# THE INTERNATIONAL LAW COMMISSION AND THE FUTURE CODIFICATION OF INTERNATIONAL LAW

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## I. INTRODUCTION

Presently, the codification process as performed by the International Law Commission (ILC) has become the target of severe criticism. In this context, even the very existence of the ILC was disputed as the Commission was said to be divested of any task as the main codification work was considered already completed. But this criticism is not new; as early as the 1970s, a UNITAR study was published which pointed at several critical issues in this process. The more the current process has already been made the subject of critical comments, the more the question arises as to whether the existing codification process will correspond to the needs of the 21st century. Hence, when addressing the future of the codification process, it seems worthwhile to proceed from an evaluation of the existing problems and of the contemporary needs for the codification of international law.

## II. THE WORK OF THE INTERNATIONAL LAW COMMISSION

According to Article 13 of the Charter, the General Assembly is considered the main organ for "the progressive development of international law and its codification." The General Assembly disposed of this task by creating the ILC as a subsidiary organ through Resolution 174 (II). The doctrine has frequently emphasized the big success of this organ, by referring to Law of the Sea Conventions of 1958, the Convention on the Diplomatic Relations of 1961, on Consular Relations of 1963, the Vienna Convention on the Law of Treaties of 1969, and the Convention for the Protection of Diplomats of 1973. However, with regard to the codification performed after that date, the commentaries start hesitating. Could the Convention on the Representation of States in their Relations to International Organizations, or the two Conventions on State Succession, which have not yet entered into force despite the elapse of twenty or at least fifteen years since their adoption, still be qualified as a success?

## III. THE RESTRICTED FIELD OF ACTIVITIES OF THE ILC

It must be borne in mind that already at the outset of the existence of the ILC, the scope of its activities was reduced by matters that were falling within the ambit of conflict of laws. Even a new organ was created to take up these matters, the UNCITRAL, which admittedly has worked so far rather successfully. However, this restriction of the competence of the ILC was not justified since matters of international criminal law were dealt with by the ILC without any problems. But even typical international law matters were taken up by other organs, such as the outer space matters, or issues relating to environmental law. Other issues were directly dealt with by the General Assembly such as the Convention on the Safety of UN and Associated Personnel of 1994. Again other matters were formulated by special agencies of the UN, such as by the IMO. Whether or not these instruments could be considered as codification *stricto sensu*, they nevertheless would fall under the competence of the ILC to develop progressively international law.

## IV. THE REASONS FOR THE RESTRICTED SCOPE OF ACTIVITIES OF THE ILC

The reasons of this reduced scope of activity are manifold and can be located in and outside the ILC. To a certain extent they result from the shift of paradigms international law and relations are subject to nowadays.

### *A. Internal Reasons*

It is sometimes argued that the ILC is not furnished with the necessary expertise in the field to be codified so that it could embark only on very general issues. It is certainly true that under actual conditions the regulations to be forged require increased knowledge in the techniques of the matters subject to regulation. Due to the increased interaction between states on all different levels, and the intensified communication between them, more and more technical matters call for regulation for which an international lawyer could consider himself not sufficiently qualified. However, there is no reason why the ILC members should not become capable of acquiring such technical knowledge either directly or by the use of resource persons. There is only the need to establish appropriate communication with the experts in the relevant fields so that instruments also of technical nature could emerge from this body.

### *B. External Reasons*

It has been argued that the time of the typical codification is over. In particular are those matters which are the most suitable for codification, as they are governed by the principle of reciprocity and rely on well settled practice. This is certainly true. A quick perusal of the matters originally proposed for codification shows that only a few are left; mainly, recognition, extraterritorial jurisdiction, rights of aliens, and territorial asylum, whereby the latter two either are already regulated by other instruments or are of an extremely political nature.

