THE INTERNATIONAL LAW COMMISSION AND THE DEVELOPMENT OF INTERNATIONAL MIGRATION LAW

Abstract: The International Law Commission is often praised for successfully codifying key areas of international law, such as the law of treaties, the law of diplomatic and consular relations, and the law of responsibility. However, its contribution to the development of the law on areas that were not directly within its purview is frequently overlooked. International migration law seems to be a case in point. This article assesses the engagements of the ILC with international migration law in three main areas. It starts by discussing the early efforts of the Commission to codify the law of asylum, placing especial emphasis on the reasons behind, and the lessons one may learn from its failure to do so. The article then examines the work of the ILC on the law of nationality, including on the elimination and reduction of statelessness, state succession, and finally diplomatic protection. At last, it analyses the Commission's attempts to systematize the law of admission and sojourn of non-nationals in its 2014 Draft Articles on Expulsion of Aliens. While the ILC has been helping to consolidate and clarify the position of international law on migration, its engagements with the field have laid bare the many political sensitivities evoked by any attempts to curb states' discretion in this domain. The article thus paints a more complicated picture about the tensions between codification and progressive development in such a contested area of the law.

Keywords: ILC; customary international law; codification and progressive development; international migration law.

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1 Introduction

The International Law Commission (ILC) has helped reduce the uncertainty and indeterminacy that characterizes a decentralized, international legal system. In line with its mandate to promote the progressive development of international law and its codification, the Commission has produced a vast number of draft articles, guidelines, conclusions and studies on various topics. For one, the ILC is usually lauded for successfully codifying key areas of international law, such as the law of treaties, the law of diplomatic and consular relations, the law on the high seas, and the law of responsibility. Yet, its contribution to the development of the law on areas that are not intuitively within its purview is only rarely accounted for.[1] The international law on migration seems to be a case in point. Although migration as such was only briefly considered as a topic by ILC,[2] the protection of migrants, refugees, and stateless persons has come to figure prominently in various of its codification projects: from nationality and statelessness, state succession, expulsion of aliens, and diplomatic protection to crimes against humanity and the ongoing debates on sea-level rise in relation to international law. Still, there seems to be relatively scarce research being conducted on the development of international migration law by the International Law Commission.

In this article, I give a detailed assessment of the engagement of the ILC with three main areas of international migration law: asylum, nationality and statelessness, and expulsion of non-

[1] See for instance, R. O' Keefe, 'The ILC's Contribution to International Criminal Law' (2006) 49 German Yearbook of International Law 201; J. Harrison, 'The International Law Commission and the Development of International Investment Law' (2013) 45 George Washington International Law Review 1; A. Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited' in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements* and Future Challenges (Oxford University Press 1999); N. Oral, 'The International Law Commission and the Progressive Development and Codification of Principles of International Environmental Law' (2019) 13 FIU Law Review 1075.

[2] Apart from being suggested as a topic for the Commission's long-term programme of work in the 1990s. See UN ILC, 'Report of the Commission to the General Assembly on the work of its forty-third session' (1991) Yearbook of the International Law Commission, vol. II(2) at 130.

nationals. The focus is on draft articles concluded by the Commission in the exercise of its mandate, as well as codification conventions that were later adopted in diplomatic conferences. However, in a bid to paint a comprehensive picture of the Commission's interactions with the field, reference will also be made to discussions, reports, studies, and different forms of outcome adopted by the ILC.

The article sets out by examining the Commission's early efforts to codify the law on the right of asylum, in an attempt to identify the reasons behind, and the lessons one may learn from its failure to do so. The article then discusses the work of the ILC on the law of nationality, including on the elimination and reduction of statelessness, state succession, and finally diplomatic protection. At last, it assesses the Commission's attempts to codify the law on admission and sojourn of non-nationals in its 2014 Draft Articles on Expulsion of Aliens. Incidentally, the article paints a more complicated picture about the need of a delicate balance between codification and progressive development in such a contested and at times uncertain area of the law. While the Commission has been helping to consolidate and clarify the position of international law on migration, its engagements with the field have laid bare the many political sensitivities associated with the subject.

Before delving into the substantive part of the article, a methodological clarification seems in order. The expression 'international migration law' can encompass various legal aspects of migration and displacement, and it seems necessary to explain how the term is being used here. The focus of the present article is not only on the rules regulating 'the movement of persons between states and the legal status of migrants within host countries.'[3] Rather, 'international migration law' is here understood as a broader set of norms governing the position of non-

[3] V. Chetail, *International Migration Law* (Oxford University Press 2019) at 7. On the definition of 'global migration law', see J. Ramji-Nogales and P. J. Spiro, 'Introduction to Symposium on Framing Global Migration Law' (2017) 111 AJIL Unbound 1.

nationals in international law in its various forms. Hence, even though certain topics may not directly concern migration, they nevertheless touch on issues at the core of the field. For instance, although the law of extradition is normally associated with international and comparative criminal law, the rule of the non-extradition of political offenders is at the basis of the right of asylum. Similarly, the work of the Commission on the law of state succession was of great importance to flesh out the right to a nationality and the avoidance of statelessness in that context. The intention is thus to assemble some of the relevant principles and rules dispersed around a vast legal expanse of codification conventions and draft articles concluded by the Commission over its seven decades and a half of existence. As a side effect, however, the paper risks being too descriptive at times – for which I apologize to the reader.

2 The Right of Asylum and the Codification that Never Was

2.1 The Law of Asylum

When the ILC first considered the law on asylum as ripe for codification during its inaugural session, the topic was very much alive. One year earlier, the UN General Assembly (UNGA) had adopted the Universal Declaration of Human Rights (UDHR), which included among other fundamental entitlements the right of everyone 'to leave any country, including his own'[4] and to 'seek and enjoy in other countries asylum from persecution'[5]——even if there was no corresponding obligation on states to grant such protection. Around the same time, the UN was in the process of establishing the Office of the High Commissioner for Refugees (UNHCR)[6]

[4] Art 13 (2) Universal Declaration of Human Rights.
[5] Art 14 (1) Universal Declaration of Human Rights.
[6] UNGA Res. 428 (V) 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 December 1950).

and drafting a Convention on the Status of Refugees, which would assert the rights stemming from the formal recognition of refugeehood. Yet, as noted by the UN Secretariat in its preparatory survey on possible topics for codification, the law in this area remained both unclear and in need of systematization.[7]

Although generally associated with the rule of non-extradition of political offenders, which first emerged in bilateral[8] and later multilateral[9] extradition treaties during the XIXth century, asylum gradually evolved into a fully-fledged yet contested international legal concept. For one, while certain countries interpreted it as simply meaning protection of non-nationals against compulsory return, others would also grant admission and even a right of residence. Similarly, and especially during and after the Second World War, asylum was also extended to individuals fleeing *en masse* from forms of persecution other than those based on political grounds. These developments were reflected in inter-war instruments[10] as well as in the new paradigm of refugee protection that emerged in the post-WWII world. A side effect of such expansion was the recurrent preoccupation that 'war criminals, traitors, and Quislings' might evade prosecution and punishment by applying for asylum.[11]

Most significantly, the proper territorial scope of the right of asylum, which was applied unevenly across the world, remained a contentious issue. The inviolability of diplomatic premises and the immunities enjoyed by warships and military vessels[12] made these spaces

[7] United Nations, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum submitted by the Secretary-General' UN Doc. A/CN.4/1/Rev.1 (1949) at 50-51.
[8] See Art 5 Extradition Treaty between Belgium and France (1834), as well as Art 3 Austria-Hungary and Sweden-Norway Extradition Treaty (1868).
[9] See e.g., Art 23 Montevideo Treaty on International Penal Law (1889) and Art 2(2) Central American Extradition Convention (1934).
[10] Such as, inter alia, the Arrangement with respect to the issue of certificates of identity to Russian Refugees (1922), the Refugee Convention (1933), the Provisional Arrangement concerning the Status of Refugees Coming from Germany (1936), and the Convention concerning the Status of Refugees Coming from Germany (1938).
[11] See UNGA Res. 8(I) 'Question of Refugees' (12 February 1946), para 'd.'
[12] See e.g., the Brussels Convention on the Immunity of State-Owned Vessels (1926) and Art 8(1) of the Convention on the High Seas (1958), which codifies customary international law. On this latter, see UN ILC,

particularly attractive for individuals fleeing persecution. However, if territorial asylum was but an aspect of states' unfettered control over the admission of non-nationals, its extraterritorial variations represented at times a limitation of the territorial sovereignty and independence of other states.[13] In Latin America, for instance, individuals often sought asylum in embassies, consulates, or other places controlled by one of the organs of a foreign state.[14] While some regional treaties regulated this form of extraterritorial state protection,[15] whether a customary right to grant asylum extraterritorially actually existed beyond——or even within——the region remained deeply contested.[16] In short, the position of international law on asylum was marked by a great degree of uncertainty.

