5 Limitations on the Expulsion of Aliens Imposed by the International Covenant on Civil and Political Rights

A Retrospect of 50 Years

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5.1 Introduction

The increasing and globalizing migration of our days is a very diverse and complex phenomenon, it has numerous causes and characteristic features. In 2016, an approximate 244 million people were affected by international migration on a global level,[1] which is called the "megatrend" of the 21st century by the International Organization for Migration.[2] From among the coercive measures taken against non-nationals (aliens), expulsion of aliens by immigration authorities affect several million people all over the world every year (only from the Member States of the European Union, an annual 400-500 thousand illegally staying third country nationals were formally expelled in the past few years,[3] and of these, an annual 170-180 thousand people were actually returned by Member States).[4] Consequently, we are witnessing a legal phenomenon that is regulated both by interna-

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1 United Nations Department of Economic and Social Affairs/Population Division, *Trends in International Migrant Stock: The 2015 Revision*. United Nations Database, POB/DB/MIG/Stock/Rev.2015, New York, December 2015, <www.un.org/en/development/desa/population/migration/data/estimates2/docs/MigrationStockDocumentation_2015.pdf> (01.11.2017).

2 *Remarks – Mr. William Lacy Swing, Director General*, International Organization for Migration To The High-Level Dialogue on International Migration and Development of the 68th Session of the United Nations General Assembly, Friday, 4 October 2013, United Nations Headquarters, New York, p. 1, <https://papersmart.unmeetings.org/media2/158050/21e-international-organization-for-migration.pdf> (01.11.2017).

3 European Commission: *Return & readmission*, <http://ec.europa.eu/dgs/home-affairs/ what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm> (01.11.2017).

4 In 2013, the EU Member States effectively removed some 166,470 illegally staying third country nationals subject to a return decision [see Communication from the Commission to the European Parliament and the Council, *5th Annual Report on Immigration and Asylum (2013)*, COM (2014) 288 final, Brussels, pp. 4-5], while this figure was 186,630 in 2012 (the number of irregular migrants who were issued a return decision

tional law and the individual national legal systems of States, in relation to which there is considerable and rather extensive State practice in place, let alone the continuously growing pool of international and domestic case law.[5]

In 1966, when the *International Covenant on Civil and Political Rights* (ICCPR),[6] which is one of the pillars of the "*International Bill of Human Rights*",[7] was adopted, the number of those involved in international migration was below today's (their total number at that time can be put at 80 million[8]) but the legal protection of those who reside in a country other than their nationality, i.e. the protection of aliens' rights in their country of residence was already regarded by the international community as an issue of key importance. It is especially *the expulsion of aliens* that brings up critical human rights issues, as such action performed by the host country may easily result in drastic changes involving serious consequences on the life and future of the person concerned.

It continues to be a basic premise of international law, just like it was the case fifty years ago, that as a traditional attribute of state sovereignty, States have the inalienable prerogative to decide which aliens are refused entry at the border and/or who are expelled and removed from their territories. However, States must exercise this traditional sovereign power within the restrictions defined by international migration law, with due respect for the growing number of relevant human rights obligations.[9] Kälin distinguishes between *three types of restrictions arising from human rights* that govern the expulsion of aliens. According to his classification, *on the one hand*, there are such universal human rights treaties in place which contain substantive law provisions specifically related to the expulsion of aliens, limiting the State's freedom to act in removing aliens who are undesired for the State. *On the other hand*, beyond the substantive law requirements, certain human rights instruments also define some procedural law restrictions and safeguards. *On the third hand*, human rights considerations may prohibit expulsions which otherwise meet the above substantive criteria and formal requirements, the execution of which would entail the violation of another fundamental right protected by international law (which is, in principle, otherwise not directly related to the issue of expulsion), such as the

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and then actually returned) [see Communication from the Commission to the European Parliament and the Council, *4th Annual Report on Immigration and Asylum (2012)*, COM (2013) 422 final, Brussels, p. 4].

5 The same was concluded by the Special Rapporteur of the UN International Law Commission responsible for the expulsion of aliens, Mr Maurice Kamto (*Ninth report on the expulsion of aliens*, submitted by Mr. Maurice Kamto, Special Rapporteur, A/CN.4/670, 25 March 2014, para. 74).

6 *International Covenant on Civil and Political Rights*, New York, 16 December 1966 (UNTS vol. 999, No. 14668, p. 171).

7 On this term, see e.g. <www.ohchr.org/Documents/Publications/FactSheet2Rev. 1en.pdf> (01.11.2017).

8 See at <www.migrationpolicy.org/programs/data-hub/charts/international-migrants-country-destination-1960-2015?width=1000&height=850&iframe=true> (01.11.2017).

9 Cf. J. Wojnowska-Radzinska, *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law*, Brill, Leiden, 2015, p. ix.

right to respect for private and family life, the right to health, the freedom of thought, conscience and religion, etc.[10]

It is following this *classification* that this piece reviews the respective provisions of the International Covenant on Civil and Political Rights. First, it examines *Articles 6 and 7* on the right to life as well as the prohibition of torture or cruel, inhuman or degrading treatment, which implicitly contain the principle of *non-refoulement*, then *Article 13* on the procedural safeguards against the arbitrary expulsion of lawfully staying aliens, and finally it looks into the further, kind of indirect obstacles to expulsion stemming from other human rights in the ICCPR. It was these provisions that first required in a legally binding international treaty that the expulsion of aliens be restricted by applying certain substantive and procedural legal obstacles, alongside with direct or indirect ones. This human rights codification of universal character counted as many as 168 States Parties in October 2017,[11] i.e. it can be stated that it represents a *quasi-universal* instrument, which in many respects reflects *general customary international law*. Furthermore, States parties to the ICCPR formulated very few reservations concerning the articles relevant for the topic.[12]

The goal of this article is to *map and give an overview* of how much the set of criteria set forth by the ICCPR regulating the expulsion of aliens has developed in the past fifty years. Furthermore, another objective is to find out which are those universal standards that should be *globally applicable* in the domestic law and practice of States regarding the expulsion of aliens, embodying a kind of "international minimum standard", as a result of the legal developments primarily triggered by the UN Human Rights Committee's (HRC) authentic treaty interpretation and quasi-jurisprudence through individual complaints. The analysis focuses on the law currently in force, hence it does not extend to the examination of the background and circumstances of the elaboration of the relevant articles of the Covenant and it also disregards the reconstruction of the underlying intent of the lawmakers by relying on *travaux préparatoires*.

10 W. Kälin, 'Limits to Expulsion under the International Covenant on Civil and Political Rights' in F. Salerno (ed.), *Diritti dell'Uomo, Estradizione ed Espulsione*, CEDAM, Padua, 2003, pp. 144-145.

11 See at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> (01.11.2017).

12 The *USA*, for example, appended an interpretative statement to Article 7 ICCPR (prohibition of torture or to cruel, inhuman or degrading treatment or punishment), not touching upon the principle of *non-refoulement*, against the restrictive nature of which several States (e.g. Denmark, Finland, Holland and Germany) raised objections on account of it being incompatible with the object and purpose of the Covenant. As regards Article 13 ICCPR (procedural safeguards against arbitrary expulsion), *France, Malta, Monaco and Pakistan* made reservations, which were also in force at the time of closing the manuscript (in the 2000s, Iceland and Mexico withdrew their reservations on this subject). Several States (such as Finland, Canada or Slovakia) also raised objections against the reservations of Pakistan, due to their unacceptability under international treaty law.

