CRIMINAL ACCOUNTABILITY OF UNITED NATIONS OFFICIALS AND EXPERTS ON MISSION

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ABSTRACT

The criminal accountability of United Nations officials and experts has become a relevant issue in the 21st century given the rise of crimes allegedly perpetrated by United Nations personnel on mission, mainly of sexual exploitation and abuse. Given the privileges and immunities these agents enjoy, combined with a jurisdictional gap over this matter, such grave violations often remain unpunished. In face of the lack of legal framework on the matter, the General Assembly included this item in the agenda of the Legal Committee in 2006. Inasmuch the Sixth Committee must devise a means to hold these agents accountable, be it an approach through the development of international law proposing a draft convention or making recommendations to member states as to how to tackle the issue on the national level.

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1 INTRODUCTION

The United Nations General Assembly Sixth Committee – the Legal Committee – is the primary forum for the consideration of legal questions within the General Assembly (UNGA). As one of the main committees of the UNGA, all UN Member States are entitled to representation on it. Its mandate can be extracted from Article 13 of the UN Charter, which provides a broad authorization to the General Assembly to elaborate new treaties on the widest range of issues, to adopt them, and to recommend them to states for their subsequent signature, ratification, and accession (United Nations, n.d.).

The criminal accountability of UN officials and experts has become a relevant issue in the 21st century because of the rise of crimes allegedly perpetrated by UN personnel on mission, mainly of sexual exploitation and abuse. Given the privileges and immunities these agents enjoy, combined with a jurisdictional gap over these matters, such grave violations often remain unpunished.

The issue of criminal accountability of UN officials and experts on mission was first introduced by the General Assembly in its sixty-first session, in 2006, within the item entitled “comprehensive review of the whole question of peacekeeping operations in all their aspects”. In that session, the General Assembly decided to include the item “criminal accountability of United Nations officials and experts on mission” in its agenda. The item was allocated to the Legal Committee as an aftermath of the debate of the Special Political and Decolonization Committee (Fourth Committee) on the “comprehensive review of the whole question of peacekeeping operations in all their aspects” in order to address the report of the Group of Legal Experts on ensuring the accountability of UN staff and experts\(^3\). The General Assembly considered this item in every early session from its sixty-second session in 2008 to its latest session, the seventy-second session in 2017. The aim of the Legal Committee on this topic is to establish a strong legal framework in order to satisfy the existent accountability gap, be it an approach through the development of international law proposing a draft convention or making recommendations to member states as to how to tackle the issue on the national level.

Insofar the present article will address this topic in four sections. First a historical background explaining the origin of this issue and touching on different approaches, with varying effectiveness, that the international community employed thus far to tackle this problem. Second, the statement of the issue which addresses the heart of the problem touching on the different controversies arising from it, ranging from the who are UN officials and experts on mission, their privileges and immunities, the rules of conduct concerning these agents to the matter of the jurisdictional gap as to how they can be held accountable for such crimes. The third section

\(^3\) “The Special Committee on Peacekeeping Operations, having considered the report of the Adviser to the Secretary-General on sexual exploitation and abuse by United Nations peacekeeping personnel (A/59/710) [...] made a number of recommendations in its report (A/59/19/Rev.1), including that the Secretary-General appoint a group of legal experts to prepare a report providing advice on the best way to proceed so as to ensure that the original intent of the Charter of the United Nations could be achieved, namely that United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, in accordance with due process. [...] the Secretary-General established a group of legal experts to consider the issue.” (UN Doc A/60/980).
addresses the previous actions already taken by the UN on this matter, specifically those taken within the scope of ad hoc Committee on the same issue created in 2006, including a draft convention on the matter, the Secretary General’s voluntary compact on sexual exploitation and abuse, and the UN Zero-Tolerance Policy. The final section contains the position of each member state of the Committee on the matter. At last the article concludes with five questions the delegates should consider in discussing the issue of the criminal accountability of UN officials and experts on mission.

2 HISTORICAL BACKGROUND

The first case involving UN personnel on mission was reported in Kosovo, Bosnia and Herzegovina, during the 1990s. Human and Women’s Rights Groups, as well as other UN agencies, denounced the sexual exploitation and abuse committed by peacekeeping officials during their missions. Moreover, the involvement of UN peacekeepers in the trafficking of women and girls for the purpose of sexual exploitation was also documented later on missions in Mozambique, East Timor, Slovenia, Cambodia, Guinea, Sierra Leone, Sudan, Haiti, and Liberia (Gustafsson 2005). The quality and substance of evidence to support criminal accountability varied, and despite numerous reports from Human Rights Watch and Amnesty International, along with widespread media coverage, it was not until allegations of abuse of the same nature emerged in the Democratic Republic of Congo in 2004 that UN officials responded to those charges (Defeis 2008).

As a response to the allegations against peacekeepers in Congo, in March 2005, the Special Committee on Peacekeeping Operations requested the UN Secretary-General to submit a report with recommendations on the problem of sexual exploitation and abuse by UN peacekeeping personnel (United Nations 2005b). The Secretary-General invited Prince Zeid Ra’ad Zeid Al-Hussein, Permanent Representative of Jordan, a major contributor to peacekeeping operations, and former civilian peacekeeper himself, to act as advisor. The Prince undertook the preparation of the report “A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations” (United Nations 2005a), commonly known as “Zeid Report”. The report detailed how women and girls were forced to trade sex for money, food and jobs, including also acts of rape disguised as prostitution (when the victims were given minor “gifts” in order to mask the sexual assault). Moreover, many of the victims were left pregnant with the so-called “peacekeeper babies” after the abuse (United Nations 2005a). Among Prince Zeid final considerations, he affirmed that

4 In 2004, 150 cases were brought against UN peacekeepers, soldiers and civilians, working at the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC). The accusations ranged from abduction and sexual abuse of minors to child pornography. (Independent 2005). The UN announced in the same year that the MONUC would investigate the reports (United Nations 2004), deciding to keep the peacekeepers identities and nationality confidential (The Washington Post 2004).

5 The Special Committee on Peacekeeping Operations began its works in 1965 under the General Assembly Fourth Committee with the purpose of reviewing and providing recommendations for peacekeeping operations. The Special Committee is composed by 147 Member States and observing members, such as the International Criminal Police Organization (United Nations 2018a).
It is recommended that the Secretary-General establish a group of experts to study the issue and make recommendations to the General Assembly on whether an international convention or other means could be used to ensure that United Nations staff and experts on mission who commit defined crimes in peacekeeping areas are held criminally accountable for their actions (United Nations 2005a, 31).

The issue of criminal accountability of UN officials and experts on mission was first introduced by the General Assembly in its sixty-first session in 2006 as “comprehensive review of the whole question of peacekeeping operations in all their aspects” (United Nations 2006a). The item was allocated to the Legal Committee as an aftermath of the debate that occurred within the Special Political and Decolonization Committee (Fourth Committee), which happened in order to address the “Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations” (United Nations 2006b). The Group was composed by five legal experts – each individual specialized in criminal law, extradition law, mutual assistance in criminal matters law, international human rights law, and privileges and immunities of the United Nations-, who were responsible for a report on the legal issues concerning accountability, jurisdiction, and investigation of UN officials and experts. Moreover, the Group elaborated a Draft Convention on the Criminal Accountability of UN Officials and Experts on Mission, which never entered into force. Following the consideration of the document by the Legal Committee, the General Assembly decided in favor of the establishment of an Ad Hoc Committee that would specifically analyze the issue disclosed by the report of the Group (United Nations 2006b).

The Legal Committee has included this item in its agenda in every session from 2008 (sixty-second) to its latest, in 2017 (seventy-second session) (United Nations 2017a). Despite the existence of some UN documents addressing sexual exploitation and abuse in the UN system, the first substantive General Assembly resolution on criminal accountability was Resolution A/62/63 of 8 January 2008. The resolution mainly called for a report from the works of the Ad Hoc Committee, but also (1) requested the adoption of measures to strengthen the pre-deployment and in-mission training of UN personnel and (2) the investigation and prosecution of crimes that may have been committed by officials and experts on mission, once those credible allegations are brought to the attention of their national state (United Nations 2017a).

The only known case in which a state was deemed responsible for its nationals employed on peacekeeping missions as UN officials is the 6 September 2013 decision of the Supreme Court of the Netherlands, which rejected the appeal made by the Dutch Ministry of Defense and Ministry of Foreign Affairs regarding the Dutch state’s own responsibility for the 1995 Srebrenica massacre during the Bosnian War. The case was originally filed by Hasan Nuhanovic, a UN interpreter who had his father, mother and brother killed by the Bosnian-Serb troops, and the family of Rizo.

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6 The Srebrenica massacre is considered one of the most brutal incidents not only of the Bosnian War, but of the European Continent since World War II, resulting in thousands of casualties. In July 1995, in the Srebrenica municipality, near the border of Bosnia with Serbia, Bosnian Serb forces carried out executions and perpetrated sexual abuse against the Bosnian Muslims, with the purpose of ethnical cleansing (The Hague Justice Portal 2008).
Mustafic, an electrician, also killed by Bosnian-Serb soldiers or related paramilitary groups. Both worked for the Dutch UN Battalion at Srebrenica in the year of the massacre. The Court decided that the Netherlands should pay damages for the victims given their failure of protecting the citizens seeking refuge at the Dutch base, who were later forced to leave (The Hague Justice Portal 2008).

Besides the condemnation, the events of Srebrenica involving the peacekeepers caused the resignation of the entire Dutch cabinet. Additionally, another civil lawsuit was filed by the organization known as the “Mothers of Srebrenica”, who sought greater compensation for their families murdered at the massacre, claiming the Dutch government was responsible for their deaths as they were also denied entry at the base under the excuse that only authorized UN personnel were allowed in it (The Hague Justice Portal 2008). However, the Dutch Court of Appeal, contradicting the previous Supreme Court ruling, decided it had no jurisdiction over the actions it attributed solely to the United Nations, which enjoys immunity from national courts. The case was later brought to the European Court of Human Rights, which held the application inadmissible as the right of a fair trial had not been violated, unlike alleged by the applicants (European Court of Human Rights 2013; Supreme Court of the Netherlands 2013).

In 2017 (at the UN seventy-second session), the Legal Committee reaffirmed the criminal accountability of UN officials and experts as a major reason of concern for the whole United Nations. The Committee addressed the latest efforts to protect the rights of victims, such as the Zero-Tolerance Policy and the Voluntary Compact on Preventing and Addressing Sexual Exploitation and Abuse (which is further discussed in the article). The appointment of a Victims’ Rights Advocate and the creation of a Trust Fund for victims were also discussed. Additionally, the States representatives reaffirmed the need for the harmonization of national disciplinary standards with those of the United Nations, and the establishment of jurisdiction in order to investigate and prosecute crimes committed by those nationals on mission (United Nations 2017b).

3 STATEMENT OF THE ISSUE

In this section, the material aspects of the accountability of UN officials and experts will be addressed in four parts: (i) the definition of UN officials and experts; (ii) the rules of conduct applicable to these agents; (iii) the privileges and immunities they enjoy; and (iv) the matter of the exercise of jurisdiction over crimes committed by such agents.

3.1 DEFINITION OF UNITED NATIONS OFFICIALS AND EXPERTS ACCORDING TO THE 1946 CONVENTION

The 1946 Convention on the Privileges and Immunities of the United Nations, at its article V, section 17, determined the Secretary-General’s competence to specify to which categories of officials the Convention would apply and to submit

7 The Mothers of Srebrenica is an association representing the 6000 women who lost family members during the massacre of Srebrenica (The Hague Justice Portal 2018).
his/her decision to the approval of the General Assembly. Therefore, as defined by
the General Assembly at that same year, the term “officials” encompasses all mem-
bers of UN staff appointed by and under the authority of the Secretary-General,
excluding the locally hired members of staff who are assigned to hourly rates (United
Nations 2005a).

However, the 1946 Convention does not conclusively define experts on mis-
sion, choosing to cite them as those other than UN officials, but who are also hired
directly by the UN, including UN police and military observers (Thoms 2014). The
lack of a precise definition has been subject to the consideration of the International
Court of Justice (ICJ) before. In its Advisory Opinion on the Applicability of Article
VI, section 22, of the Convention on the Privileges and Immunities of the United
Nations, the ICJ considered that the meaning of “experts on mission” adopted by
the Convention included individuals – other than UN officials – entrusted with a
mission and that, during the entire period of such missions, the expert would enjoy
the privileges and immunities provided for them whether or not they travelled, as
long as they kept performing their assigned duties (ICJ 1989).

3.2 THE RULES OF CONDUCT FOR UNITED NATIONS OFFICIALS AND EXPERTS

As a general rule, the UN staff shall adhere to the “highest standards of efficien-
cy, competence and integrity” (UN Charter article 101, para. 3). The latest Secretary-
General Bulletin on the Staff Rules and Staff Regulation reiterated that provision in
its Article I, Regulation 1.2, b. Furthermore, Article I, Regulation 1.2, a, concerning
the basic rights and obligations of staff, provides that all UN personnel must comply
with the duty to uphold and “respect the principles set out in the Charter, including
faith in fundamental human rights, in the dignity and worth of the human person
and in the equal rights of men and women” (United Nations 2005a). The Staff Rules
and Staff Regulation, among administrative instructions and other bulletins, com-
pose the body of restrictions on conduct binding UN staff in general, along with
volunteers, individual contractors, and consultants (United Nations 2005a).

The first document specifically addressing grave allegations of sexual exploi-
tation and abuse committed by UN officials and experts was the Secretary-General
Bulletin of 2003. Sexual exploitation and abuse are specifically prohibited by the
updated Bulletin of 2014 under Chapter I, Rule 1.2, e, including any form of sexual
discrimination or harassment, prohibiting any sexual activity under the age of 18,
regardless of the age of consent or majority locally. Other specific instances of prohi-
bited conduct in the same document include provisions such as the obligation not
to intentionally alter, destroy, falsify or misplace, or render useless any official do-
cument (Chapter I, Rule 1.2, i); the provision prohibiting Staff members from either
offering or promising any favor, gift, remuneration or any other personal benefit to
another Staff member or to any third party (Chapter I, Rule 1.2, l); the obligation not
to engage in any outside occupation or employment, whether remunerated or not,
without the approval of the Secretary-General (Chapter I, Rule 1.2, s), among other
norms regarding conflict of interest.

Regarding specific UN peacekeeping operations, troop-contributing coun-
tries have traditionally adopted the standards of conduct for peacekeepers set out in
two separate publications, entitled “Ten Rules: Code of Personal Conduct for Blue
Helmets” and “We Are United Nations Peacekeepers” (United Nations 2005a; Defeis 2008). Both documents “regulate the conduct of peacekeepers in general terms and explicitly prohibit sexual exploitation” (Defeis 2008, p. 194). However, according to the Zeid Report, UN peacekeeping operations involve military, civilians, and civil police components. Previous Secretary-General Bulletins did not apply to all three categories, thus creating a problem for the accountability of all personnel in a uniformed manner (United Nations 2005a). Finally, on the matter of transparency of the UN system, in June 2017, in response to the Legal Committee’s request contained in paragraph 27 of UNGA Resolution 71/134, the Secretary General issued a report on the relevant existing policies and procedures of the UN system regarding credible allegations that reveal that a crime may have been committed by UN officials or experts on mission (United Nations 2017).

3.3 THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

The status of UN officials and experts are determined by the 1946 Convention of Privileges and Immunities of the United Nations. The Convention entered into force in December 1946, after the deposit of the instrument of the first accession, issued by the United Kingdom of Great Britain and Northern Ireland. To this date, the Convention counts with 162 parties (United Nations 2017a). This treaty is binding to all States which have acceded to it, as stated in section 35. In addition, Articles 104 and 105 of the UN Charter respectively indicate “that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes” (United Nations 1945, art.104); and

That the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization (United Nations 1945, art. 105).

Section 18 (a) of the Convention on the Privileges and Immunities provides that officials are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Additionally, the Secretary-General and all Assistant Secretaries-General, along with their spouses and minor children, shall be granted those privileges and immunities specified in section 18, as diplomatic envoys and in accordance with international law (United Nations 2008b). According to the Zeid Report, with respect to military officials, the status-of-forces agreements dictate that the most senior official in the mission, such as the head of mission or Force Commander, is also granted privileges and immunities of diplomatic envoys. Furthermore, UN volunteers have the equivalent status of officials under the Convention, while individual contractors and consultants are usually subject to local law only. Consultants, however, may acquire the status of experts on mission under the Convention if they are required to travel on behalf of the Organization (United Nations 2005a).
Moreover, experts on mission enjoy the privileges and immunities necessary for the discharge of their functions, which includes immunity from personal arrest, as well as detention or seizure of their baggage. They are also granted immunity from legal process of every kind concerning their spoken or written words, along with their actions during the course of the mission. The inviolability of all papers and documents produced by them also encompasses their privileges (as presented in the section 22 of the 1946 Convention).

Nonetheless, as said immunities and privileges for officials and experts are established, the Convention ensures that they are never to be used for personal privilege, but only for the maintenance of the United Nations’ interests. The immunity is functional, which means that it extends only to the performance of official duties. Therefore, the immunity may be waived only by the Secretary-General, as it is his/her right and duty, in any case where it might impede justice, according to their judgement (with the advice of the Office of Legal Affairs). If the issue involves the immunity of the Secretary-General himself/herself the right to waive immunity belongs to the Security Council (Section 20 and 23 of the Convention). As an example:

If a staff member was criminally prosecuted for a traffic accident caused by his or her drunken or grossly negligent driving of a United Nations vehicle, the Secretary-General could decide that immunity would impede the course of justice and conclude that waiver of immunity would not adversely affect any United Nations interests. In such a case immunity would be waived. On the other hand, if the Secretary-General determined that there was no basis for the allegation or that the staff member had been properly performing his or her duties, immunity would be maintained (United Nations 2005a, 33).

Finally, all the agreements between the UN and its member states, for example headquarters agreements with host states, which commonly adopt their national law, are also sources of legal rules. These rules determine the scope of privileges and immunities of its nationals who serve as officials and experts on mission in the specific context of the host country, as long as they are consistent with the Charter (United Nations 2008b).

3.4 JURISDICTION FOR CRIMES COMMITTED BY UNITED NATIONS OFFICIALS AND EXPERTS

A main deterrent to holding UN officials and experts accountable for crimes committed on mission is the existent jurisdictional gap (United Nations 2016), since there is no established rule as to who can prosecute these actors. Previous United Nations reports on related topics have touched on this issue without providing a clear universal solution (United Nations 2005a; United Nations 2006a). In effect, a few possibilities have been raised so as address to how UN officials and experts could be prosecuted in the host state, by states other than the host state, or by an international court or tribunal. On a final note on the overall exercise of jurisdiction by states, the Group of Experts Report recommends the adoption of an international convention on this matter (United Nations 2006a).
3.4.1 JURISDICTION OF THE HOST STATE\(^8\)

In accordance with the territorial principle, a state may prosecute a crime committed in its territory (Crawford 2012) unless it is unwilling or unable to do so. Similarly, the jurisdiction of the host state was considered possible by both the Zeid Report\(^9\) and the Group of Experts Report\(^10\).

The Group of Experts Report presents a number of compelling arguments to support the jurisdiction of the host state. First, since the crime was committed on the territory of the host state, it is clear that it may exercise jurisdiction. Second, since it is more likely that most witnesses and evidence are to be found in the host state, holding the trial there would ensure that the proceedings are not exceedingly costly or needlessly delayed. Third, the criminal accountability of the alleged offender derives from the obligation of UN peacekeeping personnel to comply with local laws as an outcome of their privileges and immunities\(^11\). Fourth, considering that one of the purposes of deploying a peacekeeping mission is to establish the rule of law, holding a trial in the host State gives the population the sense of justice being done (United Nations 2006a, paras. 27-28). The Zeid Report made similar considerations in support of its recommendation to hold on-site courts-martial for members of military contingent (United Nations 2005a, para. 35).

Yet, some issues arise when envisioning to put the territorial principle in practice. It may be that the most convincing reason not to apply territorial jurisdiction is the fact that peacekeeping operations are most often deployed in countries with dysfunctional legal systems, where the rule of law is non-existent, not functional, or otherwise not in accordance to international human rights law (Carlson 2006).

The Zeid Report envisions the possibility of \textit{ad hoc} agreements, ensuring that the host state consents to UN assistance so as to guarantee the criminal proceedings will fulfill basic human rights standards (United Nations 2005a). However, this course of action creates another problem, since it virtually institutes two standards of treatment: one for local inhabitants and one for international officials (United Nations 2005a).

In spite of recognizing this as a legitimate concern, it is the view of Group of Experts that the perception of double standards should not, in itself, rule out any particular course of action. The Group points out that military personnel are already subject to a separate judicial system and that, for the victims, some accountability is better than none (United Nations 2006a).

Notwithstanding, the Group of Experts’ Report offers additional potential solutions. A peacekeeping mission may be given an executive mandate so that it exercises governmental powers in the host state, including the discretion to create a legal system that complies with rule-of-law requirements, allowing it to exercise

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\(^8\) All references in this section relating to the Group of Experts Report (U.N. Doc. A/60/980) were extracted from paragraphs 30 to 43 of the document and those relating to the Zeid Report (U.N. Doc. A/59/710) from paragraphs 18, 35, and 89.
\(^9\) See U.N. Doc. A/59/710, \textit{Comprehensive review of the whole question of peacekeeping operations in all their aspects}.
\(^11\) See section 3.3 above.
jurisdiction over crimes committed by peacekeeping personnel. However, given that host states are most of times unlikely to agree to confer such executive powers to the United Nations, a typical peacekeeping mission most likely will not be granted such authority (Ibid).

Alternatively, a peacekeeping operation may include a rule of law component providing for the establishment or re-establishment of the host state legal system. Such capacity-building may enable the host state to exercise fair and equal jurisdiction over all persons, irrespective of status. In this situation the problem is that, most often, full capacity-building of the legal system can only be achieved in the long term, which will not be sufficient to prosecuting crimes committed by peacekeeping personnel in the short to medium term. It must be taken into account whether the partial re-establishment of a specific portion of the host state’s legal system may be sufficient to adequately hold peacekeeping personnel accountable (Ibid).