2.2 Diplomatic Asylum and the Early Discussions at the Commission

Against this backdrop, the ILC decided to include 'the right of asylum' in its provisional list of topics for codification. Among the members of the Commission attending its first session, Jesús M. Yepes was by far the main supporter of its codification. In his interventions, the Colombian jurist constantly emphasized the humanitarian character of asylum, one of the 'noblest creations of customary international law.'[17] For him, 'the right of political asylum should be given special

'Draft Articles on the Law of the Sea, with commentaries' (1956) Yearbook of the International Law Commission 33, vol. II, at 280. These rules were later reaffirmed in Arts 32, 95, 96 of UNCLOS.

[13] As the ICJ pointed out in the *Asylum* case, 'a decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the competence of that state. Such a derogation from the territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.' In *Asylum (Colombia/Peru) (Counterclaims)* [1950] ICJ Rep 266 ('*Asylum case*') at 274.

[14] The practice can be traced back to the 1865 Peruvian Civil War, when the deposed cabinet had sought protection in the French legation which, on the instructions of the Government of Napoleon III, had refused to hand them over. See e.g., F. Villagran Kramer, *L'asile diplomatique d'après la pratique des Etats latino-américains* (Impr. Amibel 1958); C. Neale Ronning, *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (M. Nijhoff 1965).

[15] Such as the Havana Convention on Asylum (1928), the Montevideo Convention on Political Asylum (1933), and the Caracas Convention on Diplomatic Asylum (1954).

[16] See A. Grahl-Madsen, *The Status of Refugees in International Law* (v. II) (A. W. Sijthoff/Leiden 1972) at 50-54.

[17] UN ILC, 'Summary Records and Documents of the First Session, including the report of the Commission to the General Assembly' (1949) Yearbook of the International Law Commission, Chap. II(1) at 126.

priority' while its codification was 'eminently necessary and desirable'.[18] He also insisted that the Havana Convention on Asylum (1928) and the Montevideo Convention on Political Asylum (1933) should be the basis for the discussion of the topic, which could be easily codified in 'three or four articles.'[19]

His enthusiasm was rather understandable: Yepes was Colombia's agent and main legal adviser in the *Asylum* (Colombia/Peru) case,[20] which would be submitted to the ICJ in that same year. The dispute concerned the granting of diplomatic asylum, in the Colombian embassy in Lima, to Peruvian politician Víctor Raúl Haya de la Torre. Colombia relied on a 'customary international law of the Americas,'[21] which would provide for a right to grant asylum in legations and a corresponding obligation on the receiving state to respect the asylee's safe exit (*salvo conduto*) from the country.[22] It also maintained that, in accordance with such a rule, it was competent to unilaterally and definitively qualify the offence committed by the asylee as a political crime for the purpose of granting them diplomatic asylum.[23] Peru, on the other hand, claimed that it was not bound by treaty law, nor by (general or local) customary international law on the matter, as it had repeatedly repudiated it.[24] In the end, even though the Court eventually found that Peru was not bound by a purported customary rule on diplomatic asylum, it did not say much on the proper scope of the right to asylum. Moreover, in the sequel, *Haya de la Torre* case, the ICJ concluded that, notwithstanding diplomatic asylum was irregularly

[18] Ibid at 47.
[19] Ibid at 57.
[20] *Asylum (Colombia/Peru)* [1950] ICJ Rep 266 (*'Asylum case'*).
[21] Ibid, Mémoire Présenté au nom du Gouvernement de la République de Colombie (10 January 1950) at para. 25.
[22] Ibid.
[23] Ibid at para 5(d).
[24] Ibid, Contre-Mémoire Présenté au nom du Gouvernement de la République du Pérou (21 March 1950) at 277-8.

granted, Colombia was under no obligation to surrender Haya de la Torre to the Peruvian authorities.[25]

Though the Commission initially decided to include the right of asylum in its provisional list for codification, the topic was not given priority.[26] Yepes, nevertheless, was determined to get an official statement by the ILC on the issue. Together with Georges Scelle and Ricardo J. Alfaro, he proposed the inclusion, in the Draft Declaration of the Rights and Duties of States, of a right to 'accord asylum to persons of any nationality who request it in consequences of persecutions for offences which the State according asylum deems to have a political character.'[27] The provision also included a corresponding obligation on the state of nationality to 'respect the asylum accorded' which was not to be considered 'an unfriendly act.'[28] One of the points of contention in the debates that followed was precisely the existence of a settled practice regarding extraterritorial asylum. While Yepes and others supported the inclusion of a broader concept of asylum, James Brierly and J. P. A. François maintained that states were only entitled to grant this form of protection in their territories, therefore excluding legations as places of asylum.[29] Even though some members initially welcomed the proposal (which was provisionally adopted), the Commission finally rejected it due to its complexity and in view of the then pending decision in the *Asylum* case. Yepes, on the other hand, was invited to prepare a working paper on the right of political asylum to be presented during the Commission's second session,[30] which would again be postponed and in the end never submitted.

[25] *Haya de la Torre (Colombia/Peru) (Intervention)* [1951] ICJ Rep 71 ('*Haya de la Torre case*') at 82.
[26] UN ILC, Summary Records and Documents of the First Session, at 58.
[27] Ibid at 125.
[28] Ibid.
[29] Ibid at 127.
[30] UN ILC, 'Summary Records and Documents of the Second Session, including the report of the Commission to the General Assembly' (1950) Yearbook of the International Law Commission, vol. II, at 366.

Moreover, albeit diplomatic asylum would eventually resurface in other contexts, states were quick in discarding it for being 'too controversial'. At the request of the General Assembly,[31] the ILC would deal a final blow to diplomatic asylum while excluding it from the 1958 draft articles on diplomatic intercourse and immunities. Although Sir Gerald Fitzmaurice proposed the inclusion of a humanitarian exception to the provision on the inviolability of diplomatic premises,[32] the Commission decided to reject it on the basis that diplomatic asylum fell outside the scope of the topic.[33] In the end, the grant of asylum in legations was made contingent on the existence of regional or bilateral agreements between the concerned states. [34] This formula was eventually maintained in the Vienna Convention on Diplomatic Relations (1961). For example, while Art 41(1) of the Convention incorporates the principle of non-interference in internal affairs and a duty to respect the laws and regulations of the receiving state, Art 41(3) provides that legations should not be used 'in any manner incompatible with the functions of the mission.' It thus leaves no room for the granting of diplomatic asylum, except by virtue of 'a special agreement between the sending and the receiving state.' The purpose of this clause, according to the Commission, was to preserve the applicability of certain treaties regulating the granting of diplomatic asylum.[35] Similar provisions were also included in the 1963 Vienna

[31] In the debates on the Yugoslav draft resolution that asked the ILC to prioritize the codification of the law on diplomatic intercourse and immunities, Colombia proposed an amendment asking the Commission to also consider the right of asylum. The majority of states, which felt that the right of asylum (in all its forms) should be studied separately in another occasion, rejected this proposal. See UNGA, 'Official Records of the General Assembly, Seventh Session, Annexes, agenda item 58,' UN Doc. A/C.6/L.251.

[32] Fitzmaurice proposed the following amendment: '[e]xcept to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under local law, not being charges preferred on political grounds.' In UN ILC, 'Summary Records and Documents of the Ninth Session' (1957) Yearbook of the International Law Commission, vol. I, at 54.

[33] Ibid at 57.

[34] UN ILC, 'Draft Articles on Diplomatic Intercourse and Immunities, with commentaries' (1958) Yearbook of the International Law Commission, vol. II, at 104.

[35] In the commentaries to what was then Draft Art 40(3), the Commission clarified that '[t]he question of asylum is not dealt with in the draft but, in order to avoid misunderstanding, it should be pointed out that among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them.' See UN ILC, 'Draft Articles on Diplomatic Intercourse and Immunities, with commentaries', at 104.