5.2 The Principle of *Non-refoulement* in the Covenant: Shared Minimum, with a Broadening Scope

The prohibition of returning aliens (in French: *refouler*) to harm, i.e. the principle of *non-refoulement* as internationally known, is of special importance among the substantive law obstacles limiting the expulsion of aliens. As is publicly well-known, the principle of *non-refoulement* first gained universal, general legal recognition in positive international law in relation to protecting a special group of aliens, i.e. refugees who were fleeing persecution. Article 33 of the 1951 Geneva Convention relating to the Status of Refugees stipulates that:

> "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Thus, initially, the principle of *non-refoulement* was closely related to the field of international refugee law as *lex specialis*.[13] On a universal level, the development of the international protection of human rights broadened the scope of the application of the prohibition of *refoulement*, so this basic principle went beyond the confines of international refugee law and by now, it can be regarded as a general customary international law rule.[14] Although the Covenant does not explicitly contain the principle of *non-refoulement* as such (contrary to the 1984 Convention against Torture (CAT),[15] which was

13 For more in detail, consider e.g. E. Betlehem – D. Lauterpacht, 'The scope and content of the principle of non-refoulement: Opinion' in E. Feller – V. Türk – F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, pp. 88-177; G. S. Goodwin-Gil – J. McAdam, *The Refugee in International Law*, Third Edition, Oxford University Press, Oxford, 2007, pp. 201-354; K. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, Antwerpen, 2009, pp. 33-185; A. Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', *International Journal of Refugee Law* 20 (2008) pp. 373-390; O. Delas, *Le principe de non-refoulement dans la jurisprudence internationale des droits de l'homme – De la consécration à la contestation*, Bruylant, Bruxelles, 2011; F. de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture. The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT*, Brill, The Hague, 2016; European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, Publications Office of the European Union, Luxembourg, 2016, Part I and Annex.

14 See e.g. Betlehem – Lauterpacht, 2003, p. 163; M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*. N.P. Engel Publisher, Kehl, 2005, p. 163; Goodwin-Gill – McAdam, 2007, p. 348.

15 *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNTS. No. 24841, vol. 1465, p. 85). Article 3 CAT stipulates as a general prohibition that "[n]o State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. […] For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations

elaborated nearly two decades later), in a general human rights context, the principle *of non-refoulement* can primarily be derived from *Article 7* ICCPR, which prohibits torture, as well as cruel, inhuman or degrading treatment or punishments,[16] due to the extraterritorial application of these prohibitions.[17] It should be noted that Article 7, which prohibits torture and similar ill-treatment, has a special place in the architecture of the Covenant, as this prohibition is an extremely solid fundamental right, *which allows no derogations*,[18] i.e. it cannot be disregarded even "[i]*n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed*".[19] In the light of the interpretation of the extraterritorial application of the obligations set out in Article 7, the State indirectly commits torture, or in a broader sense, the violation of other prohibitions contained in Article 7, if the State returns the person concerned to such a country where this person is going to be subject to torture, or to cruel, inhuman or degrading treatment or punishment. This interpretation was also developed by the UN Human Rights Committee, the treaty-body (independent group of experts) monitoring the application of the Covenant, in its *General Comment No. 20 (1992)*,[20] which was then reaffirmed by *General Comment No. 31 (2004)*[21] on the nature of general legal obligations imposed on States Parties to the Covenant.

It should be noted that the principle of *non-refoulement* implied in the ICCPR *has a wider material scope* than the requirements set out in the 1984 Convention against Torture, from several aspects.[22] On the one hand, the scope of prohibited actions is broader, i.e. ICCPR extends this prohibition beyond torture, to ban *cruel, inhuman and other degrading*

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including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human right."

16 Article 7 ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

17 On the extraterritorial application of rights protected by the ICCPR, see e.g. Wouters, 2009, pp. 370-375.

18 Article 4(2) ICCPR: "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."

19 Article 4(1) ICCPR.

20 UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, UN Doc. HRI/GEN/1/Rev.1, para. 9. On the quasi-jurisprudence of the HRC building on this general comment, consider e.g. Nowak, 2005, pp. 185-188; United Nations, Office of the High Commissioner for Human Rights, *Expulsion of aliens in international human rights law*, OHCHR Discussion paper, Geneva, September 2006, pp. 3-4; S. Persaud, *Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights*, New Issues in Refugee Research, Research Paper No. 132, UNHCR, November 2006, pp. 6-7, available at <www.unhcr.org/4552f0d82.pdf> (01.11.2017); W. Kälin, 'Aliens, Expulsion and Deportation', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition (<www.opil.ouplaw.com>), article last updated: October 2010, para. 1.

21 UN Human Rights Committee, *CCPR General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, 29 March 2004. UN Doc. CCPR/C/21/Rev.1/Add.13, para. 12.

22 Concerning the relationship between the ICCPR and the CAT as well as their respective monitoring treaty-bodies, see Wouters, 2009, pp. 388-389.

treatments or punishments as well (e.g. in the quasi-case law of the HRC, execution by a toxic gas[23] or various corporal punishments such as whipping[24] also qualify as such). What is more, according to the HRC's activist interpretation exercised in individual complaints, this prohibition also includes the unlawfulness of the so-called "*chain-refoulement*". In this case, the affected alien is not directly exposed to the treatment not allowed by Article 7 ICCPR in the first country of *refoulement* but this "interim country" subsequently sends the individual to a country where there is a realistic danger of his being exposed to torture, or cruel, inhuman or other degrading treatment or punishment.[25] On the other hand, in view of the above-mentioned General Comments No. 20 and 31, as well as the position taken by the HRC in cases initiated as individual complaints, beyond the prohibitions expressed in Article 7 ICCPR,[26] the State Parties are also obliged to ensure that no one is removed to a country where alien's *right to life set out in Article 6* ICCPR[27] could be violated or eroded. In other words, the right to life should definitely be respected by the States in an extraterritorial dimension as well, consequently, the prohibition of *refoulement*, which prevents the expulsion of aliens, is also generated in relation to this most fundamental right called right to life. All this is clearly illustrated by *General Comment No. 31* of the Human Rights Committee, which summarises its earlier jurisprudence on this matter:

> "the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters."[28]

23 UN Human Rights Committee, *Chitat Ng v. Canada*, Communication No. 469/1991. [UN Doc. CCPR/C/49/D/469/1991 (1994)], 7 January 1994, paras. 16.1-16.4.

24 UN Human Rights Committee, *George Osbourne v. Jamaica*, Communication No. 759/1997. [UN Doc. CCPR/C/68/D/759/1997 (2000)], 13 April 2000.

25 UN Human Rights Committee, *George Osbourne v. Jamaica*, Communication No. 759/1997. [UN Doc. CCPR/C/68/D/759/1997 (2000)], 13 April 2000. *CCPR General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 12. See also: Wouters, 2009, p. 407 (labelling it as "indirect refoulement").

26 UN Human Rights Committee, *Roger Judge v. Canada*, Communication No. 829/1998. [UN Doc. CCPR/C/78/D/829/1998 (2003)], 13 August 2003, paras. 10.9, 11, which changed the previous, more cautious approach of the HRC (UN Human Rights Committee, *Joseph Kindler v. Canada*, Communication No. 470/1991 [UN Doc. CCPR/C/48/D/470/1991 (1993)], 30 July 1993).

27 Article 6(1) ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

28 *CCPR General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 12.

