

Codification of International Law. Work of the ILC

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- International Law Commission and its methods of work
- Results of the codification
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1. Concept of codification and progressive development of IL

- UN Charter (1945), Article 13, par. 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.”
- Statute of the ILC (1947), Art. 1, par. 1:
 - “the ILC shall have for its object the promotion of the progressive development of international law and its codification.”
 - Primarily public international law

1. Concept of codification and progressive development of IL (2)

- Statute of the ILC, Article 15:
 - “codification of IL” = the more precise formulation and systematization of rules of IL in fields where there already has been extensive State practice, precedent and doctrine
 - “progressive development of IL” = 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 sufficiently developed in the practice of States

2. International Law Commission and its methods of work

- ILC = the main codification organ of the UN, is a subsidiary body of the General Assembly
 - Structure of the ILC: today 34 members (originally 15), *ad personam*, elected by the GA for the term of office 5 years
 - Regional groups (5)
 - Sessions: 10-12 weeks per year (2 parts), at the European office of the UN in Geneva (UNOG)
- Organs of the ILC
 - Chairperson, First and Second Vice-Chairs, Chair of the Drafting Committee, General Rapporteur

2. International Law Commission and its methods of work (2)

- Special Rapporteurs
- Drafting Committee
- Working Groups, Study Groups
- Secretariat (Codification Division, OLA, UN)
- Methods of the work:
 - Reports of the Special Rapp., draft articles and commentaries
 - Discussion in plenary ILC and Drafting Cttee
 - Reports of the ILC (annual)
 - Consideration of Reports in the 6th Cttee, GA
 - Adoption of draft articles in 1st and 2nd reading
 - Follow-up (final product) depends on GA (member States)

3. Results of the codification

- Decision of the UN GA, or convocation of a Diplomatic conference
- Final products of the codification:
- Convention, such as...
 - 4 Geneva Conventions on the law of sea, 1958
 - Vienna Conv.on Diplomatic Relations, 1961
 - Vienna Conv.on Consular Relations, 1963
 - Vienna Conv.on the Law of Treaties, 1969
 - Vienna Conv.on the Succession of States in respect of Treaties, 1978

3. Results of the codification (2)

- Convention on Jurisdictional Immunities of States and their Property, 2004
- Convention on the Law of Non-navigational Uses of International Watercourses, 1997
- Resolution of the GA
 - Nationality of natural persons in relation to the succession of States, 2000
- Draft articles in the ILC report (GA took note)
 - Responsibility of States for Internationally Wrongful Acts, 2001
 - Diplomatic protection, 2006

3. Results of the codification (3)

- Responsibility of International Organizations
- Effects of armed conflicts on treaties, 2011
- Other products
 - Draft Code of Crimes against the Peace and Security of Mankind, 1996
 - Model Rules on Arbitral Procedure, 1958
 - Guidelines, ex.: Guide to Practice – Reservations to treaties, 2011
 - Study: Fragmentation of international law: difficulties arising from the diversification and expansion of international law, 2006

4. Recent Codification Programme

- Expulsion of aliens – 2nd reading in 2014
- Protection of persons in the event of disasters – 1st reading in 2014
- Immunity of State officials from foreign criminal jurisdiction
- Provisional application of treaties
- Formation and evidence of customary international law
- The obligation to extradite or prosecute (*aut dedere aut judicare*)
- Treaties over time (Study Group)
- Most-Favoured-Nation clause

4. Recent Codification Programme (2)

- Protection of persons in the event of disasters
- Topic on the ILC programme 2007, final Draft Articles adopted (2nd reading) in 2016
- Special Rapporteur: E. Valencia-Ospina (Colombia)
- Problem of the scope of the project
 - Protection of persons
 - Rights-based v. needs-based approach
- Definition of disaster
 - A calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage
 - Exclusion of situations of armed conflicts (not R2P)
- Duty to cooperate
- A subject not suitable for codification, rather progressive development of IL

4. Recent Codification Programme (3)

- Immunity of State officials from foreign criminal jurisdiction
- Topic in the programme since 2007
 - First Spec.Rapp. Roman Kolodkin (Russia), 3 reports
 - Second Spec.R. C. Escobar Hernández (Spain)
 - Preliminary report, 2012
 - Scope of the topic
 - State official + official acts
 - Immunity *ratione personae* / *ratione materiae*
 - Possible exceptions to immunity (draft Art. 7, 2017)
 - Procedural aspects + guarantees, 6th + 7th reports, 2018-19
 - Next (2021): 8th report, first reading in 2022
 - From 2023, the new SR Claudio Grossman (Chile)