Convention on Consular Relations (1963), which was based on the ILC draft articles on the issue.[36]

It is worth noting, however, that the skepticism with diplomatic asylum did not necessarily represent a consensus among the international legal profession of the time. For one, these early discussions at the ILC may be juxtaposed with the work of the *Institut de Droit International* (IDI) on the topic. At its Bath Session (1950), the IDI adopted a resolution on 'asylum in international law,' where it defined the concept as *la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher.*[37] Though the definition expressly excluded the so-called 'neutral asylum,' which was accorded to individuals seeking protection in times of war, it covered both its territorial as well as extraterritorial variations. For instance, Art 3 of the resolution provided that asylum could be granted in diplomatic missions, consulates, on board of warships and public vessels.[38] It also detailed the extent to which individuals fleeing persecution, armed violence, or other forms of failure of state protection could benefit from said protection, as well as the role of diplomatic agents and commanders of warships and military aircrafts.

Even though the *Institut* does not enjoy the same level of 'institutional legitimacy' as the Commission,[39] it provides an important forum for scholarly discussions within the international legal discipline. Its works have also contributed to the codification and progressive development of international law in their own way. Hence, the Bath resolution not only

[36] In the commentaries to Draft Art 55(2), the Commission noted that, in line with the duty to respect the laws and regulations of the receiving state, 'consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities.' See UN ILC, 'Draft Articles on Consular Relations, with commentaries' (1961) Yearbook of the International Law Commission, vol. II, at 124.
[37] Institut de Droit International, 'L'asile en droit international public (à l'exclusion de l'asile neutre)' (1950), 43 Annuaire de l'Institut de Droit International 1, Art 3.
[38] According to Art 3(1) of the Resolution, asylum 'peut être accordé dans les hôtels des missions diplomatiques, les consulats, les bâtiments de guerre, les navires d'Etat affectés à des services publics, les aéronefs militaires et les lieux relevant d'un organe d'un Etat étranger admis à exercer autorité sur le territoire.'
[39] See D. Tladi, 'The International Law Commission, the *Institut*, and States' (2023) 117 AJIL Unbound 231.

illustrates how the proper scope of asylum remained contested even among the jurists of the time, but also provides a counterfactual account of what the work of the ILC on the topic could look like.[40]

2.3 The ILC and the 1967 Declaration on Territorial Asylum

Although initially retaining the right of asylum as a subject ripe for codification, the ILC ended up prioritizing topics that, at that time, were considered of more relevance, including the law of treaties and the law of diplomatic and consular relations. It was only in 1959 that the codification of the law of asylum would reemerge in the debates at the Sixth Committee. After a proposal submitted by El Salvador[41]——which was promptly supported by various Latin American countries[42]——the UNGA adopted resolution 1400 (XIV) requesting the Commission to 'undertake the codification of the principles and rules of international law relating to the right of asylum.'[43] The same was done a couple of years later, when the UNGA called once again on the ILC to undertake the codification of the law of asylum. Although the Commission eventually included the topic in its future programme of work, it never in fact conducted any studies on the subject. This was in part due to the work of the then Commission on Human Rights and the Third Committee, leading to the adoption of the 1967 Declaration on Territorial Asylum.[44] The right of asylum was at last removed from the Commission's

[40] The work of the *Institut* would be expressly mentioned by the Italian delegate at the Sixth Committee's 604th meeting as 'the most important statement of present-day theory' on the right of asylum. See UNGA, 'Summary Record of the 604th Meeting: 6th Committee, held at Headquarters,' UN Doc. A/C.6/SR.604 at 17.
[41] UNGA, 'El Salvador: Proyecto de Resolución' UN Doc. A/C.6/L.443.
[42] For instance, while Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Nicaragua, Peru, Uruguay, Venezuela supported El Salvador's proposal, even if with some reservations, the delegations of Mexico and Dominican Republic opposed the codification of the right of asylum as it was 'too controversial to be the subject of general codification.' See: UNGA, 'Official Records of the General Assembly, Fourteenth Session, 604th Meeting) UN Doc. A/C.6/SR.604 at 17-18.
[43] UNGA Res. 1400 (XIV) 'Codification of the Principles and Rules of International Law relating to the Right of Asylum' (21 November 1959).
[44] See generally G. S. Goodwin-Gill, 'The 1967 Declaration on Territorial Asylum, introductory note' (2012) UN Audiovisual Library of International Law; A. Grahl-Madsen, *Territorial Asylum* (Oceana Publication 1980) at 44-60.

programme of work in 1977 as the UN prepared the stillborn Conference on Territorial Asylum.[45]

2.4 Diagnosing the 'failure' to codify the law of asylum

There are various reasons that may explain the Commission's reluctance to embark on the codification of the law of asylum. For one, the right of asylum was a topic of a high political charge. This is well illustrated by the profound disagreements as to the legal nature and proper scope of asylum. Similarly, part of the hesitancy in engaging with the subject could also be attributed to the existing geopolitical, power dynamics in both the Commission and the Sixth Committee, especially when deciding on what topics should be prioritized. In fact, while the codification of the law of asylum was of particular interest to (some) Latin American countries, as it reflected the idiosyncrasies of the region, Western members preferred the codification of the law on 'less controversial' areas, such as the law of treaties, the law of diplomatic and consular relations, the law of the high seas, and the – no less controversial – law of responsibility. Finally, external factors and contingencies also exerted some influence on the Commission's decision to discontinue the topic. If the decision of the ICJ in the *Asylum* and *Haya de la Torre* cases put into question the existence of any customary law on diplomatic asylum, the work of the Third Committee and the Commission on Human Rights made any codification efforts virtually redundant.

These notwithstanding, the discussions at the ILC and the debates at the Sixth Committee helped shed some light on both the legal intricacies surrounding the topic, as well as the

[45] See generally UN ILC, 'Official Records of the General Assembly, Thirty-second session' (1977) Yearbook of the International Law Commission, vol. II(2) at 129-30.

political difficulties evoked by it. The 'failure' to codify the law of asylum was yet another omen of how topics concerning migration would be received by states in the decades to follow.

3 The Nationality of Individuals and Statelessness

3.1 From Elimination to Reduction of Statelessness

The law of nationality was one of the first topics selected for codification by the League of Nation's Committee of Experts for the Progressive Codification of International Law,[46] later leading to the adoption of the Hague Convention on the Conflict of Nationality Laws (1930). If at that time the main preoccupation of states were the effects of conflict of nationality laws on military obligations, the status of married women and their children, and the technical aspects of statelessness, the use of mass denationalization as a tool of persecution before and during WWII exposed the consequences of the unrestrained freedom of states in this area.[47] It was against this backdrop that 'the law of nationality' found its way back to the list of topics whose codification was 'necessary or desirable'[48]——although this time by the Committee's successor, the ILC.

3.1.1 The Manley O. Hudson Report

[46] See S. Rosanne (ed), 'League of Nations' Committee of Experts for the Progressive Codification of International Law (1925-1928) (Oceana Publications 1972, vol. II) at 34-54.
[47] As noted by the UN Secretariat in its preparatory survey: '[state] practice still continues to multiply the potential causes of statelessness. In particular, many countries have recently adopted or are on the eve of adopting legislation which provides for the deprivation of certain classes of their citizens of their nationality by way of punishment for disloyalty or otherwise.' In UN ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission,' at 45.
[48] UN ILC, Summary Records and Documents of the First Session, at 281.

On the request of the United Nations Economic and Social Council (ECOSOC), [49] the Commission decided to start working on 'nationality, including statelessness' already in 1951, while appointing Manley O. Hudson as its special rapporteur. At the beginning of the Commission's fourth session, the US lawyer submitted a detailed, exploratory report[50] covering general aspects of the regulation of nationality, the question of nationality of married persons, and statelessness. Apart from outlining some historical aspects of the international law on nationality and the interactions between domestic and international legal orders in this area, the first part of the report discussed the limits on the freedom of states in nationality matters. For instance, according to Hudson, while it was for states to settle, by their own legislation, the rules concerning the acquisition of their nationality, state practice seemed to indicate that nationality could only be established by birth (*jus soli*), descent (*jus sanguinis*), or by a combination of both criteria.[51] Moreover, though no rules could be imparted from state practice on naturalization, this form of conferral of nationality was found to be contingent on the existence of a factual attachment——either personal or territorial——between individual and the conferring state.[52]

In its final part, the report identified the different causes of,[53] and problems evoked by statelessness. In Hudson's view, statelessness could be eliminated altogether through the adoption of two main rules: first, where no other nationality is acquired at birth, individuals should be given the nationality of the state in whose territory they were born; secondly, any loss of nationality after birth should be conditional on the acquisition of another nationality.[54]

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[49] ECOSOC Res. 319 B III (XI) 'Refugees and Stateless Persons' (11 August 1950).
[50] The report, however, bore the fingerprints of Paul Weis, one of the greatest experts on the issue, who had spent seven weeks working with the special rapporteur on his ILC study.
[51] UN ILC, 'Report on Nationality, including statelessness by Mr. Manley O. Hudson, Special Rapporteur' (1952) UN Doc. A/CN.4/50 at 7.
[52] Ibid at 8.
[53] These were: differences in national legislation, especially regarding the *jus soli* and *jus sanguinis* criteria for acquisition of nationality by birth; marriage; deprivation of nationality; state succession; and changes of status of parents.
[54] Ibid at 20.