Yet another alternative is to establish a hybrid tribunal\textsuperscript{12}, in order to facilitate the exercise of jurisdiction of the host state. Hybrid tribunals are essentially part of the domestic legal system with a varying number of international elements. In such way, it lowers the risk of applying different standards to peacekeeping personnel and the local population of the host state. Additionally, there is the prospect that proceedings conducted by these tribunals will produce relevant international human rights standards because of the involvement of the international community (Ibid).

In contrast, there are two limiting factors. First, the host state must agree to the establishment of such a tribunal where the peacekeeping operation does not have an executive mandate. The manner of operation of the tribunal will depend on the extent of the host state consent, thus differing in each peacekeeping mission. Second, the establishment of a tribunal of this kind imports high costs (Ibid).

The Group of Experts Report entertains one final alternative. In situations when the host state is unable to successfully exercise jurisdiction irrespective of international assistance, it may share the exercise of jurisdiction with other states. Jurisdiction encompasses various activities ranging from investigations to adjudication to the detention of persons. Accordingly, two or more states will exercise different but mutually supportive aspects of criminal jurisdiction, considering that greater the capacity of a host state to exercise criminal jurisdiction, the smaller the part which needs to be played by other states (Ibid).

It is important to emphasize that the minutiae of each peacekeeping operation vary considerably. There is no universal solution. Each of these different alternatives may be appropriate to a given set of circumstances. This cast of potential approaches is not exhaustive, and other options not herein entertained may be best suited in different contexts (Ibid).

\textsuperscript{12} Examples of hybrid tribunals are the Special Court for Sierra Leone, the Extraordinary Chambers established in Cambodia to try senior leaders of Democratic Kampuchea, and the Special Panels for serious crimes established by the United Nations Transitional Administration in East Timor to try serious criminal offences in Timor-Leste.
3.4.2 JURISDICTION OF STATES OTHER THAN THE HOST STATE

In its decision on the *Lotus Case*, the Permanent Court of International Justice recognized that “a state [...] should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty” (Permanent Court of International Justice 1927). Overall, international law traditionally recognizes four general bases for determining whether a State may exercise jurisdiction where crimes are committed outside of its territory: (i) the nationality principle; (ii) the passive personality principle; (iii) the protective principle; and (iv) the effects doctrine (Crawford 2012). Given the circumstances, states may otherwise exercise universal jurisdiction when the conditions for the former jurisdictional bases are not present (*Ibid*).

Considering the special context of crimes committed by UN officials and experts on mission, the Group of Experts Report has deemed some bases of jurisdiction irrelevant or of little relevance to the issue at hand when states other than the host state are unlikely to assert jurisdiction on those bases (*U.N. Doc. A/60/980*, para. 52). Still, for the purpose of the present section, only the nationality principle and the possibility of the exercise of universal jurisdiction will be discussed.

According to the *nationality or active personality principle*, a state is entitled to assert over extraterritorial criminal acts committed by its nationals (Crawford 2012). While nationality provides the primary criterion for criminal acts in locations or circumstances where the territorial criterion is not recognized, it may create parallel jurisdictions and possible double jeopardy when the territorial principle is in effect (*Ibid*). This view was supported by the Zeid Report which affirms that the application of the nationality criterion was an exception rather than the rule in the context of crimes committed by UN officials and experts on mission (*U.N. Doc. A/59/710*, page 6).

In contrast, the Group of Experts Report argues that, in order to minimize impunity, states should exercise jurisdiction when their nationals committed such crimes (*U.N. Doc. A/60/980*). Accordingly, from the moment the Legal Committee first undertook the commitment to address the criminal accountability of UN off-
cials and experts on mission, the General Assembly has constantly and repeatedly urged states to establish jurisdiction over serious crimes committed by their nationals while on UN missions.

In effect, *universal jurisdiction* applies to “only over those crimes regarded as the most heinous by the international community” (International Court of Justice 2002, para. 60). While it was originally attached to the crime of piracy *jure gentium* (Permanent Court of International Justice 1927), in modern times it has been extended to the so-called “core crimes” of international criminal law, *i.e.* genocide, crimes against humanity, and breaches of the laws and customs of war, especially of the Hague Convention of 1907 and the grave breaches of the Geneva Conventions of 1949 (Crawford 2012). It is most likely that torture, within the meaning of the Torture Convention of 1984, is subject to universal jurisdiction (*Ibid*).

Accordingly, the Group of Experts Report points out arguments for and against the exercise of universal jurisdiction in relation to serious crimes perpetrated by UN officials and experts on mission. An argument against is that it should not be applicable to an isolated act of rape, or that a serious sexual assault committed by one such agent does not reach the same level of seriousness of the established international crimes that attract international jurisdiction. Nonetheless, the particular degree of seriousness of such violation should be recognized given that the purpose of the purpose of that agent on mission in the host state is to promote peace and restore the rule of law (United Nations 2006a)

The solution the Group of Experts Report presents is the assertion of universal jurisdiction drawing from the obligation of *aut dedere aut judicare*, which compels a state to either try the accused or to extradite him to a state willing to do so. Thereafter, universal jurisdiction should be encouraged among states only as a last resort. That is, where both the host state and the state of nationality are unwilling or unable to prosecute the UN official or expert, other states could act to ensure accountability (*Ibid*.).

### 3.4.3 Jurisdiction of an International Court or Tribunal

Along the course of modern history there have been times when the international community accepted that certain crimes were of such gravity that the most suitable and effective way of dealing with the accountability issue was the establishment of independent international courts and tribunals. Since then, international criminal law evolved in such a way that the much promised permanent criminal court was established in 1998, and thus within the current framework the tribunal existent for the prosecution of international crimes is the International Criminal

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17 An operative provision urging states that have not done so to consider establishing this kind of extraterritorial jurisdiction has been similarly contained in General Assembly Resolutions on the criminal accountability of UN officials and experts from the first time the Legal Committee addressed this issue in its sixty-second session in 2008 to its latest session, the seventy-second session in 2017. See UNGA Resolutions 62/63, 63/119, 64/110, 65/20, 66/93, 67/88, 68/105, 69/114, 70/114, 71/134, and 72/112.
18 E.g. the International Military Tribunal (Nuremburg Tribunal), the International Military Tribunal for the Far East (Tokyo Tribunal) following the Second World War, and the ad hoc international criminal tribunals established by the United Nations Security Council in the 1990s, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).
Court (ICC) (Cryer et al 2010).

However, the jurisdiction of the ICC may not be a viable option. First and foremost, the Court can only exercise jurisdiction over the crimes that traditionally attract individual criminal responsibility, that are genocide, war crimes, crimes against humanity, and the crime of aggression. As previously addressed in the previous section on the matter of universal jurisdiction, it is unlikely that crimes committed by UN officials or experts on mission are comparable in gravity to the traditional international crimes (United Nations 2006a).

Additionally, in the absence of a referral by the Security Council under Chapter VII of the UN Charter, the ICC can exert jurisdiction when the host state or the state of nationality are party to the Court’s Statute or have accepted its jurisdiction. This issue is only aggravated by the fact that a significant number of states are not party to the ICC Statute. Even so, because its jurisdiction is governed by the principle of complementarity, the ICC can only prosecute when states are unwilling and unable to do so (Cryer 2010).

While these matters could be solved with the creation of a specific tribunal with jurisdiction solely over serious crimes committed by UN officials and experts on mission, this solution is not without its own difficulties, many of which similar to those of the ICC (United Nations 2006a). Foremost among them is that it is uncertain whether states would accept the jurisdiction of such tribunal, thus ensuring the same accountability gap if neither the host state nor the state of nationality of the alleged offender is a party to it (Ibid). Even if these difficulties could be mitigated if this new tribunal was established by the Security Council pursuant to Chapter VII, in the same fashion of the ICTY and the ICTY, it is still questionable whether the Security Council indeed has authority to create such an institution (United Nations 2006a; Cryer 2010).

4 PREVIOUS INTERNATIONAL ACTIONS

This section will address previous attempts to determine and ensure the criminal accountability of UN officials and experts on mission, as well as actions whose conditions had influence on the present issue. As seen in previous sections, the inclusion of the topic at hand in the agenda of the Legal Committee was not the first attempt to do so.

4.1 THE AD HOC COMMITTEE ON CRIMINAL ACCOUNTABILITY OF UNITED NATIONS OFFICIALS AND EXPERTS ON MISSION

The ad hoc Committee was established by the General Assembly in 2006 for the purpose of considering the report of the Group of Legal Experts, in particular its legal aspects (United Nations 2006b). It has held only two sessions to date, in 2007 and 2008. Even though the ad hoc Committee has not been convened since 2008, its work has continued within the framework of the Legal Committee’s Working Group on the same issue (United Nations 2015; id. 2016).

In the first session, held in 2007, the delegations discussed legal aspects of the Group of Experts Report. Among their considerations, there was a question of
whether the negotiation of an international convention on the accountability of UN officials and experts on mission would indeed be the most effective mean of addressing the issue. While some delegations expressed the need for additional statistical data, others noted that such analysis would be of limited use, given the difficulties in obtaining reliable information (United Nations 2007).

The specific legal aspects of the Group of Experts Report addressed on that session were scope \textit{ratione personae}; scope \textit{ratione materiae}; bases for jurisdiction; investigation; and cooperation. Overall, the \textit{ad hoc} Committee agreed that the scope \textit{ratione personae} would cover peacekeeping personnel who were United Nations officials or experts on mission. That is, those who were considered to be experts on mission within the meaning of the Convention on the Privileges and Immunities of the United Nations of 1946 and had their immunity subject to waiver by the Secretary-General. Concerning scope \textit{ratione materiae}, the \textit{ad hoc} Committee decided to maintain it over serious offences against the person among the crimes covered, including but not limited to murder and offences concerning sexual exploitation and abuse. With regard to bases of jurisdiction, while some delegations reiterated for the primacy of the jurisdiction of the host state, others argued for the jurisdiction of the state of nationality. Beyond that, the necessity to draw a distinction between universal jurisdiction and the extradite or prosecute regime was a main concern. There was an overall agreement that inter-state cooperation, as well as between states and the United Nations, would play an essential role in ensuring the effectiveness of the proposed regime, in particular with respect to the collection of evidence, extradition matters and the serving of the sentence (\textit{Ibid}).

While the considerations raised by the delegations are of a meaningful extent, the \textit{ad hoc} Committee recommended the Legal Committee to create a Working Group to continue the consideration of the Group of Experts Report, taking into account the views of the \textit{ad hoc} Committee (\textit{Ibid}).

In its second session, held in 2008, the delegations continued to address legal aspects of the Group of Experts Report. That time, the focus was mainly on legal and policy aspects of international cooperation among states. The general agreement was that inter-state cooperation should entail exchange of information, extradition, the serving of sentences and other measures to facilitate the effective exercise of criminal jurisdiction, including judicial assistance mechanisms. Similarly, cooperation with the UN could cover the exchange of information, assistance with respect to procedural matters, reporting on the current status of investigations and enhancing the rule of law capacities (United Nations 2008a).

Once more, there was the concern that it was premature to discuss the possibility of negotiating an international convention on the topic, mainly because some delegations argued it was necessary to understand the actual impediments to prosecution, before proceeding to negotiate a convention. Delegations that expressed support to a convention relied on the jurisdictional gap, contending that while bilateral agreements existed in the area, they provided incomplete coverage and did not usually address judicial cooperation between states and the United Nations (\textit{Ibid}).

However, in much similar fashion to the first session, again the \textit{ad hoc} Committee concluded the session with a reiteration of its previous session recommendation that the Legal Committee establish a Working Group to proceed addressing the legal aspects of the Group of Experts Report (\textit{Ibid}).
4.1.1 THE DRAFT CONVENTION ON THE CRIMINAL ACCOUNTABILITY OF UNITED NATIONS OFFICIALS AND EXPERTS ON MISSION

A draft convention on the present topic has been presented to the Secretary-General by the Group of Legal Experts as an annex to the report titled “Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations” (United Nations 2006a). According to the Group of Legal Experts, the document serves as a preliminary and indefinite draft representing some of the issues an actual convention should address.

Part of the objectives of the Group when drafting the document were: (i) to facilitate the conditions for waiver of immunity, mindful to not disregard the rights of the alleged offender, (ii) to set out obligations to investigate, arrest, prosecute and extradite offenders, (iii) to ensure mutual legal assistance, (iv) to protect the rights of the victims (United Nations 2006b). The draft proposes 26 possible articles, the first article defining “missions” as peacekeeping, peacebuilding or other general humanitarian operations conducted by the UN, and attributing the meaning of “officials and experts” as it is defined in the 1946 Convention of Privileges and Immunities of the United Nations, which according to the Group includes other staff and volunteers as officials and UN police and military consultants as experts (Ibid). Additionally, the draft recommends that military personnel of national contingents and any other personnel subject to the exclusive jurisdiction of another state should be excluded from the scope of application of the convention. The Group also considered that the convention should not apply to officials or experts acting as combatants against armed forces to which the law of international armed conflict applies (Ibid).

Regarding the applicable crimes, the convention set out two possible lists: one including “murder, willfully causing serious injury to body or health, rape and other acts of sexual violence, and sexual offences involving children” (United Nations 2006b, 32), and an alternate one underlining only crimes of intentional violence against the person and sexual offences punishable under the national law of that State party by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. (United Nations 2006b, 33)

The suggested lists, however, notably lack definition of “sexual offences” and “sexual violence”, as well as exclude other crimes, such as theft, fraud, weapons smuggling, illegal weapon purchasing, money laundering, and drug crimes (O’Brien 2010). Regarding jurisdiction, article 4 of the draft convention requires state parties to establish territorial and nationality jurisdiction, while also obliging parties to establish aut dedere aut judicare form of universal jurisdiction (Ibid).

4.2 THE VOLUNTARY COMPACT ON ADDRESSING AND PREVENTING SEXUAL EXPLOITATION AND ABUSE

The Secretary-General introduced the Voluntary Compact during a High-Level Meeting on the Prevention of Sexual Exploitation and Abuse held within the

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19 The exclusive jurisdiction may be established between the UN and the host state of the mission through a Model Status-of-Forces Agreement, and through a Memorandum of Understanding between the UN and the troop contributing countries (O’Brien 2010).
verge of the United Nations General Assembly on 18 September 2017. The Compact intends to send a signal to the world of joint commitment – between the Secretary-General and the individual member states signatory to it – and mutual accountability on the part of the United Nations and member states on preventing and addressing sexual exploitation and abuse. As of 29 September 2017, seventy-two-member states had already joined the Compact and another nineteen expressed their intent to do so. The document remains open for signature and all member states that have not signed are encouraged to join in this important initiative (United Nations 2017c).

In signing the Compact, member states reaffirm the belief that sexual exploitation and abuse runs counter their values and those of the United Nations. Among the commitments set out in the Compact is the specific obligation to hold the perpetrators accountable, in addition to the commitments to prevent sexual exploitation and abuse and to respect the dignity of the victims by providing them with meaningful support (ibid).

4.3 THE UN ZERO-TOLERANCE POLICY

As an attempt to restore the United Nations’ reputation and combat sexual exploitation and abuse within the Organization after a decade of reports incriminating UN officials and experts (Kanetake 2012), former Secretary-General Kofi Annan issued the 2003 Bulletin titled “Special measures for protection from sexual exploitation and sexual abuse” (United Nations 2003). The 2003 Bulletin marks the launch of the Zero-Tolerance Policy in the UN, which, despite counting with overwhelming support from Legal Committee member states’ representatives, has been subject to criticism from international media, as well as feminist critiques, throughout the years (Kanetake 2012).

The Zero-Tolerance Policy represents a broad prohibition on sexual exploitation and abuse with significant legal and political meanings, applicable to all UN staff (ibid). The first section of the 2003 Bulletin establishes the definition of sexual exploitation as any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions. (United Nations 2003, 1).

The 2003 Bulletin also specifically prohibits sexual activity with children (under the age of 18), regardless of the local age of consent or majority, along with a general prohibition on any kind of exchange for sex (United Nations 2003). The general ban on prostitution also diverges from other international conventions, such as the 1979 Convention of the Elimination of All Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child (Kanetake 2012), which do not explicitly state prostitution per se as exploitative, but the exploitative use of prostitution. The Zero-Tolerance Policy also does not entail criminal prosecution, given the variation on the legal age of consent between countries, whether it is on
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the jurisdiction of the host state or the state of nationality (United Nations 2003). Said extensive prohibition on sexual misconduct may be reasoned not only by an intent to adhere to the rule of law, specifically human rights and international humanitarian law, but also due to the political motives (Kanetake 2012).

While the UN itself cannot bear legal responsibility for the sexual misconduct of its staff during their time served in peacekeeping missions, the local population and media perception refers those cases as part of the UN’s own problems, regardless of the individual perpetrator’s contingent-contributing country of origin (Ibid). The UN, therefore, intended the Zero-Tolerance Policy, as stated on the 2003 Bulletin, to treat sexual misconduct perpetrated by its staff as a primarily internal and administrative issue, attributing internal disciplinary measures based on UN guidelines and codification directed at its staff, such as the Rules and Regulation of United Nations Staff (Ibid). In case of an allegation of sexual misconduct of a UN member of staff, section 4 of the Bulletin determines the first steps of investigation against a member of staff should be taken by the Head of Department, Office or Mission, in a confidential manner. According to the outcome of the investigation, appropriate disciplinary measures shall be applied, and, if deemed necessary, the submission of the case for consultation of the UN Office of Legal Affairs, in order to refer the case to national authorities for criminal prosecution (United Nations 2003).

Following the 2003 Bulletin entry into force, the UN depository of allegations received 1042 allegations of sexual exploitation and abuse between 2003 and 2010, with a noticeable decrease through the years (Kanetake 2003). Additionally, in 2005, the Zeid Report was published as part of the efforts to implement the Zero-Tolerance Policy, as aforementioned, being recognized as one of the main documents on the issue (Ibid). Despite the undoubtable relevance of the Zero-Tolerance Policy for the history of the United Nations, it can be argued that the policy serves more as a political response to guard the UN’s reputation and less as a tool to ensure accountability for its staff (Ibid).

5 BLOC POSITIONS

Argentina’s national provisions establish territoriality and the effects doctrine as applicable grounds of jurisdiction, including “jurisdiction over offenses committed abroad by agents or employees of Argentinian authorities in the performance of their duty” (United Nations 2017b, 24). The jurisdiction ratione personae over crimes committed extraterritorially by nationals is determined by specific legislation exclusively for public officials, therefore not applicable to UN experts or officials. The category of jurisdiction ratione materiae over these crimes comprises the general application of criminal law extraterritorially (Ibid). As most of the countries members of the Legal Committee, Argentina has previously supported the UN’ Zero-Tolerance Policy on criminal conduct, particularly sexual exploitation and abuse (United Nations 2008c), as part of the Rio Group (Ibid). Argentina has sided with Canada by defending the accountability for perpetrators of such crimes, by encouraging cooperation and the exchange of information for the best practices concerning the identification and assistance of victims and extradition (Argentina 2017). The Argentinian delegation has also emphasized the occurrence of sexual exploitation and abuse in peacekeeping missions, further stating that, in order to maintain the legiti-
macy of UN’s peacekeeping missions, it strongly supports measures included in the Security Council resolution 2272 of 2016 and the General Assembly resolution 71/278 (*Ibid*). As part of the Community of Latin American and Caribbean States (CELAC), Argentina has also expressed concern with the training of experts and officials prior to the employment to missions in order to prevent these crimes from being committed (United Nations 2013c). Additionally, CELAC has stressed in previous Legal Committee sessions that, while applauding the Secretary-General’s efforts to report the present issue, they must also immediately inform member states of possible criminal implications of its nationals. The Community emphasizes the same effective procedure used to notify incidents involving experts on mission must be used for UN officials, in order to ensure the effectiveness and efficiency of notification processes as a path for criminal accountability (Argentina 2017). The improvement of communication between states and the UN concerning the actions already taken to end impunity, including prosecutions was also stressed at the 2016 meeting of the Legal Committee (Argentina 2016).

**Australia’s** provisions for jurisdiction consist of the nationality and territoriality grounds. The jurisdiction *ratione personae* over crimes committed extraterritorially encompasses nationals (only those who undertook tasks in a foreign country due to an agreement and who are exempt to criminal proceedings in the foreign state in question), and, as stated in special legislation: over military, police and civilian United Nations officials and experts on mission. Military personnel are particularly subject to the potential application of civilian law and courts. The jurisdiction *ratione materiae* comprises the general application of criminal law extraterritorially, along with a limited list of crimes applicable to military personnel. Australia counts with two prerequisites to the application of extraterritorial jurisdiction for nationals serving as UN officials or experts on mission: any agreement, including extradition treaties, and the permission to prosecute required by a particular government official. Besides the 1946 Convention, the legal basis for applicable rules of immunity include any specific agreement with the host state and the United Nations (United Nations 2017b). Australia, along with New Zealand and Canada, encourages member states to continue their cooperation with the Secretary-General to report all investigations and procedures of UN officials and experts on mission accountability (United Nations 2014). While Australia acknowledges the cases referred by the Office of Legal Affairs, it urges that more work needs to be done in order to guarantee criminal accountability (*Ibid*), such as a convention that would establish criminal jurisdiction over nationals who served in UN operations abroad would be a step forward in the discussion (*Ibid*; United Nations 2015b), which has been stagnated for the last decade (United Nations 2017c).

**Brazil’s** applicable grounds for jurisdiction are nationality, the *ratione personae* being over its own nationals and *ratione materiae* being the general application of criminal law extraterritorially over nationals. Brazil has traditionally participated in UN peacekeeping missions, contributing with over 33,000 military officials, police officers and civilians (Brazil 2018). The country’s contribution currently amounts to more than 1,700 nationals serving in 9 UN missions (*Ibid*). As a part of the Community of Latin American and Caribbean States (CELAC), the Brazilian Government stands firmly against any misconduct, in particular criminal behavior committed by UN personnel and supports accountability for such actions. CELAC stresses the im-
portance to improve information exchange in order to register the actual number of allegations of criminal activities (United Nations 2014). Additionally, Brazil has previously manifested its view on the concept of responsibility to protect, sustained by three pillars. First, the state is “the primary bearer of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” (United Nations 2011, 2). The second pillar affirms the role of the international community in cooperation and assistance to states, while the third pillar involves collective action from the international community to be taken in case of failure of the former pillars (United Nations 2011).

