

## BEAMING SEARCHLIGHT ON THE ACTIVITIES OF INTERNATIONAL LAW COMMISSION.

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### ABSTRACT

The idea of developing International Law through the restatement of existing rules or through the formulation of new rules is not a recent phenomenon<sup>932</sup>.

Enthusiasm for the “codification movement” generally stems from the belief that written International Law would remove the uncertainties of customary international law by filling existing gaps in the law, as well as by giving precision to abstract general principles whose practical application is not settled.<sup>933</sup>

In carrying out this research, both primary and secondary sources of data are utilised. The primary sources include International Treaties, Statutes, Charters, etc, while, secondary sources include Textbooks, Yearbooks, journals, internet materials and so on. All the data were subjected to content and contextual analysis.

The International Law Commission (ILC) is one of the least understood / appreciated legal institutions on the global scene,. Hence, this paper intends to increase awareness on the functions of the ILC and how it develops and codifies international law. It also aims at holistically appraising the activities of the International Law Commission (ILC) hereinafter called “the commission”, its evolution, legal frameworks, functions, membership and prospects. It ends with concluding remarks and recommendations.

### KEYWORDS:

International Law, Progressive Development, Codification, Commission, Functions and Membership.

### INTRODUCTION - Historical Background and Evolutionary Trend

In the last quarter of the 18<sup>th</sup> Century, Jeremy Bentham proposed a codification of the whole of International Law, though in an Utopian spirit<sup>934</sup>. While it is true that only concrete texts accepted by Government can directly constitute a body of written International Law, private codification efforts, that is, the research and proposals put forward by various societies, institutions and private writers, have also had a considerable effect on the development of International Law. Particularly noteworthy are the various draft codes and proposals prepared by the *Institut de Droit International*, the International Law Association (both founded in 1873) and the Harvard Research in International Law (established in 1927) which have facilitated the work of the various diplomatic conferences convened to adopt general multilateral conventions of law-making nature<sup>935</sup>.

Inter-government regulations of legal questions of general interest may be said to have originated at the Congress of Vienna (1814-1815), where provisions relating to international rivers, abolition of slave trade and the rank of diplomatic agents were adopted by the signatory powers of the Treaty of Paris of 1814. Since then, international legal rules have been developed at diplomatic conferences on many subjects<sup>936</sup>.

Similarly, the codification of international humanitarian law contained in the Four Geneva Conventions of 12 August 1949 regarding the protection of war victims and in the protocols additional to the Geneva

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<sup>932</sup> See The Work of the International Law Commission, United Nations Publications, (2012) New York, 8<sup>th</sup> Ed. Volume 1.

<sup>933</sup> Ibid p.1; For further reading, see,Watts, A., The International Law Commission 1949-1998, (3 Vols, Oxford, 1999-2000); see also, Analytical Guide to the Work of the International Law Commission 1949-1997,United Nations, New York, 1998; The Finnish Yearbook of International Law 1998, Karl, T., et al (eds); Jennings, R. Y.,International Law Reform and Progressive Development, in G.Hafner, etal,(eds),Liber Amincorum Professor Seidl Hohenveldern((Kluver, The Hague ,1988),p.325.

<sup>934</sup> In his “Principles of International Law”, ( written in the period 1786-1789) Bentham envisaged that an international code, which should be based on a detailed application of his principle of utility to the relations between nations, would not fail to provide a scheme for an everlasting peace. However, he made little effort to base his plans for such a code upon the existing law of nations.

<sup>935</sup> See document A/AC.10/ 25, “ Note on the Private Codification of Public International Law”.

<sup>936</sup> See documents A/AC/0/5 “ Historical Survey of the Development of International Law and its Codification by International Conferences”; and A/AC.10/8, “Outline of the Codification of International Law in the Inter-American System with Special Reference to the Method of Codification”.

Conventions of the 8<sup>th</sup> June 1977 and 8<sup>th</sup> December 2005<sup>937</sup> is the direct descendant of the Geneva Red Cross Convention of 22 August 1864<sup>938</sup>.

The international effort to promote the codification and development of International Law made a further important advance with the resolution of the Assembly of the League of Nations of 22 September 1924, envisaging the creation of a standing organ called the Committee of Experts for the progressive codification of International Law<sup>939</sup>.

