

# *The Role of The International Law Commission in The United Nations. Progress or Stagnant?*

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**Abstract**— *The urgent need for international law codification leads us to the establishment of The International Law Commission (ILC). The principle purpose of codification is to tackle obstacles due to the uncertainty of customary and the abstract aspect of the general principle. In daily interaction, the subject of international law requires concrete law which is understood commonly. To fulfill the need, ILC endeavors many occasions result in various kinds of work. The purpose of its work not solely codification but also encourage the progressive development of international law. The tasks they did and trying to do, also facing issues and conditions who not always in line with their purpose. This condition raises a question regarding ILC's role in international law development and at the same time regarding its capability to perform. This work will discuss the above question by elaborate on the work of ILC. Through the elaboration, we will find the strengths and weaknesses of it. Using two approaches: history and teleological. The collected data will be analyzed and described in qualitative. Finally, this paper concludes the alteration of ILC's work aligned to their establishment's purpose.*

**Keywords-** *International Law Commission; progressive international law*

## I. INTRODUCTION

Since its establishment, ILC has worked in seven decades (Divisions of decade are: First decade (1949-1959), Second decade (1960-1969), Third decade (1970-1979), Fourth decade (1980-1989), Fifth decade (1990-1999), Sixth decade (2000-2009), Seventh decade (2010-2019). Each decade has its accomplishment and “homework”. The Commission (ILC and The Commission will use interchangeably) always work under the General Assembly's auspice because all of its work will be submitted to the assembly. As stated in Article 13 United Nations Charter, General Assembly needs to conduct study and issue recommendation to promote international co-operation in various fields such as politics, international law development, economic and others. To achieve such purpose, various commission or council has been established to work in a specific field. For international law development purposes, ILC has been established.

One of the implementations of Article 13, General Assembly adopted a resolution in 1947

concerning on Statute of the International Law Commission,( Hereinafter referred to The Statute) as the foundation for ILC's establishment. Furthermore, the statute explains that the purpose of ILC -and at the same time the main task is related to the development and codification of the law (Article 1 Statute of the International Law Commission).

The word codification should be understood as a sustainable effort to make customary international law more systematic. The Statute regulates the criteria of codification in article 15. The topic has been practiced in an advanced manner by State, even doctrine and precedent has supported it. Meanwhile, the criteria of progressive development of international law applies to two conditions. First, the unregulated issue by international law. Second, the rule has not been practiced by states sufficiently.

Both of the tasks result in the draft article, soon to be convention. This takes us to the issue of the sources of international laws. All means that took will eventually result as sources in conjunction with Article 38 (1) Statute International Court of Justice. In other words, ILC focuses its work on the source of international law.

Undoubtedly, many important international treaties (convention) have been originated from a draft article prepared by The Commission. Spread in many topics from sources of international law to the settlement of disputes (International Law Commission, Texts, Instrument and Final Reports). As commonly understood, in international relations, treaties are always considered as the main sources of international law by the subject. Hard law always gains the binding effect, and the binding effect is essential in the legal aspect. But in the last ten years (seventh decade), the Commission rarely concluded draft convention, they submitted other instruments instead. ILC's output recently tends to be part of soft law. The binding effect cannot be found in soft law instruments. This condition should imply an important changing paradigm regarding effort for the progressive development of international law because the effort still going on and The Commission still working to fulfill their assigned purpose.

## II. PROBLEMS

ILC has always been working on important topics. The Commission prepares many draft articles on international relation, the law of the sea, and put advance work in international criminal law. Regardless of the fluctuation in the procedure, as shown in their report, The Commission still firmly works in a purposive way. Yet, ILC seems to change its form of output into a non-binding legal instrument. All of these conditions bring up two main questions:

1. Does ILC still work according to its objective stated in ILC's Statute?
2. Is the change show us a regressive way in international law development?

## III. RESEARCH METHOD

Everything in life got its purpose, this is part of Bob Marley's song lyric Forever Love Jah. The sentences frequently used as quote. So does the law. It will be useful and more enlighten if we see everything in light of the purpose. In Law, we call it teleological. Different terms are addressed to the word of teleological, some scholars call it interpretation, method, and other terms. But frequently, it has been used interchangeably.[1] In this paper, the latter condition will be used.