Canada’s municipal law applies its jurisdiction according to the effects doctrine, territoriality, passive personality, protective principle, universality. The Canadian jurisdiction also includes government officials, military or diplomatic personnel who commit crimes abroad, on marine vessels or aircraft. The jurisdiction ratione personae over crimes committed extraterritorially falls over nationals and foreign nationals, stateless persons, counting with specific legislation for military, police and civilian UN officials and experts on mission. Additionally, jurisdiction ratione materiae is limited to international treaty obligations, international crimes and some national offenses. The prerequisites for the application of extraterritorial jurisdiction include the presence of the offender in the territory of forum state, the ne bis in idem principle, and the permission of prosecute by the adequate government official (United Nations 2017b). At previous Legal Committee sessions, the Canadian representative has sided with Australia and reaffirmed the importance of the compliance with the rule of law coming from UN personnel, and encouraged cooperation with the Organization to help with the proceedings (United Nations 2013c). Canada has called upon all member states to respond to the General Assembly Resolution 62/63 and urges other states to examine establishing jurisdiction over serious crimes committed by their nationals while acting as UN officials or experts on mission (Ibid). Additionally, Canada supports the proposal of a convention that would require member states to exercise criminal jurisdiction over nationals who were a part of UN missions internationally in order to strengthen the United Nations system and maintain its integrity (Ibid). Regarding Canada’s previous international actions on the issue, the state has designated a national focal point in paternity and child support cases related to allegations of sexual exploitation and abuse (United Nations 2017d).

The People’s Republic of China applies jurisdiction according to the principles of territoriality and nationality, the ratione personae being over nationals and public officials, and the ratione materiae limited to crimes accompanied by a minimum imprisonment term. The legal basis for applicable immunity rules is set on the 1946 Convention (United Nations 2017b). After decades of absence in UN missions, China has recently become one of the biggest financial contributors to peacekeeping missions and has deployed 8,000 of its nationals as peacekeepers on mission, particularly those serving as engineers, logisticians and composing the medical team (Jung 2016).

The Democratic Republic of the Congo (DRC) contributed, up until 2016, with 944 UN Peacekeepers, in missions located in the Central African Republic, Mali, and Côte d’Ivoire, having deployed troops and Formed Police Units (Providing for Peacekeeping 2016c). The country’s lack of experience in participating in
missions was noted by analysts and UN itself, given the decision to pull DRC troops from MINUSCA based on the troops’ lack of prepare and equipment for the mission (News24 2016). Additionally, DRC’s reputation has also been damaged following claims of sexual violence perpetrated by its peacekeepers in the Central African Republic mission, to which the DRC government reacted angrily (Providing for Peacekeeping 2016c). During the United Nations Organization and Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), there were over 217 allegations of sexual exploitation and abuse of Congolese women and girls, with 10 paternity claims, involving at least 75 peacekeepers (United Nations 2007b). In 2007, 3 years after the first surge of allegations, the UN Office of Internal Oversight Services concluded that it had been impossible to collect conclusive evidence on these cases (Ibid). In November 2017, the UN registered new allegations of sexual exploitation and abuse occurred during the MONUSCO against a peacekeeper of unrevealed nationality (United Nations 2018c), however, it remains unknown if the DRC has been notified of these cases (Code Blue 2017).

**Ethiopia** has served as a historical contributor of UN peacekeeping missions, dating back to the 1950s, and currently stands as the number one military and police contributor to UN operations, counting with over 8,000 peacekeepers. Alongside, Ethiopia is as well one of the leading contributors of female peacekeepers, counting with 642 women in its peacekeeping troops. The country has provided for UN operations such as the ones in Rwanda, Burundi, Liberia, South Sudan, Haiti, Mali, and Côte d’Ivoire (Providing for Peacekeeping 2017b). The country has also experienced a UN mission in its own territory: The United Nations Mission in Ethiopia and Eritrea (UNMEE), which was founded in 2000 and terminated in 2008 (United Nations 2018d). In previous Legal Committee sessions, the Ethiopian representative highlighted his concern over the damage caused by the crimes committed by officials and experts concerning the integrity of the UN’s mandate (United Nations 2013c). The Ethiopian envoy noted that privileges and immunities enjoyed by these individuals should not be used as an excuse to commit crimes of any nature, given the Ethiopian’s courts’ jurisdiction over their nationals acting as officials or experts in missions abroad (Ibid). The precondition determined by Ethiopian law is that the offense is punishable under the Ethiopian criminal code and the law of the State where the crime was committed (Ibid). Additionally, Ethiopia supports the deference of the matter to the International Law Commission for the preparation of a draft article on the subject, as well as the adoption of a comprehensive legal framework and the improvement of communication between States and the UN (Ibid).

**France** stands with the European Union in the discussion of criminal accountability of UN officials and experts, urging for more cooperation and transparency between States and the Organization in order to provide sufficient information, particularly on the training of UN staff, which should comprehend notions of human rights, international humanitarian law, sexual and gender-based violence and civilian protection (United Nations 2017e). France is the second biggest Security Council member to contribute to UN peacekeeping missions financially and with personnel, only behind China (Providing for Peacekeeping 2016b). Allegations have surged over the apparent excess of legal constraint and negligence practiced by the French military in Afghanistan in 2008, as well as sexual abuse claims occurred in the Central African Republic, for which both are being investigated (Ibid).
Germany applies the principles of nationality, universality, as well as the protective principle and the effects doctrine. The jurisdiction *ratione personae* covers nationals and foreign nationals, stateless persons, with an additional special legal regime for public officials; the *ratione materiae* covers a specific list of crime, including international crimes, crimes affecting public security and crimes which affect the State’s essentials interests. The prerequisite for the application of extraterritorial jurisdiction is double criminality (United Nations 2017b). Germany has previously been represented by the European Union delegate at Sixth Committee sessions, supporting UN’s Zero-Tolerance Policy, calling for cooperation among States and enhanced pre-deployment training of the Organization’s staff. The EU also stands for the possibility of the International Criminal Court assuming jurisdiction of cases in which national authorities are unwilling or unable to prosecute (United Nations 2013c; United Nations 2015b).

Haiti is the host State of a UN mission, the MINUSTAH, which was founded in 2004 after the departure of President Bertrand Aristide and subsequent armed conflicts that spread across the country. The Caribbean State has suffered through multiple cases of sexual abuse and exploitation committed by peacekeepers during the mission, which was terminated in 2017 (United Nations 2018e). Those cases were exposed not only in international media but also studied by researchers. They emphasized how underreported the full spectrum of cases was, and how little accountability was assured due to lack of investigation and collection of evidence, even though there was a field presence of the UN’s Office of Internal Oversight Services (OIOS) after the initial surge of allegations (Snyder 2017, Durch et al. 2009). As a result, the Haitian population claimed for the decommissioning of the peacekeepers involved in a series of protests across the country (BBC News 2012).

Hungary supports the UN’s Zero-Tolerance Policy, as a part of the European Union, while it urges cooperation among Member States to report cases and take efforts against the impunity of those who disrespect international law and the national legislation of the Host State. The EU also sustains the International Criminal Court should exercise jurisdiction in case national authorities will not (United Nations 2015b). Regarding claims of criminal conduct practiced by UN officials and experts on mission, Swedish soldiers have testified that Hungary was one of the most common places for UN peacekeeping staff to go on short leaves looking for bars and brothels at the time of the Bosnia and Kosovo missions. Regardless of what happened during those leaves, commonly no reprehension was done to UN staff (Gustafsson 2015).

India’s Penal Code establishes jurisdiction of Indian courts over extraterritorial offences committed by Indian nationals (United Nations 2013c), and the country currently stands against the proposal of an international convention on the issue, given that cases of such crimes relate to the sovereignty and the jurisdiction of each State (United Nations 2017c). According to its representatives at the Legal Committee, those which associate themselves with the Non-Aligned Movement, the issue of criminal accountability is best handled by the Member States, whose laws must ensure adequate provisions for prosecuting nationals that served as UN officials or experts on mission abroad (United Nations 2014). Moreover, assistance from the UN to states in order to update their national laws and assert extraterritorial jurisdiction when needed would help to ensure accountability for such crimes (United Nations 2014c).
2017c). The Indian delegation has expressed uncertainty over the admissibility of investigations conducted by the UN as evidence in national courts, while also condemning the reluctance of the Secretariat to waive immunity even in serious cases of misconduct of personnel (Ibid). Additionally, Indian representatives have stood for the implementation of General Assembly resolution 67/68, which recommends for all States the establishment of jurisdiction over crimes committed by nationals while serving as the Organization’s officials or experts on missions abroad (United Nations 2013c). Besides, the State is one of the biggest contributors in peacekeeping missions (The Telegraph 2018), with overall good reputation among UN staff, with only minor incidents of indiscipline reported (Providing for Peacekeeping 2013). However, India has recently informed the UN’s Secretariat that it had appointed the Ministry of Women and Child Development to assist paternity claims related to sexual exploitation and abuse (United Nations 2017d).

**Indonesia** stands as a part of the Non-Aligned Movement, while strongly supporting the UN’s Zero-Tolerance Policy, especially when it comes to crimes involving sexual exploitation and abuse. According to the Indonesian representative at the Legal Committee, the state is strongly committed to uphold the highest standards for its peacekeepers, as Indonesia is one of the top troops and police-contributing countries. The State provides for pre-deployment sensitivity training, operational guidelines and manuals for its personnel. Additionally, while expressing gratitude and respect for the work of peacekeepers, the state also demands criminal accountability for those who violate the law (United Nations 2017c).

**Israel** has frequently supported the UN three-pronged strategy to address all forms of misconduct, especially sexual exploitation and abuse (United Nations 2013c), given that crimes committed by officials and experts on mission undermine the Organization’s mandate in face of the local populations (United Nations 2014). The State supports the enhancement of cooperation among States and between the UN, as well as urging other States to address accountability and develop national legislation on such crimes and properly investigate and prosecute their nationals (United Nations 2015b). Moreover, Israel emphasizes the need for each State to first take practical steps towards criminal accountability, but also recognizes that a multilateral convention on the issue would strengthen the image of the Organization (United Nations 2013c; United Nations 2017e).

**Italy** exercises its jurisdiction on the grounds of nationality, territoriality and universality, the ratio personae being over nationals and foreign nationals. Italy’s jurisdiction ratione materiae include international treaty obligations, international crimes and crimes which affect the special interests of the State. The prerequisite for the application of extraterritorial jurisdiction is the presence of the offender in the territory of the forum State. With regard to military personnel serving as UN official or expert on mission, Italy applies its military law exclusively (United Nations 2017b). Italy, as a part of the European Union, stands in support of UN’s Zero-Tolerance Policy and of accountability for officials and experts who disrespect international law and the national host State’s law, while supporting the establishment of jurisdiction of the International Criminal Court in case national authorities are unable or unwilling to prosecute (United Nations 2014; United Nations 2015b). As of April 2017, Italy ranked as the biggest European Union contributor to UN peacekeeping missions (Providing for Peacekeeping 2017).
Mexico’s provisions to determine jurisdiction over crimes committed extra-territorially are based on nationality, the effects doctrine, passive personality and universality. Jurisdiction *ratione personae* over said crimes comprises nationals and foreign nationals, while *ratione materiae* is general - in the sense that refers to acts covered by the aforementioned grounds to determine jurisdiction - and limited to international treaty obligations. The prerequisites to application of extraterritorial jurisdiction are double criminality, the presence of the offender in the territory of the forum state, and the *ne bis in idem* principle (United Nations 2017b). As a part of the Community of Latin American and Caribbean States (CELAC), Mexico stands with other members of CELAC on the Legal Committee, supporting the UN’s Zero-Tolerance Policy and demanding the improvement of information exchange among member states and the UN, in order to properly register all allegations against officials and experts on mission, combat impunity, ameliorate the damage the victims have suffered, and restore the Organization’s credibility (United Nations 2013c). The country has also spoken before on this present issue at past sessions on behalf of the Rio Group, keeping its stand against crimes of sexual exploitation and abuse committed by UN officials and experts and defending the measures adopted by the General Assembly (United Nations 2008c). At the last Sixth Committee session of 2017, the Mexican representative emphasized the seriousness of the topic due to its gravel legal and political implications, given that only 24 out of 124 complaints received since 2007 had related information on measures adopted by states to investigate them. The country specifically encourages reports with increased information on the details of the investigations, criminal proceedings and disciplinary measures adopted by states and the UN (United Nations 2017c).

While Myanmar has not yet provided information on its national legislation in order to contribute in closing the jurisdictional gap among States nor significantly participated in the UN staff, the current crisis involving the Rohingya minority in the country and new allegations of ethnic cleansing have brought attention from the international community. Many organizations have called upon the establishment of a peacekeeping mission in Myanmar, and the UN, as of 2017, counted with 19 agencies and several staff in the Rakhine state, where most of the Rohingya community was fleeing from (The Economist 2017).

The Netherlands’ delegate at the Legal Committee also associate themselves with the European Union, whose representative emphasizes that all UN staff must respect both international law and national legislation of the host States, regardless of the immunities these officials and experts enjoy. Besides, the EU stands in support of the Organization’s Zero-Tolerance Policy and further cooperation among Member States to report cases. In the case national authorities are unwilling or unable to prosecute, the representatives defended that the International Criminal Court should exercise its jurisdiction (United Nations 2015b).

The Republic of Korea applies the territoriality, nationality, passive personality and protective principle as grounds for jurisdiction. Korean municipal law holds jurisdiction *ratione personae*, therefore, over their own nationals and foreign nationals, while holding specific legislation and use of military courts for military personnel active in service and deployed as UN officials or experts on mission. Jurisdiction *ratione materiae* encompasses the general provisions applicable to nationals, while also limited to crimes affecting the nation’s interest and public security. The prere-
quisites to the application of extraterritorial jurisdiction are double criminality, the presence of the offender in the territory of the forum State, and the *ne bis in idem* principle (United Nations 2017b). At previous Legal Committee sessions, Korean representatives have highlighted that criminal accountability is the cornerstone of the rule of law (United Nations 2013c), and that the impunity of officials and experts that have committed serious violations might signalize that UN personnel abuses the privileges and immunities given to them (United Nations 2014; United Nations 2017e). In order to avoid damage of the Organization’s credibility, the Secretary-General and Member States must take efforts to prevent offenses, such as pre-deployment training. The Republic of Korea provides three-month intensive training course for personnel selected to serve in peacekeeping operations prior to deployment (United Nations 2013c).

The **Russian Federation** has previously affirmed the need for improved communication between States and the United Nations and supported the Zero-Tolerance Policy of the Organization, condemning the cases involving sexual exploitation and abuse and urging for States to take efforts in prevention of these crimes through training (United Nations 2013c; United Nations 2014). Additionally, Russia considers that most States already count with sufficient criminal legislation to ensure effective cooperation, and that all accusations against UN staff should be in accordance to international law and handled by the domestic law of the alleged perpetrator (United Nations 2013c). Russian representatives at the Legal Committee have defended that the UN staff’s legal status should also be respected and that the proper legal procedure should be followed without unfair punishments (United Nations 2017c). The State is open to the discussion of a legally binding document at the Committee, but the delegates have emphasized that such an instrument is not needed (United Nations 2013c).

**Saudi Arabia** expressed its support for the UN Zero-Tolerance Policy, as well as encouraged the drafting of legislation that would ensure criminal accountability for the Organization’s officials and experts on mission and called for a UN human rights system that may apply to peacekeeping missions. The State also emphasized the importance of training personnel (United Nations 2017e).

**South Africa**’s municipal law adopts the nationality principle in order to establish jurisdiction over crimes under the Sexual Offenses and Related Matters Act, when such offenses are committed either by citizens or individuals ordinarily residing in South Africa. The jurisdiction *ratione personae* over crimes committed extraterritorially is over South African Nationals and the *ratione materiae* compose the aforementioned Act (United Nations 2017b). In 2015, South Africa was ranked the 8th largest African contributor of uniformed peacekeepers, with over 2000 officials deployed in mission (Providing for Peacekeeping 2015). South African peacekeepers were found guilty of more than 1000 cases of misconduct between 2002 and 2006 occurred in Burundi and the Democratic Republic of the Congo and 230 criminal cases for allegations of assault, theft, rape and murder (*Ibid*). At the Legal Committee, South African representatives have spoken in association with the Non-Aligned Movement and the African Group, supporting a draft convention on the issue of criminal accountability of UN officials and experts as a long-term measure. A short-term effort defended by the country would be the attempt to close the jurisdictional gap between Member States, with the adoption of national legislation, speaking against
the immunity of these officials (United Nations 2013c). South Africa also supports the UN’s Zero-Tolerance Policy, particularly towards sexual exploitation and abuse, and encouraged States to improve pre-deployment training, including the adoption of vetting procedures for the trainees (United Nations 2015b; United Nations 2017c). Moreover, the State defends the predominant role in the investigation and prosecution of the alleged perpetrator should be of the State of nationality, in opposition to the host state (United Nations 2014).

**Sudan**, as South Africa, also associates itself with the Non-Aligned Movement, defending no exceptions to the Zero-Tolerance Policy. The Sudanese representative expressed concern for the allegations of sexual exploitation, abuse and even killings committed by UN personnel and encouraged the exchange of information and transparency among the United Nations, the Secretary-General and the host country in order to combat impunity. The delegate hoped that the lifting of long-standing unilaterally imposed sanctions would signify an increase of Sudan’s participation in the international community (United Nations 2017d). Sudan has been involved in allegations of criminal conduct by United Nations personnel before: the Sudanese north-south civil war began in 1983, leaving a trail of over 2 million death and over 600,000 refugees. After two decades of war, a peace agreement was established in 2005, culminating in Security Council Resolution 1590 of 2005 which established the United Nations Mission in Southern Sudan known as UNMIS (United Nations 2018b). In 2007, a series of allegations of sexual exploitation and abuse perpetrated by UN personnel working in the peacekeeping mission became known in the international community. The claims mentioned hundreds of children victimized by peacekeepers. Despite the multiple serious claims and investigation by the Sudanese government, the UNMIS coordination denied the veracity of all allegations and no case was brought to trial (The Telegraph 2007). The new South Sudan UN mission in 2013 has also been affected by multiple new claims of sexual exploitation and abuse committed by peacekeepers (PeaceLab 2017).

**Sweden’s** provisions for jurisdiction are territoriality, nationality, protective principle and universality. The prerequisites for the application of extraterritorial jurisdiction are those established by national law, the double criminality, the *ne bis in idem* principle and the permission to prosecute required by a specific government official (United Nations 2017b). The Swedish municipal law allows the application of civilian law, along with the use of civilian courts, for the processing of its military personnel (United Nations 2017b). The State’s representative at the Legal Committee, siding with other Nordic countries, has reaffirmed in previous sessions the need for greater feedback from the Member States to the UN’s Office of Legal Affairs regarding the cases of criminal conduct within the UN staff (United Nations 2014; United Nations 2015b). Sweden supports the development of an international convention on the issue and the creation of an intercessional ad hoc committee to discuss the contents of such legally binding instrument (United Nations 2015b). Additionally, the country’s representatives emphasized all countries should be required to establish jurisdiction to investigate and prosecute crimes committed by their national while serving as UN officials and experts on mission (United Nations 2017e). Sweden has dealt with cases of Swedish peacekeepers sexually exploiting and abusing women and children since the UN missions in Bosnia and Kosovo, having already convicted some of those peacekeepers. However, the Swedish strategy to
prevent these cases seems to be lacking in efficiency, as more allegations are brought to the attention of the international community (Gustafsson 2005).

Turkey has yet to provide its national jurisdiction standards to the Secretary-General (United Nations 2017b). Nevertheless, Turkey has contributed with several deployments in the last 20 years, mainly in Cyprus, Afghanistan and Bosnia-Herzegovina as part of its peacekeeping foreign policy (Providing for Peacekeeping 2012). Regarding to allegations of criminal conduct from Turkish UN staff, there have been one appointment of a police chief suspect of torture in the United Nations Mission in Sudan, who is now being criminally investigated. Turkey’s current president Recep Tayyip Erdoğan has either purged or jailed almost all of the police officers with previous UN mission experience as part of its government campaign of persecution (Stockholm Center for Freedom 2017).

The United Kingdom of Great Britain and Northern Ireland was once the United Nations top contributing country in peacekeeping missions. However, since 1995, after the UN Protection Force in Bosnia, the country’s participation has been declining, even though the United Kingdom is still one of the top personnel and financial contributors in Europe, with over 300 uniformed peacekeepers and hundreds of other deployments in Afghanistan, Iraq, Bosnia, Ukraine, Sierra Leone, Somalia and Kenya. In 2012, the United Kingdom announced the Prevention of Sexual Violence Initiative, in an attempt to protect civilians, prevent and respond to sexual and gender-based violence in the United Nations and the African Union (Providing for Peacekeeping 2016a).

The United States of America’s grounds for applying jurisdiction are the nationality and territoriality principles (United Nations 2017b). During previous sessions, the United States representative had highlighted the decrease of US nationals serving as United Nation officials who were under investigation or prosecution (United Nations 2013c). The representative noted that an international convention that merely solved the gaps in jurisdiction would not be sufficient to guarantee prosecution of those crimes, given the existence of other impediments to accountability, those being “political will, the resources or expertise to prosecute cases effectively or local laws that did not address the age of consent adequately” (Ibid). In fact, the United States’ support a multilateral convention has been unsteady over the years, as its representatives in the Legal Committee frequently express doubt over the actual efficiency and effectiveness of a convention to the issue (United Nations 2014; United Nations 2015b; United Nations 2017c). The state does support, however the collection and exchange of information of the allegations made, as well as the requests to waive immunity, while urging other nations to provide information to the UN in order to analyze the actual gaps in jurisdiction and legislation among member states (United Nations 2014). The United States has also previously condemned the underreporting of sexual exploitation and abuse in peacekeeping missions and the lack of enforcement on prohibitions against transactional sex and exploitative sexual relationships between UN personnel and members of the host populations (United Nations 2015). Additionally, the state has reaffirmed the need to promote accountability not only for crimes involving sexual exploitation and abuse, but also fraud, corruption and theft committed by officials and experts on mission (United Nations 2017e).