It can be deduced from the comparison of the different procedures of elaboration and of the organs involved, that one of the reasons for the difficulties the ILC faces stems from the reduced communication process between the ILC and the states, and, therefore, the former incapacity to reflect accurately the position of States. This is corroborated by a comparison of the ILC with the other organs which, instead of the ILC, were entrusted with the elaboration of rules of international law. Whereas the ILC is composed of individual experts acting independently, the other organs, including UNCITRAL, consist of representatives of States. Hence, under existing conditions this contrast is of utmost importance as it seems to be not without reason that the States hesitate to entrust a body consisting of independent experts with the task of formulating new conventions. This development is mainly caused by the following reasons, one procedural, the others of substantial nature;

There is a major difference as to whether it is a question of a codification *stricto sensu* or a progressive development. Although it has been consistently argued that a clear distinction is not possible, it is nevertheless possible to recognize the main task of an individual text, either to codify law or to develop it progressively. In the first case, the elaboration work can rely on a consistent practice of States which is already well known. States, when conveying the information on their own practice to the ILC, are neither formulating new positions nor disclosing any state secrets nor are they making concessions which they have not yet made in the past. Thus, the ILC would not encounter major difficulties in obtaining the necessary information on the position of different States. Under these circumstances a major divergence of positions which would rule out any attempt to elaborate a commonly acceptable regime seems not very likely.

In this regard, the work of the ILC mainly consists in reformulating legal rules which already exist. In the second case, however, that of the progressive development of international law, the position of the States has not yet been established, no common patterns

have emerged. The States, when asked to communicate their position to the ILC, would have to formulate their position as a negotiating position and would, perhaps, be asked to make concessions without knowing whether they will be paid off or compensated by equivalent concessions of the others. In this situation the ILC becomes entangled in a real negotiation process among States. States would be required to entrust an independent body over which they have only limited control with the negotiating process in a matter where no established patterns exist.

It is doubtful whether in such a situation the existing process of work of the ILC remains appropriate. Certainly, according to Article 8 of the Statute of the ILC, its composition should be such that it represents the main forms of civilization and the principal legal systems of the world. However, this rule does not guarantee that the different political positions concerning one particular subject matter are also represented and, if they are represented, are even maintained in the discussion within the Commission. A State would also be less willing to ratify a convention if it was not directly involved in its elaboration. Hence, it is therefore comprehensible that if the States urgently wanted a treaty the latter's elaboration was moved from the ILC to other bodies within the United Nations system which consisted of State representatives or that if the need was felt to establish political committees within the United Nations to reconsider the work of the ILC, as it happened with the Draft Articles on State Immunity or the Statute on an International Criminal Court.

A second reason for the problems related to the current procedure of codification stems from the fact that the time of the framing of substantive rules on State behavior seems over. Greater emphasis is now put on the elaboration of so called secondary rules or metarules, i.e., rules concerning the creation, change, ascertainment of rules, and control of their compliance. In this legal field new tendencies have emerged, departing from the Westphalian system and pointing towards more institutionalization and centralization, in particular as far as the compliance procedures are concerned. These new tendencies call for new instruments which again cannot rely on already existing patterns. In this time of uncertainty about the further development, it is very difficult for a body like the ILC to anticipate the final position of States in this respect.

These new parameters of the international law creating process are echoed by the change of implementation structures of the rules of international law. Traditionally, rules of international law have addressed the mutual relations of States, mainly based on principles of reciprocity. This is, however, no longer the case since more and more substantive rules deal with the attitude of states towards their citizens as in the case of Human Rights or towards the community of States. The ILC is already

starting to deal with the former within the topic of reservation to multilateral treaties since the most difficult item therein is undoubtedly that of reservations to human rights treaties and their effects. A striking example of the second type is the new topic on the agenda of the ILC on the law of environment. Here, the ILC already stated its intention to "focus more on the fields of the duties *erga omnes* where the real complainant of deterioration of the environment is the international community at large rather than individual States," so that the study will include the topic of "global commons" as well. In both cases, the standard setting type (human rights) and the *erga omnes* duties (law of environment), the ILC will have to face structures of norms and of their legal effect which totally differ from the traditional ones so that less and less the prerequisites for a codification *stricto sensu* are existent.