The teleological method of interpretation is applied to the judicial and legislative process. Judges use it as the ground of their decision. Their reasoning was built by considering the meaning of the purpose of legal instruments and related the impact for the future. Every legal provision has its goal and that is the reason it has been created/adopted in the first place; this statement shows us the teleological in the legislative process.

In conjunction with the explanation above, the purpose of the ILC's establishment and the impact of international law development will be elaborated. In that elaboration, a brief description regarding the General Assembly and the United Nations becomes inevitable. At the same time, the history aspect will appear. Following the explanation of The Commission's establishment, the work of the International Law Commission will be analyzed as well. The history approach will focus on tracing back their work. First, the description of the prominent international convention originated from ILC's draft article. Followed by a description of The Commission work in the last ten years (2010-2019). Period of ten years determined to capture the status of the recent work. The latter description also underlined the change of its output form. All of the legal instruments will be related to the hard law and soft law concept in terms of international law's source.

All legal instruments involved in the process above will be analyzed in light of its purpose. The

description of The Commission's work will illustrate whether Commission works in line with the objective and achieve the progressive development of international law. Regarding the achievement, we will also put the future condition into consideration. Therefore, history and the teleological approach will intertwine in this paper. Various previous research concerns on ILC also be used to support the main framework of this research.

By all methods has been stated, this paper aims to answer whether ILC still working according to its objective stated in its Statute and finally conclude the process of international law development whether it is in progress path or stagnant. To complete the conclusion, suggestions regarding the advancement of the strengths of ILC and anticipation of the weaknesses will be given. Finally, it can be stated that this paper is a reflective attempt.

## IV. DISCUSSION

### A. Function and Purpose of International Law Commission (ILC)

International peace and security are the common goal of humankind. The same goal we share with the United Nations whose first article declares to maintain the common goal along with developing friendly relations among nations achieves international cooperation and harmonizing the actions of nations. The purposes will be fulfilled by effective means: international law.

Article 13 of the Charter managed further regarding council or commission who will carry out the task in a more specific field. International cooperation in the economic, social, cultural, educational, and health is assigned to the Economic and Social Council. The structure and the power ruled in Chapter IX and Chapter X of the United Nations Charter. To initiate studies in international cooperation in the political field and development of international law, the General Assembly adopt The Statute and established The Commission by resolution number A/RES/174(II) in 1947.

All of ILC's work classified in two main tasks, as stated in the Statute of The International Law Commission, they are the promotion of the progressive development of international law and the codification of international law (Article 1 (1) : The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification (Article 1 (1) : The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification). Each of the tasks will be completed through a sequence of procedures that

start and end under the auspice of The General Assembly. The scope of their task primarily in the public international law field but it does not exclude the private international law field.[2]

The function was carried out by a member of The Commission. Thirty-four members come from various countries and various legal systems. The diversity of the expert background[3] convince us that it can be used as enrichment to the Commission's point of view to accomplish the mission, particularly, the member does not represent the state's interest. They are individually responsible for their expertise.

ILC will prepare a draft article for both tasks. There are different circumstances for codification and progressive development as stated in Article 15 of The Statute. When we read the article, it should bear in mind that The Commission does not carry out merely administrative work. Two functions are not mutually exclusive.[4] Based on the purpose of international law development The Statute should be read progressively. Codification is not limited to transform existing law into written form, but also complete the gap, giving an answer to the inquiry raised during the time, reconciling divergencies in State's practice, and an effort to create universal guidance. When ILC submitted a draft article to the General Assembly, it is along with the conclusion and explanation need in international law development. It is not just transforming what is already known by States into written form. Because customary always need adaptation in implementation.

Before the Commission commence their functions, it conducts a peremptory/preparation survey. It further concluded that the distinction of convenience meaning will unworkable in practice because the stage for codification always involves progressive development. The two functions are always intertwined in the practice field.[5]

To complete their performance, The Commission has full right to conduct a study on draft or proposal submitted to it. As the reflection of cooperation, The Commission may consult with other organizations at the international and national levels, especially those organizations that share the same objective outside the United Nations like they already did with the Asian-African Legal Consultative Committee, the European Commission on Legal Co-operation and the Inter-American Council of Jurists.[6]

Since its establishment, The Commission has performed the task and produce many drafts regarding important topics for international society. Ki-Gab Park, a member of the UN ILC,

explains in his presentation about the criteria for the topic's selection. It should reflect the needs of the States, already practiced in an advanced stage, concrete, and feasible for the tasks.[6] Up to this time, The Commission has issued many drafts, reports, and studies that lay fundamental work in international law development. Based on that progress, we can conclude this part by saying the purpose of The Commission is to encourage international law development.