This Committee, consisting of seventeen experts was to prepare a list of subjects “the regulation of which by international agreement” was most “desirable and reliable” and thereafter to examine the comments of governments on the list and report on the questions which were “sufficiently ripe” as well as on the procedure to be followed in preparing for conferences for their solution<sup>940</sup>. This was the first attempt on a worldwide basis to codify and develop fields of International Law rather than simply regulating individual and specific legal problems.

The Governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enable it make binding rules of International Law. As a corollary, they also rejected proposals to confer on the General Assembly the power to impose certain general conventions on states by some form of majority vote.<sup>941</sup> There was however, a strong support for conferring on the General Assembly the more limited powers of study and recommendation, which led to the adoption of the following provision in Article 13, paragraph 1: (a)

- “(1) The General Assembly shall initiate studies and make recommendations for the purpose of :
- (a) Encouraging the progressive development of International Law and its codification.”<sup>942</sup>

During the Second Part of its First Session, the General Assembly, on 11 December 1946, adopted resolution 94(1) establishing the Committee in the Progressive Development of International Law and its Codification, sometimes known as the “Committee of Seventeen”. The committee was directed to consider the procedures to be recommended for the discharge of the General Assembly’s mandate under Article 13, paragraph 1. The Committee held thirty meetings between 12 May – 17 June 1947 and adopted a report recommending the establishment of an International Law Commission (ILC) and setting forth provisions designed to serve as the basis for its statute<sup>943</sup>. Several important questions of principle relating to the organization, scope functions and methods of an International Law Commission were thoroughly discussed by the Committee.

During the Second Session of the General Assembly, a large majority of the Sixth (Legal) Committee<sup>944</sup> favoured the setting up of an International Law Commission and a draft statute of the International Law Commission was prepared by a Sub-Committee of the Sixth Committee<sup>945</sup>. On 21 November, 1947, the General Assembly adopted resolution 174 (ii) establishing the International Law Commission and approving its statute. The Commission opened the first of its annual session on 12 April, 1949<sup>946</sup>

As it is, Article 13 of the UN Charter is the basis of the International Law Commission. It therefore goes without saying that ILC a subsidiary organ of the General Assembly of the United Nations. The activities of the ILC are regulated by the statute of the ILC.

## FUNCTION / WORK OF THE INTERNATIONAL LAW COMMISSION

Article 10 of the statute of the International Law Committee provides that, “the International Law Commission shall have for its object the promotion of the progressive development of International Law and its

<sup>937</sup> For the text of the Conventions, see United Nations, Treaty Series, Vol. 75, p.2.

<sup>938</sup> See Bevant Treaties and other International Agreement of the United States of America 1776-1949, vol. 1. P. 7.

<sup>939</sup> League of Nations, Official Journal, Special Supplement, No 21, p.10s

<sup>940</sup> Ibid

<sup>941</sup> See Documents of the United Nations Conference on International Organisation, San Francisco, 1945, vol.III, Documents 1&2; vol VIII, document 1151; and vol. IX, documents 203, 416, 507, 536, 571, 792,795 & 848.

<sup>942</sup> Article 13 (1)(a) of Charter of the United Nations. 1945

<sup>943</sup> See Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1.

<sup>944</sup> The Sixth Committee is the main committee of the General Assembly of the United Nations which is entrusted with the consideration of legal issues. See Rules of Procedure of the General Assembly, Rule 98

<sup>945</sup> See Official Records of the General Assembly, Second Session, Sixth Committee Annex 1.

<sup>946</sup> The Work of the ILC, UN publication, vol. 1 8<sup>th</sup> Ed. PP 1-6

codification”<sup>947</sup>. Article (2) provides that, “the commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law”<sup>948</sup>

Article 15 provides that, “... the expression progressive development of International Law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by International Law or in regard to which the law has not yet been sufficiently developed in the practice of states. Similarly, the expression codification of International Law is used for convenience as meaning the more precise formulation and systematization of rules of International Law in fields where there already has been extensive state practice, precedents and doctrine”<sup>949</sup>.