Uruguay stood as the largest troop-contributing country from the Americas in the last decade, with most of its uniformed peacekeepers allocated in missions on
the Democratic Republic of the Congo and Haiti. The country’s reputation, however, was damaged by a series of allegations of abuse committed by Uruguayan peacekeepers appearing first in Bosnia in 2003, and later in 2011 during the MINUSTAH, which prompted Uruguayan authorities to remove the five accused peacekeepers from the mission and hence put they under investigation. The withdrawing of peacekeepers did not satisfy the Haitian population, who demanded through protests the complete removal of Uruguayan blue helmets. In a national level, these allegations have also caused further discomfort with the country’s military, which is frequently targeted by human rights groups since its democratization in 1984. After the Inter-American Court of Human Rights decision in 2011 regarding the Gelman vs. Uruguay case, the country’s Congress approved a law that removed the amnesty granted to officers, protecting them from prosecution (Providing for Peacekeeping 2016d).

6 QUESTIONS TO PONDER

When approaching the topic of criminal accountability of United Nations officials and experts on mission, with the purpose of reaching a consensus in creating effective measures to ensure that the existent accountability gap is satisfied, the representatives in the Legal Committee are invited to consider the following questions in their deliberations:

I. Why has the international community so far failed to hold UN officials and experts on missions accountable for crimes committed in function?
II. How to ensure that the immunities enjoyed by UN officials and experts on missions do not prevent them from being criminally prosecuted?
III. How can the existent jurisdictional gap be solved?
IV. How to impose measures to ensure the criminal prosecution and accountability of UN officials and experts on mission?
V. How to ensure and increase inter-state cooperation in the conduction of investigations and judicial proceedings?

REFERENCES


tions


Permanent Court of International Justice. 1927. *The Case of the S.S. Lotus (France v. Turkey)*.


———. 2016d. “Peacekeeping Contributor Profile: Uruguay”.


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AND EXPERTS ON MISSION


———. Peace Women. 2018a. “Special Committee on Peacekeeping Operations (C34)”. http://www.peacewomen.org/content/special-committee-peace-keeping-operations-c34.


EXPULSION OF ALIENS (NON-NATIONALS)

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ABSTRACT

The discussion over the topic of the expulsion of aliens – the act performed by a State of compelling a non-national to leave its territory – has gained increased importance. Despite the importance of the issue of setting clear parameters to the sovereign prerogatives of States to expel non-nationals and of the guarantees of individuals being subjected to expulsion, to date, there is still no comprehensive international treaty on the topic in force at the universal level. Therefore, the question of whether such development in the field of international law is feasible remains open. This is due especially to this topic’s complexity and to the sensitivities of many states in dealing with the subject, central to national migration policies and domestic legislations. At the United Nations level, the efforts in drawing rules over the expulsion of aliens and codifying them have been led by its International Law Commission (ILC), and resulted, in 2014, in the adoption of the final version of the Draft Articles on the Expulsion of Aliens. A result of years of work, this document attempts to draw some basic rules on the grounds for expulsion, individuals protected from expulsion, the mode of performing this act and how individuals being subjected to expulsion may challenge it. The central question that is now posed to the Sixth Committee of the UN is whether the ILC Draft Articles should become hard law or remain as general guidelines for interpretation only. Underlying this main issue are themes such as protected persons, prejudice, and persecution, national security, procedural rights of individuals against States and the responsibility of States.

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1 INTRODUCTION

According to the most recent United Nations International Migrations Report, as of 2017, an estimate of 258 million people lived in a country other than that where they were born and thus qualify as international migrants (United Nations 2017a). Insofar as they do not hold the status of national of their host state, international migrants are within the category of non-nationals, or aliens, which comprises a wide range of different people and different causes for the international human mobility situation, ranging from economic immigrants, in search of jobs, opportunities and quality of life, to forcibly displaced persons, such as refugees and asylum seekers, who are compelled to leave their homes to escape from persecution or armed conflicts in their home countries (Weissbrodt 2008; United Nations 2017a). It is important to notice that there are also aliens who cannot be identified as international immigrants, such as foreign workers with a temporary residence permit, exchange students, business visitors or tourists (Weissbrodt 2008).

Indeed, in the context of globalization and capitalist market economy, international human mobility has become a relevant topic in nearly every corner of an increasingly interconnected world (United Nations 2017a). Nevertheless, whereas the free movement of goods, services, capital and people are indeed the hallmarks of market economy, some states have shown little receptiveness specifically towards the free movement of people (Weissbrodt 2008). Notwithstanding, according to the United Nations, there are perceivable benefits that migration, supported by appropriated policies, can bring, namely in terms of “inclusive and sustainable economic growth and development” (United Nations 2017a, online) for both home and host communities, either by sending financial remittances to home countries, which in 2016 alone made up to USD 416 billion worldwide, as by filling crucial labour gaps, creating jobs as entrepreneurs and by paying taxes and social security contributions in the host countries (United Nations 2017a).

Having said that, the central point of the debate on migration domestic policies and legislations revolves today around the socioeconomic causes, dynamics and effects of international migrations, where the policy-makers and other actors involved in the political debate put forward rival claims, based on different empirical assertions on these causes, effects and consequences of migration (Boswell et al. 2011). These assertions include “claims about the numbers of immigrants entering or leaving a particular country, how long they are staying, what kind of work they undertake, their impact on the welfare system or the ability of migrants to ‘integrate’ into the societies in which they live” (Boswell et al. 2011, 1). Indeed, such rival knowledge claims create what a number of scholars have termed “policy narratives”, which play a determinant role in shaping public policies in general and in the field of legal treatment of non-national in particular (Boswell et al. 2011). In this order of ideas, the legal treatment given to aliens, that is, of non-nationals of the state in which they are present, particularly with regards to their expulsion procedures, is in many countries still a controversial subject at the level of domestic public policy debate, and consequently at the levels of national and international law (Harris and

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4 Most interestingly, whereas this knowledge and the worldviews and beliefs underpinning it shape the perceptions of the particular interests of society’s sectors, these interests in turn also influence how the knowledge will be produced and deployed (Boswell et al. 2011).
For instance, in the recent years alone, the deportation of undocumented aliens has, once again, made up the headlines on the political debate in the United States. Even though immigration policy was one of the most controverted matters surrounding an eventual Trumps then candidacy during the elections of 2016, during Obama’s administration alone more than 2.5 million migrants were deported during the eight years of his term, more than any other president in American history (The Guardian 2016). Furthermore, although Obama fostered an immigration reform in Congress, which was stopped by Republican opposition (The New York Times 2016), his administration more than doubled the number of border patrol agents, also contracting a huge prison company to tackle the imprisonment of migrants (The Guardian 2016). Nevertheless, the current situation is likely to continue in this path, for President Trump’s election fostered the creation of a complicated scenario for migrants and other aliens, as a number of measures were taken in order to hamper migration processes into the United States since his accession to the Presidency (The Independent 2017).

From the standpoint of international human rights law, aliens are generally in a situation of vulnerability, as they usually receive different treatment in relation to the nationals of a country, either because the domestic laws allow for different treatment on the basis of nationality or because of structural inequalities, which in practice end up conditioning or limiting the access of aliens to their rights and to services provided by the state (Inter-American Court of Human Rights 2003). This situation of vulnerability is sometimes aggravated by manifestations of prejudice by the local population, such as xenophobia, racism and ethnic discrimination – social phenomena that are often intensified within certain sectors of a society during periods of social and political instability or of economic hardship (Inter-American Court of Human Rights 2003; Weissbrodt 2008).

Considering, for instance, the situation of the Rohingya ethnic Muslim minority in Myanmar, whose increasing persecution after the most recent escalation of violence in that country has led massive human displacement, which in turn amounted to a regional humanitarian crisis in Southeast Asia. Since August 2017, an estimate of 700,000 Rohingyas that lived in Myanmar were forcibly displaced to neighbouring countries, namely Bangladesh (BBC 2018a). In that context, the Rohingya were described by the Director of the United Nations Migration Agency as “one of the most persecuted peoples in the world” (International Organization for Migration 2017, online). Furthermore, since Myanmar’s independence the Rohingya were denied the right to citizenship, which has effectively rendered them stateless persons (Albert 2018; Al-Jazeera 2018; Kipgen 2014). As such, the Rohingya cannot lose their nationality, as they have none. Inasmuch as the right to citizenship has been formally denied to the Rohingyas, these persons are in a situation of extreme vulnerability: they have been stripped out of any of the rights, guarantees and, contrastingly, even the penalties entailed by the right to citizenship, such as the formal procedure of expulsion. Indeed, the complexity of the Rohingya crisis in Myanmar lies fundamentally in the fact that they have long been stateless persons within Myanmar’s state (Kipgen 2014).

The cases of the United States and of Myanmar are but a couple of contemporary examples of situations in which the issue of expulsion of non-nationals is pres-
sparing, shedding an interesting light to many of its underlying problems. It is not our objective in this paper, however, to make an extensive analysis of cases of expulsion of aliens in these or in other countries. This is due to the fact that the expulsion of aliens is a reality within countless legal systems that operate in very different factual contexts all around the Globe. Nevertheless, these examples do shed an insightful light on the central discussion of this article throughout the following sections, which will not focus on the political, but rather on the legal aspects and implications of the expulsion of aliens. As we are going to see in the next section, the right of a state to expel the foreigners under its jurisdiction is not unlimited, but instead has its parameters and limits set by International Law.

2 STATEMENT OF THE ISSUE

In 2014, the International Law Commission (ILC) adopted the Draft Articles on the Expulsion of Aliens (Draft Articles), which “marked an important stage in the development of international law relating to migration” (Neuman 2017, 3), being the “first real set of draft articles adopted so far by the Commission in the field of human rights” (Forteau 2017, 32). Even though the ILC’s Draft Articles do not constitute a binding international treaty, following the mandate of the ILC, they aim at both codification and progressive development of fundamental rules on the topic (International Law Commission 2014), thus providing a very accurate and complete conceptual framework for the discussion on this topic.

That being said, the term “alien” is defined in the Draft Article 2 (b) as “any individual who does not have the nationality of the State in whose territory the individual is present” (International Law Commission 2014, Art. 2 (b)), comprising both individuals with the nationality of a different state or without the nationality of any state, the stateless persons (International Law Commission 2014). The Draft Articles are, therefore, applicable to the expulsion by a state of any aliens that are present on its territory, with the express exception of those non-nationals that enjoy privileges and immunities under International Law, such as persons under diplomatic or consular protection, as seen in Draft Article 1 (2) (International Law Commission 2014).

5 The International Law Commission (ILC) consists of a group of thirty-four experts of different states on the field, subordinate to the United Nations General Assembly, and created by General Assembly Resolution 174 during its second session (United Nations 1947). The ILC was preceded in the League of Nations by the Committee of Experts for the Progressive Codification of International Law, whose work culminated in the League of Nations Codification Conference of 1930, greatly advancing the consolidation of international law in the themes of nationality, territorial waters, and the responsibility of states for damage caused to foreigners and their property (International Law Commission 2017). It was established with the goal of codifying and developing international law, which it does by issuing reports and formulating draft articles, even having concluded a draft statute for a future international criminal court (International Law Commission 1994).

6 Under Draft Article 1 (2), aliens who enjoy privileges and immunities under international law would be excluded from the protection of the Draft Articles, precisely “because of the existence of [these] special rules of international law governing the conditions under which they can be compelled to leave the territory of the State in which they are posted” (International Law Commission 2014, para. (4) of commentary to Art. 1). Furthermore, the state of nationality of the alien being subject to expulsion would also be allowed, under Draft Article 31, to exercise diplomatic protection in relation to the alien in question, pursuant to the rules and conditions set forth by the well-established legal regime of diplomatic protection (International Law Commission 2014). The fundamental rationale underlying the law of immunities, of which the primary source is the 1961 Vienna Convention on Diplomatic Relations (VCDR), is the idea that the territorial state, in respect for the sovereign equality of states, should refrain from exercising its jurisdiction over the individuals present on its territory who are protected by such immunities (Henriksen 2017).
Due to the broad scope of the Draft Articles in the particularly sensitive field of migration policy and law, such project faced the opposition of many states (Fortea 2017; United Nations 2018). These responses were, arguably, not only because of resistances towards progressive developments in international migration law, but also due to “the difficulty in reconciling the Draft Articles with existing multilateral treaties at both a universal and regional level” (Fortea 2017, 30). On top of that, some states have challenged the necessity of elaborating a multilateral treaty based on the Draft Articles, namely because of “divergences of opinion and [the] still evolving character of many aspects of the Draft Articles” (United Nations 2018, online), with some delegations suggesting the Draft Articles should take the form of a set of guiding principles, instead (United Nations 2018).

Furthermore, it is worth noting that the Draft Articles, due to their purpose, inevitably overlap with the existing international treaties in the field of human rights (Fortea 2017), such as the International Covenant on Civil and Political Rights (ICCPR)7 or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)8. For that reason, the ILC sought to reconcile the Draft Articles and existing norms of international law by determining, in Draft Article 3, that “[e]xpulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular of human rights” (International Law Commission 2014, Art. 3, our highlights). The purpose of the “without prejudice” clause, in the second part of Draft Article 3, is to allow the cumulative application of the Draft Articles and existing treaties, indicating that the expulsion of aliens should comply with both sets of rules (Fortea 2017).

In this context, it is also worth noting that the ILC is concerned in ensuring the language used in the Draft Articles is consistent with the language incorporated in existing international treaties, by “paying lip service to the wording of existing treaties” (Fortea 2017, 33). This drafting technique has been long used by ILC and was indeed employed in some of the Draft Articles (Fortea 2017). This technique seeks, on the one hand, to prevent inconsistencies with the already existing body of international law that would result from a “creative” approach to the drafting process; on the other hand, such technique is only used “to the extent that it does not prevent any progressive development of international law that the ILC may be willing to recommend” (Fortea 2017, 34).

In light of the aforementioned, along the following subtopics, we will firstly explore the sources of international law with an emphasis in the distinction between treaties and guidelines as to their natures and effects. Secondly and advancing to the substantive matter of this topic, we will seek to conceptualize the right of

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7 The 1966 International Covenant on Civil and Political Rights (ICCPR) is a key human rights treaty, which deals with a wide range of civil and political rights and liberties (Henriksen 2017). The ICCPR, together with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), constitute the International Bill of Human Rights. The Covenant was adopted by the U.N. General Assembly in 1966 and came into force in 1976. The ICCPR has 172 states parties as of 30 August 2018.

8 The UNCAT is a “human rights treaty specifically designed to ensure protection of the right to be free from torture and ill-treatment” (Rodley 2018, 167), insofar as it mandates a global prohibition on torture and other acts of cruel, inhuman, or degrading treatment or punishment and creates an instrument to monitor governments and hold them to account. The UNCAT was adopted by the U.N. General Assembly on 10 December 1984 and came into force on 26 June 1987. As of 30 August 2018, the UNCAT has 163 states parties.
expulsion, pursuant to the definition given by the International Law Commission, analysing what are the requirements and grounds for its lawfulness. Thirdly, we will turn our attention to the hypotheses in which, according to the ILC’s Draft Articles, expulsion of non-nationals should be prohibited under international law. Finally, we will present what the substantive and procedural rights of aliens being subject to expulsion are, as well as the legal consequences of expulsion for the expelling states.

2.1 SOURCES OF INTERNATIONAL LAW AND THE DISTINCTION BETWEEN HARD AND SOFT LAW

Before beginning the analysis of the ILC Draft Articles on the Expulsion of Aliens, we will discuss, in the following section, what are the sources of international law, with an emphasis on treaties and customary international law and the interrelation between those two sources. In addition to that, it will also be explained the distinction between the concepts of “hard law” and “soft law”. This section is not intended to be an exhaustive analysis, but rather a superficial overview on sources of international law that seeks to provide important subsides for this topic’s central discussion.

2.1.1 SOURCES OF INTERNATIONAL LAW AND THE INTERRELATION BETWEEN TREATIES AND CUSTOM

As it happens in any other branch of law, when looking for the content of international law, one should look at its sources, that is, the set of rules that constitute the international legal system (Henriksen 2017). Indeed, a legal source informs us what substantively constitutes the law and provides us with the basis of the correspondent legal obligation (Chinkin 2018). Furthermore, from a practical perspective, the sources of international law serve as “the argumentative tools available to the international lawyer” (Henriksen 2017, 22). Nevertheless, uncovering the law is not an easy task in the field of public international law. This is due to the “lack of a universal legislature and a system of courts with compulsory jurisdiction” and to the fact that “international law is a decentralized legal system, [thus one in which] legal obligations may derive from more than one particular source” (Henriksen 2017, 21).

To date, the most significant attempt to specify the sources of public international law (Crawford 2012) remains the Article 38 (1) of the Statute of the International Court of Justice (ICJ and ICJ Statute), which reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (International Court of Justice 1945, Art. 38 (1)).
The list set forth in Article 38 (1) reflects the formally recognized sources of international law⁹, of which the most important are the international treaties, or conventions (Crawford 2012), in so far as they represent “the most direct and formal way for states to create right and obligations under international law” (Henriksen 2012, 23). Considering that what constitutes the legal basis of treaty-based obligations is the consent of states to be bound by the treaty, it can only create obligations for the consenting states and, once in force, the state that has consented to be bound must perform it in good-faith, in accordance with the principle *pacta sunt servanda*¹⁰ (Crawford 2012; Henriksen 2017).

It is worth noting that international human rights law as it stands today derives primarily from universal and regional multilateral treaties, which can also be termed as conventions, charters, covenants, protocols, pacts, or even statutes, though the different nomenclature does not imply any difference towards its legal treatment (Chinkin 2018). One particularity of human rights treaties, which concerns its object and purpose, is that instead of providing for a “reciprocal exchange of rights and duties between states parties”, as many other treaties do provide, they seek to impose on states parties “constraints upon their treatment of individuals within their territory and subject to their jurisdiction” (Chinkin 2018, 66). One of the main advantages of adopting treaties in the human rights field is that “[w]idespread treaty adherence provides for a degree of uniformity between states in their understanding of the requirements of international human rights law” (Chinkin 2018, 67).

Moreover, even though the sources of international law are presented separately, as in Article 38 (1) of the ICJ Statute, in practice they influence each other (Crawford 2012). Such is the interrelation between treaty law and customary international law. In short, international customary law exists when a particular way of behaving is followed by states in their interstate relations as a general practice (objective element, commonly referred as “State practice”), and this practice is accepted by them as legally binding (subjective element, known as “opinio iuris”) (Crawford 2012; Henriksen 2017). In that sense, as the own ILC has recognized, upon several occasions, “treaties may contribute to the crystallization or [progressive] development of a rule of customary international law” (Forteau 2017, 30). Therefore, “[w]hen the content of a treaty-based and a custom-based obligation is identical, the two sources will complement and reinforce each other” (Henriksen 2017, 29).

However, it is important to bear in mind that it is established in international law that “even where a treaty rule comes into being covering the same ground as a customary rule, the latter will not be simply absorbed within the former but will maintain its separate existence” (Shaw 2017, 71). In this order of ideas, the “great expansion of treaty law since 1945 has resulted in a fruitful yet conflicting interplay between customary international law and treaty law” (Forteau 2017, 30). Furthermore, as Forteau (2017, 30) points out,

According to the famous “Baxter Paradox”, the development of multilateral treaty law can also hinder, rather than stimulate, the development of

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⁹ Notwithstanding, there has been extensive academic debate whether this list of Article 38 (1) is an exhaustive one, considering that, in practice, even the ICJ has often relied on other sources that are not on the list, such as unilateral statements from states. About this discussion see Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014), 19-30.

¹⁰ *Pacta sunt servanda* is the general principle of international law upon which the obligatory nature of treaties is founded (Shaw, 2017), which can be translated as “agreements must be kept”. 

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customary international law: as Baxter put it ‘as the number of parties to a
treaty increases, it becomes more difficult to demonstrate what is the state
of customary international law dehors the treaty’. As such, State practice
driven by a treaty should not count as State practice motivated by cus-
tomary international law.

His argument is that, regardless of the merits of Baxter’s equation, which is
more likely to be merely apparent rather than a reality, it affects, though in a dif-
ferent form, the work of the ILC on matters that are already regulated by existing
multilateral treaties (Forteau 2017), as “the inscription of international rules on the
marble of multilateral treaties could hinder any further development of internatio-
nal law”, thus making its codification and progressive development more difficult
(Forteau 2017, 31). In light of that, he ponders whether the added value of draft arti-
cles proposed by the ILC on topics that are already object of a large number of mul-
tilateral treaties, such as the Draft Articles on the Expulsion of Aliens, “could be, at
best, limited (since most States are already bound by [those other] treaty obligations)
and, at worst, harmful to existing treaties” (Forteau 2017, 31).

Therefore, it is necessary to consider, while discussing the matter, whether
there are any conflicts between the Draft Articles and existing rules of international
law (whether treaty-based or custom-based), on the one hand, and on the other if
the Draft Articles present some added value in relation to the existing body of in-
ternational law, that is, if they “have codified or proposed norms [...] in areas where
gaps should be filled” (Forteau 2017, 32).

2.1.2 HARD AND SOFT LAW INSTRUMENTS: CONCEPTUALIZATION AND DIS-
TINCTIVE FEATURES

Depending on the scope of the norms that are being proposed, taking into
account the implication of the binding nature of treaties, it is a common practice
“for states to create norms of behaviour of a non-legally binding nature” (Henriksen
2017, 37). Whereas the legally binding norms, e.g. treaties or international customary
law, are known as “hard law”, those legal instruments or documents or treaty pro-
visions of a non-binding nature are referred to as “soft law” (Henriksen 2017, Shaw
2017). Such terminology indicates that “the instrument or provision in question is
not of itself ‘law’, but its importance within the general framework of international
legal development is such that particular attention requires to be paid to it” (Shaw
2017, 87). Therefore, the distinction between “hard” and “soft” laws is not related to
the precision of the norm, but to its normative character with regards to its binding
force (Henriksen 2017).

The distinctive feature of soft law is that it does not need to constitute a bind-
ing norm in order to exert its influence in the international relations and politics
(Shaw 2017). Furthermore, during the negotiation and drafting processes of many
of those instruments, they receive attention and care to detail in equal measure as
binding texts do (Chinkin 2018), as such instruments may well be hardened into cus-
tomary law or become the basis of a treaty (Harris and Sivakumaran 2015).