The true challenge, however, laid with the reluctance of states to accept these rules in their entirety. Mindful of that, he proposed an alternative, elaborated set of recommendations aimed at preventing and reducing cases of statelessness in its various forms.[55]

The reactions to Hudson's report during the Commission's debates revealed that these issues were far from settled. Though there was a general agreement on the adverse consequences of statelessness, the ILC could not agree on how it should be addressed. One of the points of contention was precisely the juxtaposition of the freedom of states in nationality matters and the limits imposed by international law.[56] This was clear, for example, from the discussions about deprivation of nationality. While some members opposed any substantial restrictions to the prerogative of states to deprive individuals of their nationality, others pointed to the inadequacy of a plenary 'right' in this respect, especially if the goal was to eliminate statelessness. This point was raised by Sir Hersch Lauterpacht, for whom 'not even naturalization by fraud should be punished by deprivation of nationality, in so far as such deprivation resulted in statelessness.'[57]

These disagreements notwithstanding, there was a shared expectation that the work of the Commission would be grounded on the progressive development of the law, insofar as the established norms on nationality were insufficient to eliminate——or even effectively reduce——cases of statelessness.

3.1.2 The Cordova Report

[55] Ibid at 21-23.
[56] See UN ILC, 'Summary records of the fourth session, 4 June – 8 August 1952' (1952) Yearbook of the International Law Commission, vol. I, at 100-142.
[57] Ibid at 136.

Following Hudson's resignation, Roberto Cordova was made special rapporteur, asked to prepare a report of his own, and to propose articles accompanied by commentaries. Based on his conclusions, the Commission discussed two possible legal instruments to address statelessness. One was a draft convention on the elimination of statelessness, which included inter alia an unconditional right to acquire the nationality of the country where one was born, if they would otherwise be stateless, and a peremptory prohibition on deprivation of nationality leading to statelessness. The other was a convention on the reduction of future cases of statelessness, which articulated some rules on the prevention of statelessness while expressly recognizing that its total elimination was not possible. This latter also incorporated a qualified obligation on states to grant nationality on individuals born stateless in their territory, as well as some exceptions to the prohibition of nationality deprivation. The discussions that followed during the ILC's fifth session once again confirmed how divisive the topic was.[58] Yet, in the end, the Commission managed to amend and adopt the two draft conventions on first reading and to submit them to the consideration of states, whose main concerns where the restrictions to their discretion in this area and the conflicts between some of the draft provisions and their legislations.[59] The draft conventions would be further reviewed during the ILC's sixth session, later adopted, and finally submitted to the UNGA for further action in 1954.

Cordova would be elected to the ICJ in the following year, where he would later dwell on some of these matters as a judge in the *Nottebohm* (Liechtenstein v. Guatemala) case. His proposed draft conventions, however, would continue to be discussed at the UNGA, which in due course requested the Secretary-General to convene a conference on the elimination or reduction of statelessness in 1959. In the end, states took the ILC draft convention on reduction of future

[58] UN ILC, 'Documents of the Fifth Session, including the report of the Commission to the General Assembly' (1953) Yearbook of the International Law Commission, vol. II, at 170-197 and 202-280.
[59] UN ILC, 'Documents of the Sixth Session, including the report of the Commission to the General Assembly' (1954) Yearbook of the International Law Commission, vol. II, at 163-173.

statelessness as a basis for their work since it focused on preventing and reducing cases of statelessness at birth. Apart from the contrasting views on which criteria of nationality acquisition to privilege,[60] states could not reach an agreement on the prohibition of nationality deprivation and were forced to adjourn the conference.[61] They would reconvene almost two years later and finally adopt the Convention on the Reduction of Statelessness in 1961.

3.1.3 The Convention on the Reduction of Statelessness (1961)

If the 1930 Hague Convention on Nationality articulated the principle whereby the competence of states on nationality matters is thus presumed unfettered insofar as no prohibiting rules exist, the Convention on the Reduction of Statelessness (1961) created positive obligations to grant nationality, even if under certain circumstances. According to Art 1, a state party is under a duty to confer 'its nationality to a person born in its territory who would be otherwise stateless' either at birth, by operation of law, or based on an application. In this latter case, however, the state will have considerable latitude to make acquisition of its nationality conditional on certain requirements. Similarly, Arts 2 to 4 establish further rules on the acquisition of nationality by stateless persons at birth, as well as conditions they might need to fulfill. In a similar vein, loss of nationality either by change of civil status (Arts 5 to 6) or renunciation (Art 7) is subject to possession or acquisition of another nationality. Art 8 of the Convention prohibits deprivation of nationality leading to statelessness, although providing for some exceptions, such as where an individual infringes their duty of loyalty, repudiates their allegiance, or threatens their state's vital interests. While Art 9 is peremptory in prohibiting discriminatory deprivations of nationality, Art 10 establishes that treaties on territorial transfers between contracting states

[60] P. Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962)11 International and Comparative Law Quarterly 1073, at 1078-1080.
[61] UNGA, 'Note by the Secretary-General with Annex containing Observations by Governments on Deprivation of Nationality' UN Doc. A/CONF.9/10 (9 June 1961).

must include provisions ensuring that no individual becomes stateless because of the change of sovereignty. Alternatively, nationality is to be conferred on individuals who would otherwise become stateless as a result of territorial transfers.

Though more incremented than the first drafts elaborated by the International Law Commission, the 1961 Convention managed to break new ground while preserving the ethos of the Commission's draft convention. As such, the work of the ILC on the prevention and reduction of statelessness may be one of its most successful projects in the field of international migration law. In the end, its 'success' was in part the result of a careful balance between the recognition of states' freedom in matters of nationality and the establishment of new obligations qualifying, but not totally limiting said discretion. The elaboration of two draft conventions with different approaches also shows how the eradication of statelessness was as easy to achieve in theory as it was politically divisive in practice.

3.2 The Right to a Nationality and the Avoidance of Statelessness in the Law of State Succession

If the ILC had already codified important aspects of the law on state succession,[62] especially in respect of treaties[63] and later in relation to state property, archives, and debts,[64] the end of the Cold War and the wave of disappearance and dissolution of states that followed brought the issue back to the Commission's agenda.[65] This time, however, the ILC was called upon to

[62] In fact, the 'Succession of States and Government' was also included by the ILC in its initial list of topics suitable for codification. See UN ILC, Summary Records and Documents of the First Session, at 37-39.
[63] UN ILC, 'Draft Articles on Succession of States in respect of Treaties, with commentaries' (1974) Yearbook of the International Law Commission, vol. II(1).
[64] UN ILC, 'Draft Articles on Succession of States in respect of State Property, Archives and Debts, with commentaries' (1981) Yearbook of the International Law Commission, vol. II(2).
[65] UNGA Res. 48/31 'Resolution adopted by the General Assembly on the Report of the Sixth Committee (A/48/612)' (24 January 1994) at 3

study the legal consequences of this modality of territorial transfers on nationality matters[66]—–which differed fundamentally from those other issues. While the main question raised by state succession in relation to treaties[67] and public assets was whether the successor state could inherit rights and obligations possessed by the predecessor state, the situation of the inhabitants of territories affected by changes of sovereignty also evoked serious human rights considerations.[68] For instance, the disintegration of the Soviet Union in 1991 and the outbreak of armed conflicts and ethnic tensions in several of its former republics left millions of individuals exposed to the risk of statelessness.[69] Similarly, the breakup of the former Yugoslavia and the wars and mass atrocities that ensued laid bare the dangers of discriminatory nationality laws.[70] At the same time, the lack of clear, detailed rules governing collective acquisition and loss of nationality in case of state succession created considerable uncertainty.