However, the definition of the concept of "*irreparable harm*", which also appears in the above quotation, has so far been missing, so it continues to have a somewhat hazy meaning. According to academic commentators, the word "*irreparable*" primarily means grave violations of human rights. In the case of *Roger Judge v. Canada*, the Human Rights Committee, which acts as a quasi-judicial body in individual complaints, clarified that a State Party that has already abolished the death penalty must not return or extradite an alien to such a State where *capital punishment is still permitted*, except if the country concerned obliged itself via a diplomatic assurance or some other means not to execute the returned individual.[29] Moreover, it was not clear from General Comment No. 31 whether or not Article 7 ICCPR applies also extraterritorially. The HRC then touched upon this specific issue in one of its country-specific concluding observations when it required the United States not to return an individual from a detention centre outside US territory to a country where the person could be at risk of torture of other forms of ill-treatment.[30] Subsequently, the Committee reconfirmed its position on the extraterritorial application of the prohibition of *refoulement* in a case initiated by an individual petitioner as well.[31]

Thus, the principle of *non-refoulement*, expanding beyond the framework of international refugee law, has grown into a universally recognised, general human rights requirement in the past few decades. It can be concluded that this protection extends to all aliens who left their countries of origin because of a well-founded fear of persecution specified in the 1951 Geneva Convention, and also to all those, by virtue of the ICCPR, in the case of whom there is serious risk that they would be exposed to torture, inhuman or other degrading treatment or punishment, or whose right to life would suffer grave and irreparable harm if they had to return to a given country.[32] This prohibition of a customary law character, which is even qualified as having the rank of *ius cogens* according to some scholars,[33] kicks in from the very moment that aliens present themselves at the border of another State (*non-refoulement*) and might apply even extraterritorially, i.e. this basic principle does not only protect those who already stay in the territory of a given State from expulsion.

29 *Roger Judge v. Canada*, Communication No. 829/1998, para. 10.4.

30 UN Human Rights Committee, Concluding Observations on the United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16 (mentioned by R. Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU*, Cambridge University Press, Cambridge, p. 174).

31 UN Human Rights Committee, *Arshdin Israil v. Kazakhstan*, Communication No. 2024/2011, UN Doc. CCPR/C/103/D/2024/2011, 31 October 2011.

32 This approach is followed in Wouters' monograph (Wouters, 2009).

33 J. Allain, 'The jus cogens Nature of non-refoulement', *International Journal of Refugee Law* 13 (2001), pp. 533-558; A. Farmer, Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection, *Georgetown Immigration Law Journal* 23 (2008), pp. 1-38.

5.3 The Procedural law Safeguards of the Expulsion of Aliens: The Less Generous Relative

Besides the principle of *non-refoulement* described above, which *implicitly* derives from Articles 6 and 7 ICCPR and which protects all aliens irrespective of the lawfulness or unlawfulness of their stay, the Covenant contains a further, *explicitly* formulated provision that is of cardinal significance regarding certain limitations on the expulsion of aliens. This is *Article 13*, which embodies a distinct microcosm in itself. Given its vital importance, this inevitable cornerstone of universal nature is worth citing word for word:

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

In general, when examining the rules set out in universal human rights codifications on the expulsion of aliens, one can mostly find requirements and limitations of a *procedural nature* rather than substantial law-based obstacles and restrictions to expulsion (although these procedural safeguards and criteria are elaborated in much more detail than in the case of other protected rights).[34] Article 13 ICCPR takes an account of and explains the procedural safeguards related to the expulsion of aliens *in due detail*, differently from several other universal human rights instruments (e.g. Universal Declaration of Human Rights, or Article 3 CAT). These were later echoed, almost verbatim, by the 1985 UN General Assembly Declaration on the human rights of individuals who are not nationals of the country in which they live (Article 7).[35] These provisions restricting the States are mainly aimed at preventing arbitrary action and they embody the minimum rules of a fair procedure, thus providing a basic protection mechanism against the implementation of unlawful expulsions.[36]

34 It is Van Waas who draws attention to the uniqueness of this feature. She points it out that the procedural rules and guarantees related to other protected rights are not detailed in such manner in other UN human rights treaties as in Article 13 ICCPR or in Article 22 of the 1990 UN migrant workers convention (L. Van Waas, *Nationality Matters: Statelessness under International Law*, Intersentia, Antwerpen, 2008, p. 116).

35 *UN General Assembly Resolution 40/144. Declaration on the human rights of individuals who are not nationals of the country in which they live*. A/RES/40/144, 13 December 1985.

36 Expulsion of aliens in international human rights law, 2006, p. 10.

5.3.1 The Personal Scope of Article 13

The safeguard clause that prevents arbitrary expulsions does not welcome all the migrants warmly, as its personal scope exclusively extends *to the lawfully residing aliens*, which was also confirmed by the practice of the Human Rights Committee.[37] Accordingly, the interpretation of the expression "*lawfully residing*", as well as the precise definition of *the scope of non-nationals* covered by this category come up as questions of key importance. Besides aliens, *stateless persons*[38] should of course also be listed here, along with those immigrants who settled in a country on a *permanent basis* and this is their place of habitual residence, in the case of whom it qualifies as their "own country"[39] pursuant to Article 12(4) of the Covenant.[40] The starting point is *General Comment No. 27 (1999)* of the Human Rights Committee, according to which States Parties to the ICCPR, as a result of their sovereignty, may determine the rules of lawful and unlawful entry into their country by themselves, through which they can set restrictions on the entry of aliens and they can set different criteria to such entry, until these comply with their international law obligations.[41]

If one starts the analysis from the more distant end of the time horizon, it can be concluded that a *permanent, stable* foreign residence is not a requirement: less is enough for the mechanism described in Article 13 ICCPR to gain momentum and become applicable. This derives from the Covenant's *travaux préparatoires* as well as the influential pieces of academic literature.[42] If one looks into the nearer end of the time horizon, it may cause one more headache to determine whether there is any *minimum duration* required for the lawful residence of an alien. Despite the restrictive practices applied by States, the Human Rights Committee found in the 1980s that the residence permit of a Greek asylum seeker issued for the duration of the asylum procedure was sufficient for establishing her lawful residence in Sweden, so the protection of Article 13 extended to the rejected asylum applicant threatened with expulsion.[43] Clearly rejecting some of the

37 UN Human Rights Committee, *Maroufidou v. Sweden*, Communication No. 58/1979. [CCPR/C/12/D/58/1979 (1981)], 9 April 1981, and also UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, 41 UN GAOR, Supp. No. 40, UN Doc. A/41/40. Annex VI, para. 10.

38 *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, para. 1. "Stateless person" means a person who is not considered as a national by any State under the operation of its law (Article 1 (1) of the Convention relating to the Status of Stateless Persons of 28 September 1954 (UNTS No. 5158, vol. 360, p. 117)).

39 Article 12(4) ICCPR: "No one shall be arbitrarily deprived of the right to enter his own country." On the authentic interpretation of the term "own country", see UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 20.

40 Nowak, 2005, p. 292.

41 *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, para. 4.

