*, at 20 (providing “treaties may codify pre-existing rules of customary international law. In these circumstances, they are in their ‘origin and inception’ declaratory of such rules”).

<sup>42</sup> See also Ahmadou Sadio Diallo (Rep. of Guinea v. Democratic Rep. of the Congo), Reply of the Republic of Guinea at 27 – 28 (Nov. 10, 2008) (considering the pre-1945 customary rules applicable to the expulsion aliens).

<sup>43</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 7 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 7 – 8.

<sup>46</sup> *Id.* at 20 – 21.

<sup>47</sup> *Id.* at 21.

prohibited grounds for discrimination that might have occurred since the adoption of the Covenant.”<sup>48</sup>

Another example is Draft Article 24 which states that “A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Once again, the starting point was a multilateral convention in force (the 1984 Convention against torture)<sup>49</sup> which the ILC decided to expand:

“draft article 24 broadens the scope of the protection afforded by this provision of the Convention, since the obligation not to expel contained in the draft article covers not only torture, but also other cruel, inhuman or degrading treatment or punishment. This broader scope of the prohibition has been introduced at the universal level [the ILC refers here to the interpretations of the Human Rights Committee] and by certain regional systems.”<sup>50</sup>

The broadening of the scope of the prohibition was adopted by the Drafting Committee and then by the Commission. As the Chairman of the Drafting Committee made clear,

“Concerns have been expressed as to the extension of the prohibition contained in article 3 of the 1984 Convention against Torture . . . which refers exclusively to torture and not to cruel, inhuman or degrading treatment. In view of the concurring views on that matter of universal bodies, such as the Human Rights Committee or the Committee on the Elimination of Racial Discrimination, as well as judicial bodies, such as the European Court of Human Rights and the Inter-American Court of Human Rights, the Drafting Committee has considered preferable not to amend this draft article, with the understanding that the restrictive approach of the 1984 Convention and its treaty organ, the Committee against Torture, will be properly reflected in the Commentary.”<sup>51</sup>

As a matter of principle, there is nothing wrong in the ILC developing international law, except that it inescapably creates a discrepancy with existing treaties. Admittedly, one could say that the Draft Articles do not impair existing treaties since the ILC only provides for more favorable rules. But the question is: more favorable to whom? To the individuals or to the States? From that perspective, any extension of the rights of the individuals necessarily implies that the rights or the powers of the States, and thus their rights under existing treaty law, are affected. In human rights law, it is not possible for the development of international law to be neutral. It necessarily affects the rights of one party, be it the State or the individual.

The ILC was conscious of this difficulty and, in some instances, therefore deliberately refrained from developing international law. For instance, Draft Article 23, as adopted on first reading, set

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<sup>48</sup> *Id.* See also *id.* at 34 – 35.

<sup>49</sup> See *id.* (stating “The wording of draft article 24 . . . is inspired by article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”)

<sup>50</sup> *Id.*

<sup>51</sup> Chairman of the Drafting Committee, *Statement of the Chairman of the Drafting Committee*, at 19 (June 6, 2014), [http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc\\_chairman\\_statement\\_expulsion\\_of\\_alien.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_expulsion_of_alien.pdf&lang=E) [https://perma.cc/2ECV-4V2M]. See also Sean D. Murphy, *The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission*, 109 AJIL 125, 130 – 31 (2015),

forth the obligation not to expel an alien to a State where his or her life or freedom would be threatened. The Chairman of the Drafting Committee observed in 2014 that

“The prohibition set out in paragraph 1 has been the source of concerns by Governments, since it was extending the scope of the Convention relating to the status of Refugees of 1951 to situations where the freedom of the alien was threatened. The Drafting Committee has considered more appropriate not to engage in such a development of international law and to delete from paragraph 1, and from the title of draft article 23, the reference to ‘freedom’.”<sup>52</sup>

As a result, Draft Article 23 extends the prohibition on expulsion to all aliens, not just refugees, but only where his or her life is threatened. Other examples of self-restraint include: the decision to redraft Draft Article 18 on the obligation to respect the right to family life, the text of which was initially “probably too close to the text of a regional instrument, namely the European Convention on Human Rights”, and for which it was “more appropriate” to use “the terms of article 17 of the ICCPR, which are also used in the other regional instruments on protection of human rights”;<sup>53</sup> the decision “not to address, in the text of draft article 24, situations where the risk of torture or cruel, inhuman or degrading treatment or punishment emanated from persons or groups of persons acting in a private capacity”;<sup>54</sup> the decision not to specify any time requirement for the consideration of a suspensive appeal of the decision to expel (the ILC explicitly stating that it “did not go so far as” the solution recommended by the Parliamentary Assembly of the Council of Europe);<sup>55</sup> and the decision to be cautious about formulating in Draft Article 29 the right of readmission in case of unlawful expulsion. As the ILC noted,