It was against this backdrop that the ILC decided to pursue the topic with a view of clarifying the law in this area,[71] eventually leading to the adoption of the Articles on the Nationality of

[66] Although nationality was originally part of the Commisson's studies on state succession under the title 'status of the inhabitants' which fell under the cluster 'succession in respect of matters other than treaties,' it was later excluded given its complexity. See UN ILC, 'Documents of the twentieth session, including the report of the Commission to the General Assembly' (1968) Yearbook of the International Law Commission, vol. II, at 220-21.
[67] State succession in relation to human rights treaties has important consequences for the protection of individuals, although in a different manner. See e.g., A. A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd ed) (Martinus Nijhoff Publishers 2013) at 469-477.
[68] This difference had been noted by Mohammed Bedjaoui, then Special Rapporteur on Succession of States in respect of matters other than treaties: '[i]n all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. The successor State does not let the inhabitants of the territory retain their former nationality. This is a manifestation of its sovereignty.' In: In: UN ILC, 'Documents of the twentieth session including the report of the Commission to the General Assembly' [1968] Yearbook of the International Law Commission, vol. II, at 114. See also I. Ziemele, 'State Succession and issues of Nationality and Statelessness' in A. Edwards and L. van Waas (eds), Nationality and Statelessness under International Law (Cambridge University Press 2014) at 217-246.
[69] See A. Zimmermann, 'State Succession and the Nationality of Natural Persons — Facts and Possible Codification' in P. M. Eisemann, M. Koskenniemi, and S. Maljean-Dubois (eds), *State Succession: Codification Tested against the Facts* (Brill Nijhoff 2000) at 627-632.
[70] On these questions, see J. Pejic, 'Citizenship and Statelessness in the Former Yugoslavia: the legal framework' (1995) 14 Refugee Survey Quarterly 1, 1-18.
[71] Though initially covering the nationality of both legal and natural persons, the Commission following the suggestion of Special Rapporteur Vaclav Mikulka, decided to separate both topics, giving priority to the latter while the former was later relinquished.

Natural Persons in Relation to State Succession in 1999.[72] The twenty-six articles adopted by the Commission on second reading include both general provisions (Arts 1 to 19) and specific ones on different forms of state succession, such as where there is a transfer of part of the territory (Art 20), unification of states (Art 21), dissolution of a state (Art 22-23), or separation of part(s) of the territory (Arts 24-26).[73] Also, the articles only apply to successions of states occurring in accordance with international law, therefore excluding cases of illegal annexation of territories.[74]

3.2.1 The Articles on Nationality of Natural Persons in relation to State Succession (1999)

As the preamble makes clear, their *Leitmotif* is the avoidance of statelessness and the implementation of the——elusive——human right to a nationality in the context of state succession. According to the main rule in the said articles, individuals possessing the nationality of the predecessor state on the date of the succession will retain the right to the nationality of 'at least one of the states concerned.'[75] This latter is complemented by a duty on these states to 'take all appropriate measures to prevent cases of statelessness stemming from state succession.'[76] In fact, the wide discretion enjoyed by states in settling rules on acquisition and loss of nationality, coupled with the lack of international criteria coordinating their application, is bound to produce conflicts of laws in this domain. The exclusive but concurrent competence of states to legislate on nationality matters may allow an individual to hold, for instance, two or more nationalities, while also rendering others stateless. This tension is even more apparent in cases of state succession, where the status of the inhabitants of the territory

[72] UN ILC, 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries' (1999) Yearbook of the International Law Commission, vol. II(2).
[73] As explained in the commentaries, the Commission did not include a reference to newly independent states as it believed that any new cases of decolonization would invariably fall within one of those categories. See ibid at 23.
[74] Art 3 1999 Articles on Nationality of Natural Persons.
[75] Ibid Art 1.
[76] Ibid Art 4.

affected by the change of sovereignty becomes the concern of at least two states. The Commission thus tried to reduce this uncertainty by delimiting the competence of both predecessor and successor states in nationality matters, while fleshing out the right to a nationality.[77]

These normative commitments are also reflected in Art 5, according to which individuals habitually residing in the territory of the successor state on the date of the succession are presumed to have acquired the latter's nationality. While its main purpose is to address the effects of possible delays between the date of the succession and the adoption of domestic nationality laws, especially by avoiding that the concerned individuals are treated as stateless in the meantime, this presumption is nevertheless rebuttable. For instance, as explained in the commentaries, individuals entitled to exercise an option may decide to retain the nationality of the predecessor state or to become a national of a successor state other than the one of habitual residence.[78] There may also be instances where the status of the inhabitants is regulated by a treaty.[79] The Commission seems to have taken an intermediary position between the conclusion that international law does not impose automatic transfer of nationality, nor any duty on the successor state to grant its nationality[80] and the theory that the population follows the change of sovereignty in nationality matters.[81]

Things get more complicated when it comes to the nationals of the predecessor state who are, at the time of the transfer, residing outside the territory affected by the change of sovereignty. However, the solution found by the ILC was rather odd. For one, according to Art 8, if these

[77] Ibid Art 6.
[78] UN ILC, Draft Articles on Nationality of Natural Persons in relation to the Succession of States, at 29.
[79] For example, the 1947 Italian Peace Treaty.
[80] See O'Connel, *The Law of State Succession* (Cambridge University Press 1956) at 247-249; Weis, Nationality and Statelessness in International Law, at 143-44.
[81] See I. Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 British Yearbook of International Law 284, at 320.

individuals are also nationals of another state, the successor state is not required to grant its nationality, nor should it attribute it against the will of the concerned individuals. Moreover, as Art 22 seems to suggest, where the state ceases to exist and dissolves into two or more successor states, former nationals of the predecessor state who are habitually residing outside the territorial unit in question, but nevertheless bear an 'appropriate legal connection' with it, are entitled to the nationality of the relevant successor state. Considering the commitments to avoid statelessness, the Commission decided to stretch this provision to benefit individuals habitually residing in a third state, but who were either born in the territory at issue, had their last habitual residence therein, or possessed any appropriate connections with the successor state.[82]

The ILC nevertheless took the avoidance of statelessness to its breaking point by allowing the imposition of nationality on persons habitually residing outside the territory at issue, but who would otherwise be rendered stateless.[83] Although this may seem desirable under international law,[84] insofar as it would in theory help reduce statelessness, no state is free to acquire the allegiance of natural persons without their consent. The Commission's conclusion seems to reflect——even if unintentionally——the logic that nationality serves principally the interests of states and that stateless individuals are objects capable of being appropriated (akin to the concept of *terra nullius*). Yet, under a human rights paradigm, the individual's right to choose a nationality would likely trump any such attempts of forced naturalizations.[85]

By contrast, the ILC privileged the will of individuals whenever they qualify to acquire the nationality of two or more states. The so-called 'right of option' enables them to choose

[82] UN ILC, Draft Articles on Nationality of Natural Persons in relation to the Succession of States, at 44.
[83] Ibid at 31.
[84] See e.g., P. Weis, *Nationality and Statelessness under International Law* (Sijthoff & Noordhoff 1979) at 115; E. S. Zeballos, *La nationalité au point de vue de la législation comparée et du droit privé humain* (BnF 1914) at 238–240.
[85] On a similar issue, see generally H. Lauterpacht, 'The Nationality of Denationalized Persons,' (1948) 1 The Jewish Yearbook of International Law 164.

between either the nationality of the predecessor state and the successor state, or between the nationalities of two or more successor states. As the commentary to Art 11 clarifies, the term 'option' also covers the procedures for voluntarily acquiring a nationality by declaration, as well as renouncing a nationality acquired *ex lege*. Renunciation, however, will not be effective if the individual is rendered stateless——again, even if they so wish.

Ultimately, the implementation the right of option, or the exercise of the right to acquire or retain a nationality, cannot be subject to discriminatory grounds, nor arbitrarily denied. The articles also incorporate additional guarantees for individuals affected by state succession, including the protection of family unity, the right of children to acquire the nationality of the state where they were born, and the right of non-nationals habitually residing in the successor state to retain that status.

Though the Commission wished to see the articles on nationality adopted as a declaration,[86] therefore diverging from its previous codification projects on state succession, states could not reach an agreement their final form. The UNGA eventually decided to simply take note of the articles and annex them to a resolution[87]——a practice that would later become frequent.