42 See e.g. Nowak, 2005, p. 293.

43 *Maroufidou v. Sweden*, Communication No. 58/1979, para. 9.2

bad faith legal solutions applied by certain States, the HRC provided a protective shield from the other side as well when it stipulated that an expulsion order issued against an alien, who otherwise resides legally in the territory of a country, does not render this person an illegal migrant from the perspective of Article 13. Put it differently, such an action of the immigration authorities does not remove the individual concerned from the protective shield of the ICCPR and the effect of the safeguard provisions thereof, otherwise the human rights guarantees included in Article 13 would be emptied and lose their meaning.[44] Similarly, in light of the quasi-case law of the Human Rights Committee, those non-nationals will also qualify as ones "residing lawfully" whose actual removal after their expulsion is not executed by the host State for practical or humanitarian reasons, thus the protection provided by Article 13 ICCPR will already extend to them in relation to the subsequent aliens policing measures.[45]

From all this, it can be concluded that whatever legal title entitling a person to stay exists, and whatever *titre de séjour* such a person may have, for however short period an alien legally resides in the territory of one of the Contracting States, it is the provisions set out in Article 13 ICCPR that govern the situation of the person concerned. This also implies that asylum seekers who *wish to enter* the country at the border, or those who are caught there after *an irregular border-crossing* but cannot be returned due to principle of *non-refoulement*, also enjoy the protection provided by Article 13 ICCPR in the expulsion procedure if their asylum claim was rejected. The reason for this is that the prohibition of *refoulement* applies to them from the moment that their application for asylum has been lodged, and as part of this principle, they also have the right to remain in the territory of the country in question.[46] As long as the lawfulness of the residence of an alien is *disputed*, the legal protection and safeguards provided by Article 13 should also be applied for the individual subject to expulsion, as required by the authentic interpretation of the Human Rights Committee in *General Comment No. 15 (1986)*.[47]

5.3.2 Hidden Substantive Law Criteria

Among the mostly procedural requirements set out in Article 13, there is a concealed element that requires the *legality* of expulsion, i.e. carrying it out in accordance with domestic law. The expression "*expelled* […] *in pursuance of a decision reached in accor-*

44 UN Human Rights Committee, *Celepli v. Sweden*, Communication No. 456/1991. [UN Doc. CCPR/C/51/D/456/1991 (1994)], 26 July 1994, para. 2.1; *Karker v. France*, Communication No. 833/1998 [UN Doc. CCPR/C/70/D/833/1998 (2000)], 26 October 2000, paras. 2.1, 8.6. and 9.3 (these cases are mentioned by Nowak, 2005, p. 293).

45 *Celepli v. Sweden*, Communication No. 456/1991, paras. 7.1, 9.2. See also: *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, A/HRC/20/24, 2 April 2012, para. 54.

46 Persaud, 2006, p. 10.

47 *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, para. 9.

dance with law" as set out in Article 13(1) ICCPR refers to the fundamental requirement that expulsion must be *lawful*, and as such, it provides protection against arbitrary action by the authorities. This prerequisite, which can be considered as having customary international law character; or which some deem to be a general principle of law,[48] is fundamentally a requirement of substantive law. It stipulates that the unilateral act of the State which is embodied in the expulsion decision, should be based on and be compliant with the State own domestic law. In other words, the expulsion must be ordered by the competent authorities in compliance with the laws in force of the State (*patere legem quam ipse fecisti*). The International Court of Justice (ICJ) also interpreted the requirement of "in accordance with law" in its ruling delivered in the *Diallo case (Guinea v. Democratic Republic of Congo)* in 2010. The ICJ stated that

> "the expulsion of an alien lawfully in the territory of a State […] 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."[49]

One might ask whether the Covenant also requires *any other substantive law standards* besides the mere existence of the domestic legal grounds that allow expulsion. In the *Maroufidou v. Sweden* case, the Human Rights Committee gave an affirmative answer to this question when it explained that the legal bases for expulsion set forth in domestic law should be in full harmony with the Covenant, so beyond the formal legal requirement (i.e. the existence of a domestic legal rule regulating this subject), the criterion of "in accordance with law" also implies substantive compliance.[50] In light of the above, for instance, in case of expelling an alien, States' domestic regulations cannot discriminate against a certain group of aliens or individuals of a certain nationality as compared to other aliens, since this practice would result in violating Articles 2, 3 and 26 ICCPR.[51] Thus, the valid expulsion grounds defined in domestic law can be conceived as a specific substantive law requirement stemming from international law, which is a precondition that expulsion is carried out in line with the Covenant, in conformity with the principle of legality.[52]

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48 *Preliminary report on the expulsion of aliens*, by Mr. Maurice Kamto, Special Rapporteur. Document A/CN.4/554, 2 June 2005, para. 23, available at: <http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_554.pdf&lang=EFSX> (01.11.2017).

49 International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Merits, Judgment of 30 November 2010, ICJ Reports 2010, p. 663, para. 65.

50 *Maroufidou v. Sweden*, Communication No. 58/1979, para. 9.3. See also Nowak, 2005, p. 295.

51 Cf. *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, para. 10.

52 The case law of international arbitration tribunals has supported this approach from the earliest times as well. See e.g. *Lacoste v. Mexico* (Mexican Commission), Award of 4 September 1875 (see in J. Bassett Moore,

The highly prestigious Institute of International Law (*Institut de Droit international*) already tried to systemise and give an indicative list of the *permissible grounds for expulsion* in its 1892 Geneva Resolution.[53] In defining these, however, the territorial State enjoys a very high degree of freedom and it is at its discretion to define a great number of different reasons for expulsion,[54] even if almost all of them can actually be linked to national security, public order (*ordre public*),[55] or public morals considerations.[56] Without being exhaustive, the most typical grounds for expulsion, which at the same time *prima facie* remain within the boundaries of international law, are as follows: a) irregular entry and residence; b) further stay after the expiry of the residence document following a legal entry (so-called overstay); c) reasons of public security (e.g. the committing of a crime); d) other reasons of public order; e) national security reasons (e.g. in the case of terrorists); f) public health reasons; or g) if the alien imposes a disproportionate burden on the country's social welfare system, etc.[57] Hence, one cannot make an exhaustive inventory of the expulsion grounds, only an indicative list of these can be drawn up. What is common in them is that the reasons for expulsion should be in conformity with international human rights standards of customary law nature, including the principle of non-discrimination, and with other undertaken international obligations by the

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History and Digest of the International Arbitrations to Which the United States Has Been a Party. Vol. IV, Government Printing Office, Washington, 1898, pp. 3347-3348.); *Paquet* case *(Expulsion)* (Mixed Claims Commission Belgium-Venezuela, 1903), UNRIAA, Vol. IX, pp. 323-325; *Boffolo* case (Italian-Venezuelan Mixed Claims Commission, 1903), UNRIAA, Vol. X, pp. 528-538; *Tacna-Arica Question (Chile/Peru)*, Award of 4 March 1925, UNRIAA, Vol. II, pp. 921-958. Source of the cases: *Expulsion of aliens, Memorandum by the Secretariat*. International Law Commission, Fifty-eighth session, Geneva, 1 May–9 June and 3 July–11 August 2006, A/CN.4/565, 10 July 2006, paras. 301-304.

53 *Règles internationales sur l'admission et l'expulsion des étrangers* (Rapporteurs: MM. L.-J.-D. Féraud-Giraud et Ludwig von Bar), Institut de Droit international, Session de Genève – 1892, Article 28, which lists ten types of legitimate reasons (legal grounds) for expulsion.

54 Goodwin-Gill, for instance, notes that the USA immigration law previously had 18 different categories of aliens who can be expelled, who could be deported from the territory of the United States for as many as 700 different reasons (G.S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Clarendon Press, Oxford, 1978, p. 240). Others remark that it is impossible and unnecessary to map the reasons for expulsion in the municipal laws of individual States in an all-inclusive, detailed manner, since each existing legal ground can be derived "from public interests" in the broad sense of the word (R. Plender, *International Migration Law*, Second Edition, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 478 (footnote 15).