#### B. The Work of International Law Commission (ILC)

##### 1. Remarkable Achievement on International Convention

Many conventions have been adopted by states that come from The Commission's draft. The remarkable ones concerning three topics. They are treaties, international relations, and the law of the sea. The 1969 Vienna Convention on Law of Treaties (VCLT) concludes what has already been practiced and known for many centuries. It took more than fifteen years to consist of a sequence of procedures. If we refer to Ki-Grab's explanation about the need for States and practiced in the advanced stage, priority on treaties can be understood. Treaties take a leading place as the main sources of international law, and many cases brought to court due to contentious grows from treaty interpretation.[7] States always use treaties and create one in terms of the relation between them. In the modern era, customary become inadequate since it is presented unwritten and open multi interpretation in implementation.

In conjunction with that condition, certainty in the written norm becomes urgent. When VLCT is adopted, it gives certainty and clear rules regarding treaties include how the treaty operates, reserve, and terminate.[8] Since its adoption, VLCT becomes the main reference for state-party, and for those non-party states, VLCT still has a binding effect as the reflection of customary international law. Accordingly, tribunal and court based their decision on VCLT.[9]

In the international relations field, ILC prepares a draft for what we know now as Vienna Convention on Diplomatic Relations 1961, Vienna Convention on Consular Relations 1963, Special Missions, 1969, and Convention 1973 who focus on Protected Persons including diplomatic agents. There are many more draft articles has been submitted to the General Assembly regarding this field.[10] For the diplomatic aspect, the work is very complete including permanent, temporary mission, and protection of the agents. Of course, the most important legal

aspect of the diplomatic field is the issue of privilege and immunities. Based on cooperation spirit, we should also give credit to other entities who help this achievement, they are Harvard and International de Droit.[11]

Other than the Law of Treaties and international relations, priority was also given to the Law of the Sea. However, the latter issue took a substantially longer period to complete, reflecting that the topic's complexity and difference opinion raise during the conference.[12] The recent convention adopted comes from The Commission's draft is The United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004.[13] The conference starts in 1991, which means that the states need 13 years' negotiation on those topics.

This process demonstrate that The Commission performs codification and encourage progressive international law task in a parallel way. As explained before codification cannot be limited merely as transform existing law into written form. Under the sequence procedure to produce a draft article, The Commission reinterprets, reclassified, and give a clear definition (redefine) (The link between maintenance of international peace and security and progressive development of international law. It is linked by and ensuring the application of these rules in international relations by formulating, restating or recasting them in a form which clarifies its content or restores its certainty. See: A/CN.4/245. 1971) in the draft article. When the draft article was submitted to the General Assembly, two purposes have been fulfilled. In the sources of international law sense, The Commission has strengthened the vital role of law in the written form.

## 2. Recent Work of The Commission

This part will elaborate on the work of The Commission in the last ten years from 2010 -2019 for capturing the recent work purpose. Some information from the year before 2010 will be mentioned to support the explanation. Based on the summary of ILC Report on 62nd session – 71st session (Chapter 1) these are topics that has been discussed by The Commission in 2010-2019:

1. Reservations to Treaties
2. Expulsion of aliens
3. Effects of armed conflicts on treaties
4. Protection of persons in the event of disasters

5. The obligation to extradite or prosecute (*aut dedere aut judicare*)
6. Immunity of State officials from foreign criminal jurisdiction
7. Treaties over time
8. The Most Favoured Nation clause
9. Shared natural resources
10. Settlement of dispute clauses
11. Responsibility of international organizations
12. Other decisions and conclusions of the Commission
13. Provisional application of treaties
14. Formation and evidence of customary international law
15. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
16. Customary Law
17. Extradite or prosecute
18. Cooperation with other bodies
19. Organization of the work of the session.
20. Identification of customary international law.
21. Protection of the environment in relation to armed conflicts.
22. Protection of the atmosphere.
23. Crimes against humanity
24. Peremptory norms of general international law (*jus cogens*)
25. Protection of the environment in relation to armed conflicts.
26. Peremptory norms of general international law (*jus cogens*).
27. Succession of States in respect of State responsibility.
28. General principles of law.
29. Sea-level rise in relation to international law