The consideration of the adoption of a legal instrument on the nationality of individuals in relation to state succession would be later discontinued by the UNGA in 2011. Notwithstanding the apparent failure to adopt a formal, legal document on the issue, the work of the ILC still provides valuable guidance to states in an area where the law is extremely complex and uncertain. Some of the Commission's conclusions and approaches were, for example,

[86] UN ILC, 'Report of the Commission to the General Assembly on the work of its fifty-first session' (1999) Yearbook of the International Law Commission vol. II(2) at 16.
[87] UNGA Res. 55/153 'Nationality of Natural Persons in relation to the Succession of States' (30 January 2001).

incorporated in the Council of Europe Convention on the Avoidance of Statelessness (2006) in relation to State Succession.

3.3 Nationality and Statelessness in the ILC Articles on Diplomatic Protection (2006)

In its 2006 Articles on Diplomatic Protection, the ILC would once again reconsider the position of international law on nationality in at least two respects. From the outset, an unescapable question the Commission had to answer was whether the exercise of diplomatic protection was contingent on the existence of a 'genuine link' between national and claimant state, as suggested by the ICJ in the already mentioned *Nottebohm* case.[88] The dispute involved the expropriation of Frederich Nottebohm's assets by Guatemala in the context of the Second World War. Nottebohm, who was born a German national but later acquired Liechtenstein's nationality by naturalization, lived in Guatemala for more than three decades before being deported to the United States and interned as an enemy alien until the end of WWII. In 1949, his Guatemalan assets were expropriated without compensation and Liechtenstein started proceedings before the ICJ on his behalf. In its 1955 judgment, the Court rejected Liechtenstein's claim finding that Nottebohm's links to this latter were not 'sufficiently close' to be considered effective and therefore opposable to Guatemala, a country with whom he had a 'long-standing and close connection.'[89] The precedent has been heavily criticized from its inception and remained deeply contested as a matter of international law.[90]

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[88] The Court famously described nationality as a 'legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual [...] is in fact more closely connected with the population of the State conferring nationality than with that of any other State' In *Nottebohm (Liechtenstein v. Guatemala)* (Second Phase) [1955] ICJ Rep 4, at 23.

[89] Ibid at 26.

[90] In the *Flegenheimer* case, the Italian-United States Conciliation Commission confirmed the relative, limited nature of the ICJ decision, noting that the Court did not intend to establish a rule of general international law so as to require the existence of a genuine link between individual and state for the exercise of diplomatic protection on behalf of the former. See *Flegenheimer Case—Decision No182* [1958] UNRIAA (Sales 65.v4) 327, at 376. See also A. Macklin, 'Is it time to retire *Nottebohm*?' (2017) 111 AJIL Unbound 492.

On the suggestion of Special Rapporteur John Dugard, the Commission took the view that the precedent set in *Nottebohm* was but a solution to a specific, isolated case and not as a rule applicable to all states.[91] In fact, as noted in the commentary, if the said requirement was strictly applied today, when economic globalization and international migration has been increasing robustly, millions of persons would be rendered stateless.[92] This was well received by states in the Sixth Committee. While most delegates supported the Commission's approach,[93] some (few) others resisted the idea of discarding the precedent set in *Nottebohm* as it might still be useful. [94]

Interestingly, John Dugard had initially suggested keeping the genuine link test for when diplomatic protection became a 'legal duty' instead of merely a 'right' of the state of nationality. He had proposed the inclusion of a provision whereby a state would be obliged to intervene on behalf of wronged nationals where the injury resulted from serious violations of a peremptory norm of international law (*jus cogens*).[95] However, following Dugard's proposal, a state would be under no obligation to protect a national who had no genuine link with it.[96] Due to the possible conflicts with the law of state responsibility and the lack of state practice and corresponding *opinio juris*, this draft article was be later deleted.

A second important development was the inclusion of a right to exercise diplomatic protection on behalf of refugees and stateless persons lawfully and habitually residing in the state 'at the

[91] UN ILC, 'Draft Articles on Diplomatic Protection, with commentaries' (2006) Yearbook of the International Law Commission, vol. II(2) at 29-30.
[92] Ibid at 30.
[93] UN ILC, 'Comments and Observations received from Governments, Diplomatic Protection' UN Doc. A/CN.4/561 and Add. 1–2 (2006) at 40.
[94] For instance, Belgium, El Salvador, Italy, and Morocco highlighted the usefulness of the precedent set in Nottebohm for cases of dual or multiple nationalities, conflating the concepts of 'effective/genuine link' and 'dominant nationality.' Ibid at 39, 44, and 45.
[95] UN ILC, 'Report of the Commission to the General Assembly on the work of its fifty-first session' (1999) Yearbook of the International Law Commission vol. II(2) at 77-78.
[96] Ibid.

date of injury and at the date of the official presentation of the claim.'[97] This was a new exception to the rule of nationality of claims, whereby in principle a state can only assert a right of diplomatic protection in respect of its own nationals.[98] While the traditional view was that a state that wrongs an individual lacking a nationality does not commit an 'international delinquency,'[99] the ILC felt——and rightly so——that time had come to consign this postulation to the legal dustbin. In fact, as the commentary makes clear, the normative justifications behind that innovation were the widely endorsed commitments to reduce statelessness and protect the rights of refugees and stateless persons.[100] The value of this provision is rather limited as it does not apply against the state of nationality of the refugee, even if the injury was caused after they had already established lawful and habitual residence in the state of refuge.[101] Thus, diplomatic protection would not be available to individuals targeted with discriminatory expropriations for having been expelled, even though they are by then *de facto* stateless but with a connection to the claimant state by virtue of regular and long-term residence in its territory.[102]

The initiative to progressively develop the law of diplomatic protection to include refugees and stateless persons was in line with the broader approach adopted by John Dugard to the topic. For him, diplomatic protection 'remained an important weapon in the arsenal of human rights protection'[103] and should thus be understood beyond an inter-state paradigm. It also received overwhelming support from members of the Commission. Yet, in the absence of a treaty

[97] Art 8(1) and (2) UN ILC Articles on Diplomatic Protection (2006).
[98] See *Panevezys-Saldutiskis Railway* (*Estonia v. Lithuania*) (Judgment) [1938] PCIJ Series A/B 76, at 16.
[99] See *Dickson Car Wheel Company (USA) v. Mexico* [1931] UNRIAA (Sales 1951.v1) 669, at 678.
[100] UN ILC, Draft Articles on Diplomatic Protection, at 35-37.
[101] Art 8(3) 2006 UN ILC Articles on Diplomatic Protection.
[102] J. Crawford, 'The International Law Commission's Articles on Diplomatic Protection' in T. Maluwa, M. du Plessis, and D. Tladi (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill Nijhoff 2017) at 154.
[103] UN ILC, 'First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur' (2000) UN Doc. A/CN.4/506 and Add. 1 at 215.

adopted on the basis of the draft articles, states have been quite skeptical to recognize this rule as established international law.[104]

4 The Expulsion of Non-Nationals under International Law and the Perils of Progressive Development

Few topics are as relevant and controversial as the admission and stay of non-nationals in the territory of a state. No doubt, the control over who enters and stays in one's territory is one of the areas encroaching deeply on the self-interest of states. While the traditional view was that states have an 'unfettered right'[105] to refuse admission of aliens, as well as to settle the conditions for their lawful stay, such discretion is by now restricted by both international refugee and human rights law norms——especially by obligations of *non-refoulement*. These, however, have remained scattered around a vast legal expanse of both treaty-based provisions and customary international law norms, which are normally assessed in compartmentalized ways. It was in this context that, in its first effort to systematize the law in this area,[106] the ILC decided in 2004 to include the expulsion of aliens on its agenda and appointed Maurice Kamto as its special rapporteur.

4.1 The Draft Articles on the Expulsion of Aliens (2014)

[104] See UN ILC, Comments and Observations received from Governments, at 45-47. See also *Al Rawi and Others, R(on the Application of) v. Secretary of State for Foreign Affairs and Another* [2006] EWHC 972 (Admin) at para. 63.

[105] See e.g., S. Oda, 'The Individual in International Law' in M. Sorensen (ed), *Manual of Public International Law* (Macmillan Press 1968) at 482.

[106] In fact, even though the law on extradition——one of the *loci classici* of the rules limiting the discretion of states in this area——was included in the provisional list of topics for codification in 1949, the Commission never actually elaborated draft articles on the topic. Rather, in 2014, the ILC concluded its final report on the obligation to extradite or prosecute (*aut dedere aut judicare*), where it briefly mentions the rule of non-extradition of asylees. See UN ILC, 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission' (2014) Yearbook of the International Law Commission, vol. II(2) at 19.

