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# Missed Opportunities in the International Law Commission's Final Draft Articles on the Expulsion of Aliens

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Won Kidane<sup>1</sup>

## I. INTRODUCTION

In its Final Draft Articles on the Expulsion of Aliens,<sup>2</sup> the International Law Commission (“ILC” or “the Commission”) appears to have avoided confronting some uncertain rules of international law relative to the expulsion of aliens, essentially taking a “without prejudice” approach.<sup>3</sup> Most notably, it has interpreted some rules of international law more narrowly than its mandate of codifying existing rules and helping their progressive development would have permitted. This essay describes how the ILC has missed opportunities to help clarify some uncertainties and help the progressive development of certain emerging contemporary norms.

## II. MANDATE AND OBJECTIVES

The Draft Articles can only be accurately evaluated in light of the mandate of the ILC and the objectives that it was supposed to accomplish. This section highlights each of these points to set the stage for the substantive assessment in the sections that follow.

When the General Assembly of the United Nations created the ILC in 1947, it delegated its mandate under Article 13(1)(a) of the Charter of the United Nations to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”<sup>4</sup> The Statute of the ILC also states in Article 1 that:

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1. Associate Professor of Law, Seattle University School of Law. I would like to thank Professor James C. Hathaway, Professor Tiyanjana Maluwa, and Professor Victor Romero for taking their time and giving me their very helpful comments on the draft of this essay.

2. See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, *Draft Articles on the Expulsion of Aliens*, U.N. Doc. A/CN.4/L.832 (2014) [hereinafter *Draft Articles*].

3. A “without prejudice” approach leaves existing rules undisturbed and fails to pass judgment on their accuracy or desirability. When the mandate is to codify existing rules or help their progress, the preservation of the status quo unhelpfully errs on the side of caution.

4. U.N. Charter art. 13, ¶ 1. It reads in full:

The General Assembly shall initiate studies and make recommendations for the purpose of:  
a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;

“The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.”<sup>5</sup>

Since the Commission’s inclusion of the topic of the expulsion of aliens in its program of work in 2004 (Fifty-Sixth Session) to its submission of the final Draft Articles in 2014 (Sixty-Sixth Session),<sup>6</sup> the Special Rapporteur, Maurine Kamto, submitted nine reports containing various iterations of the rules of international law on the topic.<sup>7</sup> The Commission adopted the Draft Articles on June 6, 2014, and it adopted the Commentaries on August 5.<sup>8</sup> On the same day at its 3238th meeting, in the exercise of its mandate, the Commission recommended to the General Assembly, “(a) 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; (b) To consider, at a later stage, the elaboration of a convention on the basis of the draft articles.”<sup>9</sup>

The Draft Articles and the Commentaries are not only a product of a lengthy deliberative process but also presumably a fair representation of the broadest possible consensus.<sup>10</sup> However, it appears that as political docu-

b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

c. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

5. G.A. Res. 174 (II), Statute of the International Law Commission (Nov. 21, 1947), *amended by* G.A. Res. 485 (V) (Dec. 12, 1950), G.A. Res. 984 (X) (Dec. 3, 1955), G.A. Res. 985 (X) (Dec. 3, 1955), and G.A. Res. 36/39 (Nov. 18, 1981). Article 15 of the Statute provides the definition of the important terms as follows:

In the following articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

6. *See* Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 10 (2014).

7. *See* Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *First Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/554 (June 2, 2005); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Second Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/573 (July 20, 2006); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Third Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/581 (Apr. 19, 2007); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Fourth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/594 (Mar. 24, 2008); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Fifth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/611 (Mar. 27, 2009); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Sixth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/625 (Mar. 19, 2010); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Seventh Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/642 (May 4, 2011); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Eighth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/651 (Mar. 22, 2012); Maurice Kamto (Special Rapporteur on the Expulsion of Aliens), *Ninth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/670 (Mar. 25, 2014).

8. *See supra* note 5, at 11.

9. *See id.*

10. The thirty-four members of the ILC are distinguished jurists of the highest order but by no means come from the ranks of the world’s prominent human rights advocates. Although they do not sit

ments, both the Draft Articles and the Commentaries settled on the lowest common denominator in pursuit of consensus. In so doing, they missed the opportunity to clarify genuine uncertainties in some areas and regressed contemporary developments in other areas.