In comparison to hard law, soft law instruments can be faster and more flexib-
le for states to conclude and adhere to, and while it is not intended to create binding
obligations for the state – and thus its formal legal implementation at the domestic level –, it still reflects its political intention to act in a certain way (Shaw 2017). In that sense, “while a violation of the soft law norm will not be met with legal sanction, the political price associated with violating the norm may be high” (Henriksen 2017, 37). Furthermore, one significant advantage of the soft law format is that it “may facilitate reaching a political consensus, bring an issue onto the international agenda, define the area of international concern, and provide guidelines for behaviour that may generate the requisite practice for a rule of customary international law” (Chinkin 2018, 82).

The category of “soft law” include a vast range of instruments, namely resolutions of international organizations, interpretative declarations, reports adopted by international agencies and final instruments of global summit meetings, as well as codes of conduct, standards of behaviour and guidelines11 (Henriksen 2017; Chinkin 2018). Indeed, at the Sixth Committee’s 72nd session, in 2017, a “number of delegations affirmed that the draft articles constituted an important contribution as guidelines to states (United Nations 2018, online), and “considered that the elaboration of a convention was either premature or unnecessary and that the draft articles should instead serve as a set of non-binding guidelines on the expulsion of aliens” (United Nations 2018, online).

2.2 THE RIGHT OF EXPULSION OF ALIENS (NON-NATIONALS)

Pursuant to the usual style of international treaties, the general provisions of the Draft Articles are laid down in Part One, which comprises Draft Articles 1 to 5, in which are defined the scope and use of terms of the Draft Articles, as well as what the right of expulsion constitutes and what are its requirements and grounds for lawfulness.

2.2.1 DEFINING THE RIGHT OF EXPULSION

The acts of expulsion and deportation can be defined, in legal terms, as the state’s unilateral acts of ordering a natural person to leave its territory, if necessary, forcefully (Kälin 2010). Although there is no uniform terminology at both domestic and international levels, “there is a clear tendency to call expulsion the legal order to leave the territory of a State, and deportation the actual implementation of such order in cases where the person concerned does not follow it voluntarily” (Kälin 2010, 2). In Draft Article 2 (a), “expulsion” is defined as “a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State” (International Law Commission 2014, Art. 2 (a)). Concerning this definition, a couple of considerations have to be made, after the Commission’s commentary to Draft Article 2.

First, it is essential to distinguish here a “formal act” from a “conduct” at-

tributable to a state – whereas the former consists in a formal decision issued by the competent state organ ordering the alien to leave its territory, the latter can be either an action or omission on the part of the state that could result in expulsion (International Law Commission 2014). In this context, an omission could be understood as “tolerance towards conduct directed against the alien by individuals or private entities, for example, if the State failed to appropriately protect an alien from hostile acts emanating from non-State actors” (International Law Commission 2014, para. (4) of commentary to Art. 2). Moreover, in the absence of a formal act, what is determinant for establishing the existence of an expulsion act is the intention of the state in question, by means of an active or passive conduct, to expel the alien from its territory (International Law Commission 2014).

Secondly, the condition that the expulsion, whether in the form of a formal act or of a conduct, must be attributable to a state, should be understood in light of the criteria established in the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)\textsuperscript{12}, Chapter II of Part One (International Law Commission 2014). This derives from the fact that unilateral acts of states, such as expulsion, are also capable of producing legal effects under public international law (Crawford 2012). Indeed, the issue of responsibility for eventual breaches of obligations contained in a legal system is one that all such systems have to deal with and, in international law, the rules specifying the consequences of such violations are found primarily within the field of state responsibility (Henriksen 2017). Therefore, the international law of responsibility is indeed “indispensable for the well-functioning of international law and the international society that the law regulates” (Henriksen 2017, 127), and the fact that a wrongful conduct can be attributed to a state constitutes one of its core aspects.

In light of the aforesaid, Draft Article 3 sets out, in its first sentence, the right of a state to expel an alien present on its territory (International Law Commission 2014). Regardless of the terminology adopted at the domestic level, in general lines, the expulsion of non-nationals may take place in three different situations: (i) when the person being subject to expulsion is lawfully present, e.g., with a residence permit, in the country issuing the expulsion order; (ii) when the person’s stay on the territory of the state is no longer lawful, e.g., due to the expiry of a visa or residence permit; and (iii) when the alien’s presence has never been regularized by the state: the undocumented or “illegal” migrants (Kälin 2010)\textsuperscript{13}.

As a matter of principle, the right to decide on the admission, the continuing presence of aliens on its territory and thus on their expulsion is an inherent right of states, which emanates from the idea of national sovereignty and it has been long recognized as such (Crawford 2012; Kälin 2010; Kanstroom 2017). In that sense, the

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\textsuperscript{12} Adopted by the ILC in 2001, the Draft Articles on the Responsibility of State for Internationally Wrongful Acts was the result of many years of work by the Commission. The Draft Articles combine both codification and progressive development on the field of the law of state responsibility and is concerned with the secondary (And not the primary) rules on state responsibility (Harris and Sivakumar, 2015). Responsibility of states for internationally wrongful acts must not be confused with individual criminal responsibility.

right of expulsion has been acknowledged not only at the domestic law level, but also in a number of different international fora\textsuperscript{14}, such as arbitral awards, decisions of claims commission and decisions of regional courts and commissions (International Law Commission 2014, see footnotes 28 and 29 of the Draft Articles). Indeed, for a long time such discretionary powers of the state were almost unlimited (Kälin 2010).

However, with the emergence of a whole body of international human rights law after the promulgation of the Universal Declaration of Human Rights, in the aftermath of the Second World War, external limitations towards the exercise of state powers in relation to individuals have been progressively adopted and implemented at the universal and regional levels (Henriksen 2017). This development is indeed reflected in the very limitations that condition and shape the exercise of the right of expulsion, as we are going to analyse in the following subsection.

2.2.2 REQUIREMENT FOR CONFORMITY WITH THE LAW AND THE LEGAL GROUNDS FOR EXPULSION

Insofar as expulsion is concerned, the first limitation established by international law to the discretion of states is the requirement for conformity with law of the expulsion decisions, which shall not be permissible “unless they are based upon and ordered and implemented in accordance with domestic law” (Kälin 2010, xx). Indeed, such requirement is a logic implication of the legal fact that the expulsion should be exercised within the framework of law, considering that the “prerogative of regulating conditions of expulsion on its territory within the limits of international law entails the obligation to comply with the rules it has laid down [at the domestic level] or subscribed to in this area” (International Law Commission 2014, para. (3) of commentary to Art. 4).

Furthermore, the requirement for conformity with domestic law is consistently established in international human rights law, at both universal and regional levels (International Law Commission 2014). At the universal level, this restriction was first enshrined in Article 13 of the ICCPR, with respect to non-nationals lawfully present on the territory of the expelling state (Kälin 2010). This requirement’s ratione personae\textsuperscript{15} scope has been extended by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention)\textsuperscript{16}, which in its Article 22 extend this guarantee to all migrant workers, regardless of the regularity of their migratory status (Kälin 2010).

In this order of ideas, in paragraph (4) of the commentary to Draft Article 4, the ILC took the view that this requirement “must apply to any expulsion decision, irrespective of whether the presence of the alien in question on the territory of the expelling State is lawful or not” (International Law Commission 2014, para. (4) of commentary to Art. 4).

\textsuperscript{14} Plural of “forum”, Latin term that designates a place, meeting, or medium where ideas and views on a particular issue can be exchanged.

\textsuperscript{15} Ratione personae is a Latin term, which can literally be translated as "by reason of his/her person" or "by reason of the person concerned".

\textsuperscript{16} The Migrant Workers Convention was adopted by the United Nations General Assembly in 1990, but entered into force only in 2003. Its primary objective is to “bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention [of universal application]” (United Nations 1990). As of August 2018, the Convention had 52 states parties.
The protections accorded to irregular aliens, displaced persons, asylum seekers, persons granted asylum\textsuperscript{17}, or stateless persons are almost identical to those accorded to a person lawfully residing in a state other than that of their nationality (International Law Commission 2014; Murphy 2013). Thus, by granting largely the same protections to all the aforementioned categories of aliens, the Draft Articles “move beyond the national laws of many states and the European Union and beyond provisions on expulsion contained in widely adhered-to human rights instruments that differentiate between [those] groups” (Murphy 2013, 166). Notwithstanding, the ILC held the view that the requirement of conformity with the law applies to all such categories of aliens, “domestic legislation may provide for different rules and procedures for expulsion depending on the lawful or unlawful nature of [their] presence” (International Law Commission 2014, para. (4) of commentary to Art. 4).

Finally, the issue of the grounds for lawfulness of the expulsion is a multifaceted one, comprising a number of different aspects related, namely, to “the statement of the ground for expulsion, the existence of valid ground and the assessment of that ground by the competent authorities” (International Law Commission 2014, para (1) of commentary to Art. 5), and are defined in Draft Article 5. The only limitations to the discretion of states in this particular, that are explicitly provided by human rights treaties, are the general prohibitions of discrimination, namely Article 26 of the ICCPR (Kälin 2010). The ILC, in order to establish the set of grounds for the lawful expulsion of an alien, relied on the developments of international law from other sources, such as the judgement of the ICJ in the \textit{Diallo} case\textsuperscript{18}, which is cited in many commentaries of the Draft Articles (Crawford 2012; Forteau 2017; International Law Commission 2014).

First and foremost, Draft Article 5, in its paragraphs (1), (2) and (4), determines that the expelling state has the obligation under international law to indicate and state the grounds in which the expulsion decision is based, which has to be provided by its domestic law and cannot be contrary to its obligations under international law.

\textsuperscript{17} Here the terms “asylum” and “asylum seekers” must be understood as synonym expressions of “refuge” and “refugee seekers” respectively, and must not be mistaken with the Latin-American institute known as “political” or “diplomatic” asylum. Indeed, “up until the Convention on Territorial Asylum and the Convention on Diplomatic Asylum, both of 1954, the word “asylum” was used exclusively to refer to the specific mechanism of “political” or “diplomatic” asylum [...], while the expression “refugee status” referred to the protection granted in the territory of the State; this partly explains the dichotomy “asylees-refugees” and its implications for the protection of refugees” (Inter-American Court of Human Rights 2013, para. 137, footnote 162). About this discussion see: Case of the Pacheco Tineo Family v. Plurinational State of Bolivia (Inter-American Court of Human Rights 2013, paras. 137-143).\textsuperscript{18} In the Ahmadou Sadio Diallo case, involving the Republic of Guinea (applicant) and the Democratic Republic of Congo (respondent), the ICJ considered the questions of Mr. Ahmadou Sadio Diallo’s rights as an individual, and in so far as it concerns protection of his direct rights as associé in a private company, called Africom-Zaïre and Africontainers-Zaïre. Mr. Diallo, a businessman of Guinean nationality who lived in the DRC, was according to the Guinean submission, arrested and detained by the DRC, was “despoiled of his investments, businesses, and property, and then expelled from the country. Such conducts were, held the applicant, carried out in breach of international law obligations by the DRC, as Guinea was unable to exercise its diplomatic protection in relation to Mr. Diallo (International Court of Justice 2010).
(International Law Commission 2014). In the judgement of 30 November 2010 in the Diallo case, the ICJ concluded that under Article 13 of the ICCPR and Article 12 (4) of the African Charter on Human and People’s Rights (African Charter),

the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with “the law”, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, [...] [this] is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights (International Court of Justice 2010, para. 65).

When the state fails to adduct grounds capable of providing a sufficiently “defensible basis” for the expulsion measure, as it was the case of the Democratic Republic of Congo in the Diallo case, it then constitutes an arbitrary decision (International Court of Justice 2010, para. 82; International Law Commission 2014).

Moreover, the fact that the lawfulness of an expulsion decision under international law is dependent on the condition that it is based on a ground provided by domestic law is self-evident, considering there is no list of valid grounds of expulsion applicable to aliens in general under public international law (International Law Commission 2014). Indeed, national laws provide a wide range of grounds for expulsion, being the violations of domestic immigration laws the most frequently invoked ground for it, hence making the unlawfulness of the alien’s presence on the territory of the state a permissible ground for expulsion under international law (International Law Commission 2014). Secondly, concerns that the alien in question may present a threat national security and public order are also often invoked as justifications for expulsion (Kälin 2010). However, the margin of appreciation states have to determine what consists in a legitimate concern of “ordre public” has to be measured according to human rights standards (Crawford 2012).

On top of that, paragraph 3 of Draft Article 5 deals with the manner in which the ground for expulsion should be assessed. This assessment should be made in accordance with the principles of good faith and reasonability, and the factual circumstances that may (or may not) give rise to an expulsion should be taken into consideration (International Law Commission 2014). Such circumstances, where relevant, include “the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise” (International Law Commission 2014, Art. 5 (3)), which is particularly relevant when the expulsion measure is justified on the grounds of national security or public order (International Law Commission 2014).

Ultimately, in case of non-observance of such requirements, the responsibility of the state for not complying with its obligations emerges. This topic will be dealt in detail in subsection 2.4.3. In the next section, Part Two of the Draft Articles spans from Draft Article 6 to 12 and deal with the hypotheses in which the exercise of the right of expulsion should be expressly prohibited.
2.3 CASES OF PROHIBITED EXPULSION OF NON-NATIONALS

Part Two of the Draft Articles establishes the cases in which the expulsion of aliens is prohibited and extends from Draft Article 6 to 12, covering the prohibition of expulsion of refugees and stateless persons, as well as of collective and disguised expulsion, and the prohibited hypotheses of deprivation of nationality for the purpose of expulsion, of expulsion for the purpose of seizure of property, and of expulsion to circumvent extradition procedures.

2.3.1 PROHIBITION OF EXPULSION OF REFUGEES AND OF STATELESS PERSONS

The Draft Articles on the Expulsion of Aliens of the ILC provide in the initial part of its Part Two the framework for dealing with the cases of prohibited expulsion, i.e., the situations in which the expulsion of aliens is not allowed under any grounds or circumstances. In this sense, Article 6 provides that

(a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order; [and that] (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 judgement of a particularly serious crime, constitutes a danger to the community of that country (International Law Commission 2014, Article 6).

The first clause is related to the existence of a national security or public order situation as an indispensable condition for the expulsion of aliens. In the second clause, the article enshrines the principle of non-refoulement, that is, the obligation that states have not to return a refugee to a place where he or she probably and notably will or could suffer any kind of harm. The 1951 Refugee Convention defines refugee as anyone who “is outside their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (United Nations 1951, 3). Furthermore, regional instruments, such as the 1984 Cartagena Declaration within the context of the Organization of the American States, expand the definition of refugee, thus its scope, covering also groups of persons in flight from events such as armed conflict, massive or systematic human rights violations, or serious disturbances of public order (Edwards 2013). 

In the same vein, Article 7 of the Draft Articles on the Expulsion of Aliens tackles the rules relating to the expulsion of stateless persons, in verbis: “[t]he pre-

19 The Cartagena Declaration on Refugees is a non-binding agreement adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena de Indias, Colombia from 19–22 November 1984. One of its main features is that it recommended the expansion of the scope of the definition of refugee, comprising, in addition to the hypotheses of the 1951 Refugee Convention and its 1967 Protocol, also the threat of generalized violence, internal aggression, and massive violation of human rights as ground for conceding the status of refugee to a person (Organization of American States 1984).
present draft articles are without prejudice to the rules of international law relating to stateless persons, and in particular to the rule that a state shall not expel a stateless person lawfully in its territory save on grounds of national security or public order” (International Law Commission 2014, XX). In characterizing what a “stateless person” is, the 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as “a person who is not considered a national by any State under the operation of its law” (Convention Relating to the Status of Stateless Persons 1954, Article 1). Statelessness can be classified as (i) \textit{de jure} statelessness, when the person has no nationality because of the nationality laws applied to her or him; or (ii) \textit{de facto} statelessness, a rarer situation that arises most commonly from state repression, when the person has a nationality but is not able to exercise it, for a variety of reasons (Shearer and Opeskin 2011). Moreover, statelessness may arise either by birth, if the person is not able to fulfil the requirements of the domestic law of the country where she or he was born, or by the loss of nationality without the correspondent acquirement of another.

\subsection*{2.3.2 PROHIBITION OF COLLECTIVE EXPULSION}

The Article 9 of the Draft Articles on the Expulsion of Aliens sets out a prohibition on the collective expulsion of aliens in order to more vehemently enforce the requirement for states to analyse and provide a substantial basis for each individual case before proceeding to expel an alien. This prohibition takes its basis from numerous regional treaties, such as the European Convention on Human Rights, the African Charter on Human and Peoples’ Rights, the Arab Charter on Human Rights, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families on a universal level (International Law Commission 2014).

A well-regarded document of international law, the International Covenant on Civil and Political Rights did not set out any specific rules about the subject, but the Human Rights Committee has formed a legal understanding that collective expulsion would go against the procedural rights of aliens of each having their case individually considered (Human Rights Committee 1986).

The judgements on numerous cases\textsuperscript{20} of the European Court of Human Rights have highlighted the following elements, among others, as strong evidence that one might be being subjected to collective expulsion: (i) the government of the expelling state issues orders requiring a number of aliens to leave its national territory on identical terms; (ii) the government of the expelling state requests a number of aliens to present themselves at the same time and at the same place as part of the process of expulsion; (iii) the government of the expelling state carries out no identification process or individual interviews as its officials physically conduct a number of aliens outside its territory; (iv) the absence of interpreters or legal advisers that might help with each individual case during the execution of the expulsion process of a group of aliens; and (v) the existence of governmental orders asking that its officials systematically give special attention or make special efforts in cases of ex-

\textsuperscript{20} \text{Čonka v. Belgium, Georgia v. Russia (I), Shioshvili and Others v. Russia, Berdzenishvili and Others v. Russia, Hirsi Jamaa and Others v. Italy and Sharifi and Others v. Italy and Greece.}
EXPULSION OF ALIENS (NON-NATIONALS)

Just as in other specific situations of expulsion of aliens, Article 9 sets out a reservation to the prohibition on collective expulsion. It specifies that the rules drawn out in the rest of the article shall not trump other international rules regarding the collective expulsion of aliens when the expelling state is involved in an armed conflict. Such provision is generally thought to be limiting on the human rights of aliens, since critics believe states have a propensity to create special rules for a situation that give them more powers in the face of individuals, especially considering a scenario in which the state might claim to have its national security at risk (Neuman 2016).

2.3.3 PROHIBITION OF DISGUISED EXPULSION

The Draft Articles on the Expulsion of Aliens of the ILC set out a prohibition also on the disguised expulsion of aliens, which it defines as expulsion that results indirectly from either the action or the omission of a state, going on to include tolerance or support of the acts committed, within its territory, by its own nationals or any other persons, with the intention of causing the departure of aliens and without being in accordance with the law (International Law Commission 2014).

This provision was included in the Draft Articles in order to emphasize that the lack of an easily demonstrable act or order does not exempt a state from responsibility, when it intentionally provokes a series of circumstances that leaves the aliens subjected to expulsion with no realistic capability of choosing, or allows them to go on without enacting policies in order to provide relief from such circumstances. Rather, it seeks to immediately criminalize the conduct of states that opt to act through these means, as they go against the procedural rights that the Draft Articles confer to aliens being subjected to expulsion (International Law Commission 2014).

The term “constructive expulsion” is sometimes used interchangeably with “disguised expulsion”, although it seems central to the concept of constructive expulsion that it becomes apparent that the alien being subjected to expulsion is departing voluntarily. In reality, however, this departure is caused by the conjunction of circumstances so dire in the individual’s country of residence that it sees no better option than leaving, coupled with a failure of the state to act with diligence to protect the rights of this individual (Boczek 2005).

The concept of constructive expulsion, and the possibility of holding states responsible for it despite there being no demonstrable direct order of carrying out the expulsion by officials of the government, were treated in length by two mixed claims commissions before the International Law Commission did so: the Iran-United States Tribunal and the Ethiopia-Eritrea Claims Commission. The Iran-United States Tribunal was the first to treat the subject, in a number of cases relating to

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21 “Mixed claims commissions are bodies founded ad hoc [that is, created for a particular purpose only] on the basis of international agreements usually consisting of a majority of nationals of the States Parties to the agreements and established with the purpose of settling claims which have arisen between citizens of different States, between citizens of one State and the other State, or between the States themselves in formal and final proceedings”. Historically, such “commissions played a very prominent role in the Peaceful Settlement of International Disputes in the 19th century.” In: Dolzer, Rudolf. "Mixed Claims Commissions" (2010). In Max Planck Encyclopaedia of Public International Law.
United States citizens who left Iran at the time of the Iranian Revolution, allegedly because of acts attributable to the revolutionaries and the post-revolutionary government. Although the Tribunal accepted the possibility of wrongful expulsion even if there are no explicit orders or specific actions by state agents that can be pointed out (Cove 1987), in most of these cases, the Tribunal’s final decision considered that the departure of the United States citizens was attributable to public unrest, and not to the state. However, in the Short v. Islamic Republic of Iran case, judge Brower emitted a dissenting opinion that considered the discourses of leaders of the Iranian Revolution could be held responsible for motivating the acts carried out by members of the revolutionary groups (Haddadi and Khosroshahi 2015).

Despite the apparent ample progress made by the Draft Articles in protection of aliens being subjected to expulsion proceedings, the International Law Commission’s subsequent official commentaries to the Draft Articles have been criticized by the academia for setting up a much higher standard to the application of this prohibition than the original text did. The criticism goes on to mention that the Commission wrongly based itself on jurisdiction from the Eritrea-Ethiopia Claims Commission, which dealt with a situation of mass expulsion during wartime, and allegedly turned factual circumstances much more complicated and confusing. This has prevented the creation of refined rules on disguised expulsion (Kidane 2017), even because grounds such as national security may be alleged to justify expulsions in war times.

2.3.4 OTHER PROHIBITIONS

As a logic corollary of the right the national has to return to the State where he or she is a national, States have no right to expel their own nationals, being this rule firmly established in international law (Perruchoud 2011). In this sense, Draft Article 8 provides that “[a] State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her” (International Law Commission 2014, Article 8).

