

Human Rights and the International Law Commission's Draft Articles on the Expulsion of Aliens

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The completion of the project of the International Law Commission (ILC) on “the expulsion of aliens”² marked an important stage in the development of international law relating to migration. The resulting Draft Articles on the Expulsion of Aliens³ reflect the joint effort of the ILC’s distinguished experts on public international law, from all regions of the world, to enunciate principles that regulate states’ exercise of a power that is frequently abused. The product of this multi-year effort deserves the attention and engagement of other experts in the field of international migration, regardless of the cold reception it has initially received from states.

The international law regarding expulsion of aliens combines influences from centuries-old interstate rules on responsibility for injury to another state’s nationals and modern rules of human rights law, which I will construe here as including refugee law. The Draft Articles may someday serve as the basis for a multilateral treaty regulating the expulsion of aliens, and in the meantime they offer themselves as a reference for identifying states’ international responsibilities within the scope of the topic. The introductory “general commentary” and the commentary on draft article 3 point out that the Draft Articles involve both codification of existing international law and exercises in progressive development of international law, twin aspects of the ILC’s mandate.

The goal of this essay is to examine the Draft Articles from the human rights perspective. One should ask, to what extent do the Draft Articles measure up to existing human rights standards, to what extent do they fall short of those standards, and to what extent do they progress beyond the status quo in human rights law? This short essay cannot be comprehensive, but it will explore several provisions of the Draft Articles for that purpose.

The Draft Articles clearly express respect for human rights, and as I will discuss later, draft article 3 includes a savings clause specifying that rules of the Draft Articles are without prejudice to states’ human rights obligations. This disclaimer does not make it unnecessary to examine how well those rules conform to human rights standards, and how much reliance would need to be placed on the savings clause to displace the articulated rules. The concern underlying

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² As the ILC was aware, the term “alien” is traditional but has problematic connotations. I use it in this essay because of its ubiquity in the ILC’s text and commentary.

³ The Draft Articles, including text and commentary, are included in the 2014 Annual Report of the ILC. *See Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session* [hereinafter “ILC Draft Articles”], Draft Article 3(e), U.N. Doc. A/69/10, 17, para. 45 (2014).

this essay is that, although the Draft Articles make a number of advances, other features of the Draft Articles fall short.

1. Good Things First

I begin with the affirmative, welcoming the provisions that conform to prevailing human rights standards and the provisions that make reasonable advances in the protection of aliens facing the prospect of expulsion. Of course, the fact that a legal rule offers greater protection to an alien does not necessarily mean that it is superior from the human rights perspective, since it might unduly sacrifice the rights of others, but the Draft Articles appear to have sufficiently taken countervailing interests into account.

The commentaries on the Draft Articles expressly identify four provisions as representing an exercise in progressive development of international law. These include draft article 23, paragraph 2, regarding the scope of the non-refoulement obligation when the alien faces the death penalty; draft article 26, to the degree that it extends the listed procedural rights to aliens who are unlawfully within the territory of the state seeking to expel them;⁴ draft article 27, on the suspensive effect of an appeal against an expulsion decision; and draft article 29, recognizing a qualified right of readmission after unlawful expulsion. These are not necessarily the only provisions that involve progressive development, however, and it is not clear that all the elements identified as progressive actually go beyond existing law.⁵

Other examples of progressive development may include draft article 21(1), favoring voluntary departure, and draft article 5(3), if understood as imposing a case-by-case reasonableness standard for all expulsion decisions. The principled formulation of the prohibition on “disguised expulsion” (also known as constructive expulsion) in draft article 10 is also quite useful, particularly in the context of US federalism when subnational entities without the power to make lawful expulsions seek to induce the departure of aliens.⁶ Professor Mathias Forteau identifies some other examples as progressive in his essay for this symposium.⁷

2. Refoulement to Torture or Other Ill-treatment

Draft article 24 sets forth the prohibition on returning an alien to a country where he or she may be subjected to torture or to cruel, inhuman or degrading treatment. It reads in full:

⁴ *But see infra* Part 5, regarding the degree to which it does not extend the listed procedural rights to aliens who are unlawfully within the territory of the state seeking to expel them.