It is also one of the functions of the commission to accept proposals from the General Assembly for progressive development of International Law. Article 16 provides, “when the General Assembly refers to the Commission a proposal for the progressive development of International Law, the Commission shall follow in general a procedure on the following lines:

- (a) It shall appoint one of its members to be Rapporteur;
- (b) It shall formulate a plan of work;
- (c) It shall circulate a questionnaire to the Governments and invite them to supply within a fixed period of time, data and information relevant to items included in the plan of work.
- (d) It may appoint some of its members to work with the Rapporteur on the preparation of drafts pending the receipt of replies to this questionnaire.
- (e) It may consult with scientific institutions and individual experts; these experts need not be nationals of members of the United Nations.
- (f) It shall consider the draft proposed by the Rapporteur.
- (g) ..
- (h) ..
- (i) ..
- (j) The commission shall submit the draft so adopted with its recommendation through the Secretary General to the General Assembly”<sup>950</sup>.

Article 17 provides that, “the commission shall accept and consider proposals and draft multilateral conventions referred to it by members of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of International Law and its codification, and transmitted to it for that purpose by the Secretary General”<sup>951</sup>.

Article 18 provides that,

- (1) “The commission shall survey the whole field of International Law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not.
- (2) Where the commission considers that codification of a particular topic is necessary and desirable, it shall submit its recommendation, to the General Assembly.
- (3) The commission shall give priority to requests of the General Assembly to deal with any question”<sup>952</sup>

The Commission shall adopt a plan of work appropriate for each case<sup>953</sup>. It shall prepare its draft in the form of articles and shall submit them to the General Assembly together with a commentary<sup>954</sup>.

The foregoing clearly shows that the statute of the ILC makes a clear distinction between ‘progressive development of international law’ and ‘codification of international law’<sup>955</sup>. In practice, the Commission’s work on a topic usually involves some aspects of progressive development as well as the codification of International

<sup>947</sup> Article 1(1) of the Statute of ILC

<sup>948</sup> Article 1(2) of Statute of ILC. The Commission has not however, always maintained a strict distinction between public and private international law, and has considered aspects of the latter category in some of its works. See for example, its consideration of the topic “Jurisdictional Immunities of States and their Property”

<sup>949</sup> Article 15 of the Statute of ILC

<sup>950</sup> Article 16 of the statute of ILC

<sup>951</sup> Article 17 of the statute of ILC

<sup>952</sup> Article 18 of the statute of the ILC

<sup>953</sup> Article 19 of the statute of the ILC

<sup>954</sup> Article 20 of the statute of the ILC

<sup>955</sup> See Article 15 of the statute of the ILC

Law, with the balance between the two varying depending on the particular topic<sup>956</sup>.

The Commission also has a duty to make recommendations to the General Assembly on any matter of International Law<sup>957</sup>. Also, according to Article 24, “the commission shall consider ways and means of making the evidence of customary international law more readily available, such as the collection and publication of documents concerning states practice and the decision of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter”<sup>958</sup>.

#### **COOPERATION WITH GOVERNMENTS AND OTHER BODIES.**

The commission constantly has and maintains direct relationship with governments. Member states may refer proposals or draft convention to the commission for consideration.<sup>959</sup> The materials, comments and observations submitted by governments to the commission play a vital role in the codification methods of the commission. Also, the commission interacts and relates with other bodies and official bodies and agencies. It may consult with any organ of the United Nations on any subject which is within the competence of that organ<sup>960</sup>. The commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its function.<sup>961</sup> The commission and the Secretary General shall comply with the resolutions of the General Assembly and other principal organs of the United Nations concerning relations with Franco-Spain and shall exclude both from consultations and from the list organizations which have collaborated with the Nazis and Fascists.<sup>962</sup>

#### **THE INTERNATIONAL LAW SEMINAR**

Since 1965, the International Law Seminar has been held in conjunction with the commission’s sessions, and many hundreds of young professionals have been introduced to the United Nations and to the work of the commission through the seminar. During the seminar, the participants observe plenary meetings of the commission, attend specially arranged lectures and participate in small group discussions on specific topics.<sup>963</sup>

#### **COMPOSITION AND MEMBERSHIP OF THE COMMISSION**

Article 2(1) of ILC provides that; “the commission shall consist of thirty-four members who shall be persons of recognized competence in International Law.”<sup>964</sup> No two members of the commission shall be nationals of the same state.<sup>965</sup> In the case of dual nationality, a candidate shall be deemed to be a national of the state in which he ordinarily exercises his civil and political rights.<sup>966</sup> Members of the commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of states members of the United Nations.<sup>967</sup> The members of the commission shall be elected for five years, and shall be eligible for re-election.<sup>968</sup>

The commission shall sit at the European Office of the United Nations at Geneva. The commission shall however, have the right to hold meetings at other places after consultations with the Secretary General.<sup>969</sup> With respect to The Secretariat, the Codification Division of the Office of Legal Affairs of the United Nations serves as the Secretariat of the Commission. Article 14 provides that the Secretary-General of the UN shall, so far as he is able, make available staff and facilities required by the commission to fulfill its task.<sup>970</sup>

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<sup>956</sup> See Yearbook of the International Law Commission 1979, vol. II (part one), document A/CN.4/325/ para 102, and *ibid*, 1996.