55 On the manifold and complex relationships of public interests and the legal status of aliens, see monographically, in a European dimension, e.g. E. Neraudau-D'Unienville, *Ordre public et droit des étrangers en Europe. La notion d'ordre public en droit des étrangers à l'aune de la construction européenne*, Bruylant, Bruxelles, 2006.

56 See Goodwin-Gill, 1978, p. 262; L.B. Sohn – T. Buergenthal (eds.), *The Movement of Persons Across Borders*, Studies in Transnational Legal Policy, No. 23, Washington, D.C., The American Society of International Law, 1992, p. 89 (cited by J-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice*, Kluwer Law International, The Hague, 1995, p. 30).

57 On the possible expulsion grounds more in details, see Expulsion of aliens, Memorandum by the Secretariat, paras. 325-422; Preliminary report on the expulsion of aliens, paras. 17-20; Kälin, 2010, para. 7.

State, which serve as the yardsticks for the permissibility and lawfulness of States' sovereign action in this respect.

The question arises whether the substantive requirements arising from Article 13(1) that narrow the discretion of sovereign states with regard to expulsion may also involve that the *Human Rights Committee may perform the substantive legality control* of national expulsion decisions as well. What is for sure is that as long as the expulsion of an alien was not even based on domestic legislation (like, for instance, in the *Diallo* case), it gravely violates the ICCPR, since such a decision was obviously not adopted "in accordance with law". Likewise, when domestic law governing expulsion is contrary to ICCPR, the Human Rights Committee makes use of its right to perform a substantive conformity check of national law codifying the obviously arbitrary legal basis for expulsion.[58] The delicate legal question is whether the Human Rights Committee is entitled to control whether an individual act of the authorities (expulsion) is compliant with the applicable domestic legislation, which is otherwise in harmony with the ICCPR. It was in the case of the above-mentioned Greek asylum-seeking lady in Sweden that the HRC elaborated the well-known *Maroufidou formula*, which represents the reserved approach. According to this, the competence and mandate of the Human Rights Committee, as a general rule, do not extend to evaluating whether the competent authorities of the Contracting States have rightly interpreted or applied their domestic laws, except if they have done so in bad faith or by abusing the law or their powers.[59]

5.3.3 *The Formal Legal Limits and Procedural Safeguards of Expulsion*

Despite the above, it should be pointed out that the human rights standards appearing in Article 13 ICCPR do not basically restrict States' sovereign prerogatives as to when they exercise their "inalienable" right to expel aliens. Their primary focus is that as long as States use this traditional sovereign power, then they should act in accordance with certain procedural safeguards, respecting the rule of law (procedural restraints). Thus, when international human rights law (e.g. the principle of *non-refoulement*) does not prevent expulsion, States have to proceed in a humane and dignified manner, by respecting the formal requirements and procedural safeguards stemming from Article 13 ICCPR when the otherwise lawful expulsion decision is adopted and then implemented (e.g. if a forced removal is carried out with escorts). All this should be done in a way that taking coercive measures also stand the test of proportionality. Examining the procedural safeguards specified in Article 13 more closely, they can be divided into two well-separable phases

58 UN Human Rights Committee, *Hammel v. Madagascar*, Communication No. 155/1983. [UN Doc. CCPR/C/29/D/155/1983 (1987)], 3 April 1987, para. 19.3. From academic commentaries, see e.g. Nowak, 2005, p. 295.

59 *Maroufidou v. Sweden*, Communication No. 58/1979, para. 10.1. See also Nowak, 2005, pp. 295-296; Persaud, 2006, p. 11.

from a procedural point of view. On the one hand, there is *an administrative* phase that lasts until the adoption of the expulsion order, and on the other hand, there is another phase for *legal remedies (judicial review or review by administrative authorities)* aimed at appealing the expulsion order.[60]

The *conditio sine qua non* of the first phase is that the expulsion order is adopted "*in accordance with law*", which is an inevitable starting point in order to put into motion the set of criteria built in the ICCPR. *Legality* is a premise of granite solidity from a formal legal perspective as well, which must apply throughout the entire expulsion procedure, in every moment. Furthermore, the "[alien] shall […] be allowed to submit the reasons against his expulsion."[61] Given that the implementation of this criterion requires an individualised assessment of each expulsion case, *the prohibition of collective or mass expulsion* is a logical consequence of this. The quasi-jurisprudence of the Human Rights Committee also supports that the prohibition of mass expulsion is a corollary of Article 13 of the Covenant. The HRC emphasised that the alien's right to have a decision adopted in his own case, his right to present his arguments against the expulsion, as well as his right to have a negative decision reviewed all lead to the conclusion that collective expulsion is incompatible with Article 13 ICCPR.[62] This conclusion was repeatedly expressed by the HRC in subsequent country reports as well,[63] from which it also becomes clear that the prohibition of collective expulsion does not only concern legal migrants but also aliens in an irregular situation.

The *second phase* of the expulsion procedure is when the expulsion order against an alien is *reviewed* by the competent (administrative or judicial) authority or a person or persons especially designated by the competent authority.[64] It is to be added that Article 13 ICCPR does not necessarily requires that such a review has to be made by a court. However, certain requirements regarding the nature of the authority are to be met. *General Comment No. 31 (2004)* of the Human Rights Committee confirmed that the reviewing authority is required to be independent and impartial, investigating allegations of violations promptly, thoroughly and effectively.[65] As regards the scope of the review, it can be established that although the drafters of this ICCPR article gained inspiration from the 1951 Geneva Convention relating to the Status of Refugees (Article 32 thereof), there are significant differences between the versions codified in the two texts (in the former, the wording is only "shall […] be allowed to submit the reasons" and "to have his case

60 See this classification e.g. in Persaud, 2006, p. 10.

61 Article 13, second sub-sentence.

62 *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, para. 10.

63 See e.g. *Concluding Observations on the Dominican Republic* (CCPR/CO/71/DOM), 26 April 2001, para. 16.

64 The permissibility of delegating competence, which was strongly disputed in the Third Committee of the UN General Assembly in the drafting phase, was borrowed by ICCPR from Article 32(2) of the 1951 Geneva Convention relating to the Status of Refugees.

65 *CCPR General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 15.

reviewed", while in the latter, there appears a stronger expression: "shall be allowed to submit evidence to clear himself, and to appeal").[66] The somewhat softer wording of ICCPR may arouse doubts on whether the phase of remedies should actually be separated from the first-instance procedure ending with expulsion order, and whether the facts of the case established by the first-instance authority can be challenged during the review.[67]

These doubts have, however, been dispersed in *General Comment No. 15 (1986)* of the Human Rights Committee as well as in many of its country reports when the HRC confirmed that the review is not part of the first-instance procedure but is an independent, distinct procedural step.[68] It is still not decided whether or not the review should also extend to *questions of facts*. As there was no such case in which this issue was brought up, the Human Rights Committee has not yet had the opportunity to express its views on this issue. In legal literature, the following approach is strongly represented: given the rather serious consequences of expulsion, and that after the person's removal from the territory the alien will no more be in the position to apply for any further legal remedies, in light of the object and purpose of Article 13, the rule requiring a review mechanism should be interpreted in a way that it necessitates *both the factual and legal assessment* of the expulsion order.[69] Furthermore, it is less known that the Human Rights Committee has specifically emphasized that *women may request* that their expulsion decision be reviewed *with the same conditions as those of men*, especially in relation to grave violations of human rights concerning sexuality (e.g. in case of rape, forced abortion, or forced sterilisation).[70]

The ultimate aim of expulsion of aliens is that the person, who will thus cease to be under the territorial sovereignty of the host country, must leave the territory of the country concerned. In this view, the issue of the *suspensive effect of the legal remedy*, or the lack thereof, against the expulsion order, is sharply illuminated. This is the case when the alien actually deported suffers an irreparable harm due the removal from the host country, especially if the expulsion was unlawful and if the alien is (would) still (be) entitled to remain in the territory of the country as a result of the successful legal review. Although the text of the Covenant is silent on this issue, the Human Rights Committee interpreted the relevant provisions of ICCPR in a broad manner here as well. The HRC may, on the one hand, order the suspension of the implementation of expulsion for the duration of the

66 Persaud, 2006, p. 11.

67 Such doubts have been voiced by e.g. J. C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005, p. 671 [footnote 70]; S. Joseph – M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Third Edition, Oxford University Press, Oxford, 2013, paras. 13.16-17.