4. Recent Codification Programme (4)

- Provisional application of treaties
 - Topic in the ILC programme since 2012
 - Special Rapp. J.M. Gómez-Robledo (Mexico)
 - Art. 25, Vienna Convention on LT, 1969
 - International obligation x internal position of States regarding provisional application
 - Draft guidelines: 1st reading 2018, 2nd reading 2021
- Formation and evidence of customary IL
 - Topic in the ILC programme 2012, draft conclusions adopted (1st reading) in 2016, final (2nd reading) in 2018
 - Special Rapp. Michael Wood (UK)
 - Systemic rules on identification of custom.IL
 - Analysis of case-law, ICJ and other tribunals

4. Recent Codification Programme (5)

- Treaties over time
 - Topic in the ILC programme since 2008
 - Study Group: 3 reports (2010-2012)
 - Spec. Rapp. Georg Nolte (Germany), 2012
 - Change: “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”
 - Interpretation on interpretation rules in Art. 31/3/a,b of the VCLT
 - Draft conclusions (1st reading) adopted in 2016, 2nd reading 2018
- The Most-Favoured-Nation clause
 - In the past: 1978 draft articles on the MFNC
 - Topic put in the ILC programme in 2008, final report in 2015
 - Study Group (chairman: D. Mc Rae, Canada)
 - MFN provisions in the context of the GATT and WTO
 - MFN in the context of the OECD and UNCTAD
 - Interpretation of MFN clauses by investment tribunals

5. New topics for ILC

- WG on the Long-term programme of work
 - Not all topics are put on the current agenda
 - 5 topics on the Long-term programme (2011)
 - Other L-T topics: 2013, 2014, 2016(2), 2017(2), 2018(2), 2019(2)
 - Difficult process of selection of new topics
- Protection of the atmosphere (since 2013)
 - Spec. Rapporteur: S. Murase (Japan)
 - Draft conclusions, 1st reading 2018, 2nd reading 2021
- Protection of the environment in relation to armed conflicts (since 2013)
 - Spec. Rapporteur: Ms. M. Jacobsson (till 2016), 3 reports
 - New Spec. Rapporteur: Ms. M. Lehto (from 2017, 2 reports)
 - Draft principles (general + 3 temporal phases)
 - Adopted 1st reading 2019, 2nd reading in 2022

5. New topics for ILC (2)

- The new topics:
- Crimes against humanity (SR: S. Murphy)
 - From 2015, 4 reports, draft articles, 1st reading 2017
 - 2019 (2nd reading): draft articles on prevention and punishment of crimes against humanity (15 DA+annex)
 - Recommendation to GA: elaboration of a convention
- Jus Cogens (SR: D. Tladi)
 - From 2016, 4 reports, draft conclusions (23 DC + annex)
 - Identification and consequences of peremptory norms of GIL
 - 2019 (1st reading), 2nd reading in 2022
- Succession of States in respect of State responsibility
 - From 2017 (SR: P. Šturma), 5 reports until 2022
- General principles of law (SR: M. Vázquez-Bermúdez)
 - Draft conclusions, 2019 – first report, 1st reading in 2023
- Sea-level rise in relation to international law (Study Group)
 - From 2019, 5 co-chairs, outcome: issue papers + report

6. New / future topics for ILC (3)

- The newest topics (from 2023):
 - Settlement of disputes to which international organizations are parties (SR: A. Reinisch)
 - Prevention and repression of piracy and armed robbery at sea (SR: Y. Cissé)
 - Subsidiary means for the determination of rules of international law (SR: Ch. Jalloh)
- Future programme:
 - Non-legally binding agreements (SR: M. Forteau)
 - 1st report in 2024

7. Conclusion

- A successful history of the ILC and its codification programme...
- But a recent news about the crisis of codification of internat.law
- States do not want to conclude new conventions based on the ILC draft articles
- A more active Sixth (Legal) Cttee of the GA regarding the ILC works, but Member States are divided...
- Good news in 2024: 2 topics to become conventions
- Most outcomes of the ILC work are non-binding documents
- However, the ILC is not legislator, its collective works rank among teachings/doctrine (= subsidiary means)
- Impact on the selection of new topics by the ILC in the sense that it prefers rather non-controversial topics that leads to draft conclusions, guidelines or even studies, instead of draft articles
- A shift from the progressive development and codification of IL to rather interpretative studies/conclusions?

7. Conclusion

- Questions and comments ?
- Thank you for your attention !
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