⁵ See the discussion of draft article 23, *infra* Part 3.

⁶ In fact, the implications of this article for subnational entities became one of the reasons why the United States suggested that it be deleted. See Int’l Law Comm’n, *Expulsion of Aliens: Comments and observations received from Governments*, U.N. Doc. A/CN.4/669, at 29-30 (2014) (comments of the United States).

⁷ See generally Mathias Forteau, *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*, <http://harvardhrj.com/>.

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 subject to torture or to cruel, inhuman or degrading treatment or punishment.

The text of draft article 24 is fine as written, but a problem arises in the commentary. The text itself expresses well the existing principle of human rights law that the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment entails a corresponding non-refoulement obligation. The evidentiary standard described in the text derives from article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁸, and resembles the phrasings used by the European Court of Human Rights in applying the European Convention on Human Rights (ECHR)⁹ and by the Human Rights Committee in applying the International Covenant on Civil and Political Rights (ICCPR).¹⁰

The problem occurs in paragraph (4) of the Commentary, where the ILC declines to take a position on whether the non-refoulement rule applies in cases where the risk of torture or cruel, inhuman or degrading treatment emanates from private actors without the involvement or acquiescence of state officials. The commentary recognizes that the European Court does not draw such a distinction, but rather views article 3 ECHR as prohibiting refoulement when the risk exists, regardless of its source. The Human Rights Committee follows the same interpretation of the non-refoulement obligation under article 7 ICCPR.¹¹ Nonetheless, the ILC commentary gives undue credence to arguments based on the limited scope of the definition of torture in article 1 of the UNCAT.

The ILC's hesitation misconstrues the place of the UNCAT in the human rights system. The UNCAT presupposes the preexisting prohibitions of torture and cruel, inhuman and degrading treatment, and enumerates a series of preventive, repressive and remedial obligations to increase the effectiveness of those prohibitions. Article 1 UNCAT provides a definition of torture for the purposes of UNCAT, without prejudice to wider definitions applied elsewhere; article 16 UNCAT applies a subset of those obligations to cruel, inhuman or degrading treatment, again without prejudice to other instruments. Some of the obligations under UNCAT, such as the training of custodial officials and the requirement to "keep under systematic review interrogation rules [and] arrangements for the custody and treatment" of arrested persons,¹² make sense in

⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter "UNCAT"], Dec. 10, 1984, 1465 U.N.T.S. 85.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocol No. 11, Nov. 1, 1998, E.T.S. No. 155.

¹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

¹¹ I am aware that the United States is on record as opposing *any* non-refoulement obligation under the ICCPR, but tailoring the Draft Articles to the preferences of the United States would require abandonment of nearly all of draft article 24, and not merely the coverage of risks posed by non-state actors.

¹² See *supra* note 8, UNCAT arts. 10(1), 11.

relation to the state apparatus but not to the independent conduct of private actors. Understandably, both article 1 and article 16 restrict UNCAT obligations to acts committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” These restrictions in a highly specialized treaty were not designed to undermine obligations existing elsewhere, and the care of the Committee Against Torture to remain within its own mandate to monitor compliance with UNCAT should not be given undesired normative significance.

Thus, the commentary to draft article 24 impairs the contribution of that provision to reaffirming prevailing global human rights standards.

3. The Death Penalty and Threats to Life

The phrasing of a non-refoulement obligation based on the right to life in draft article 23 is even more problematic, despite the fact that draft article 23 includes some progressive elements. The first paragraph of draft article 23 deals with expulsion to a state where the alien’s life is threatened on discriminatory grounds, and the second paragraph deals with expulsion to a state where the alien faces the death penalty. These paragraphs do not adequately capture the circumstances in which the right to life generates non-refoulement obligations.