68 *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, para. 10; *Concluding Observations on Lithuania* (CCPR/CO/80/LTU), 4 May 2004, para. 7; *Concluding Observations on Uzbekistan* (CCPR/CO/83/UZB), 26 April 2005, para. 12.

69 See e.g. Persaud, 2006, p. 12.

70 UN Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 27 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, para. 17.

individual compliant procedure that is conducted before it.[71] On the other hand, the HRC pointed out in several of its country reports that the Contracting States should ensure the suspensive effect of the appeal against the expulsion order (even if an alien threatens national security), with special regard to expelling rejected asylum seekers, since the risk of *refoulement* is particularly high in such cases.[72] Based on the practice of the Human Rights Committee developed in individual complaints,[73] aliens in *an irregular situation* are also entitled to claim the right to legal remedy as stipulated in Article 2(3) ICCPR, and to apply suspending the implementation of expulsion until their appeal is assessed.[74]

Aliens subject to expulsion should also be entitled to *legal representation* in the proceedings, i.e. that they should have the opportunity to appoint a legal representative of their choice in the expulsion procedure. Having a legal representative is an essential safeguard for the expelled alien to be able to actually and effectively benefit from the related procedural rights and the available legal remedy.[75] In interpreting Article 13 ICCPR, the Human Rights Committee took the view that the right to a fair trial (as defined by Article 14 ICCPR) does not extend to those aliens who are subjected to an expulsion procedure.[76] However, the situation has been nuanced by the HRC in a case based on an individual complaint, which interpreted Article 13 ICCPR in such a way that it implies the principle of *due process of law*. As a result, this rule expressly governing on the expulsion of aliens, should be interpreted in light of Article 14 of ICCPR.[77] All this was topped by the Committee in its *General Comment No. 32 (2007)*, which clarified that *the right to an interpreter* (also specified in Article 14 ICCPR[78]) can be invoked by all aliens residing in a

71 Kälin, 2010, para. 11.

72 See e.g. *Concluding observations of the Human Rights Committee: Lithuania*, CCPR/CO/80/LTU, 4 May 2004, para. 7; *Concluding observations of the Human Rights Committee: Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 22. ("The State party should […] give complaints a suspensive effect on expulsion measures."); *Concluding observations of the Human Rights Committee: Morocco*, CCPR/CO/82/MAR, 1 December 2004, para. 13; *Concluding observations of the Human Rights Committee: Uzbekistan*, CCPR/CO/83/UZB, 26 April 2005, para. 12; *Concluding observations of the Human Rights Committee: France*, CCPR/C/FRA/CO/4, 31 July 2008, para. 20. In academia, it was also noted by Persaud, 2006, p. 12; Wouters, 2009, pp. 413-414.

73 UN Human Rights Committee, *Alzery v. Sweden*, Communication No. 1416/2005. [UN Doc. CCPR/C/88/D/1416/2005 (2006)], 25 October 2006, para. 11.8.

74 Kälin, 2010, para. 10.

75 Article 13, third sub-sentence ICCPR.

76 UN Human Rights Committee, *Zundel v. Canada*, Communication No. 1341/2005. [UN Doc. CCPR/C/89/D/1341/2005 (2007)], 4 April 2007, para. 6.8 and *Esposito v. Spain*, Communication No. 1359/2005 [UN Doc. CCPR/C/89/D/1359/2005 (2007)], 30 May 2007, para. 7.6. This was later expressed by the Human Rights Committee also in a horizontal manner, in a General Comment interpreting *in abstracto* Article 14 ICCPR, see UN Human Rights Committee, *CCPR General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 14 July 2007, UN Doc. CCPR/C/GC/32, para. 17.

77 UN Human Rights Committee, *Mansour Ahani v. Canada*, Communication No. 1501/2002 [CCPR/C/80/D/1051/2003 (2004)], 29 March 2004, para. 10.9.

78 Article 14(3) ICCPR: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality […] To have the free assistance of an interpreter if he cannot understand or speak the language used in court."

given country, irrespective of their migration status and lawfulness or unlawfulness of stay. Hence, the right to an interpreter must apply to the expulsion procedures as well.[79]

The remarkably thick procedural law safety net in Article 13 ICCPR seems to be relativized by a clause taken over almost verbatim from Article 32(2) of the 1951 Refugee Convention, which allows a way out for the States. Namely, the above guarantees and safeguards should be applied "*except where compelling reasons of national security otherwise require*". However, one of the cornerstones of the international protection of human rights is that exceptions that allow derogation from the main rule, i.e. the protection of human rights must be *narrowly construed*. This narrow interpretation limits the scope of when the above *national security clause* can be invoked, and also, academic commentators with great authority also add that the term "compelling reasons" suggests that this provision can be only invoked in exceptional cases and its scope of application is even narrower than that of the ordinary national security considerations (e.g. terrorists,[80] or caught secret agents can be expelled from a country without a personal hearing and providing legal remedy).[81] The standards are set high in the cases initiated as individual complaints before the Human Rights Committee as well; for the Contracting States to successfully rely on the national security clause in order to conduct summary expulsion procedures. This quasi-judicial treaty body has thus condemned States several times which made for not permitted reference to this derogation (e.g. in connection with the expulsion of a French lawyer working in Madagascar[82] as well as an internationally wanted drug dealer nicked in the Dominican Republic[83] on national security grounds).

Summing up the above, lawfully residing aliens may defend themselves against arbitrary expulsion, surrounded *by significant procedural safeguards*. Nonetheless, after thoroughly mapping the quasi-jurisprudence of the Human Rights Committee, which receives individual complaints on the basis of the 1988 Optional Protocol to the ICCPR,[84] the conclusion can be drawn that in most cases the HRC had not established violations of Article 13 ICCPR. Instead, the treaty body, applying a rather high threshold, only deemed the expulsion of an alien running counter to the Covenant if the expulsion measure suffered from a manifest and grave procedural error.[85]

79 *CCPR General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, para. 40.

80 See e.g. UN Human Rights Committee, *Salah Karker v. France*, Communication No. 833/1998.

81 Nowak, 2005, p. 300.

82 *Eric Hammel v. Madagascar*, Communication No. 155/1983, para. 19.2.

83 UN Human Rights Committee, *Pierre Giry v. Dominican Republic*, Communication No. 193/1985 [UN Doc. CCPR/C/39/D/193/1985 (1990)], 20 July 1990, para. 4.3.

84 Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966 (UNTS No. 14668, vol. 999, p. 171).

85 See e.g. *Eric Hammel v. Madagascar*, Communication No. 155/1983, para. 20; *Pierre Giry v. Dominican Republic*, Communication No. 193/1985, paras. 5.5-5.6; UN Human Rights Committee, *Cañon Garcia v. Ecuador*, Communication No. 319/1988 [UN Doc. CCPR/C/43/D/319/1988 (1991)], 12 November 1991, para. 6.1; and UN Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002 [UN Doc. CCPR/C/80/D/1051/2003 (2004)], 29 March 2004, para. 10.9.