## V. THE POSSIBLE ADJUSTMENTS OF THE LAW CREATING PROCESS TO THE NEW REQUIREMENTS

The possible adjustments could be of a procedural nature as well as one relating to the nature of the outcome. As to the procedural nature, the shift from the codification to the progressive development of international law and the preponderance of the negotiation element require a changed communication between the States and the ILC. The communication channels between them must be improved so that the ILC can take the different positions of the States abroad and serve as a honest broker of these positions. Consequently, the States are called upon already at the outset of the work of the ILC to clarify their position and convey it to the ILC which is what they did not regularly in the past.

During the process of the formulation of rules their must be an interactive exchange of views between States and the ILC which is what requires a closer contact between the State representatives and the ILC members responsible for that particular work. Thus, it could be imagined that the special rapporteur addresses directly the States mostly concerned by the relevant draft, and submits his work article by article for scrutiny by the representatives in the sixth Committee. More than the existing method would such procedure force the States to take a stance to the draft articles.

It should also not be forgotten that certain valuable work in the field of progressive development of international law originates from the epistemic community such as IUCN, IDI or ILA. In particular in light of the novelties in the structure of international law, a closer cooperation between these bodies and the ILC would also be of a certain relevance.

These institutions should therefore cooperate with the ILC and foster an intensive exchange of views with the ILC.

As to the nature of the outcome of the work of the ILC it has to be questioned whether the treaty form is still the most suitable one. So far, the ILC has mostly envisaged the elaboration of treaties as being the only instruments entailing legally binding effect. However, this effect addresses only the parties to the relevant treaty, i.e., States which have undergone a formal procedure for expressing their consent to be bound. Further, no State can be forced to initiate such a procedure. Consequently, in a more general perspective, a treaty is susceptible of a broader acceptance only if it does not deviate too much from the existing patterns of behavior of States since otherwise they would refrain from ratifying it.

In contrast thereto, use can be made of other instruments which precede the creation of norms. Although they do not pertain to the law creation process itself, customary law or treaty law, they nevertheless influence this process considerably. These prenormative instruments or "soft law" appear in form of declarations, resolutions or similar kind. Their function on the law creation can be described as follows:

> (1) they can educate the States to pursue a particular attitude;
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> (2) they can prepare the grounds for the elaboration of new rules, by treaty or customary law;
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> (3) they can make the States aware of a certain problem in international relations being not yet sufficiently regulated; and
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> (4) finally, they can furnish hitherto unclear customary rules with a certain precise formulation.

In a situation which is marked by the progressive development rather than by codification *stricto sensu*, such kinds of instruments could increasingly influence the behavior of States so that a core of established patterns could emerge which then could easily be converted into legal rules. In the course of the solidification of the States' attitudes, an intensive interaction will occur between the States' attitudes and the relevant instrument. The latter will have to prove whether its content is so convincing that the States will conform to it.

This type of instrument possesses certain advantages over treaties: *ratione temporis*-they have an immediate, legally not binding, effect once they are adopted and need not be made subject to a formal process of ratification; *ratione personae* they address all States in the same way.

Finally, they can more rapidly react to the quick change of the subject-matters to be regulated. Their lack of legal effect is of less significance than one might think: even if a State is bound by a treaty, the compliance with the treaty can be controlled only if it is based on a reciprocal structure or otherwise an appropriate mechanism exists to this end, be it a judicial organ like the ICJ or a treaty organ. Particularly, in fields where the new implementation structures become applicable, reciprocity no longer provides a sanction mechanism so that in the absence of control mechanisms the compliance even with treaty obligations can hardly be ascertained.

As long as the regulation is not based on reciprocal structures which in the absence of compliance mechanisms constitute the only sanction mechanism. In light of these considerations, which are not totally new, the ILC could start reconsidering the best possible way of the creation of rules of international law, taking into account these prenormative instruments. Nevertheless, the formulation of treaty law should not be thrown overboard but should no longer be contemplated as the only means of formulation of new rules of international law. By resorting also to this different form of instruments the ILC could widen its scope of activity and with its great authority assist the community of States in finding the necessary regulatory response to the new challenges in international relations.