Draft article 23(1) reads:

No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

The commentary suggests that this norm derives from the classic prohibition of refoulement in article 33 of the Refugee Convention, but broadens it. The commentary emphasizes that the protection is not limited to “refugees”; in other words, the threat does not have to be based on persecution on one of the five specific grounds listed in the Refugee Convention,¹³ and the exclusion grounds in article 1 of the Refugee Convention do not apply. Rather, a threat to life based on any ground of discrimination impermissible under international law precludes return to the state where the threat exists. Draft article 23(1) appears to go beyond the Refugee Convention norm in another respect as well: the prohibition is absolute, and there are no exception clauses relating to national security or criminal convictions in the expelling state. (Perhaps it would have been helpful for the commentary to make the latter point explicit.)

The commentary also points out that the ILC did not include in draft article 23(1) the branch of the classic prohibition of refoulement that refers to threats to freedom, in contrast with

¹³ The five Convention grounds are race, religion, nationality, membership of a particular social group, and political opinion. Their actual coverage has changed over the years with the interpretation of the vague term “particular social group.”

threats to life. An earlier version of the Draft Articles had included threats to freedom as well as threats to life in the relevant provision. Making such a broad prohibition absolute would have gone far beyond the jurisprudence of the European Court of Human Rights or the Human Rights Committee,¹⁴ and it provoked criticism from states.¹⁵ The ILC's final version omitted the portion on threats to freedom from this provision, but draft article 6 calls states' attention to their Refugee Convention obligations.¹⁶

With regard to threats to life, however, draft article 23(1) may still be too narrow. From the text and the commentary, the focus seems to be on discriminatory threats to life in the state of destination,¹⁷ not the broader category of arbitrary deprivation of life in the state of destination. Discrimination on grounds of status or opinion are not the only features that would render deprivation of life arbitrary in violation of international law. The Human Rights Committee understands the ICCPR as prohibiting return to a state where there is a real risk of the irreparable harm contemplated by article 6 of the ICCPR, as explained in the committee's General Comment No. 31.¹⁸ That prohibition includes the scenario in which a state that has not abolished the death penalty returns an individual to a state of destination where a death sentence is likely to be procured in a manner inconsistent with the ICCPR.¹⁹ The European Court of Human Rights has held that returning a person to a situation of indiscriminate violence intense enough to pose a real risk to the life of any civilian would amount to inhuman and degrading treatment in violation of article 3 of the ECHR.²⁰ Moreover, as in the case of torture, the relevant threats to life should

¹⁴ The European Court of Human Rights held in *El Masri v. Former Yugoslav Republic of Macedonia*, 2012-VI Eur. Ct. H.R. (Grand Chamber), that transfer of a detainee to another country where he risked a flagrant violation of the right to liberty violated article 5 of the European Convention. The Human Rights Committee has thus far avoided the question whether the right to liberty under article 9 of the ICCPR generates a non-refoulement obligation, observing instead that sending a person to a country where he or she faces a real risk of a severe violation of article 9 may amount to inhuman treatment under article 7. See Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), para. 57, U.N. Doc. CCPR/C/GC/35 (2014).

¹⁵ See *supra* note 6, A/CN.4/669 at 50-51 (comments of Canada and the United Kingdom).

¹⁶ Moreover, draft article 3 includes an open-ended "without prejudice" clause regarding other human rights obligations, discussed *infra* Part 4.

¹⁷ Even within its own limits, the focus on discrimination is marred by the inability of the ILC to agree on whether international law protects against discrimination on grounds of sexual orientation. The commentary on draft article 23 and on draft article 14 (concerning states' own obligation not to discriminate) refers to the settled understanding of the human rights institutions that such discrimination violates the treaties, but hesitates because some states oppose it. The actual text of draft articles 14 and 23 leaves open by its silence whether discrimination on grounds of sexual orientation or gender identity involves an "other ground impermissible under international law."

¹⁸ See Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

¹⁹ See Human Rights Committee, Communication No. 2024/2011, *Israel v. Kazakhstan*, Views adopted 31 October 2011, para. 9.5 (extradition to China). Professor Jacqueline Bhabha's essay, see Jacqueline Bhabha, *Progressive Development, Children's Rights and the ILC Draft Articles on the Expulsion of Aliens*, <http://harvardhrj.com/>, calls attention to another example, capital punishment for a crime committed when the convicted person was below eighteen years of age. Both article 6(5) ICCPR and article 37(a) of the Convention on the Rights of the Child absolutely prohibit such punishment.