5.4 Other, Indirect Limitations under the Covenant

When the absolute prohibition on expulsion (*non-refoulement*) or procedural law restrictions and safeguards set out in the ICCPR (see Articles 6, 7 and 13) cannot come into play in certain expulsion cases, an alien may seek help in other human rights considerations impeding his/her removal. A formally lawful expulsion order as well as its implementation (deportation) may lead to the violation of the individual's *other human rights protected by the Covenant*, which are in principle otherwise not directly related to the expulsion. Expelling an alien may often go at variance with the following human rights:[86] the right to private and family life,[87] the freedom of expression,[88] rights of child,[89] the right to property,[90] or even trade union rights.[91] It requires individual examination, on a case-by-case basis, to assess which will prevail when two considerations are measured against each other: the interest of the State in removing the alien from its territory (e.g. for public order, public security or national security reasons), or respecting various human rights of the person threatened with expulsion. If human rights considerations represent a greater weight, then these will also present themselves as obstacles to expulsion, as the case may be.

Cherry-picking from the above, I will examine more in detail the possibility to rely on *the right to private and family life* (Article 17 ICCPR) in an expulsion context, having regard to the serious consequences the violation of this right entails to the life of the

86 For more details on these eventual interferences, consider Expulsion of aliens, Memorandum by the Secretariat, 2006, paras. 445-481, 578-584.

87 From among the human rights codifications of universal character, consider Article 16(3) of the Universal Declaration of Human Rights (UDHR); Article 17 ICCPR; Article 10 of the International Covenant on Social, Economic and Cultural Rights and Article 9(1) of the Convention on the Rights of the Child. The case law of judicial and quasi-judicial bodies relating to the right to family unity (e.g. before the Human Rights Committee or the UN Committee against Racial Discrimination) has emerged primarily in the context of the expulsion of aliens. In these cases, the individuals concerned invoked the respect for the right to family unity as an obstacle hindering their expulsion (K. Jastram, 'Family Unity' in A. T. Aleinikoff – V. Chetail (eds.), *Migration and International Legal Norms*, T.M.C. Asser Press, The Hague, 2003, p. 191).

88 Regarding universal human rights codifications, see Article 19 UDHR and Article 19 ICCPR.

89 The 1989 UN Convention on the Rights of the Child (CRC) provides a comprehensive codification of children's rights, which is the widest ratified multilateral convention all over the world (with 196 Contracting States), besides the 1949 Geneva Conventions on humanitarian law. Therefore, the CRC undoubtedly reflects general customary international law in this field.

90 Respect for property rights and the prohibition of arbitrary deprivation of property are specifically set forth with regard to aliens in the 1985 UN General Assembly Declaration on the human rights of individuals who are not nationals of the country in which they live (Article 9).

91 In the framework of the International Labour Organization (ILO), several conventions have been elaborated which defined general requirements concerning the right to organise and the freedom to establish trade unions. ILO Conventions Nos. 87 and 97 do just that. The quasi-judicial body dealing with the application of the freedom of assembly in ILO Member States (ILO Committee on Freedom of Assembly) has already established that the expulsion of a trade union leader in relation to his activity would infringe and disproportionately limit his human right to organise, so it was qualified unlawful (International Labour Organization, Committee on Freedom of Association, *Digest of Decisions 1996*, para. 127).

individual, as well as the considerable practice of the Human Rights Committee in individual cases. The point of departure is again *General Comment No. 15 (1986)* of the HRC, which acknowledged that the respect for family life is a factor which may guarantee protection from arbitrary expulsion for a lawfully residing alien.[92] Furthermore, the HRC also dealt with several individual complaints filed by expelled children or their parents and where carrying out the expulsion orders would have separated the child from one or both of the parents. According to the Committee, the fact that one of the members of the family is entitled to reside in the territory of the country concerned does not necessarily mean that the forced return of the other family member will qualify as undue interference with family life, thus such an act of the State does not automatically violate the Covenant.[93] However, in other cases emanating from similar individual complaints, the HRC was of the opinion that such separation of the family *would have violated* the *individuals' right to family life*, so their expulsion was prevented by the right to family unity.[94] The Committee also added that with a view to respecting the right to family life, and to assessing the reasonable and proportionate restriction thereof based on objective criteria, a balance is to be drawn between two competing or conflicting considerations. These are, on the one hand, the essential interest of the State in carrying out expulsion (be it related to public order, public security or national security), and, on the other hand, to what extent the deportation of an alien would make the life of other family members difficult or even impossible.[95] In such a *balancing exercise*, which essentially means the comparison of the conflicting interests of the community and the expelled person,[96] the following criteria can be taken into account: a) the duration of residence in the host state, b) the age (s) of the child(ren), c) the family's financial and emotional independence, d) the parents' behaviour, and e) when assessing state interests, the principle of proportionality should always be reckoned with as well.[97]

92 *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, para. 5. For scholarly writings and commentaries, see e.g. Nowak, 2005, pp. 396-398; Expulsion of aliens in international human rights law, 2006, pp. 4-5; Wojnowska-Radzinska, 2015, pp. 47-52.

93 Expulsion of aliens in international human rights law, 2006, p. 4.

94 The leading case in this respect is UN Human Rights Committee, *Hendrick Winata and So Lan Li v. Australia*, Communication No. 30/2000 [UN Doc. CCPR/C/72/D/930/2000 (2001)], 21 July 2001, para. 7.1; then later on another HRC communication prohibiting the expulsion of the wife and children of a male asylum seeker during the asylum procedure on account of respecting family life (UN Human Rights Committee, *Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002. [UN Doc. CCPR/C/79/D/1069/2002 (2003)], 29 October 2003, para. 9.6).

95 UN Human Rights Committee, *Francesco Madafferi and Anna Maria Immacolata Madafferi v. Australia*, Communication No. 1001/2001 [UN Doc. CCPR/C/81/D/1011/ 2001 (2004)], 26 July 2004, para. 9.8.

96 A. di Pascale, 'Exceptional Duties to Admit Aliens' in R. Plender (ed.), *Issues in International Migration Law*, Brill, The Hague, 2015, p. 208.

97 A. T. Aleinikoff, 'International Legal Norms and Migration – A Report' in A. T. Aleinikoff – V. Chetail (eds.), *Migration and International Legal Norms*, T.M.C. Asser Press, The Hague, 2003, p. 18; Nowak, 2005, p. 395; Wojnowska-Radzinska, 2015, p. 49.

In sum, the *right to private and family life* may provide *genuine protection* against the expulsion of aliens. What is more, it is so irrespective of the lawfulness of stay, therefore it is also of help to *migrants in an irregular situation*. The longer time the person concerned or his/her family has stayed in the territory of the host country as well as the tighter and more manifold their ties are to the country of residence, the more chances there are for these being assessed as obstacles to expulsion, unless the State can present compelling reasons related to public interests to justify the necessity of expulsion (e.g. in the case of terrorists, or multiple recidivist criminals).[98]

5.5 Closing Thoughts

Some of the aspects of the expulsion of aliens, i.e. being an "inalienable" prerogative" that is at the core of State sovereignty, on the one hand, and a coercive measure involving rather serious consequences for the human rights of an individual, on the other hand, have been first codified in the ICCPR, before regional endeavours have culminated in other codification instruments. The explicit or implicit substantive law restrictions confining the expulsion of aliens within an international legal framework (e.g. the imperative of the prohibition of *refoulement*; the legality of expulsion; or the prohibition of collective expulsion), as well as procedural law safeguards (condensed in Article 13 ICCPR and further elaborated in the quasi-case law of the Human Rights Committee) inspired the subsequent elaboration of European and American human rights standards on the same subject-matter.[99] It is a remarkable achievement that a set of rules established on the universal plane, which create limits for States to exercise their powers on expelling aliens, have been developing as "living law" for more than 50 years by now – even if the contours of these rules are not fully clarified as yet in some constellations.