### III. MISSED OPPORTUNITIES

Given the amount of time and energy spent on the Draft Articles, more areas of uncertainty could have been clarified. Indeed, prior working drafts contained some promising developments in certain areas that were omitted from the final version.<sup>11</sup> Two areas that could have benefited from the Draft Articles are highlighted below.

#### *a. Uncertainties in the International Law of Expulsion in Times of War*

Rules of international humanitarian law<sup>12</sup> pertaining to the expulsion of “enemy aliens”<sup>13</sup> or “protected persons”<sup>14</sup> could have benefited from an informed codification or progressive development. A leading treatise argues that:

Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may

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as representatives of their respective governments, most of the members have held high government positions ranging from diplomatic posts to attorney general. The Statute of the ILC provides in Article 3 that “[t]he members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations.” *Supra* note 4, art. 3. For more on membership, see *Membership*, INT’L LAW COMM’N. (July 20, 2015), available at <http://legal.un.org/ilc/ilcmembe.shtml> [<https://perma.cc/AY9M-TKA5>]. The current members are: Mohammad Bello Adoke (Nigeria), Ali Mohsen Fetais Al-Marri (Qatar), Lucius Caflisch (Switzerland), Enrique J.A. Candiotti (Argentina), Pedro Comissário Afonso (Mozambique), Abdelrazeg El-Murtadi Suleiman Gouider (Libya), Concepción Escobar Hernández (Spain), Mathias Forteau (France), Juan Manuel Gómez-Robledo (Mexico), Hussein A. Hassouna (Egypt), Mahmoud D. Hmoud (Jordan), Huang Huikang (China), Marie G. Jacobsson (Sweden), Maurice Kamto (Cameroon), Kriangsak Kittichaisaree (Thailand), Roman A. Kolodkin (Russian Federation), Ahmed Laraba (Algeria), Donald M. McRae (Canada), Shinya Murase (Japan), Sean D. Murphy (United States of America), Bernd H. Niehaus (Costa Rica), Georg Nolte (Germany), Ki Gab Park (Republic of Korea), Chris M. Peter (United Republic of Tanzania), Ernest Petric (Slovenia), Gilberto Vergne Saboia (Brazil), Narinder Singh (India), Pavel Šturma (Czech Republic), Dire D. Tladi (South Africa), Eduardo Valencia-Ospina (Colombia), Marcelo Vázquez-Bermudez (Ecuador), Amos S. Wako (Kenya), Nugroho Wisnumurti (Indonesia), Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland).

11. See discussion *infra* Section IV(b).

12. The Four Geneva Conventions of 1949 and the Additional Protocols of 1972 are the principal sources of contemporary International Humanitarian Law. See DOCUMENTS IN THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

13. The term “enemy aliens” in contemporary usage refers to nationals of the enemy state found in the territories of the particular state. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956 (2002) (discussing the notion in light of the events of September 11, 2001).

14. Under the Geneva Convention, citizens of the enemy state are called “protected persons.” Protected persons include “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, art. 4.

consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable.<sup>15</sup>

The rules contained in the relevant Geneva Convention and Protocol are not specific. Article 35 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva Convention) states that “[a]ll protected persons [including aliens] who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State.”<sup>16</sup>

The official commentary of the International Committee of the Red Cross notes that “[t]he words ‘who may desire to leave the territory’ show quite clearly that the departure of the protected persons concerned will take place only if they wish to leave.”<sup>17</sup> It also states that “[t]he International Committee’s original draft laid down that no protected person could be repatriated against his will” and that “the same idea is implicit in the text actually adopted.”<sup>18</sup>

The ILC’s Draft Articles missed the opportunity to shed light on this speculation. A rule as fundamental as the prohibition in times of war of the expulsion of the nationals of an enemy State to their State of nationality against their will should not have been left for speculative interpretation of a combination of implicit provisions.

Indeed, the Draft Articles exclude “aliens enjoying privileges and immunities under international law”<sup>19</sup> in the scope provision, but they make no such express exclusion from the scope of coverage of aliens in times of war. Presumably, the Draft Articles cover the expulsion of aliens in times of war. If so, the Draft has missed an opportunity to clarify and progressively develop the rules in this area.