²⁰ See *Sufi and Elmi v. United Kingdom*, App. Nos. 8319/07, 11449/07, para. 241, Eur. Ct. H.R. (2011) (finding that return to Mogadishu would violate article 3); see also *L.M. v. Russia*, App. Nos. 40081/14 et al., paras. 119-126, Eur. Ct. H.R. (2015) (finding that return to Syria would violate both article 2 and article 3).

include not only threats emanating from government itself, but unavoidable risks of death at the hands of private actors.²¹

Perhaps the residual phrase “any other ground impermissible under international law” could be construed as capacious enough to embrace all of these infringements of the right to life. If so, neither the text nor the commentary aids the reader in reaching that interpretation. Nor do the published summaries of the ILC meetings in which draft article 23(1) and its commentary acquired their current wording.²²

Draft article 23(2) reads:

A State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

The commentary characterizes two elements of this rule as progressive development, namely, the extension of the prohibition from an expelling state that has abolished the death penalty to an expelling state that “does not apply it”, and the inclusion of a real risk of a future death penalty in addition to an existing death sentence.

The prohibition on expulsion to the death penalty is more weakly phrased than the prevailing norms in Europe, where the abolition of the death penalty has been entrenched. At the global level, many states retain the death penalty, whether in practice or only in law. Article 6 of the ICCPR places limits on capital punishment in “countries which have not abolished the death penalty,” while encouraging abolition; the Second Optional Protocol to the Covenant forbids capital punishment, but so far fewer than half the parties to the ICCPR have ratified it. The Human Rights Committee construes Article 6 as holding abolitionist states to a stricter standard in extradition or expulsion. It wrote in *Judge v. Canada*:

For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that

²¹ See *Sufi and Elmi*, *supra* note 20; Human Rights Committee, Communication No. 1959/2010, *Warsame v. Canada*, Views adopted 21 July 2011, para. 8.3 (involving expulsion of Somali national who had never lived in Somalia).

²² See, e.g., Int'l Law Comm'n, Provisional summary record of the 3134th meeting, U.N. Doc. A/CN.4/S.R.3134 (2012), at 25; Int'l Law Comm'n, Provisional summary record of the 3135th meeting, U.N. Doc. A/CN.4/S.R.3135 (2012), at 13-14; Int'l Law Comm'n, Provisional summary record of the 3216th meeting, U.N. Doc. A/CN.4/S.R.3216 (2014), at 12-13.

It is true that the French version of draft article 23(1) (which is the original) does not repeat a word meaning “ground” twice, but rather uses “*raison*” the first time and “*motif*” the second time. That variation does not appear to expand the scope of draft article 23(1), especially given the commentary and the drafting history. The French version of the commentary focuses on “*motifs de discrimination*” as the content of the paragraph.

they will be sentenced, without ensuring that the death sentence would not be carried out.²³

That case involved a fugitive who had already been sentenced to death, but the Committee's reasoning was broader, and it is consistent with the Committee's general approach to expulsions that impose a real risk of future irreparable harm as contemplated by articles 6 and 7.

Against this background, the ILC commentary correctly describes the widening of the obligation in draft article 23(2), from abolitionist states to states that have not abolished the death penalty but do not apply it, as progressive development. The Human Rights Committee has not yet adopted such an interpretation of the ICCPR, although it may be moving in a similar direction.²⁴ The description of the "real risk" element as progressive development, on the other hand, is puzzling. Possibly the commentary treats the content of the *Judge* case as limited to its factual context, paying insufficient attention to the broader practice of the committee summarized in General Comment No. 31.