“Even from the standpoint of progressive development, the Commission was cautious about formulating any such right. Draft article 29 therefore concerns solely the case of an alien lawfully present in the territory of the State in question who has been expelled unlawfully and applies only when a competent authority has established that the expulsion was unlawful and when the expelling State cannot validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question.”<sup>56</sup>

This self-restraint is quite significant and illustrates the fact that the power of the ILC to propose some progressive development of international law in a field (human rights law) where there are a large number of multilateral treaties could be problematic. Progressive development of international law could undermine existing treaties in two different ways.

First, the methodology followed by the Commission (the reliance on existing instruments as a source of inspiration rather than as one element among others of State practice or *opinio juris*) can have collateral effects on some treaties. Indeed, in some cases, the ILC put treaties in force and *soft law* instruments on the same level, as if they were equally relevant under international law. In some instances, the ILC relied exclusively on *soft law* instruments. To take one example, the ILC expressly indicated in the commentary of Draft Article 19 that “Draft article 19,

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<sup>52</sup> *Id.* at 18 – 19.

<sup>53</sup> *Id.* at 14 – 15.

<sup>54</sup> Int'l Law Comm'n, Draft Arts. on the Expulsion of Aliens, with Commentaries, at 37 – 38 (2014) [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [https://perma.cc/CZ4U-9XLA]

<sup>55</sup> *See id.* at 46 – 47.

<sup>56</sup> *Id.* at 47.

paragraph 3, is inspired by a recommendation put forward by the Special Rapporteur on the human rights of migrants.”<sup>57</sup> In other cases, the Commission referred both to treaty law and *soft law* instruments as equal sources of inspiration. For instance, paragraph 3) of the commentary of Draft Article 13 equates a declaration adopted by the UNGA with treaty obligations:

“It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law. That said, mention should be made in particular in this context of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly on 13 December 1985.”

This same method (reliance both on treaty obligations and *soft law* instruments, without any specific qualification) is used at paragraph 2) of the commentary of Draft Article 18, paragraph 2) of the commentary of Draft Article 19 and paragraph 2) of the commentary of Draft Article 26. It is perfectly understandable that for the purpose of codifying or progressively developing international law the ILC can rely on any existing instruments, whatever their legal value, provided they correspond to what the Commission thinks is the current state of customary international law or is appropriate to recommend as a matter of progressive development of international law. However, there is a risk of “demonetization” of treaties in considering them on the same level as non-binding instruments – at least when the ILC does not establish that the rules concerned correspond to (well-established or *in statu nascendi*) state practice and *opinio juris*.

More importantly, there may be also an issue of *legitimacy*. A specific characteristic of multilateral human rights treaties is that there is typically, for each treaty, a treaty-body or a court competent to interpret and apply it. To that extent, it may be argued that it is primarily for these courts and organs to develop, by way of interpretation, the relevant rules and that any “third” court or institution (including presumably the ILC) should show some self-restraint in that field.

It does not mean that, on balance, the Draft Articles do not make a meaningful contribution to the codification and progressive development in this area. It only means that for the Commission to properly exercise its functions in a field prominently regulated by treaties, a fine balance (and the corresponding methodology) must be struck between the strengthening of general international law and the necessity not to impair the proper functioning of existing rules and, perhaps more importantly, existing institutions.

One difficulty, however, is that human rights treaty bodies are of an ambiguous nature, being both quasi-judicial bodies and bodies developing the law they have to apply. This may explain why the ILC encounters some difficulty in positioning itself in relation to these organs and why it is not comfortable with the categorization of their practice as practice (or evidence) for the purpose of establishing customary international law or as subsequent practice in relation to treaty interpretation.<sup>58</sup>

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<sup>57</sup> *Id.* at 27.

<sup>58</sup> See e.g., Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 206 – 07 (2014) (considering subsequent agreement and subsequent practice in relation to treaty interpretation); see also *id.* at 8.; Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at 15 (2015).