After several years of discussions in both the ILC's plenary and drafting committee, including nine-reports by the special rapporteur, the Commission finally adopted thirty-one draft articles on second reading, together with commentaries.[107] The 2014 Draft Articles on the Expulsion of Aliens tried to strike a balance between codification and progressive development in a particularly contentious area of the law. So much so that the ILC felt the need to reaffirm that the draft articles embodied rules 'established by certain treaty regimes or firmly established in customary international law, although some of them constitute progressive development of international law.'[108]

The draft articles set out by recognizing the 'sovereign,' yet qualified right of states to expel non-nationals from its territory, which must be performed within the boundaries demarcated by, and in compliance with the said draft articles and 'other applicable rules.'[109] While this 'without prejudice' clause might at first evoke problems of conflict of norms and international lawmaking,[110] its main purpose is to situate the draft articles within a broader legal environment. As the commentary to Draft Art 3 makes clear, by expressly mentioning other rules, the Commission wanted to emphasize 'the importance that respect for human rights assumes in the context of expulsion' which is 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.'[111] This is also confirmed by the wording of Draft Art 13(2), which provides that all aliens subject to expulsion 'are entitled to respect for their human rights, including those set

[107] UN ILC, 'Draft Articles on the Expulsion of Aliens, with commentaries' (2011) Yearbook of the International Law Commission, vol. II(2).
[108] Ibid at 6.
[109] Draft Art 3 UN ILC Draft Articles on Expulsion of Aliens.
[110] See generally M. 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' (2016) Harvard Human Rights Law Journal 1.
[111] UN ILC, Draft Articles on the Expulsion of Aliens, at 6.

out in the present draft articles.' Still, it is unclear how one would solve a possible conflict between the draft articles and such 'other applicable rules.'

The draft articles also adopt a comprehensive definition of 'alien,' covering all individuals physically present in the territory of the expelling state who do not possess this latter's nationality, irrespective of their migratory status. This expansion in scope was a point of contention for some states, which were particularly eager to keep the distinction between the treatment of 'lawful' and 'unlawful' non-nationals.[112] Moreover, in theory, the draft articles would be applicable to individuals already covered by special regimes, such as refugees, stateless persons, and migrant workers and their families. Yet, by focusing on the territorial scope of 'alienage,' the definition ends up excluding individuals who may be under the jurisdiction of a state, but not formally in its territory (e.g., asylum seekers stopped by the coast guard outside territorial waters).

On its part, expulsion is defined as 'a formal act, or conduct consisting of an act or omission, attributable to a state, by which an alien is compelled to leave [its] territory.'[113] Hence, it includes both a positive and a negative duty on the part of the state. For one, according to the draft articles, state authorities will have to abstain from unlawfully expelling non-nationals, as well as to ensure that non-state actors do not compel them to leave the country. The draft articles also make a distinction between expulsion and other measures of a compulsory nature, such as extradition, surrender to an international criminal court or tribunal, and rejection (*refoulement*) at the border. The commentary even suggests that individuals stopped at an airport——and therefore physically present in the state——but who are found to be ineligible for admission can be sent back without being formally 'expelled.' This, nevertheless, would have

[112] This issue was raised, for instance, by the Russian delegate. See UNGA, 'Summary Record of the 19th Meeting: 6th Committee, Genaral Assembly, 69th Sess' UN Doc. A/C.6/69/SR.19 (Nov. 17, 2014) at 13.
[113] Draft Art 2(a) ILC Draft Articles on Expulsion of Aliens.

to be applied without prejudice to 'rules of international law relating to refugees.'[114] However, when defining the proper scope of such rules, the Commission adopted a fairly conservative approach, circumscribing their application to individuals formally recognized as refugees, when in fact the protection against non-rejection under international refugee law was by then extensive to asylum seekers.[115] Similarly, the ILC decided to limit the scope of *non-refoulement* at the border to international refugee law, when in fact this norm was already well established in international human rights law.

This notwithstanding, the draft articles do cover the expulsion of individuals irregularly staying in a country, either because their status changed after lawfully entering in the state, or even if their entry was unlawful in the first place. Not only that, but they virtually equate the protections of both regular and irregular non-nationals, including certain procedural guarantees originally reserved to aliens lawfully staying in the territory of the expelling state. The Commission therefore departed from most human rights treaties, and even the 1951 Refugee Convention, which normally secure different sets of rights based on the individual's attachment to the foreign country. For instance, by conditioning a state's right to expel aliens unlawfully staying in its territory to a 'decision reached in accordance with law,' the Commission went beyond Art 13 of the ICCPR[116] and other human rights treaties.[117]

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[114] Draft Art 6 ILC Draft Articles on Expulsion of Aliens.

[115] See UNHCR, 'Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2009 (Conclusion No. 1-109)' (UNHCR 2009), at 7, 115, 121-123; UNGA Res. 51/75 'Office of the United Nations High Commissioner for Refugees' (12 February 1997).

[116] Art 13 of the ICCPR provides that 'an alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

[117] See e.g., Art 22(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); Art 32 (2) of the 1951 Refugee Convention; Art 31(2) of the 1954 Statelessness; Art 12(4) of the African Charter on Human and Peoples' Rights (1981); Art 22(6) of the American Convention on Human Rights (1969); Art 1(1) of Protocol No. 7 to the European Convention on Human Rights (1984); Art 26(2) of the Arab Charter on Human Rights (2004).

To expel an alien according to the draft articles, the state must observe certain procedural guarantees, including the right of expellees to receive notice of the decision that determined their expulsion, to challenge that decision before a competent authority, to access effective remedies, to have legal representation, and to be assisted by an interpreter is so required. These rights, however, can be set aside if the individual in question has been unlawfully present in the country for a brief duration (i.e., less than six months according to the commentaries[118]). Moreover, if detained for the purposes of expulsion, aliens must be separated from ordinary prisoners; detention cannot be arbitrary, punitive, or for an indeterminate period.[119] Another important guarantee recognized in the draft articles is the right to seek consular assistance and protection, which has proven to be an essential protection for individuals targeted with expulsion as noted by the ICJ in the *Diallo* (Republic of Guinea v. DRC) case.[120] This is a restatement of Art 36 of the VCCR as interpreted by the ICJ in the *LaGrand* (Germany v. United States)[121] and *Avena* (Mexico v. United States)[122] cases.

The Commission also incorporated the wording of Art 32 (the prohibition of expulsion of refugees lawfully staying in a country) and Art 33 (the duty of *non-refoulement*, including its exceptions) of the Refugee Convention, without major changes. There is also a specific provision on the expulsion of stateless persons, which makes a *renvoi* to Article 31 of the 1954 Statelessness Convention.[123] Additionally, states are prohibited from depriving an individual of nationality for the sole purpose of expulsion. Left unsaid in the draft articles is whether such provision would also apply to nationals outside the state of nationality at the moment of the

[118] UN ILC, Draft Articles on Expulsion of Aliens, at 45.
[119] Drat Art 19(1)(a) UN ILC Draft Articles on Expulsion of Aliens.
[120] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639 at para 95.
[121] *Avena and other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12, at paras. 49–114.
[122] *LaGrand (Germany v. United States of America)* (Judgment) [2001] ICJ. Rep 466, at paras. 64–91.
[123] UN ILC, Draft Articles on Expulsion of Aliens, at 12-13.

deprivation. Collective and constructed (or disguised) expulsions are equally interdicted, and so are expulsions used to confiscate one's assets or to circumvent ongoing extradition procedures. Nevertheless, this latter does not apply to enemy aliens and their property rights in times of war.[124]

In a different set of draft articles, the ILC details limitations on the right of expulsion based on the destination. According to Draft Art 22, a state can expel an alien to their country of nationality or habitual residence or to any other state willing to accept them. If such a state cannot be identified, then the individual in question may be sent to a country where they have a right of admission or, depending on the circumstances, to the state from where they have entered the expelling state.[125] In fact, the presence of aliens on the territory of a state triggers a complex set of legal relations as a consequence of them being non-nationals. As Judge Read noticed in his dissenting opinion in the *Nottebohm* case, by admitting non-nationals the state 'brings into being a series of legal relationships with the State of which he is a national.'[126] In other words, the admittance of foreigners creates a tacit agreement between the receiving state and the state of nationality: by emitting travel documents on behalf of its national, a state is giving an assurance that they may be returned to its territory.[127] In creating possible obligations to admit non-nationals on states of transit, the Commission took this premise to the extreme.