As previously occurred, it took years for negotiate on any topics. Work for the conference to adopt convention is a long procedural way since it also involved compromise among the state's interest and standing point. The long-term work condition also appears in this decade. For example, ILC work on topic most-favored-nation starts form 1967. Topics Immunity of State officials from foreign criminal jurisdiction still in an on-going process, topic treaties overtime has been a convert to Subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Out of the topics mentioned in the table above, the work of The Commission has concluded four draft articles. They are draft articles on the effects of armed conflicts on treaties, 2011, draft articles on the expulsion of aliens, 2014, draft articles on the Protection of persons in the event of disasters, 2016, and draft

articles on prevention and punishment of crimes against humanity, 2019. Many of those topics still in the forthcoming deadlines for comments from governments.[15]

Still in that range of period, The Commission results in other forms as well. [16] They are Guide to Practice on Reservations to Treaties, 2011, Draft conclusions on the identification of customary international law, 2018, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018, Draft conclusions on the identification of customary international law, 2018.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries 2006. Draft Declaration on Rights and Duties of States with commentaries 1949. Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater 1994. Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law 2006.[17] Final report the obligation to extradite or prosecute, 2014. Final Report of the Study Group on the Most-Favoured-Nation clause 2015.

There is a clear shift paradigm in The Commission's work. Other forms of the draft article are more often concluded. Even in the last two decades, no outcome has become the convention.[18] Some of the draft articles remain become draft, yet still, give influence in binding document atmosphere. The most prominent example is the draft articles on responsibility of States for internationally wrongful acts, 2001. Many states adopt it to their national law. States use the article as their basis to construct an argument and their legal opinion whenever they considered wrongful acts happen and demand another country to repair. Scholars discuss it in their writing. The Court uses it as a legal basis for judgment. [19] In fact, many specialized bodies of United Nations rely on ILC's work. Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities. The Conclusions of the Work of the Study Group on the Fragmentation of International Law, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations become an important source for international law's subject as well. In other words, nowadays legal instrument has its binding force not only through the traditional way: conference for the convention. This is a good starting point for international law development.

Accordingly, discussion on hard law and soft law should be involved. The legally binding effect can only be found in hard law. In terms of ILC's work, the hard law manifests in the convention whose process always emphasizes three stages of treaties making. Three stages who always consuming time and sometimes exhausting to reach approval from participants. It could be understood if we remember all the sequence of procedures The Commission should comply with. In addition, the political atmosphere involved in the conference's session to conclude treaties also needs time. Political sphere also the dominant aspect in the General Assembly

On the other hand, the process of soft-law making can be done more efficiently. The Commission plays its role as an expert body who work and do research on specific topics and produce principle, guidance, conclusion, and study report. The result will be used by states, international organizations, and judges. For states, the soft law's path is considered more persuasive and gives more voluntary nuance. States can adopt it in their national law. Once it has been adopted and practiced, soft law finds its binding nature through states' practice. Eventually, Court and tribunal will use the soft law as a legal basis for various cases. International organizations, whose members are states, use it in their internal activity. Scholars cite them in their writing. By using Article 38 (1) of the United Nations Charter, the principle, conclusion, and study report of The Commission meet the characteristics of general principle, judicial decision, and highly qualified publicist. These have a direct impact on the sources of international law.

## V. CONCLUSION

The changing of the International Law Commission on their final output in line with international society's need for quick response in dynamic change. In parallel, international law still progresses in a better way, particularly in international law sources. Instead of relying only on convention procedure and path, the international community starts to shift for the possibility that soft law also useful to enrich the hard law, even provide guidance which hard law cannot provide in time. If the source is progressive than the international law itself is progressive. The Commission leads the process of international law's progressive development in their tendency to produce soft law and spread the influence on international law's subject

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