<sup>957</sup> Article 23 of the statute of the ILC

<sup>958</sup> Article 24 of the statute of the ILC

<sup>959</sup> See Article 17 of the statute of ILC. For further reading, see, Bedjaoul, M., *International Law: Achievements and Prospects*, Mantnus Nijhoff Publishers, 1991

<sup>960</sup> Article 25 (1) of the statute of ILC

<sup>961</sup> Article 26 (1) of the statute of ILC

<sup>962</sup> Article 26 (3) of the statute of ILC

<sup>963</sup> *The Work of the ILC*, UN Publications, (2012) vol 1, 8<sup>th</sup> Ed. P.70.

<sup>964</sup> Article 2(1) of statute of ILC

<sup>965</sup> Article 2(2) of statute of ILC

<sup>966</sup> Article 2(3) of statute of ILC

<sup>967</sup> Article 3 of statute of ILC

<sup>968</sup> Article 10 of statute of ILC

<sup>969</sup> Article 12 of statute of ILC

<sup>970</sup> Article 14 of statute of ILC

Also, the members of the commission enjoy juridical status at the place of its permanent seat.<sup>971</sup> The principles and immunities to which the judges of the International Court of Justice are entitled are also enjoyed by the members of the commission, for the duration of the commission's sessions at Geneva, Switzerland. These are the privileges and immunities by heads of missions accredited to the international organizations at Geneva. The members of the International Law Commission will be entitled to special red identity.<sup>972</sup>

## PROSPECTS OF THE INTERNATIONAL LAW COMMISSION

Since its inception, the commission has come up with lots of draft articles, protocols, conclusions, principles guidelines and other nomenclatures in furtherance of its functions and objectives / encouraging progressive development of international law and its codification". The ILC Draft Articles on the Law of the Sea 1954 gave birth to the four Conventions on the Law of the Sea. The ILC Draft Articles on the Law of Treaties led to the Convention on the Law of the Treaty. A lot of ILC Draft Articles have formed the basis of several Treaties and Conventions today.

The following multilateral conventions have been concluded or given birth to under the auspices of the United Nations based on Drafts prepared by the International Law Commissions:- The Conventions on the Law of the Sea and Optional Protocol (1958), Convention on the Reduction of Statelessness (1961); Vienna Convention on Diplomatic Relations and Optional Protocols (1961); Vienna's Convention on Consular Relations and Optional Protocols (1963); Conventions on Special Missions and Optional Protocol (1969); Vienna Convention on the Law of Treaties (1969); Vienna Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973); Vienna Convention on Representation of States in their Relations with International Organization of a Universal Character (1975); Vienna Convention on Succession of Status in Respect of State Property, Archives and Debts (1983); Vienna Convention on the Law of Treaties between States and International Organizations (1986); Convention on the Law of Non-Navigational uses of International Water-Courses (1997); United Nations Convention on Jurisdictional Immunities of States and Their Property (2004).<sup>973</sup>

The following are some of the texts that have been finalized by the International Law Commission:

Draft Declarations on Rights and Duties of States<sup>974</sup>; Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.<sup>975</sup> Draft Code of Crimes against the Peace and Security of Mankind (1954); Draft Code of Crimes against the Peace and Security of Mankind (1996); Draft Convention on the Elimination of Future Statelessness;<sup>976</sup> Draft Articles on the Status of the Diplomatic Courier and Diplomatic Bag Not Accompanied by Diplomatic Courier and Draft Optional Protocols;<sup>977</sup> Draft Articles on Most-Favoured-Nation Clauses;<sup>978</sup> Draft Statute for an International Criminal Court, Annex and Appendices I-III;<sup>979</sup> Articles on Nationality of Natural Persons in Relation to the Succession of States<sup>980</sup> Articles on the Responsibility of States for Internationally Wrongful Acts;<sup>981</sup> Articles on Prevention of Trans-Boundary Harm from Hazardous Activities;<sup>982</sup> Articles on Diplomatic Protection;<sup>983</sup> Articles on the Law of Trans-boundary Aquifers;<sup>984</sup> Guide to Practice on Reservations to Treaties;<sup>985</sup> Articles on the Responsibility of International Organization;<sup>986</sup> Articles on the Effects of Armed Conflicts on Treaties.<sup>987</sup>