4. The "Without Prejudice" Clauses

The texts of several provisions of the Draft Articles describe their content as "without prejudice" to certain other rules of international law. These "without prejudice" clauses function in different ways, sometimes as a savings clause for rules that give greater protection to the alien facing expulsion; sometimes as preserving powers of the state that might otherwise seem inconsistent with the norm set forth in the text; and sometimes by depriving the particular provision of any normative force at all. The first category, savings clauses for greater rights protection, is traditional in human rights treaties, and I will not examine it here. The second category, preserving state power, raises potential difficulties, and the third category, undercutting the text, creates problems of style and emphasis.

The power-preserving clauses in the second category include language in draft article 3; draft article 9, paragraph 4; and draft article 26, paragraph 4. Draft article 3 concerns the state's right of expulsion:

A State has the right to expel an alien from its territory. 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.*

²³ Human Rights Committee, Communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, para. 10.4 (emphasis in original).

²⁴ The Human Rights Committee is currently involved in drafting a new General Comment on article 6. The rapporteurs' initial draft, proposed additional restrictions on the extradition practice of retentionist states. See Human Rights Committee, Draft general comment No. 36: Article 6: Right to life, U.N. Doc. CCPR/C/GC/R.36/Rev.2 (2015).

One might hope that the “without prejudice” clause is merely a long-winded way of expressing a savings clause of the first category, ensuring that the enumeration of certain human rights limits on expulsion in the Draft Articles does not detract from the force of other human rights limits that the ILC failed to address. In part, the clause does serve that purpose. But the clause does more. The commentary explains that draft article 3 also saves some *restrictions on rights* that can be found in certain human rights treaties. The example given is the power of states to derogate from human rights in times of emergency. The drafting history shows that the ILC used draft article 3 as the vehicle for recognizing the derogability of some of the rights protected by the norms in the Draft Articles, avoiding the need to spell out the consequences of derogation provisions norm by norm. This solution may imperil the norms, however, because draft article 3 is written broadly (“without prejudice to other applicable rules...”), and the commentary does not describe the derogation example as exclusive. Thus draft article 3 might make norms in the Draft Articles yield to other external rules of international law less favorable to the alien. The final words say “rules of international law, *in particular* those relating to human rights,” not “rules of international law relating to human rights.”

To illustrate the point, draft article 9(4) qualifies the prohibition of collective expulsion of aliens, specifying that “[t]he present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.” Actually, given the wording of draft article 3, draft article 9(4) appears to be superfluous, as it is already covered by the “without prejudice” clause of draft article 3. Possibly draft article 9(4) was made explicit for greater clarity.

Against this background, one must ask: what other rules of international law less favorable to the alien does the clause in draft article 3 preserve? The phrasing of draft article 3 has introduced serious uncertainty into the Draft Articles. It impairs the guidance they offer, and a different solution would be needed if the Draft Articles were ever further developed into a treaty. The current version gives too much leeway for states to create international obligations that will conflict with the protections of the Draft Articles, and override them. The human rights system has repeatedly witnessed the propensity of states to promote competing regimes that undermine human rights protection.

Turning to the third category, we find that two of the draft articles are phrased entirely as “without prejudice” clauses.²⁵ For example, draft article 6 is labeled “Prohibition of the expulsion of refugees,” but as written it does not prohibit anything. Its operative content is only that the entire Draft Articles are without prejudice to certain rules of refugee law. Again, the drafting history illuminates the reason for this strange format. The ILC attempted to summarize some rules of international refugee law, and to give them some progressive development, and later reverted to existing law that was too complex to restate fully at reasonable length. Instead, the ILC converted draft article 6 into a savings clause for refugee law norms, including an

²⁵ The other example is draft article 7 on expulsion of stateless persons.

express paraphrase of articles 32 and 33 of the 1951 Refugee Convention. Draft article 6 does not require states to comply with these norms, regardless of what treaties they may be parties to, and regardless of whether the norm also constitutes customary international law. Draft article 6 merely leaves the law as it finds it.