15. 1 OPPENHEIM’S INTERNATIONAL LAW (Robert Jennings & Arthur Watt eds., 9th ed. 1996), at 941.

16. Geneva Convention Relative to the Protection of Civilian Persons in Times of War art. 35, Aug. 12, 1949, 6 U.S.T. 3516.

17. INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958), at 235.

18. *Id.* On a related note, however, the commentary states at 235 n.1.:

While forced repatriation—that is, sending a person back to his country against his will—is prohibited, the right of expulsion has been retained. For example, if France were to break off diplomatic relations with Germany, she would not be entitled to send German nationals under escort to the German frontier against their will; she could, however, decree their deportation and send them under escort to the Belgian, Spanish, or Swiss frontiers.

19. Draft Articles, *supra* note 1, art. 1, ¶ 2.

*b. Uncertainties in the International Law of Non-Refoulement*

As fundamental to the international law of protection as it might have been, the principle of non-refoulement<sup>20</sup> suffers from a measure of uncertainty in its national application, particularly as it relates to the territorial scope of its reach.<sup>21</sup> The Draft Articles rephrases the principle in the following terms:

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.<sup>22</sup>

While the Draft Articles ostensibly place emphasis on the State's rights to expel, they go no further than to restate the minimum standard using a "without prejudice" clause. The Draft Articles neither systematically codify rules that have emerged over the years in the application of the principle of non-refoulement, including when it might be derogated from, nor simplify or advance its future application. For example, in recent years, the principle of non-refoulement has increasingly come in collision with national laws relating to the exclusion or deportation of persons that states consider terrorists under their respective domestic rules. Some, for example, include

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20. The most useful articulation of this principle is contained in United Nations Convention Relating to the Status of Refugees art. 33, ¶ 1, Jul. 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]:

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

21. See *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (holding that aliens purposefully intercepted on the high seas may be repatriated without violating the principle of non-refoulement contained under the Article 33 of the Refugee Convention of 1951). *But see* JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 335 (2005) (offering a careful framing of why *Sale* must be understood as an isolated and fundamentally wrong decision as a matter of international law).

22. Draft Articles, *supra* note 1, art. 6.

unreasonably broad definitions of terrorism or national security to justify expulsion.<sup>23</sup>

In particular, the rule contained in the Draft Article 6 under the title “Prohibition of Expulsion of Refugees” disturbs the principle of non-refoulement by merging the rule under Article 32 of the Refugee Convention on expulsion, which states that “a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order,”<sup>24</sup> with the classic expression of the principle of non-refoulement contained in Article 33, which states:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>25</sup>

Whether it is a technical error in drafting or purposeful merger of the two principles, Draft Article 6 needlessly confuses and perhaps even complicates the basic principle of non-refoulement by adding “a State shall not expel a refugee in its territory save on grounds of national security or public order.”<sup>26</sup> The principle, even in its classic formulation, continues to be a subject of great controversy.<sup>27</sup> Draft Article 6, instead of helping to resolve existing controversy, adds to the confusion by merging it with an expulsion provision that does not contain the same level of reasonableness safeguards. Indeed, in its current formulation, Draft Article 6 neither accurately codifies existing rules of international law pertaining to the principle of non-refoulement nor helps clarify or progress them.<sup>28</sup>

Draft Article 23 also needlessly adds to the uncertainty of the existing status of the law of non-refoulement. Draft Article 23 states: “No alien shall be expelled to a State where his or her life would be threatened on

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23. For examples of how states define terrorism to justify exclusion and expulsion, see Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 *FORDHAM INT'L L.J.* 300 (2010).

24. Draft Articles, *supra* note 1, art. 6(a).

25. Refugee Convention, *supra* note 19, art. 33.

26. Draft Articles, *supra* note 1, art. 6(a).

27. See discussion *supra* note 20.

28. If the merger of these two principles was thought to have any purpose, it is not clear from the text itself. What is clear is that the title of Draft Article 6, “Prohibition of Expulsion of Refugees,” suggests that it is meant to be a restatement of the principle of non-refoulement.

grounds such as race, sex, language, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.”<sup>29</sup> This is clearly an attempt to avoid a clear expression of protection on grounds of sexual orientation, which appears to be sufficiently consolidated in the jurisprudence of major refugee receiving nations. Indeed, the official Commentary on the Draft Articles states, “As for the prohibition of any discrimination on grounds of sexual orientation, there is a trend in that direction in international practice and case-law, but the prohibition is not universally recognized.”<sup>30</sup> This would have been another opportunity for a progressive development on this specific aspect of international refugee law. The ILC has missed it.