Notwithstanding this, denationalisation is considered by some States as a possible measure to be taken in cases that the denationalisation does not result in statelessness, e.g., when the person has more than one nationality, a possibility that increases everyday due to nowadays migration processes around the world (Perruchoud 2011). This usually happens when States invoke the criterion of effective or dominant nationality in order to avoid the incidence of the rule forbidding them to expel its own nationals; very commonly, persons with double nationality, although born in one country, which represents the dominant nationality, have the nationality of their parents in cases of ius sanguinis nationality legislation regarding the parents’ country of origin (Perruchoud 2011).

Another prohibition set by the Draft Articles is the prohibition of expulsion for purposes of seizure of property, which has its provisions described by Article 11, in verbis: “[t]he expulsion of an alien for the purpose of confiscating his or her assets is prohibited” (International Law Commission 2014, Article 11). This prohibition of confiscatory expulsions has its main ground fully supported by the principle set out in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live (United Nations General Assembly 1985), because “[n]o
alien shall be arbitrarily deprived of his or her lawfully acquired assets” (International Law Commission 2014, para. (1) of commentary to Article 11). Furthermore, a myriad of human rights treaties recognizes the right to property, one of the basic principles of today's society, fundamentally connected to the rule of law. However, it is important to emphasize that the expression *arbitrarily* leaves the path opened to deprivation of lawfully acquired assets as a sanction consistent with law (International Law Commission 2014).

The last provision regarding the cases of prohibited expulsion of non-nationals tackles the prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure, Article 12 meaning that “[a] State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure” (International Law Commission 2014, Article 12). The term *disguised extradition* refers to situations in which the State achieves jurisdiction over a person without going through official extradition processes (Bassiouni and M. Cherif 2014). The European Court of Human Rights decided in the case of *Bozano v. France* that refusal of a State to grant an extradition request, but detaining that individual with the view to deport him or her to a country that would extradite the person in its turn to the requesting country, amounts to disguised extradition and therefore violates the right to liberty and security (Kälin 2010). Moreover, Article 12 relates only to situations in which the objective of the State in expelling the person is just the circumvention of the extradition procedures, that is, aiming solely at avoiding its obligations in the context of an extradition procedure (International Law Commission 2014).

2.4 THE RIGHTS OF NON-NATIONALS SUBJECT TO EXPULSION

Immediately after setting the hypotheses of prohibited expulsion, Part Three of the Draft Articles begins, setting forth the protection of the rights of aliens subject to expulsion. Part Three of the Draft Articles, in comparison to the other parts, comprises the largest number of articles, stretching from Draft Article 13 to 25. It is divided in four Chapters: Chapter I (articles 13-15) sets the general provisions; Chapter II (articles 16-20) specifies the protection required in the expelling state; Chapter III (articles 21-24), in turn, stipulates the protection in relation to the state of destination of the expelled alien; finally, Chapter IV (article 25), defines the protection in the transit state of the human rights of an alien subject to expulsion.

2.4.1 SUBSTANTIVE RIGHTS: HUMAN DIGNITY, HUMAN RIGHTS, THE PROHIBITION OF DISCRIMINATION AND THE PROTECTION OF VULNERABLE GROUPS

Draft Article 13 (1) determines that all aliens being subject to expulsion should be treated with humanity and respect for the inherent dignity of the human person throughout all stages of the expulsion process, which, in some cases, may include the imposition of restrictive or custodial measures to the expellee (International Law Commission 2014). The respect for human dignity is invoked in the preambles of UDHR, ICESCR and ICCPR as a fundamental underlying principle of this In-

ternational Bill of Human Rights, which these three overarching universal human rights treaties constitute (Rodley 2018). These general principles of respect for the human dignity is particularly relevant in the context of the expulsion of aliens, considering the fact that “aliens are not infrequently subjected to humiliating treatment in the course of the expulsion process offensive to their dignity as human beings, without necessarily amounting to cruel, inhuman or degrading treatment” (International Law Commission 2014, para. (2) of commentary to Art. 13).

Paragraph (2) of Draft Article 13, in turn, recalls that all aliens who are subject to expulsion are entitled to respect for their human rights, with an emphasis in the rights laid down in the Draft Articles, due to its particular relevance in the context of expulsion of aliens, but without implying any hierarchical primacy in relation to the protection of human rights deriving from international conventions and general international law (International Law Commission 2014). In that order of ideas, leading UN documents have acknowledged the comprehensive and holistic nature of human rights, by stating that “all human rights are indivisible, interdependent, and interrelated” (van Boven 2018, 135). Indeed, irrespective of the category of human rights that one is considering – individual or collective rights; civil, political, economic, social, or cultural rights – intersections between them are inevitable in practice, which evidences that categorizations or classifications “correspond more to conceptual premises than to realities” (van Boven 2018, 135).

Draft Article 14 sets out the obligation to respect the rights of the aliens subject to expulsion “without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origins, property, birth or other status, or any other ground impermissible under international law” (International Law Commission 2014, Art. 14). In that sense, it is interesting to note that the terms “non-discrimination” and “equality” have been often used interchangeably to describe, respectively, the negative and positive dimensions of the same principle (Moeckli 2018). Whereas the ideal of (formal) equality requires that equals be treated equally, “the prohibition of discrimination precludes differential treatment on unreasonable grounds” (Moeckli 2018, 149). In the context of expulsion of aliens, the obligation of non-discrimination “applies to the exercise of the right of expulsion, [covering] both the decision to expel or not to expel and the procedures relating to the adoption of an expulsion decision and its possible implementation” (International Law Commission 2014, para. (2) of commentary to Art. 14).

Finally, special attention to particularly vulnerable persons, such as children, older persons, persons with disabilities and pregnant women, is given in Draft Article 15, which sets out “the obligation of the expelling State to treat and protect vulnerable persons who are subject to expulsion with due regard for their vulnerabilities and special needs” (International Law Commission 2014, para. (2) of commentary to Art. 15). Furthermore, this draft provision is not exhaustive ratione personae, as it extends these requirements to “other vulnerable persons” (International Law Commission 2014).

### 2.4.1.1 THE SPECIFIC OBLIGATIONS OF THE EXPPELLING, TRANSIT AND DESTINATION STATES

Even though this assertion has become almost a truism, it is nevertheless important to emphasize that to every human right that is laid down in this particular
set of Draft Articles, as well as in all other human rights treaties’ provisions setting forth rights, there is a correspondent obligation for the states to ensure this right is observed. This obligation can be either positive, thus implying the imperative for the state to act in order to enforce this right, or negative, in which case the state should refrain from action, so that a human right can be enjoyed by a person (Mégret 2018).

The domestic implementation of the obligations of States regarding human rights treaties remains as the primary means of implementation, whereas the complaint systems established by treaties and maintained by special committees, whether inter-state or individual, are designed to supervise the aforementioned domestic implementation of treaties, thus being considered as secondary means of implementation (Chalabi n.d.).

The obligations of states regarding human rights have been described by the United Nations Special Rapporteur on the Right to Food, Asbjorn Eide, as being of three kinds: to respect, meaning to abstain from taking any conduct that would violate a given right; to protect, meaning to ensure that no third party takes any conduct that would violate a given right; and to fulfil, meaning that the state must take active measures in order to facilitate or provide the enjoyment of a given right (United Nations 1987).

In so far as the expulsion of aliens is concerned, the Draft Articles set a number of specific obligations to the expelling state, as well as for the state of destination of the expelled alien and the eventual state of transit. Along chapters II, III and IV of Part Three, these obligations are detailed according to the role of the state in the proceedings. Starting with Article 16, which calls on expelling states to protect the right to life of the individuals being subjected to expulsion. The text may lead readers to believe that, according to the aforementioned classification, this is simply an obligation to protect, requiring the state to defend the life of the expelled individuals from third parties, and following common logic, to respect, obliging states to abstain from taking these individuals’ lives themselves. However, it can be argued that it may also comprehend an obligation to fulfil whenever state action is necessary to guarantee the continuation of the individual’s life, such as when the individual suffers from hunger or an infirmity (Human Rights Committee 1982).

The text of Article 17 is more specific as to the conduct required of the expelling states. It requires them to not subject an alien subject to expulsion to torture or any other cruel, inhuman or degrading treatment or punishment. In the expression “not subject”, it is made clearer that it only requires the states themselves to abstain from such conduct, making this only an obligation to respect. The ILC’s commentaries on the Draft Articles stated this expressly, adding that the obligation of the expelling state not to expel aliens to another state where they may be subjected to such conduct is set out in Article 24 (International Law Commission 2014).

Article 18 follows this trend of clarity as it requires of expelling states that they respect the right to family life of aliens being subjected to expulsion, which has been considered by the commentaries to the Draft Articles not as an absolute prohibition on expulsion whenever it would interfere in the unity of the alien’s family, but only when it is considered that such interference is arbitrary or unlawful. Reference is made to a fair balance between the interests of the State and of the alien subject to expulsion as a parameter for arbitrariness, according to case law of the European Court of Human Rights, and in the view of the ILC, in a manner compatible with the

Article 19 branches off into various obligations that limit the manner and extent to which an alien subject to expulsion may be held under detention for this purpose specifically. Despite the negative language used in some of its provisions, the duties that arise out of Article 19 are generally of the third nature, that is, of an obligation to fulfil, as they demand extra care in the state’s actions, such as establishing special judicial procedures and detention centres separate from persons deprived of liberty for other reasons, save for exceptional circumstances which the commentaries to the Draft Articles link to the International Covenant on Civil and Political Rights (International Law Commission 2014).

Article 20 demands of the state both an obligation to protect the property of aliens subject to expulsion, and also that states allow the free disposition of property from abroad, up to where the law admits it, constituting an obligation to respect. This may be interpreted as, when expelled aliens may not maintain their property inside the state they were expelled from, giving them a reasonable time to conclude all of their business inside that state. Alternatively, a monetary compensation could be offered for the loss of property, although it can be argued that this would go against the principle of free disposition of property set out by the article. Many pre-existent treaties also added that this protection could be flexibilized in favour of social interest, but Article 20 makes no express mention on the subject (International Law Commission 2014).

Article 21 demands that expelling states facilitate voluntary departure, take the necessary measures to ensure the safe transportation of expelled aliens when forcible expulsion is needed, and give reasonable time for aliens to prepare for their departure, considering the individual circumstances of each case. The two first denote obligations to fulfil, something that can be identified by the use of the terms “facilitate” and “take the necessary measures”, both of which express positive action from the state. Special attention is brought in the ILC’s commentaries to the fact that facilitating voluntary departure does not mean exerting pressure over aliens to make them choose to do so, as that would constitute an instance of disguised expulsion. The obligation of giving reasonable time for the alien to prepare prior to their expulsion is linked to the subject of Article 20 (International Law Commission 2014).

Article 22 defines which states an alien ought to be expelled to, although they are not expressly listed in an order of preference, and always respecting the principle of non-refoulement consecrated in Article 23 and Article 24. They are listed in this manner: (i) the state of origin of the alien; (ii) any other state with an obligation to receive the alien under international law; (iii) any state willing to receive the alien, at the request of the expelling state or, where applicable, at the alien’s request; (iv) any state where the alien has a right of entry or stay; (v) where applicable, to the state from where the alien entered the expelling state (International Law Commission 2014).

Article 23 sets out the first part of the rule of non-refoulement, prohibiting the expulsion of an alien to a state where their life would be threatened under a non-exhaustive list of motives impermissible under international law: race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status. It also sets out a special rule for states which do not apply death penalty of not expelling an alien to a state where they have been sen-
tenced or have a real risk of being sentenced to death, unless the state of destination 
has offered an assurance that the alien shall not be sentenced or that the sentence 
shall not be carried out if they already have been sentenced. Article 24 sets out basically 
the same prohibition, but this time relating to torture or to cruel, inhuman or 
degrading treatment or punishment, and regardless of the grounds for such conduct 
(International Law Commission 2014).

At last, Article 25 sets out a general rule for eventual transit states to protect 
the human rights of aliens subject to expulsion, according to its particular obligations 
under international law, that is, those it has contracted by joining international 
conventions as a party and general rules of international law. Given the generality of 
such provision, its nature cannot be determined, as it may encompass obligations of 
any sort (International Law Commission 2014).

2.4.2 PROCEDURAL RULES

The procedural rules are laid down under Part Four of the Draft Articles, which 
comprises Draft Articles 26, 27 and 28.

Recalling the discussion held above, the right of expulsion is indeed an attribute 
of the sovereignty of states. Such fact, however, does not imply that there are 
no basic, minimum standards constraining the right of states to expel aliens from 
its territory. These restrictions are particularly acute in the field of procedural due 
process (Kidane 2013). Notwithstanding, there is no detailed, comprehensive set of 
rules at the international level “establishing expulsion proceedings and reconciling 
the rights of the individual subject to expulsion with the sovereign rights of the exp- 
pelling State” (Kidane 2013, 293). Instead, there is a number of scattered rules, at both 
the universal and regional levels, providing sets of minimum standards of treatment 
of aliens (Kidane 2013).

At the universal level, the most relevant law-making treaties setting minimum 
standards for procedural due process in the context of expulsion of aliens are the 
ICCPR, the Refugee Convention, the Stateless Persons Convention, the Migrant 
Workers Convention and the UNCAT. At the regional level, the relevant sources in- 
clude the American Convention on Human Rights and the European Convention 
for the Protection of Human Rights and Fundamental Freedoms, as well as the jur- 
isprudences of the Inter-American Court of Human Rights23 and of the European 
Court of Human Rights24 (Kidane 2013). Together, these instruments set certain mi-
nimum standards for the treatment of aliens during the expulsion process, seeking 
to ensure that such decisions are non-arbitrary and fair (Kälin 2010; Kidane 2013).

Even though at the level of international law the concerns towards judicial 
proceedings were traditionally focused on how criminal trials should be conducted, 
it is important to bear in mind that “the right to a fair trial extends beyond such trials 
to civil and certain administrative proceedings” (Shah 2017, 265). Therefore, despite

23 See Inter-American Court of Human Rights, Juridical Condition and Rights of Undocumented 
Migrants (2003), para. 121 (on due process). Vélez Loor v. Panama, para. 132 (right to representation 
in administrative proceedings) and para 143 (right to due legal process, regardless of the migratory 
status). Other guarantees: Inter-American Court of Human Rights, Nadege Dorzema, para. 175, and 
Pacheco Tineo, para. 133.
the fact that the act of expulsion, from the legal standpoint, cannot be strictly consi-
dered a punishment, but rather an administrative act, the body of international law
mentioned in the paragraph above, as well as State practice indicate that procedural
guarantees are undoubtedly relevant also in the context of expulsion (Kidane 2013).
Furthermore, recalling Draft Article 19, all aliens that are subjected to detention for
the purpose of expulsion, save in exceptional circumstances, should be separated
from the normal prison population (International Law Commission 2014; Murphy
2013).
In the Draft Articles, in so far as the procedural rights of aliens subject to ex-
pulsion are concerned, Draft Article 26 (i) confers the following procedural rights to
any alien subject to expulsion:

(a) the right to receive notice of the expulsion decision; (b) the right to chal-
lenge the expulsion decision, except where compelling reasons of national
security otherwise require; (c) the right to be heard by a competent autho-
"rity; (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
(International Law Commission 2014, Art. 26 (i)).

The right to receive notice of the expulsion decision in a language that they
understand is a *conditio sine qua non* for the alien who is being subject to expulsion
to exercise all of their procedural rights, and thus be able to prepare an adequate de-
fence against the expulsion order. It is embodied in Article 22 of the Migrant Worke-
rs Convention (International Law Commission 2014; Shah 2018). Also, whereas the
rights to challenge the expulsion decision and to access the effective remedies for
that purpose are both based on Article 13 of the ICCPR, the right of the alien to be
personally heard by a competent authority, which, according to the ILC, is essential
for the exercise of the right to challenge the expulsion decision, is still object of
controversy in the State practice in the area (International Law Commission 2014).
Underlying the exercise of the aforementioned rights are the rights to be re-
presented before the competent authority and of free assistance of an interpreter
in case the alien does not understand or speak the language used by the competent
authority (International Law Commission 2014). Whereas the former is based on
Article 13 of the ICCPR, the latter provision is, in turn, reflected on the wording of
Article 14 (i) of the same Covenant, which makes reference to criminal proceedings
(International Law Commission 2014).
Nevertheless, Draft Article 26 (i) still represents a progressive development
to the extent that these procedural rights that are limited to lawfully present aliens,
in the provisions in which it was inspired, are to be enjoyed by any alien, “irrespec-
tive of whether that person is lawfully or unlawfully present in the territory of the
expelling state” (International Law Commission 2014, 39). The sole exception to the
general rule is that of its Paragraph 4, which determines that the procedural rights
laid down in Paragraph 1 are without prejudice to national legislations applicable to
the expulsion of aliens who have been unlawfully present in the territory of a state
for a short period. According to a number of national laws, this must not exceed six
months (International Law Commission 2014; Murphy 2013). This provision, howe-

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25 That is, an indispensable condition.
ver, does not imply that the procedural rights of Paragraph 1 cannot be applied to this group of aliens, but that it would be under the discretion of the expelling state to decide whether to apply the minimum standard set out in the Draft Articles or to disregard them and apply their domestic legislations concerning the expulsion of this particular group of non-nationals.

In this order of ideas, Paragraph 2 of Draft Article 26 establishes that the procedural rights listed in Paragraph 1 are without prejudice to other procedural rights or guarantees provided by the expelling country’s national law, e.g., right to free legal assistance, or by other obligations set forth in the international law, namely international treaties, binding on the expelling state (International Law Commission 2014). Moreover, Paragraph 3 ensures the right of the expelling alien to seek for consular assistance, which nevertheless, leaves the state of the alien’s nationality free to decide whether or not to provide consular assistance, as long as it does not impede the right of the expellee to seek consular assistance (International Law Commission 2014).

Furthermore, Draft Article 27 determines that only appeals against an expulsion decision that are lodged by aliens lawfully present in the expelling country’s territory will have a “suspenso effect” on the expulsion until the appeal is judged (International Law Commission 2014; Murphy 2013). This provision is aimed at ensuring the effectiveness of the appeal, in situations where the execution of the expulsion decision would render, in practice, the exercise of the right to appeal impossible, in practice (International Law Commission 2014). In addition to that, Draft Article 27, even though being restricted only to lawfully present aliens, still represents a progressive development, considering that “State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision when there is a real risk of serious irreversible harm to the alien subject to expulsion” (International Law Commission 2014, para. (1) of commentary to Art. 27).

Notwithstanding, criticism in the academic field has been raised with regard to potentially regressive developments of the Draft Articles in terms of procedural due process. The right to legal aid or appointed counsel was intentionally removed from the final version of Draft Article 26. As Paragraph (6) of its Commentary clarifies that the right to be represented before a competent authority laid down in Paragraph 1 (e), “does not necessarily encompass the right to be represented by a lawyer during expulsion proceedings”, neither “the obligation on the expelling State to pay the cost of representation” (International Law Commission 2014, para. (6) of commentary to Art. 26; Kidane 2017). According to Won Kidane, in practice, “the denial of counsel in many cases amounts to a denial of the form of relief from expulsion altogether” (Kidane 2017, 87), considering that “providing the substantive right but denying the procedural means to claim and obtain it makes the substantive rights entirely meaningless” (Kidane 2017, 87).

### 2.4.3 Legal Consequences of Expulsion

The legal consequences of expulsion are disciplined in Part Five of the Draft Articles, which comprises Draft Articles 29, 30 and 31. Two are the possible remedies
envisaged by the Draft Articles for the unlawful expulsion of aliens lawfully present on the territory of the expelling state. Firstly, there would be the possibility of return to the expelling country under Draft Article 29, which would nevertheless be “subject to a discretionary exclusion on grounds of national security or public order” (Kidane 2017, 87) or when the alien “no longer fulfils the conditions for admission under the internal law of the expelling State” (International Law Commission 2014, Art. 29 (i)). In this situation, “the expelling state retains the right to deny readmission to an alien who has been unlawfully expelled” (International Law Commission 2014, para. (6) of commentary to Art. 29). Secondly, under Draft Article 30, there would be the possibility for the victim of an unlawful expulsion to obtain reparation, considering an unlawful expulsion constitutes an internationally wrongful act (Kidane 2017).

2.4.3.1 THE RIGHT OF READMISSION

The right of readmission, as the name suggests, consists, under Draft Article 29, in the subjective right of the alien that has had to leave the territory of a state due to an unlawful expulsion to re-enter the territory of the expelling state, as long as the conditions are met (International Law Commission 2014). It is “clearly a progressive development on its own accord” (Kidane 2017, 88), even though it is a cautious one (International Law Commission 2014): the right enunciated by Draft Article 29 comprises only aliens that were lawfully present on the territory of the expelling state and were expelled by means of an unlawful decision, that is, a decision that breaches a rule of international law, inasmuch as it does not comply with national law (International Law Commission 2014).

Moreover, the unlawfully expelled alien can only be readmitted “when a [national or international] competent authority has established that the expulsion was unlawful and when the expelling state cannot validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question” (International Law Commission 2014, para. (2) of commentary to Art. 29). In addition, the assessment of the condition for readmission must be exercised in accordance with the principle of good faith (International Law Commission 2014).

2.4.3.2 THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

It is worth noting, however, that the right of readmission does not impair the legal regime governing the responsibility of states for internationally wrongful acts (International Law Commission 2014). In essence, state responsibility arises when there is an international legal obligation in force between two specific states, this obligation has been violated as a result of an act or omission imputable to one of the states and, finally, this unlawful act or omission results in loss or damage for the other state (Shaw 2017).

That being said, the rules on state responsibility are of a secondary, and not primary, nature (Henriksen 2017). Whereas primary rules “define the particular obligations that may generate responsibility if they are violated”, secondary rules, in turn, “determine the consequences of violating the primary rules” (Henriksen 2017,
In that context, the ARSIWA does not seek to define the content of the breach that has given rise to responsibility, but instead it provides “the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom” (Harris and Sivakumaran 2015, 426).

Regarding the primary rules governing expulsion of aliens, in light of the Draft Articles, it is “undisputed that expulsion in violation of a rule of international law entails the international responsibility of the expelling state for an internationally wrongful act” (International Law Commission 2014, para. (1) of commentary to Art. 30). Supporting this assertion, there is abundant jurisprudence on reparation in cases of unlawful expulsion of aliens for injuries sustained by the latter (International Law Commission 2014, see footnote 204), namely from Mixed Claims Commissions dealing also with this issue and human rights bodies, such as the European Court of Human Rights, and the Inter-American Court of Human Rights (International Law Commission 2001, see paras. (18) and (19) of the commentary to Article 36).