This may also explain the cautious attitude of the ICJ in the *Diallo* case (on which the commentaries of the Draft Articles rely on many occasions).<sup>59</sup> First, while the Applicant's claim in this case was based both on customary international law and treaty law, as the Court itself acknowledged in its Judgment on the merits,<sup>60</sup> the Court limited its findings to violations of treaty obligations, without explaining why it did not assess whether the same acts were also breaches of customary international law.<sup>61</sup> Second, the Court considered that:

“Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.”<sup>62</sup>

The ILC paid tribute to the specific status and power of human rights treaty bodies in some parts of the commentaries of the Draft Articles. For example, Paragraph 3) of the commentary of Article 17 observed that:

“Draft article 17 does not address the question of the extent to which the prohibition of torture or cruel, inhuman or degrading treatment or punishment also covers cases in which such treatment is inflicted, not by *de jure* or *de facto* State organs but by persons or groups acting

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<sup>59</sup> Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 2 (2014) (observing that “[t]he applicable international case-law has been accumulating since the mid-nineteenth century and has in fact facilitated the codification of various aspects of international law. This basis in case-law has recently been reinforced by a judgment of the International Court of Justice [fn. 12 refers to the *Diallo* case] that clarifies the relevant law on various points.”)

<sup>60</sup> See Ahmadou Sadio Diallo (Rep. of Guinea v. Democratic Rep. of the Congo), Judgment, 2010 I.C.J. Rep. 639, 645 (Nov. 30) (stating “In the Application (Part One), Guinea maintained that . . . Mr. Diallo's arrest, detention and expulsion constituted, inter alia, according to Guinea, violations of “the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’ [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.); see also Ahmadou Sadio Diallo (Rep. of Guinea v. Democratic Rep. of the Congo), Reply of the Republic of Guinea at 28 (Nov. 10, 2008). ,

<sup>61</sup> See Ahmadou Sadio Diallo (Rep. of Guinea v. Democratic Rep. of the Congo), Judgment, 2010 I.C.J. Rep. 639, 692 (Nov. 30); see also, Annemarieke Vermeer-Künzli, *The Subject Matters: The ICJ and Human Rights, Rights of Shareholders, and the Diallo Case*, 24 Leiden J. of Int'l L. 607, 610, (2011).

<sup>62</sup> See Ahmadou Sadio Diallo (Rep. of Guinea v. Democratic Rep. of the Congo), Judgment, 2010 I.C.J. Rep. 639, 664 (Nov. 30); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, Separation Opinion of Judge Higgins, *ICJ Reports 2004*, p. 213, § 27. Judge Higgins also observed in 2004 that “For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose” (*id.*)

in a private capacity. That issue is left to the relevant international monitoring bodies to assess or, where appropriate, to the courts that might be called upon to rule on the exact extent of the obligations arising from one instrument or another for the protection of human rights.”<sup>63</sup>

In some other cases, the ILC expressly relied on progressive interpretations of the ICCPR from the Human Rights Committee, for instance by indicating that “Article 13 of the International Covenant on Civil and Political Rights does not expressly prohibit collective expulsion. However, the Human Rights Committee expressed the opinion that such a form of expulsion would be contrary to the procedural guarantees to which aliens subject to expulsion are entitled.”<sup>64</sup> In this way, the ILC endorsed an interpretation (of a recommendatory nature) which is not necessarily accepted by every State.<sup>65</sup> Once again, nothing prevents the Commission doing so in the accomplishment of its mandate to codify and progressively develop international law. The question, however, is whether it is wise or appropriate for the Commission to intrude in matters which are, primarily, governed by treaty rules and specific treaty mechanisms. This is a question that the ILC and UN Member States should carefully and seriously address in the future when framing the role of the ILC in the codification and progressive development of contemporary international law

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<sup>63</sup> *See id.* at 24 – 25.

<sup>64</sup> *Id.* at 15.

<sup>65</sup> U.N. GAOR, 69th Sess. At 5, U.N. Doc. A/C.6/69/SR.21,(Nov. 18, 2014) (Suggesting the same is true regarding the practice of the UNHCR under the 1951 Geneva Convention. In 2014, Iran declared for instance during the debate within the Sixth Committee that it “appreciated the careful consideration of refugee matters in the draft articles, but the approach set out in the commentary of draft article 6 was not underpinned by sufficient State practice. . . . the practice of the UNHCR did not necessarily reflect State practice.”)