The draft articles also reflect important developments of the norm prohibiting *refoulement* in international human rights law. Apart from the express recognition of the absolute prohibition on *refoulement* to a real risk of torture or other inhuman treatments or punishments, the draft

[124] On the legal regime of enemy aliens, see generally A. Clapham, *War* (Oxford University Press 2021) at 195-206.
[125] UN ILC, Draft Articles on Expulsion of Aliens, at 32-34.
[126] *Nottebohm (Liechtenstein v. Guatemala)*, Dissenting Opinion of Judge Read, at 46.
[127] As Goodwin-Gill aptly notes, 'the passport, with its reference to returnability, is of crucial importance as indicating the destination to which the alien may be removed on his exclusion or subsequent deportation.' In G. S. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford University Press 1978) at 3.

articles adopted a broad protection against expulsion to a place where one's life might be threatened due to their 'race, color, 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.'[128] Though the Commission ended up deleting the expression 'threats to one's freedom' on the insistence of some states,[129] this latter provision expands on the prohibition of *refoulement* under Art 33(1) of the Refugee Convention, which was already incorporated into another draft article. The existence of overlapping draft articles——one on refugees, and another on aliens in general——is bound to create some confusion.

Another important addition was the prohibition of *refoulement* to a country where there is a real risk of death penalty, although contingent on diplomatic assurances that capital punishment will not be imposed or carried out. Even though the right to life had already been interpreted as entailing *non-refoulement* obligations,[130] the Commission felt the need to push for the progressive development of the law in two respects. First, by prohibiting states that may have the death penalty in their legislation, but nonetheless do not apply it in practice, from expelling an individual to a country where they may face capital punishment. Secondly, by extending the scope of protection to situations where there is a real risk that a death penalty will be imposed, and not only to instances where capital punishment has already been imposed.[131]

The draft articles also include an additional layer of protection for those individuals subject to expulsion. For one, all expellees must have their human rights respected, without discrimination, and be treated humanely. These include the right to life, personal and physical integrity, and to have one's family life respected. Vulnerable persons are also protected under

[128] Draft Art 14 ILC Draft Articles on Expulsion of Aliens.
[129] In especial on the comments made by the United Kingdom and Canada. UNGA, 'Expulsion of Aliens: Comments and observations received from Governments' UN Doc. A/CN.4/669 (21 March 2014) at 50-51.
[130] See e.g., *Judge v. Canada* CCPR/C/78/D/829/1998 (13 August 2003); *Ahani v. Canada* CCPR/C/80/D/1051/2002 (29 March 2004); *Warsame v. Canada* CCPR/C/102/D/1959/2010 (21 July 2011).
[131] UN ILC, Draft Articles on Expulsion of Aliens, at 34-35.

the draft articles. In the event of an expulsion, voluntary departure should be preferred. However, if a forcible implementation is required, the expelling state should provide the alien with 'a reasonable period of time to prepare for their departure, having regard to all circumstances.'[132]

At last, the Commission also included a separate section of draft articles on the legal consequences of expulsion, including an innovative right of readmission as a form of reparation, a provision on state responsibility, and a re-statement of the right of the state of nationality to exercise diplomatic protection on behalf of its expelled national.

4.2 'Too Much' Progressive Development?

No doubt, the 2014 Draft Articles on the Expulsion of Aliens represented a commendable initiative by the ILC to clarify and articulate a particularly sensitive area of international law, especially by codifying settled norms on the human rights of non-nationals and progressively developing others. Yet, they have been the subject of considerable criticism from both states and academia, eventually becoming the Commission's *bête d'aversion*.[133] Commentators note that some draft articles have failed to incorporate——or have even 'regressively developed'[134]——rights firmly established in international migration law. In addition, some have questioned the Commission's decision to propose draft articles on an area already regulated by a large number of bilateral, regional, and multilateral treaties. In fact, though the draft articles try to

[132] Ibid, at 30-32

[133] This 'contentiousness' is illustrated by the initial inability of the UNGA to endorse, or even take note of, the draft articles, but to merely take '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 decided to continue the consideration of the recommendation at the seventy-second session of the General Assembly (2017).' See UNGA Res. 69/119 'Expulsion of Aliens' (18 December 2014).

[134] W. Kidane, 'Missed Opportunities in the International Law Commission's Draft Articles on the Expulsion of Aliens' (2017) 30 Harvard Human Rights Journal 77, at 83-88.

fix this issue through various 'without prejudice' clauses, the ways these may prevent and resolve conflicts between different bodies of law remain uncertain.[135]

Some states, on the other hand, have been dissatisfied with the (im)balance between codification and progressive development. As certain delegations observed, the Commission went 'far beyond' existing norms on the topic, especially where state practice remained inchoate. Others pointed to the possible mismatches between the regime established by the draft articles and already existing frameworks on the expulsion of aliens, which could 'hamper relevant international cooperation and to result in impunity of criminals.'[136] Subjacent to these reactions are the political sensitivities raised by the international regulation of migration, an area where states have increasingly conflicting views. [137]

This is well illustrated by the more recent debates on the 2019 Draft Articles on Crimes against Humanity,[138] which expressly provide for an absolute prohibition on *refoulement*. According to Draft Art 5, states would be barred from expelling, returning, surrendering, or extraditing an individual where 'there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.'[139] An additional paragraph details some of the positive obligations deduced from the duty of non-return, including an obligation to conduct a risk assessment. While the provision simply replicates a formula adopted by various human rights treaties since at least the 1980s,[140] some states have been particularly exasperated by the

[135] Forteau, A New 'Baxter Paradox'?, at 4-5.
[136] This issue was raised by China. See UNGA, 'Summary Record of the 20th Meeting: 6th Committee, Genaral Assembly, 69th Sess' UN Doc. A/C.6/69/SR.20 (10 November 2014) at 5.
[137] As Sean Murphy rightly notes the 'central difficulty with [this] 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.' In S. D. Murphy, 'The Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission' (2015) 109 American Journal of International Law 125, at 130.
[138] UN ILC, 'Draft Articles on Prevention and Punishment of Crimes against Humanity' (2019) Yearbook of the International Law Commission, vol. II(2).
[139] Draft Art 5(2) ILC Draft Articles on the Prevention and Punishment of Crimes against Humanity.
[140] For instance, Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

lack of security exceptions[141]——showing yet again their hesitancy in accepting any perceived restrictions to their discretion over admission and sojourn of non-nationals.

5 Conclusion

Established to progressively develop international law and promote its codification, the International Law Commission has been playing a pivotal role in reducing the indeterminacy and uncertainty inherent in the international legal system. While the Commission has been praised for effectively codifying key areas of international law, its work has also shed light on areas that were not directly under its purview. As this article demonstrates, international migration law seems to be a prime example of that. The protection of migrants, refugees, and stateless persons has come to figure prominently in various of its draft articles, conclusions, and studies. The article also emphasized the challenges faced by the Commission when dealing with the many political sensitivities evoked by any attempts to curb states' discretion in this domain.

With the ongoing studies on sea-level rise in relation to international law, the ILC is once again venturing into the domain of international migration law.[142] Although the Commission does not intend to provide an exhaustive analysis of the application of international law to sea-level rise, its work will likely identify, clarify, and articulate existing legal frameworks that can be mobilised to deal with the far-reaching consequences of rising sea levels. The initiative is another attempt to use international institutions in addressing certain effects of climate change.

[141] Especially by the United States, the UK, Jordan, Iran, and China. See e.g., UNGA, 'Summary record of the 19th meeting' UN Doc. A/C.6/72/SR.19 (20 November 2017) at 2-3, 9-10, 15.

[142] UN ILC, 'Second Issues paper by Patricia Galvao Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law' UN Doc. A/CN.4/752 (19 April 2022), at 105-107. See also B. Burson, W. Kälin, and J. McAdam, 'Statehood, Human Rights and Sea-Level Rise: A Response to the International Law Commission's Second Issues Paper on Sea-Level Rise in Relation to International Law' (2023) 4(1) Yearbook of International Disaster Law 265, at 273-276.

Yet, it remains to be seen what sort of action will be taken after the Commission's final report, as well as whether it will enjoy the same degree of authority as other of its works. What previous engagements with the field indicate, however, is that the 'success' of any of the ILC's projects in this domain hinges on finding the right balance between codification and progressive development. This also includes taking into account the historical, political, and social circumstances surrounding the topic at issue, as well as the broader legal environment of which it is part. It is hoped that the Commission continues to contribute to a better understanding of key principles and rules of international migration law, thus furthering their sensible use by members of the legal profession who are often faced with uncertainty in this deeply contentious field.