The rules on reparation contained in Part Two of the ARSIWA are particularly relevant in the context of the expulsion of aliens (International Law Commission 2014). The basic principle of reparation was first established by the Permanent Court of International Justice in the Chorzów Factory case, in which it ruled that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed” (Permanent Court of International Justice 1928, pp. 47-8). Presently, the principle of full reparation by a state for an injury resulting from the commission of an internationally wrongful act is set forth in Article 31 of the ARSIWA, which defines injury, for the purposes of international responsibility, as “any damage, whether material or moral, caused by the internationally wrongful act of a State” (International Law Commission 2001, Art. 31 (2)). Article 34, in turn, sets out the three different forms that reparation may take place: (i) restitution (Article 35), (ii) compensation (Article 36), and (iii) satisfaction (Article 37), all of which can be enforced either alone or in combination (International Law Commission 2001).

(i) Restitution is certainly the most obvious form of reparation, since its objective is to re-establish the situation that existed before the wrongful act was committed (Shaw 2017), provided that the restitution in kind is materially possible and does not result in a disproportionate burden in relation to the benefit (International Law Commission 2001). However, restitution is becoming an increasingly less common form of reparation, namely due to political complexities (Shaw 2017). Nevertheless, in cases involving arbitrary expulsion of aliens, “restitution in the form of return of the alien to the expelling State has sometimes been chosen” in the past, in which “satisfaction has been given in the form of the revocation of the expulsion order and return of the expelled alien” (International Law Commission 2014, para. (3) of commentary to Art. 30).

(ii) Compensation, in turn, is due when reparation cannot be achieved through restitution and it is intended to cover “any financially assessable damage including loss of profits” (International Law Commission 2001, Art. 36 (2)). Today financial compensation constitutes “the most relevant means of reparation and it is well established that a court or tribunal with jurisdiction over a case may award compensation for damage suffered” (Henriksen 2017, 144). Furthermore, with regards to the
unlawful expulsion of aliens, compensation is a well-recognized mean of reparation for both material and moral damages sustained by the expelled alien (International Law Commission 2014). The main sources of inspiration for the ILC in relation to compensation are the jurisprudences of regional human rights judicial bodies, namely the Inter-American Court of Human Rights and the European Court of Human Rights (International Law Commission 2014).

When the reparation for the injury cannot be made by means of restitution or compensation, a state responsible for a wrongful act is obliged, under Article 37 of ARSIWA, to give (iii) satisfaction for such injury (International Law Commission 2001). In practice, satisfaction may consist of “an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality” (International Law Commission 2001, Art. 37 (2)), such as giving an assurance or guarantee of non-repetition of the act (Shaw 2017). In the case of unlawful expulsion of aliens, satisfaction is likely to be applied as a form of reparation, “particularly in situations where the expulsion decision has not yet been executed” (International Law Commission 2014, para. (5) of commentary to Art. 30), e.g., a judgement by the competent judicial authority determining the unlawfulness of the expulsion order.

Among all the different categories of aliens covered by the Draft Articles, in what concerns the aforementioned remedies for unlawful expulsion, special note should be taken on the refugees under the definition of the 1951 Refugee Convention. That is because neither readmission nor reparation in any of its forms, as they are formulated in the Draft Articles, manage to “meaningfully address the specific circumstances of refugees for two reasons” (Kidane 2017, 88).

Therefore, it is at least theoretically impossible for a refugee who had been unlawfully expelled to be readmitted into the country of refuge, namely if the expulsion is to the country where persecution occurred or could occur (Kidane 2017). The mechanisms for pursuing reparation are not available to the refugee, in as much as the state that could endorse the expelled refugee in an eventual claim for reparation is the same state that persecutes them or allows their persecution (Kidane 2017). There is, therefore, a structural problem preventing refugees from accessing these remedies.

### 3 Previous International Actions

#### 3.1. Draft Articles of the International Law Commission

The International Law Commission’s Draft Articles on the Expulsion of Aliens detail a series of state obligations surrounding the act of expulsion, which refer to: (i) required previous conditions; (ii) classes of individuals who are protected against expulsion; (iii) obligations regarding the manner of carrying out the act of expulsion for both the expelling state, the state of destination and eventual transit states; and (iv) the procedural rights of aliens against such act (International Law Commission 2014). The Draft Articles have received some favourable appraisal, such as in the advances they have made on the rights of the aliens being subjected to expulsion, both in setting procedural rights to these aliens and in granting them remedies for when
an expulsion which has already taken place is later found to be unlawful, as well as in requesting expulsions to be justified in a case-by-case basis and extending the responsibility of States by prohibiting disguised expulsion (Neuman 2016).

There was some criticism, however, on the omission of the Commission over certain topics that were present in the working versions of the Draft Articles, with an easy consensus being sought instead. For example, the Commission expressly stated, both in the Draft Articles and in its commentaries, that it would refrain from addressing the situation of collective expulsion of aliens during an armed conflict and the protection of their property, allegedly to not enter the field of – and provoke a situation of incompatibility with – international humanitarian law. Other examples of criticized decisions of the Commission include not extending a protection to aliens from being expelled to a state where their life may be threatened for their sexual orientation, guaranteeing the right to counsel and legal aid, and being unsatisfactory in creating remedies to unlawful expulsion directed towards refugees (Kidane 2016).

Overall, despite general approval of the continued efforts in codification of the theme, many academics consider that the members of the Commission were too shy on their final recommendations to the General Assembly (Kanstroom 2017), with many recommendations for further progress having been made that could be considered by the General Assembly in future codification efforts.

### 3.2 Previous Actions of the Sixth Committee of the General Assembly

At the twenty-third meeting of the Sixth Committee, in November 2012, during the sixty-seventh session of the General Assembly, the Chair of the International Law Commission requested written comments from the Committee’s members on the draft articles on the expulsion of aliens that have been approved in first reading by the Commission (United Nations 2012).

Indeed, since many of the draft articles were adopted by the ILC for the first time in its sixty-fourth session earlier that year, the 67th session was the first opportunity for the governments represented in the Legal Committee to comment on the proposed set of rules that resulted from more than one decade of work by the Commission (Pronto 2013). A wide range of views towards the draft articles was expressed by the delegations there present (United Nations 2013). Whereas some representatives praised the Commission’s efforts, others expressed doubts as to the usefulness of attempting to codify such rules in the form of an international treaty (Pronto 2013).

In 2014, at its sixty-ninth session, the General Assembly considered the Report of the Commission on the work of its sixty-sixth session, in which the later presented a version of the draft articles with the modifications and amendments in response to the written comments submitted, throughout the previous year, by the governments represented in the Sixth Committee (Pronto 2013). Furthermore, upon recommendation of the Commission made under that same point of the agenda, the General Assembly decided that it would consider the possibility of elaborating an international convention of the basis of the ILC’s Draft Articles only at a later stage (United Nations 2014).

At the General Assembly’s seventy-second session, in 2017, the Sixth Committee once again discussed the topic on the expulsion of aliens. During the general
comments stage, the critical importance and contemporariness of this topic, as well as its underlying complexity, were emphasized by the delegations present (United Nations 2018). Many representatives highlighted “the importance of striking a balance between State sovereignty and the human rights of the person expelled or in the process of expulsion” (United Nations 2018, online). Whilst some delegations expressed the view that this topic directly intruded into the domestic sphere of states, thus impairing their capacity to enjoy discretion in this area, a number of other delegations affirmed that the Draft Articles constituted an important contribution as guidelines to states and that, indeed, aliens should only be expelled in exceptional circumstances (United Nations 2018).

In addition, a number of delegations expressed the view, which was consolidated in Resolution 72/117, that the General Assembly should take note of the Draft Articles on the expulsion of aliens (United Nations 2017b; United Nations 2017c). At the 25th meeting of the Legal Committee, during the seventy-second session of the General Assembly, in 2017, the delegation of Paraguay, on behalf of the Bureau, introduced the Draft Resolution A/C.6/72/L.13, entitled “Expulsion of aliens”, which was adopted at the 28th meeting in 6 November 2017, without a vote, following the Committee’s standard voting procedure (United Nations 2018). The General Assembly, pursuant to its Resolution 72/117 of 18 December 2017, decided to include the topic entitled “Expulsion of Aliens” in the provisional agenda of its next session (United Nations 2017c).

The purpose of the Sixth Committee, in the next session, will therefore be to, inter alia, examine what, if any, form will be given to the Draft Articles presented by the ILC, as well as any other appropriate action concerning that issue (United Nations 2017c). Nevertheless, for a better understanding of what the upcoming action of the Legal Committee is likely to be, some points are worth of note, and for that one should look in more detail to some of the previous actions by the Committee.

Already at the Committee’s sixty-seventh session, in 2012, some governments have voiced their positions on the final form they believe the draft articles should take, and arguments were expressed by the delegations there present both in favour of and against its adoption in the form of a multilateral or ‘law-making’ treaty (Pronto 2013). Since then, many delegations had repeatedly expressed their scepticism towards this issue. In general lines, their argument is that it is not feasible or desirable at the current stage of international law to turn the Draft Articles into legally binding rules, but rather that, in order to ensure its compliance by states, it should, instead, take the form of guidelines or principles (United Nations 2013).

The rationale behind such position, which was manifested by several delegations, is that due to divergences between countries and the still evolving character of many aspects comprised in the Draft Articles, the drafting of a binding “law-making” treaty based on them would, presently, be either premature or unnecessary (United Nations 2018). Highlighting the relevance of local, national and regional initiatives on the topic, some delegations have questioned the advisability of a convention on rules that already exist in other human rights instruments, applicable to refugees and other categories of persons in human mobility (United Nations 2018).

What is essential to notice are the primary roles of the ILC to contribute both to the progressive development of international law, in areas which still lack regulation, or where the law still cannot rely on the practice of states to further develop,
and to the codification of the already existent corpus of international law (International Law Commission 1947). Regardless of the fact that the importance of the ILC’s statutory roles were not only acknowledged, but indeed appreciated by the Sixth Committee itself (United Nations 2017b), the texts that are drafted by the Commission do not necessarily have to become international treaties (Pronto 2013). Therefore, this is one fundamental aspect underlining the central object of the present topic, in which delegations are expected to diverge.

In the sense, even though international treaties are the “most direct and formal way for state to create rights and obligations under international law” (Henriksen 2017, 23), in practice, states can be reluctant to state explicitly whether their commitment is intended to be legally binding, and the lack of precision in the wording while drafting a treaty, as well as the use of purposely general or vague terms indicates an intention not to create legally binding obligations (Henriksen 2017).

In conclusion, the work of the ILC in drafting the articles on the expulsion of aliens is deeply intertwined to the role of the Sixth Committee in considering and eventually shaping the set of rules proposed by the ILC, in order to make it more “palatable” to the states that are the ones that will eventually have to comply with these norms. This aspect is relevant especially when implementing and executing their national policy on the treatment and expelling of non-nationals. In the case of the draft articles, it is possible to see that the efforts of international law to strike the balance between the quest for protection and accommodation of vulnerable people living under this system with the sensibilities and securitarian discourses of some nation states are still a work in progress (Kidane 2017).

### 4 BLOC POSITIONS

#### 4.1 AFRICAN COUNTRIES

The Democratic Republic of the Congo has a past of criticized actions towards expulsion of aliens, as the episode regarding Zairian people mass expulsion in early 1990 demonstrates (The New York Times 1991). Nowadays, however, the country is facing a strong increase in the number of internally displaced people, positioning Congo ahead of Syria, Iraq, Afghanistan and Nigeria (Deutsche Welle 2017). That said, taking into consideration the actual situation inside of the country, the biggest concern of the African country towards the expulsion of aliens is the protection of human rights, especially the right of non-refoulement, as well as the enhancing of regional instruments able to help neighboring countries to deal with local and transnational issues properly.

Ethiopia is surrounded by many countries in fragile political and economic situations, such as Eritrea, Somalia and South Sudan, what makes it a transit country for refugees and other migrants. In January 2018, Ethiopia was hosting close to one million refugees, with growing numbers, being the second largest refugee-hosting
country in Africa, only after Uganda (Norwegian Refugee Council 2018). The open-door refugee policy, however, was reaffirmed earlier this year, for the Administration for Refugee and Returnee Affairs (ARRA) stated it will “continue to receive new arrivals from several of its neighbors, notably from South Sudan, Somalia, Eritrea, Sudan and Yemen” (African News 2018, online). Due to this scenario, political and economically, a deep concern about the rights of people in refuge situation is in the center of Ethiopian foreign affairs’ agenda.

**South Africa** has a controversial record of its own in the expulsion of aliens. The only facility destined to holding foreigners awaiting expulsion in the country is the Lindela Repatriation Centre, and rumours of overcrowding, bad treatment and even human rights violations surround the place. Although the Department of Home Affairs of South Africa reported to have significantly decreased its numbers of foreigners removed from the country (Africa Check 2016), other sources state that a great number of asylum seekers is summarily detained upon denial of their refugee status in a routine basis. Although asylum seekers have been denied due process and not been properly informed of their rights, they are nominally owed a reasonable temporary stay and the right to appeal the denial of their application, and the delegate should reflect this in their speech (News Deeply 2017). Nevertheless, South Africa is a party to the African Charter on Human and Peoples’ Rights, which requires expulsions to be made via decisions taken in accordance with the law and prohibits collective expulsion, but also limits acts of collective expulsion to those aimed towards national, racial, ethnic or religious groups, and not groups of other kinds. The delegate’s opinion should reflect this, including this restrictive description (African Union 1981).

**Sudan** has no comprehensive official migration policy, and its regulations concerning foreigners are dispersed in many different laws. The state is also a party to a series of treaties which provides rules regarding immigrants, but not to three treaties considered important to human rights, specifically about the rights of migrant workers and their families, women and victims of human trafficking. Sudanese law in general creates a very difficult environment for migrants seeking to work or just reside in Sudan for long periods (International Organization for Migration 2011). Even then, hundreds of asylum seekers who had found their way to Sudan from Eritrea and other countries were expelled (Human Rights Watch 2014), allegedly without being guaranteed the right to a lawyer (Dabanga 2017). The delegate should thus manifest themselves in a non-committing manner about the necessity for an extensive number of remedies, arguing for the sovereign right of a state to implement its own migration control policy. The state is also a party to the African Charter on Human and Peoples’ Rights, which mandates that decisions to expel should be pursued in accordance with the law and prohibits collective expulsions, although considering them in a restrictive manner, only classifying it as such when it is aimed towards national, racial, ethnic and religious groups (African Union 1981).

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**4.2 EUROPEAN COUNTRIES**

**Germany** is the most powerful and influential country within the EU in both political and economic terms, and eventually became the leading actor in tackling the recent “refugee crisis”, by adopting a welcoming and inclusive stance towards non-EU international migrants, having received more than 1 million immigrants between 2015-2016 (Financial Times 2018; The Independent 2018c). Furthermore, under Chancellor Angela Merkel, Germany sponsors a European-wide solution to migration issues, in order to preserve the unity of the EU (The Independent 2018c). Concerning the expulsion of aliens, the grounds for expelling a foreigner from Germany are, in line with Union Law framework, conclusively regulated by the Residence Act (in German, *Aufenthaltsgesetz*), according to which non-nationals shall, in most cases, be subjected to expulsion if they have breached German laws, thus posing a danger to public safety, law and order, or other substantial interests of the Federal Republic of Germany, such as in the cases of drug-trafficking, smugling, human trafficking or terrorism (Baden-Württemberg 2018). In addition to that, the Residence Act affords the non-nationals being subject to an expulsion procedure with basic procedural rights and guarantees, and persons belonging to certain groups, such as asylum applicants and refugees, can only be expelled on serious grounds relating to public safety or order, such as a terrorist threat, for instance (Baden-Würt-

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27 Being members of the **Council of Europe**, all the countries in this section are under the auspices of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (shortly the European Convention on Human Rights), specially Protocol No. 7 to the Convention, signed the 22nd of November 1984. Article 1 of the Protocol No. 7, provides the prohibition of being expelled without the pursuance of a decision reached in accordance with law, having the alien the right to submit reasons against his expulsion, to have his case reviewed and to be represented for these purposes before the competent authority. It is important to highlight that the Council of Europe is an international organisation created in 1949 with the objective of promoting democracy and protecting human rights and the rule of law in Europe (Council of Europe 2018). It should not be mistaken with the European Union as it includes 47 members, 28 of which are also members of the European Union (Council of Europe 2018).

28 As members of the **European Union**, **Germany**, **France**, **Italy**, **Hungary**, **The Netherlands**, **Sweden** and the **United Kingdom of Great Britain and Northern Ireland**, are bound to the European Union Law rules on the expulsion of aliens. The general competence of the Union to regulate the entry, residence and rights of non-EU nationals is defined in Part Three, Title V, Chapter 2 of the Treaty on the Functioning of the European Union (TFEU). Insofar as the expulsion of non-EU or third-country nationals is concerned, the main source is the Returns Directive (Directive 2008/115/EC), which “regulates the procedure for expelling [non-EU] irregular immigrants, including rules on detention, entry bans, and procedural rights” (Peers 2017, 790). According to this Directive, the Member State can issue an expulsion order against a non-EU citizen whenever “there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security” (European Union 2008, Article 7 (4)). Citizens of the EU, in turn, cannot be expelled from an EU country as they enjoy the right of free movement within the Union. Nevertheless, Directive 2004/38/EC has established that an EU Member State can restrict the movement and residence rights of EU citizens and their families on the grounds of public policy, public security, or public health, “on the personal conduct of the individual concerned”, which has to represent “a genuine, present and sufficiently serious threat to the fundamental interests of society” (Peers 2017, 502-503). It is worth noting that the involvement of the EU in migration law, besides having to deal with the aspects of migration per se in a coherent way, also seeks to strike a balance between two different, yet related conflicting aspects: on one side, the balance between the EU competence to legislate in this field and the national sovereignty of EU states, and on the other, the tension between immigration control and the protection of human rights (Peers 217, 791). The tensions between these overlapping conflicting aspects became latent after the outburst of the European “refugee crisis”, which after a complicated period of diverse responses, has “pushed the EU towards greater harmonization [of the rules] in this field” (Peers 2017, 791).
temberg 2018). The delegate of Germany is therefore expected, as the block’s main leadership, to uphold the Union’s values, as well as the EU supranational normative framework on the issue of expulsion.

**France** has also led the European Union through the migration crisis that escalated in 2015, in a Franco-German initiative to address this issue in a coherent manner, in relation with what the EU represents in terms of democratic values and human rights (The Guardian 2015). In August 2018, however, the French Legislative has passed a new immigration law, publicly defended by the French President, Emmanuel Macron, tightening the rules on asylum, which criminalizes illegal border crossings, by introducing a one-year prison sentence to anyone caught in this act, as well as speeds up the procedures to expel economic migrants who had their asylum applications denied, by decreasing the time in which they can apply for asylum and increasing the time they can be detained before being deported (BBC 2018c; Human Rights Watch 2018; The Local 2018). Even though the bill has still to be sanctioned by the Executive, its declared support to it signals a hardening in the French migration policy, which will result in a regressive development in the expulsion procedures of economic migrants. The current French domestic rules on expulsion are, nevertheless, still in accordance with the EU standards and regulations. The delegate of France is, thus, likely to adopt a sceptical stance in relation to the topic.

Since 2014, around 640,000 asylum seekers have landed in the territory of **Italy**, the majority of them coming from Libya, although there has been a decrease in the numbers of international migrants, with only 14,500 arriving so far in 2018 (The Independent 2018b). The Italian government argues that the burden sharing of the crisis is unfair, as under the current EU rules, asylum seekers must apply for asylum in the country in which they first enter the EU. Considering Italy is situated in the Union’s Southern outer border it has become, alongside Greece and Spain, a “frontline state”, thus having to process a larger share of migrants arrivals and of asylum applications in comparison to Northern wealthier EU states, which in turn argue they have already received enough immigrants and refugees. As a result, burden-sharing negotiations to tackle the migration crisis were deadlocked, leading Italy to adopt a hard-line policy on migration (The Guardian 2018c). In this context, the Italian Minister of Interior, Matteo Salvini, who vowed to deport all the non-Italian Roma (also known as Romani or gypsy) population living in Italy29, is campaigning on a pledge to deport around 500,000 migrants who are living irregularly in Italy (The Guardian 2018c; The Guardian 2018d). Therefore, taking into consideration that the Italian government has adopted a hard-line policy on migration, the delegate of Italy is very unlikely to support the adoption of further binding norms at the multilateral level that may hinder the advance of the country’s current migration policy.

After the recent dramatic increase on the influx of migrants seeking to enter the EU through the Balkan route, **Hungary** has decided to erect an impenetrable barrier on its border with Serbia (which was later extended also to the Hungarian-Croatian border) in order to prevent the entering of potential asylum seekers in its territory (The Independent 2018a). In addition to that, Hungary has adopted in 2016 the so-called “push-back laws”, which have made asylum applications in the country almost impossible in practice, as well as criminalized and levied extra taxes on NGOs that provide assistance to immigrants, acting, according to its critics, contrary to EU Law and the EU values under article 7 of the Lisbon Treaty, namely

29 An estimate of up to 180,000 Roma live in Italy, of whom only about 43% are Italian citizens.
the commitment with human rights and democratic values (Guardian 2018b). These regressive legal developments were reinforced by a *de facto* expulsion policy that is currently being carried out by Hungary, which aims at making refugees already living in Hungary want to leave the country, by making their livelihoods unsustainable and withdrawing any integration support to this population (The Independent 2018a). Furthermore, in 2018, the Hungarian Prime-Minister Viktor Orban has publicly sponsored, together with the Italian Deputy PM and Minister of Interior, Matteo Salvini, the creation of a “pan-European anti-migrant alliance that would seek to prevent migration to Europe from besieged regions in Africa and the Middle East” (Deutsche Welle 2018).