Thus draft article 6 largely omits refugee law from the scope of the project. It does not exclude refugees from the benefit of other rules in the Draft Articles, but it excludes the norms of refugee law, unless they appear in later articles, from the subject of expulsion of aliens. This is a large hole in the undertaking. At a time when compliance with obligations to refugees is under pressure, reinforcement of those norms would have been more desirable than a non-normative recognition of their existence. If the Draft Articles are further developed into a treaty, a different solution should be found.

5. Procedural Rights

Professor Won Kidane addresses draft article 26 on procedural rights in his essay,²⁶ and I will add a few complementary observations here. Draft article 26(4) indicates that “[t]he procedural rights provided for in this article are *without prejudice to the application of any legislation of the expelling State* concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.” This clause preserves rules of national law, not rules of international law. The commentary identifies six months as a possible meaning for “brief duration,” and characterizes the recognition of the procedural rights listed in draft article 26(1) for unlawfully present aliens after six months as a progressive development.²⁷ That claim may involve an overly literal and narrow reliance on the text of article 13 of the ICCPR. Expulsion decisions are frequently enforced by arrest and involuntary transportation. Under article 9 of the ICCPR, any alien, even if unlawfully present, has the right to notice of the reasons for an arrest (compare draft article 26(1)(a)), and the right to bring proceedings before a court to determine whether the detention is unlawful (compare draft article 26(1)(d)). The text and commentary also do not take into account the Human Rights Committee’s observation in General Comment 15 that “if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.”²⁸ There is more scope for operation of the savings clause in draft article 26(2) than the commentary seems to recognize, and there is some ambiguity about how the ILC intended for draft article 26(2) and draft article 26(4) to interact. As currently drafted, draft article 26 appears to give undue encouragement to summary expulsion based on allegations of unlawful presence.

²⁶ See generally Won Kidane, *Missed Opportunities in the International Law Commission’s Final Draft Articles on the Expulsion of Aliens*, <http://harvardhrj.com/>.

²⁷ Presumably draft article 26(4) applies only to the rights listed in draft article 26(1), and not to the right of seek consular assistance in draft article 26(3).

²⁸ Human Rights Committee, General comment No. 15: The position of aliens under the Covenant, para. 9 (1986), reprinted in U.N. Doc. HRI/GEN/1/Rev.9 (2008), at 198.

6. Conclusion

The ILC's Draft Articles on the Expulsion of Aliens afford an uncertain guide to the human rights standards that limit states' conduct in the expulsion of aliens. Some provisions of the Draft Article track prevailing human rights standards and some provisions progress beyond them. However, other provisions fall short unless they are supplemented by the general savings clause. Some provisions may undermine human rights standards by creating ambiguities or by subordinating human rights principles to other treaty regimes.

Why did this happen? While various hypotheses could be entertained, it might be worth recalling two related facts about the ILC. First, while the individual members of the ILC serve independently, the ILC reports to the Sixth Committee of the UN General Assembly, which gives them annual feedback on the progress of their work. Second, the ILC officially seeks the input of states on the substance of its projects.²⁹ The ILC infrequently establishes contact with human rights bodies (even those that are meeting in Geneva during its sessions), and does not solicit comments from nongovernmental organizations on the initial drafts that it issues. There may be a broader lesson to be learned about the ILC's need to broaden the range of sources from which it receives information to inform its drafts and deliberations. As one ILC member has observed after describing the limited practice of external discussions, "it may be that the Commission's isolation goes too far."³⁰

If the Draft Articles are to play an important role in the future, then there will be a need for vigilance by human rights advocates. Should that role ever take the form of conversion into a multilateral treaty, then some provisions should be modified and different solutions should be found for expressing the relationship between the listed norms and other rules of international law. Should the Draft Articles themselves remain as a prestigious reference document, then continuing reminders will be necessary of the gaps and the need to look outside the document.

²⁹ A convenient summary of the ILC's methods of work can be found on the United Nations website at <http://legal.un.org/ilc/methods.shtml> [<https://perma.cc/VTW3-67NA>].

³⁰ Donald McRae, *The Work of the International Law Commission, 2007-2011: Progress and Prospects*, 106 *Am. J. Int'l L.* 322, 335 (2012).