#### IV. REGRESSIVE DEVELOPMENTS

The Draft Articles have also shown a regression in certain substantive and procedural rules. This section focuses on a few rules.

##### *a. Substantive*

In the interest of brevity, this section focuses only on the Draft Article pertaining to constructive expulsion. The Draft Article on the prohibition of disguised expulsion is generally progressive.<sup>31</sup> However, the Commentary needlessly heightens the standard, taking away from the progressivism. The Draft Article reads:

1. Any form of disguised expulsion of an alien is prohibited.

29. Draft Articles, *supra* note 1, art. 23(1).

30. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session, *Draft Articles on the Expulsion of Aliens, with Commentaries*, U.N. Doc. A/69/10, at 34 (2014) [hereinafter Commentaries].

31. UNHCR's Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugee, HCR/GIP/12/09 (Oct. 23, 2012), available at <http://www.unhcr.org/509136ca9.pdf> [https://perma.cc/QLB2-G7Z4].

The Guidelines states on page 5, para. 14 for example that “A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that. As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.” Citing to among other sources: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can., Sup. Ct.) (hereafter “Canada v. Ward”), available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html> [https://perma.cc/2MJG-6UAF]; *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), available at <http://www.unhcr.org/refworld/docid/3ba9c1119.html> [https://perma.cc/5APL-DKY8]; see also *Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007), available at <http://www.unhcr.org/refworld/docid/4829b1452.html> [https://perma.cc/KA6V-D69C]; *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (High Court) (Austl.), (hereafter “S395/2002”), available at <http://www.unhcr.org/refworld/docid/3fd9eca84.html> [https://perma.cc/S4Y7-6YL8]; Refugee Appeal No. 74665, New Zealand, Refugee Status Appeals Authority, 7 July 2004 (hereafter “Refugee Appeal No. 74665”), available at <http://www.unhcr.org/refworld/docid/42234ca54.html> [https://perma.cc/3R5A-SDUV].

2. For the purposes of the present draft article, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from an action or an omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intended to provoke the departure of aliens from its territory other than in accordance with law.<sup>32</sup>

The rule is stated with sufficient clarity, including the standard that needs to be met (“supports or tolerates acts committed by its nationals or other persons”). However, predicated on jurisprudence of arbitral tribunals such as the Eritrea-Ethiopia Claims Commission, the Commentaries inject a very high standard. It states in particular: “It is understood that a particularly high threshold should be set for this purpose when it is a matter of mere tolerance unaccompanied by definite actions of support on the part of the State for the acts of private persons.”<sup>33</sup>

The standard that was taken from the Eritrea-Ethiopia Claims Commission, which in turn has its genesis in the jurisprudence of the Iran-U.S. Claims Tribunal, is that:

[C]onstrutive expulsion awards require that those who leave a country must have experienced dire or threatening conditions so extreme as to leave no realistic alternative to departure. These conditions must result from actions or policies of the host government, or be clearly attributable to that government. Finally, the government’s actions must have been taken with the intention of causing the aliens to depart.<sup>34</sup>

Draft Article 10 does not require such a very high showing of direct intent by the government in each individual case. The use of the jurisprudence of the Eritrea-Ethiopia Claims Commission is misplaced not only because the Commission itself understood the law and the facts wrong<sup>35</sup> but also because the Commission was dealing with mass expulsion in times of war, which is doubtfully applicable to individual expulsion cases of all types. Because the Commentaries rely on jurisprudence that arose out of complicated and confusing wartime factual circumstances of mass expul-

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32. Draft Articles, *supra* note 1, art. 10.

33. Commentaries, *supra* note 29, at 17, ¶ 6.

34. *Id.* ¶ 5 (quoting Eritrea’s Claims 15, 16, 23, and 27–32, 26 R.I.A.A. 195), ¶ 91 (Eritrea-Ethiopia Claims Comm. 2004).