Nevertheless, when it comes to the discussions regarding the expulsion of aliens in *Europe over the last two decades*, the ICCPR occupied *an underrated position* as compared to its significance, in contrast with the European Convention on Human Rights (ECHR) and the often activist jurisprudence of the European Court of Human Rights (ECtHR),[100] as well as the ever increasing EU migration *acquis* and case law developed by

98 Wojnowska-Radzinska, 2015, p. 52.

99 See Article 22 of the American Convention of Human Rights (<www.oas.org/dil/ treaties_B-32_American_Convention_on_Human_Rights.htm> – 01.11.2017) and Article 1 of Protocol No. 7 (1984) to the European Convention of Human Rights (<www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a082> – 01.11.2017).

100 See a summary on this by e.g. H. Lambert, *The position of aliens in relation to the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2007; and on the changing dynamics of the case law of the Strasbourg Court regarding the expulsion of aliens, see A. Farahat, 'Enhancing Constitutional Justice by Using External References: The European Court of Human Rights' Reasoning on the Protection against Expulsion', *Leiden Journal of International Law* 28 (2015), pp. 303-322.

the EU Court of Justice.[101] This "side-lined" role can only be partially justified, even if the majority of individual complaints brought before the Human Rights Committee target traditional immigration countries outside the old continent (such as Australia or Canada). The sad reality is that in the EU, whose legislation on the expulsion of aliens (or in the EU parlance, the "return of illegally staying third country nationals")[102] encompasses deeper-rooted obligations and more sophisticated standards and conditions than those of general international law, EU Member States are prone to forget about such universal international instruments as the Covenant. However, it is by far not certain that a national expulsion measure which is compliant with EU law (e.g. the Return Directive) would stand the test of requirements arising from ICCPR, as interpreted and further developed by the Human Rights Committee. True, the enforcement mechanisms at the disposal of the ICCPR are not as highly developed and robust as those in EU law or even in case of ECtHR judgments. Added to this, in the European context, aliens actually prefer to bring their cases to the Strasbourg or Luxembourg Courts that are deemed more efficient and "having sharper teeth".

The national authorities and courts, however, cannot restrict themselves to have a thorough knowledge on EU law or the ECtHR case law. All EU Member States are bound by *further international human rights conventions* such as the ICCPR, the domestic implementation of which is a constitutional requirement stemming from the rule of law. Also, in many cases, one can find more progressive, higher standards of human rights protection related to the expulsion of aliens in the case law of the Human Rights Committee and in its *de facto* authentic treaty interpretations, which are to be taken into account in the practice of the state organs in accordance with the generally accepted rules of treaty interpretation (Articles 31-33 of the 1969 Vienna Convention on the Law of the Treaties). It may happen that if the separation or staying together of a family, or the establishment of the prohibition of *refoulement* are in stake in a particular case, it is the life or death, or physical integrity of the person concerned that depends on the careful application of international human rights considerations. This is one of the noteworthy messages conveyed to modern times by the ICCPR and the several decades of Human Rights Committee case law, building on the relevant articles of the Covenant. It is so

101 For a general overview, see e.g. European Union Agency for Fundamental Rights – Council of Europe, *Handbook on European law relating to asylum, borders and immigration. Edition 2014*, Publications Office of the European Union, Luxembourg, 2014, Chapters 6 and 7; S. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, Fourth Edition, Oxford University Press, Oxford, 2016, Chapter 7 [Irregular Migration]; F. Lutz – S. Mananashvili, 'Return Directive 2008/115/EC' in K. Hailbronner – D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary*, C.H.Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, second edition, pp. 658-763.

102 First and foremost these are the "Return Directive" (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 12.24.2008) and Commission Recommendation of 27.09.2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6505 final, Brussels, 27.09.2017, Annex.

much so with special regard to the legal and other challenges associated with the unprecedented volume of recent migration flows that cause a lot of headache in our days, too.

Finally, looking at the future for a moment, I would like to highlight *two developments*, which may lead to the wider rediscovery of substantive and procedural limits on the expulsion of aliens elaborated under the Covenant. One of these is the *Draft articles on the expulsion of aliens* adopted at second reading by the UN International Law Commission (ILC) in the summer of 2014. Many specific provisions of the above-discussed requirements of the Covenant and the quasi-case law of the Human Rights Committee can be rediscovered in the draft articles. Likewise, these universal standards served at least as a source of inspiration during the codification exercise within the ILC. It is still not clear whether the majority of States are willing to transform the draft articles into a fully-fledged, legally binding convention of universal character.[103] The other development is that *the UN summit for refugees and migrants*, which took place in New York in September 2016, may bring new momentum to the global adherence to human rights considerations defined by ICCPR in the field of expulsions.[104] The comprehensive *Global Compact for Safe, Orderly and Regular Migration*[105] envisaged by the 2016 New York Declaration on Refugees and Migrants (signed by the heads of state and government of all UN Member States), to be adopted in intergovernmental negotiations until the end of 2018, may repair the global normative architecture on the expulsion of aliens, in the edifice of which the ICCPR and the HRC rich case law constitute the essential, massive base of universal standards. Thus, we may not have to wait for another fifty years for taking a new look at the normative developments regarding the expulsion of aliens elaborated under the aegis of the United Nations. Until then, long live the Covenant!

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103 The UN International Law Commission recommended, in 2014, the draft articles to the attention of the UN General Assembly, i.e. to that of the UN Member States, asking them to decide what the final form of the document should be later (e.g. whether a diplomatic conference should be convened for the adoption of an stand-alone codification convention with legally binding force). The UN General Assembly revisited this question in fall 2017 (*Resolution adopted by the General Assembly on 10 December 2014 [on the report of the Sixth Committee (A/69/498)]*, 69/119, Expulsion of aliens, A/RES/69/119, paras. 1 and 3) and decided to return to this topic at its 75th session in 2020 for further action (*Resolution adopted by the General Assembly on 7 December 2017 [on the report of the Sixth Committee (A/72/461)]*, 72/117, Expulsion of aliens, A/RES/72/117), para. 3).

104 The outcome of the summit was the endorsement by all UN Member States of the *New York Declaration for Refugees and Migrants*. A/71/L.1, 19 September 2016, available at <https://refugeesmigrants.un.org/sites/default/files/a_71_l1.pdf> (01.11.2017).

105 *New York Declaration for Refugees and Migrants, Annex II – Towards a global compact for safe, orderly and regular migration*. On the possible legal nature and substance of this global compact, see e.g. E. Guild – S. Grant, *Migration Governance in the UN: What is the Global Compact and What Does it Mean?*, Queen Mary School of Law Legal Studies Research Paper No. 252/2017, available at <https://ssrn.com/abstract=2895636> (01.11.2017); T. Gammeltoft-Hansen – E. Guild – V. Moreno-Lax – M. Panizzon – I. Roele, *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration*, Raul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, October 2017, available at <http://rwi.lu.se/app/uploads/2017/10/RWI_What-is-a-compact-test_101017-senaste-1.pdf> (01.11.2017).