**The Netherlands** has opted for a wide-ranging, comprehensive approach to international migrations, considering its major impact in Dutch society, especially its potential economic, cultural and scientific benefits to the country (Ministry of Justice and Security 2018). The objective of this approach is to ensure that migration is safe and well-managed, as well as that the adequate protection to the non-nationals in situation of vulnerability is afforded, and that the migration influxes meet the needs and capacity of Dutch society. In order to achieve this, Dutch local and central governments seek to strengthen the cooperation with civil society actors as well as with other countries within and outside the European Union (Ministry of Justice and Security 2018). The legal framework in which the expulsion of non-nationals occurs under the 2013 Modern Migration Policy Act is in line with the EU regulations and policy on the matter, thus the stance of the delegate is expected to be coherent with the latter.

The **Russian Federation** has made its own moves in increasing the regulations to reduce its flow of migrants. The number of expulsions also has rapidly increased following the adoption of new legislation in 2013, and some claim that it was passed in order to make Russia able to expel foreigners who were formerly under legal status (Russia Beyond 2016). There have been some under detention as part of the process of expulsion who revolted allegedly because of ill-treatment and long periods of waiting to be finally taken out of the country (The Moscow Times 2018). Russia is a party to the European Convention on Human Rights and there have been older cases that have made it to the European Court of Human Rights (namely Georgia v. Russia (I), Shioshvili and Others v. Russia and Berdzenishvili and Others v. Russia) in which Russia was accused of implementing a policy that was unjustly unfavourable to Georgian nationals, of improperly examining the particular case of each of them separately and, as a result, of not guaranteeing them due process (European Court of Human Rights 2018). Despite this history of condemnations, Russia still based its allegations on the European Convention of Human Rights, and its delegate should support all provisions of the Draft Articles that reflect the ones present in this treaty. Also based on the allegations of Russia in the Georgia v. Russia (I) case, the delegate should support the notion that states should be allowed to expel aliens under grounds of national and international security (European Court of Human Rights 2014).

**Sweden** has, for a long time, been considered the world’s most receptive country to immigrants, and is a party to the European Convention on Human Rights. It accepted hundreds of thousands of people in the last decade as a part of its “open door policy”, but by 2015 it tightened its policy as part of the populace, many backing the Sweden Democrats, claimed the number of immigrants coming in was overbur-
dening the welfare system (Public Radio International 2017). Although the government has restricted the access into the country due to structural reasons and became more incisive on detaining illegal immigrants, its speech remains generally favourable towards refugees and demand-oriented labour migration, and has attempted to follow a clean policy of expulsion (Swedish Ministry of Justice 2018). Thus, its delegate should assume a generally progressive stance on the matter, granting aliens both extensive protection against expulsion and remedies during the process.

The United Kingdom of Great Britain and Northern Ireland is a founding party to the European Convention on Human Rights, but its recent intention to withdraw from the European Union raised questions on whether it would remain under the regime of the European Court of Human Rights or not, with the current Prime Minister, Theresa May, and many Parliament members of the Conservative Party siding with leaving it (The Guardian 2018a). Aliens being subjected to administrative removal in the United Kingdom have the right to provide evidence against it, with an eventual possibility to appeal, the right to a legal adviser and also the right to have the removal order reviewed by a judge (Citizens Advice 2018). The government has recently followed a policy of discouraging immigration and cracking down on illegal immigrants, having raised the legal requirements to prove one’s legal status in the country, but a recent scandal involving long-time residents who entered the United Kingdom during a time when such documentation was not needed losing their jobs and benefits due to the change (BBC 2018b) caused Prime Minister Theresa May to publicly apologize for the distress (The New York Times 2018c). Nevertheless, as the detachment from the European Union is currently an impending process, the United Kingdom is still bound, as a general rule, to the European Union’s supranational legal framework. Therefore, the delegate’s opinion should be coherent with said rules of Union Law.

4.3 Middle Eastern Countries

Israel has notably pursued an active policy of its own regarding the expulsion of certain aliens, especially migrants from Eritrea and Sudan who have entered the country in great numbers in the 21st century. Although they generally seek to be recognized as refugees, the Israeli government considers most to be immigrants motivated by economic factors, looking for work within its territory, entering Israel illegally. In reaction to this flood of immigrants, Israel approved a plan that offered illegal immigrants with the options of either accepting to be relocated to Rwanda or Uganda or being placed under detention for trespassing the border without a permit (Al Jazeera 2018b). Most recently, after both African States left the deal, Israel adopted a new plan involving encouraging immigrants to leave voluntarily to countries indicated by the UNHCR. However, the Israeli government is still very defensive of their previous actions as necessary (The Times of Israel 2018). Considering the aforementioned events and the opinions emitted by the government regarding it, the delegate should support the demand for a high standard on defining which aliens deserves protection against expulsion under refugee status. The delegate should also either oppose the prohibition on disguised expulsion or demand that a high standard should be imposed for considering a particular case as disguised expulsion, such as the circumstances leading the alien to leave the state being at least a significant
threat to the alien's physical integrity or life, as Israel's act of imprisoning those who refused to leave voluntarily might otherwise be considered as disguised expulsion.

**Saudi Arabia** houses an immense population of foreigners, with reports showing that they constituted more than half of the country's workforce in 2008. It also has a delicate historic of treatment of the foreigners it expels, typically because they have surpassed their legal time of stay or no longer work for the same employer stated in their documents. Aliens have been subjected to summary expulsions and some allegedly suffered abuses while under the custody of Saudi authorities, sometimes in makeshift facilities. A few have died or been injured in clashes with security forces during raids conducted to search for illegal immigrants, or were returned to states where they were at risk and in some cases had their physical integrity effectively violated, which might lead the delegate to wish to flexibilize the expelling state's obligations to ensure the alien shall be safe in the state of destination (Global Detention Project 2016). Additionally, Saudi Arabia is not a party to the United Nations Refugee Convention, nor does it have any domestic legislation concerning refugees, as a consequence having no system of asylum concession, which turns the situation of many foreigners more fragile than it would be in other States, and might lead the delegate to seek a non-compromising stance on the protection of refugees (Human Rights Watch 2017). Regarding the expulsion of aliens, Saudi Arabia has already manifested itself in favour of a necessity of accordance with the law, of a right to seek legal remedies and of a prohibition of collective expulsion, according to Article 26, paragraph 2 of the Arab Charter of Human Rights, of which the state is a party (League of Arab States 2004).

**Turkey**, as one of the requirements of being part of the Council of Europe according to Resolution 1031 of its Parliamentary Assembly, is a party to the European Convention on Human Rights, which mandates that its members pursue any decisions towards expelling an alien according to law, and grant a number of procedural guarantees to the alien to contest such decision, making it the official position that the delegate should pursue (Council of Europe 1994). It has not, however, always acted in a manner compatible with its obligations, and has detained asylum seekers at its border area and summarily sent them back (Human Rights Watch 2000b), and according to at least one case brought before the European Court of Human Rights, Jabari v. Turkey, denied them the right to an effective remedy to challenge the expulsion, which might lead the delegate to assume a non-compromising stance towards the topic (European Court of Human Rights 2000).

### 4.4 NORTH AMERICAN COUNTRIES

According to Section 95 of the Constitution of **Canada**, each province has a discretionary margin to deal with immigration, as long as it does not collide with the acts of the Parliament of Canada. In this sense, the justice system of Canada is very inclined to protect refugees and aliens, having enacted several laws in order to enforce this protection, as the 1994 Department of Citizenship and Immigration Act, the 1985 Citizenship Act and the 2001 Immigration and Refugee Protection Act. Justin Trudeau was also one of many chiefs of state condemning Trump’s policy on family splitting earlier this year, revealing Canada’s protective stance on the treatment of aliens on the international stage, despite criticism over its immigration cen-
tres being an inappropriate environment for minors (The New York Times 2018). This should be reflected in the delegate’s performance within the Legal Committee and motivate them to argue in favour of extensive protection and guarantees against expulsion for aliens.

Article 33 of the Constitution of Mexico gives the President the power to expel undesirable aliens as he or she sees fit, without a prior trial and immediately (Narvaez-Hasfura 1997). Having a National Catalogue of Foreigners, visitors who do not possess proper documents and identification are subject to arrest at any time (National Review 2013). Thus, the delegate should argue in support of a short process for expulsion, with reduced possibility for remedies, in favour of efficiency in pursuing official decisions of the state.

The United States of America lie in a complicated situation regarding the expulsion of aliens, as the government has deported thousands of immigrants in the last decade, and the current government has made that one of its main agendas. Despite the Supreme Court of the United States having already stated in two separate cases, Plyler v. Doe and Kwong Hai Chew v. Colding, that even aliens who are unlawfully in the territory of the United States are guaranteed a hearing before a judge as part of their right to receive due process of law, including if they are to be deported, President Donald Trump and White House spokeswoman Sarah Huckabee Sanders have claimed that a judicial process is dispensable for the deportation of illegal immigrants (Time 2018). Also contradicting this claim is the fact that the United States are a party to the International Covenant on Civil and Political Rights, which consecrates, in its Article 13, both the necessity for decisions of expulsion to be reached according to the law and the right of the alien to have the decision reviewed by a competent authority except when compelling reasons of national security are involved (Office of the High Commissioner for Human Rights 1966). The country furthered its restrictive immigration policy by adopting a strategy of imposing visa sanctions to officials (and their families) from countries which do not cooperate with the deportation of their nationals from the United States (HuffPost 2018). Considering this, the delegate should attempt to argue within the frame of the ICCPR but explore the loopholes in the manner Article 13 was written to support the President’s claim. For example, that the competent authority it refers to does not need to be a judicial authority, with an administrative process being possible, and that when the article refers to the right of the alien to have the decision reviewed it means that such a revision may be carried out after the decision has already been executed and the alien has been removed from national territory. Generally, the delegate should seek to preserve the power of the state to decide when an alien may be expelled as much as possible.

### 4.5 South American and Caribbean Countries

Argentina received the highest number of legal migrants in Latin America and the Caribbean in the 21st century, mostly of them from Bolivia and Paraguay (The World Factbook 2018). In 2002, the Regional Agreement for Nationals of the Member States of the Common Market of the South (Argentina, Brazil, Uruguay and Paraguay) and the associated states, Chile and Bolivia), was signed, permitting nationals of the six countries to reside wherever they wanted within the scope of
the Agreement and granted them equal treatment regarding economic activity (Cavaliere 2012). In 2004, Argentina decided to extend protection from deportation with the sanction of Law N° 25.871, which recognised a human right to migrate, and followed the main principles set by the 1990 Convention on Migrant Workers (Dirección Nacional de Migraciones 2004). Considering this trend of receptiveness and extension of guarantees to non-nationals, the delegate should manifest themselves in a generally progressive manner, granting further protection (such as through the promotion of the principles of the Cartagena Declaration, including the principle of non-refoulement) and possibilities for remedies to the aliens.

The 1988 Federal Constitution of Brazil in the chapeau of its Article 5 establishes that nationals and foreigners residing in the country are entitled to equal treatment before the law, ensured the inviolability of their fundamental rights. The specific rules on expulsion of non-nationals within the Brazilian legal system are set forth in Articles 54-62 of the new Migration Law (Law 13.445, of 24 May 2017). Most importantly, these provisions give a definition of expulsion, establish conditions as well as prohibitions to the expulsion act and enshrines basic procedural guarantees to persons subjected to an expulsion procedure. Specifically with regards to the expulsion of refugees, Articles 36 and 37 of the Law Implementing the 1951 Convention on the Status of Refugees (Law 9.474, of 22 July 1997) determine, respectively, the prohibition of the expulsion of refugees as the general rule (except for reasons of national security or public order) and the prohibition of returning a refugee to a country where their life, liberty or integrity is threatened. Such provisions are purposely in consonance with the 1951 Convention, namely its non-refoulement principle. Mention should be made, however, to the policy narrative dominated by the ideal of national sovereignty and security (in detriment of the fundamental rights of non-nationals), which prevailed under the auspices of the now revoked 1980 Foreigner’s Statute. However, that the legal paradigm has shifted towards a more protective approach to the fundamental rights of non-nationals, the adequate implementation of the new law by that domestic authorities in charge of applying the domestic migration law and policy (Oliveira 2017). It is important to notice that the views of different Brazilian state organs on this topic are not homogeneous, and whereas more conservative institutions, such as the Federal Police, pressured – in part successfully – the Executive to veto certain progressive developments within the new law, the Ministry of Foreign Affairs (Itamaraty), along with organized civil society, held the position that the text approved by the Congress should have been sanctioned by the President without any vetoes whatsoever30 (Brasil de Fato 2017). In addition to that, in light of the current migration crisis in the northern border of Brazil with Venezuela that resulted from the massive influx of immigrants coming from the latter, the Itamaraty reaffirmed, in a speech recently delivered by the permanent representative of Brazil in the Organization of American States, the eagerness of Brazil in receiving these migrants from Venezuela, without mentioning expulsion as a possible solution to tackle this crisis (Brasil 2018), thus evidencing a human rights oriented approach to this issue at the international politics level.

Due to political developments that began with the election of President François Duvalier – also known as Papa Doc – in 1957, the Republic of Haiti has

30 It is interesting to notice that when the new Migration Law was sanctioned, Mr. Aloysio Nunes, who was the author of this bill while in office as a Senator, held the office of Minister of Foreign Affairs.
strong ties to the recent refugee crisis in Latin America and the Caribbean (Loescher and Scanlan 1984). Since then, the country has become an emissary of migrants to various parts of America, most notably the United States and, especially after the deployment of the MINUSTAH (The United Nations Stabilization Mission in Haiti) by UN Security Council Resolution 1542, Brazil (Moraes, Andrade and Mattos 2013). The political situation was considered stabilized by 2010 and the multinational UN taskforce was about to withdraw when an earthquake took place, the biggest in the known history of Haiti (The New York Times 2010), worsening the refugee crisis. For these reasons, Haiti is extremely interested in the development of a regional structure in order to make discussions with its neighboring countries politically available (Gavigan 1997).

**Uruguay** has always taken the forefront when it regards to civil and political rights enhancement in Latin America, being, for example, the first country to enable laws regarding universal suffrage. In this sense, the country has an open policy regarding migrants, having enacted comprehensive legislation regarding migration – Ley No. 18.250 (Ley de Migración) – and refugees – Ley No. 18.076 (Derecho al refugio y a los refugiados). In addition, Uruguay has been working with the UN High Commissioner for Refugees in the Syrian Refugee Resettlement Programme, being the execution of the program an uncomfortable issue, though (Camejo 2017). That said, Uruguay is willing to stand up for hard guarantees regarding protection of human rights and development of refugees rights as well, granting further protection to aliens and strengthening the principle of non-refoulement.

### 4.6 OCEANIAN, SOUTH AND SOUTH-EAST ASIAN COUNTRIES

**Australia** is a party to both the ICCPR (International Covenant on Civil and Political Rights) and the 1951 Convention Relating to the Status of Refugees, combined with the 1958 Migration Act, which provides domestic legislation about the procedures regarding the expulsion of aliens (Wessels 2017). Australia’s history of treatment of foreigners is not without stains, however: there was a recent tightening of the national migration policy, which left many candidates to asylum unable to complete their journeys (News Deeply 2018), and the UN Refugee Agency has denounced Australia’s neglect over asylum seekers already within its territory, taking years to evaluate applications, not providing needed services and not granting them work permits. Worst of all, Australia has forcibly transferred asylum seekers from Papua New Guinea and Nauru back to their home countries, where they are at risk, acting with indifference to the principle of non-refoulement (United Nations High Commissioner for Refugees 2017). Nominally, however, Australia still holds obligations under several treaties regarding the treatment of refugees and stateless people, including protection from expulsion, and to carry out expulsion proceedings according to the law, with the right to a judicial review (Attorney-General’s Department 2018).

The **People’s Republic of China** adopted a law on control of the entry and exit of aliens at the 13th Meeting of the Standing Committee of the Sixth National People’s Congress, being it promulgated by Order No. 31 of the President of the People’s Republic of China (Deng Xiaoping, from 1978 to 1990) on November 22nd, 1985, and effective as of February 1st, 1986. This regulation grants the inviolability of the
lawful rights and interests of aliens on Chinese territory, the law granting them also freedom of their person. Most of the immigration aiming at entering its territory comes from Vietnam, for a myriad of reasons, from religious persecution to racial intolerance, and North Korea, even though there are no official numbers regarding to Korean immigration into China (The World Factbook 2018c).

Although the Constitution of India does not define the concept of alien, many legal texts deal with the differences existing between the prerogatives given to citizens against the ones given to non-nationals – not all the fundamental civil and political rights that are available to Indian citizens are also applicable to aliens. The country has historically presented a contradictory approach towards refugee and asylum, sometimes waiving the incidence of national legislation like the Foreigners Act and the Passports Act, and in other cases forbidding peoples like the Rohingya to enter the country (The Wire 2017a). Recently, after the expulsion of numerous Rohingya from its territory, the government of India has issued an opinion that it is not bound by the principle of non-refoulement considering that it is not a party to the 1951 United Nations Refugee Convention, but this occurred in answer to a specific situation. In international conferences it has historically assumed a stance of defending openness to refugees and the application of the principle of non-refoulement, something that the delegate’s opinion should reflect (The Wire 2017b).

Indonesia has recently involved itself in a crisis regarding the allocation of refugees. It has recently received numerous refugees from elsewhere in Asia and Africa, who were mostly seeking passage to other countries such as Australia and the United States of America, but after these countries tightened their migratory policies, the bulk of these asylum seekers had to remain in Indonesia. The president has signed a decree recognizing their status and setting up extra shelters in 2017, but settling permanently is still ruled out from their options as they have no access to formal education and formal sources of income (News Deeply 2018), and many speak of curfews and violence in the shelters (Vice 2018). In 2005, the government had already shocked the international community by considering expelling even foreign troops and aid workers who were involved in aiding the tsunami-stricken province of Aceh, something that it backtracked on soon after. It maintained, however, that it would expel those entering Aceh for political purposes, mainly worried with supporters of the local separatist insurgents entering it disguised as part of the foreign aid missions (The Guardian 2005). In general, the delegate should take a stance against resolutions that put more burdens over states and seek to conserve their national autonomy, especially regarding the maintenance of national security.

The relation of Myanmar with the subject of expulsion of aliens is highly contentious. Accused of socially excluding the Rohingya people through a number of legislative changes, including changes of regime, and now provoking an exodus of the ethnic group from its territory, the country’s official stance is that the group is actually formed by a large contingent of Bengali workers who moved to Myanmar during the period of British colonial occupation and remained there illegally, something that would legitimize their expulsion (Al-Jazeera 2018). The government denies human rights violations and, regarding the alleged attacks by Burmese soldiers against civilians, the state claims its forces have only acted against armed militants (BBC 2018b), which the government has affirmed to have international links.
to jihadist groups, like the Arakan Rohingya Salvation Army\(^{31}\) (The Guardian 2017b). Regarding its general immigration policy, Myanmar is relatively restrictive with long stays, but has no current operational system of issuing work permits, since legislation on the subject has been foreseen but has not been elaborated yet (Myanmar Times 2014). The government of Myanmar is known for a generally harsh opinion on illegal immigration, stating that it helps spread terrorism, indicating that the delegate should manifest in favour of allowing the expulsion of aliens under reasons of national defence (Global News 2017).

The Republic of Korea is a party to a few treaties regarding the human rights of foreigners and has a very controlled process and an extensive system of remedies for those being subjected to expulsion to contest the decision, showing a general opinion against the permission of summary expulsions (Chung 2012). The actions of the government of South Korea have revealed a support for the right to expel aliens that either belong to an international terrorist group or are on an internationally shared database of wanted persons, on the basis of national security (Fox News 2017).

5 QUESTIONS TO PONDER

I. Should the ILC Draft Articles on the Expulsion of Aliens take the form of a “soft law” non-binding instrument or of a “hard law” binding multilateral treaty? Consider what the domestic and international implications of manifesting the consent to be bound by an international treaty are, as well as if there are consequences for disregarding norms of a non-binding nature.

II. The hypotheses in which expulsion is prohibited under the ILC Draft Articles are consistent with the domestic laws and policies of most countries around the world? What can be done about it in order to promote a consensus?

III. In the context of the international human rights law and international refugee law systems, why some countries ratified the main treaties at universal and regional levels, and other did not? If the ILC Draft Articles contains provisions that overlap those of the treaties some countries are bound, is this a problem? Could the two overlapping sources of treaty obligations hypothetically coexist in the international legal order?

IV. Is it lawful to accord to non-nationals a legal treatment different from that accorded to the nationals, in accordance with domestic procedural law and its overarching constitutional principles? Do the standards set forth in the ILC Draft Articles in any way conflict with domestic and regional legal order?

V. Should be included in the ILC Draft Articles provisions entailing responsibility to states incurring in a violation of its obligations under the Draft Articles?

REFERENCES

Africa Check. 2016. FACTSHEET: Detention and deportation of undocumented migrants in South Africa at the Lindela Repatriation Centre. Available at: https://africacheck.org/

\(^{31}\) Shortly known as ARSA, it is an insurgent armed group which opposes the alleged persecution against the Rohingya people in Myanmar.
EXPULSION OF ALIENS (NON-NATIONALS)


Citizens Advice. 2018. If you’re going to be deported from the UK. Available at: https://www.citizensadvice.org.uk/immigration/living-in-the-uk-illegally/if-youre-going-to-be-de-
ported-from-the-uk/.
Council of Europe. “About us - who we are”. Available at: https://www.coe.int/en/web/about-us/who-we-are.
Financial Times. 2018. Germany to tighten asylum laws amid public outrage. Available at: https://www.ft.com/content/e90783c2-6c86-11e8-92d3-6c13e5c02914
The Guardian. 2005. Threat to expel foreigners dropped. Available at: https://www.theguardian.com/uk/
EXPULSION OF ALIENS (NON-NATIONALS)


———. 2018b. Hungary is making a mockery of ‘EU values’. It’s time to kick it out. Available at: https://www.theguardian.com/commentisfree/2018/jun/22/hungary-eu-values-refugees-viktor-orban.


HuffPost. 2018. U.S. Punishes Laos And Myanmar Over Dispute on Deporting Their Citizens. Available at: https://www.huffpostbrasil.com/entry/us-punishing-laos-myanmar-deportations_us_5b477428e4b0e7c958f8f580.


———. 2018b. Italy’s far-right government turns away rescue ship with 224 refugees. ‘They will only see Italy on a postcard’. Available at: https://www.independent.co.uk/news/world/europe/migrant-crisis-italy-rescue-ships-matteo-salvini-libya-spain-latest-mission-lifeline-a8412591.html.