35. This author was a member of the counsel team that represented Ethiopia in these proceedings. For a discussion of the Commission’s jurisprudence on the expulsion of aliens, see SEAN D. MURPHY, WON KIDANE & THOMAS R. SNIDER, *LITIGATING WAR: MASS CIVIL INJURY AND THE ERITREA-ETHIOPIA CLAIMS COMMISSION* 320–31 (2013).

sion,<sup>36</sup> they do not help the progressive interpretation of the otherwise well-crafted rules on disguised expulsion.

*b. Procedural Due Process*

The Draft Articles have also shown notable regression in certain procedural areas. The focus here is on the right to counsel, legal aid, and the legal effects of unlawful expulsion.

*i. Right to Counsel and Legal Aid*

Draft Article 26 states:

An alien subject to expulsion enjoys the following procedural rights: (a) the right to receive notice of the expulsion decision; (b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require; (c) the right to be heard by a competent authority; (d) the right of access to effective remedies to challenge the expulsion decision; (e) the right to be represented before the competent authority; and (f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.<sup>37</sup>

What is conspicuously missing is the right to legal aid or appointed counsel. The Commentaries make it expressly clear that:

Paragraph 1 (e), the content of which is based on article 13 of the International Covenant on Civil and Political Rights, gives an alien subject to expulsion the right to be represented before the competent authority. From the standpoint of international law, this right does not necessarily encompass the right to be represented by a lawyer during expulsion proceedings. In any case, it does not encompass an obligation on the expelling State to pay the cost of representation.<sup>38</sup>

The rule of international law had a different formulation in prior drafts by the Special Rapporteur Maurice Kamto. For example, the sixth report, in Draft Article C1, had the following formulation:

1. An alien facing expulsion enjoys the following procedural rights:
  - a. The right to receive notice of the expulsion decision.

36. On the difficulty of fact finding, see, e.g., John Crook, *Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-State Disputes*, in *THE FUTURE OF INVESTMENT ARBITRATION* 313–37 (Catharine A. Rogers & Roger P. Alford eds., 2009).

37. Draft Article, *supra* note 1, at 26.

38. Commentaries, *supra* note 29, at 43, ¶ 6.

- b. The right to challenge the expulsion [the expulsion decision].
- c. The right to a hearing.
- d. The right of access to effective remedies to challenge the expulsion decision without discrimination.
- e. The right to consular protection.
- f. The right to counsel.
- g. The right to legal aid.
- h. The right to interpretation and translation into a language he or she understands.

The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.<sup>39</sup>

The final version of Draft Article C1, as reflected in Draft Article 26, maintained all but the right to legal aid and the right to consular protection. As an effort in progressive development and in view of the contemporary right to counsel movement, this would have been a good opportunity to interpret the existing doubt<sup>40</sup> of the right to a meaningful opportunity to claim and pursue the rights under the Draft Articles.

In developed legal systems, given the complexities of the laws and the institutions that administer them, the benefits of the substantive rules cannot be meaningfully claimed pro se. While the provision on the right to interpretation is a positive development, the unavailability of legal counsel would have a negative consequence comparable to the unavailability of an interpreter. A random visit to any immigration court in the United States conducting a removal proceeding without counsel on the side of the respondent would not fail to amuse the casual observer.<sup>41</sup> For example, the typical conversation between an immigration judge and an alien in removal proceedings goes something like this: “The government charges that you are removable under INA 237(a)(1)(A) as an alien inadmissible at the time of entry. How do you plead?” It is not unusual to hear a pro se respondent utter “not guilty.” The judge might record that as the denial of the allegation but matters quickly get more complicated. The Government’s counsel would ask the judge to order the alien deported based on available documentation.<sup>42</sup> It is also not unusual for the immigration judge to order re-

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39. Maurice Kamto (Special Rapporteur on the on the Expulsion of Aliens), *Sixth Rep. on the Expulsion of Aliens*, U.N. Doc. A/CN.4/625, Add.1 (Mar. 19, 2010) (emphasis added).

40. The rule on the right to legal aid in the United States is clearly negative. There is movement in the direction of offering this right in the European Union. For a discussion, see Won Kidane, *Procedural Due Process in the Expulsion of Aliens under International, United States and European Union Law: A Comparative Analysis*, 27 EMORY INT’L L. REV. 287, 325–36 (2013).

41. For a discussion of the impacts of the imbalance in immigration proceedings in which the government is represented by counsel but the respondent is not, see Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647 (2012).