<sup>971</sup> See Yearbook of the International Law Commission, 1979, vol II (part two) document A/34/10 paras 11-13

<sup>972</sup> Ibid.

<sup>973</sup> The Work of the ILC, UN Publication (2012) vol II, pp 284-298.

<sup>974</sup> See the Yearbook of the ILC 1949.

<sup>975</sup> See the Yearbook of the ILC 1950.

<sup>976</sup> See the Yearbook of the ILC 1954, Vol. II

<sup>977</sup> See the Yearbook of the ILC 1989 Vol. II part two

<sup>978</sup> See the Yearbook of the ILC 1978 Vol. II, part two

<sup>979</sup> See the Yearbook of the ILC 1994 vol. II, part two

<sup>980</sup> See the Yearbook of the ILC 1999 vol. II, part two

<sup>981</sup> See the Yearbook of the ILC 2000 vol. II part two

<sup>982</sup> See the Yearbook of the ILC 2001 vol. II part two

<sup>983</sup> Adopted by the Commission at its fifty-eight session in 2006.

<sup>984</sup> Adopted by the Commission at its sixtieth session in 2008

<sup>985</sup> Text adopted by the Commission at its sixty-third session in 2011

<sup>986</sup> Text adopted by the Commission at its sixty-third session in 2011

<sup>987</sup> Text adopted by the Commission at its sixty-third session in 2011; for further reading, see, Jeffrey S.M. The International Law Commission, University of South Carolina Press (2000); Making Better International Law: The International Law Commission at 50, (United Nations, New York, 1999-2000); Crawford, J., "The International L

## THE CURRENT AGENDA OF THE INTERNATIONAL LAW COMMISSION

The following are the works currently before the ILC at its seat at the United Nations Office at Geneva: Immunity of State Officials from Foreign Criminal Jurisdiction; Protection of Persons in the event of Disasters; Formation and Evidence of Customary International Law; Protection of the Environment in relation to Armed Conflict; the Obligation to Extradite or Prosecute (aut dedere aut judicare); Protection of the Atmosphere; Crimes Against humanity e.t.c.

It is hoped that before long the commission will be able to come up with draft articles on the topics itemized above.

## CONCLUDING REMARK

*The Commission has adopted and laid before the General Assembly of the United Nations several draft codes, declarations, conventions and articles. This paper has examined the activities of the International Law Commission holistically. It sufficiently espoused the relevant legal framework concerning the ILC. It is hoped that the analysis has shed some light on the grey areas hitherto bedevilling this area of the law.*

The ILC, single handedly, has contributed to the progressive development of the International Law as well as its codification more than any institution on record. Whether Draft Articles of the ILC eventually becomes a Convention (Treaty) or not, it does not lose its salt. For instance, Draft Article on State Responsibility has not been adopted as Treaty/Convention up till date, yet it is recognized globally, even by International Court of Justice. The mammoth Draft Codes or Articles from the ILC have no doubt helped in shaping international law and in exponential development of the International Law Jurisprudence.

## RECOMMENDATIONS

The ILC has the problem of resource constraint; hence, the General Assembly should increase the budget and financial muscle of the ILC for better efficiency and effectiveness.

Regional governments should develop regional institution to perform at regional level what the ILC is doing at the global level and both institutions should synergizes rather than being rivals.

Governments should cooperate with the ILC. The collaboration and cooperation of governments is an important precondition for the success of the work of codification and progressive development of international law. Governments should supply comments, data and furnish information as often and as fast as they are required.

The ILC should not at any time allowed itself to be influenced by the political, economic, and ideological struggles that occur on the international arena. Instead, the ILC should be guided by the overriding interest of humanity on any issue.

In the work of codification under the aegis of the United Nations, all states must be given the opportunity of participating .

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