42. For an overview of the process, see Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641–45 (2010). The Government’s counsel often view their role as the alien’s adversary. See ARNOLD PORTER LLP, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, RE-

removal because of such a request. Then, the immigration judge, as required under applicable regulations, would ask the alien if she wants to apply for affirmative relief. The judge might sometimes outline the forms of relief that may be available to the alien, which may include asylum, withholding of removal, cancellation of removal section (a) or (b),<sup>43</sup> relief under the Convention Against Torture (CAT) or even deferral of removal, and would ask, as required by the regulations: “Would you like to seek one of these forms of relief?” Each one has its own complexities that are almost impossible for a lay person to meaningfully pursue. If states are required to make some forms of relief such as asylum available to refugees (for example), the denial of counsel in many cases amounts to a denial of the form of relief from expulsion altogether.<sup>44</sup> Providing the substantive right but denying the procedural means to claim and obtain it makes the substantive rights entirely meaningless.

The ILC’s omission of the right to legal aid from its Final Draft is indeed regrettable. This would have been an excellent opportunity for the ILC to positively contribute to the progressive development of international law relative to the expulsion of aliens.

## ii. *The Legal Effects of Unlawful Expulsion*

The Draft Article on the legal consequences of expulsion envisions two possible remedies for unlawful expulsion of lawfully present aliens: (1) a possible return to the country from which expulsion occurred subject to a discretionary exclusion on grounds of national security or public order,<sup>45</sup> or (2) reparation, as unlawful expulsion is considered an internationally wrongful act.<sup>46</sup>

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FORMING THE IMMIGRATION SYSTEM: PROPOSAL TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1–60 (2010), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf).

43. For example, the detailed instructions that EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents, gives include the following statement:

Prior to service of the Notice to Appear, or prior to committing a criminal or related offense referred to in sections 212(a)(2) and 237(a)(2) of the INA, or prior to committing a security or related offense referred to in section 237(a)(4) of the INA, you have at least seven (7) years continuous residence in the United States after having been lawfully admitted in any status

DEPT OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FORM EOIR-42A: APPLICATION FOR CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS (2015), <http://www.justice.gov/eoir/eoirforms/eoir42a.pdf>; DEPT OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FORM EOIR-42B: APPLICATION FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS (2005), <http://www.justice.gov/eoir/eoirforms/eoir42b.pdf>.

44. Studies show that unrepresented asylum seekers are significantly less likely to be granted asylum in the United States than represented asylum seekers. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

45. Draft Articles, *supra* note 1, art. 29.

46. *Id.* art. 30.

Although clearly a progressive development on its own accord (especially in terms of its formulation that “[a]n alien . . . shall have the right to be readmitted”<sup>47</sup>), the remedies do not meaningfully address the specific circumstances of refugees for two reasons. First, the readmission of a wrongfully expelled refugee into the country of refuge is theoretically impossible, especially if the expulsion is to the country where persecution could occur. Secondly, and perhaps more interestingly, the mechanism to pursue reparation would not be available to a refugee because the state that is supposed to espouse the claim would be the same state that the refugee fears would persecute her. There would be a structural standing problem to seek remedy for an internationally wrongful act on behalf of a refugee. As the Commentaries suggest, reparations are often provided through Claims Commissions<sup>48</sup> or claims espoused by expellee’s state of nationality.<sup>49</sup> There can be no state with the standing to pursue a remedy on behalf of a refugee for an internationally wrongful act that harms the refugee especially in cases where the state of nationality or residence is the agent of persecution. The only remedy in this regard appears to be a human rights system that grants individual standing and access. The Draft Articles and the Commentaries do not satisfactorily address this issue.

## V. CONCLUSION

More than a decade of effort has resulted in the codification of a coherent set of rules. While it has done a remarkable job in its effort to codify existing rules, it seems to have missed the opportunity to clarify and advance the rules of international law in the certain areas discussed above. International law’s effort to balance humanity’s quest for protection and accommodation of vulnerable others with the security and sensibilities of host communities remains a work in progress.

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47. *Id.* art. 29(1).

48. See Commentaries, *supra* note 29, at 49 n.204.

49. See, e.g., Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 2010 I.C.J. 631, ¶ 161 (Nov. 30).