International Law Commission of the United Nations: Question of Efficiency

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Abstract: Codification of international law is a hallmark of strengthening of international law system in the twentieth century. Role of conventional rules in the system of its sources is increasing as the codification of various sectors and areas of international law. Codification in doctrine of international law is a form of systematization of the international law norms, principally, of customary law, carried out by their comprehensive treatment, including the exclusion of obsolete, rules that are no longer apply in practice, elimination of internal contradictions and obvious gaps. An awareness of the need for reform the process of codification of international law in order to adapt it to the realities of the XXI century is maturing in the scientific community as a whole. Authors of this article hope that the above considerations will encourage constructive discussion on how to return to the era of the heyday of the United Nations Commission on International law in the field of the codification and progressive development of international law among scientists and practitioners.

Key words: Codification • Progressive development • International Law • Doctrine • Norms • UN International Law Commission • practice • Application

INTRODUCTION

Codification of international law – has become the distinguishing feature of international law taken as a legal system in the twentieth century. Codification of various branches and fields of international law has increased the role of treaty norms in the system of its sources.

In the doctrine of international law by the term "codification" a form of systematization of international legal norms, predominantly customary law norms, carried out through a process of comprehensive refinement, including through exclusion of elements which are outdated and are no longer applicable, to eliminate internal contradictions and obvious gaps is understood. This usually results in the creation of a new systemically interconnected and consolidated legal Act, which is more qualitative and progressive.

Codification process leads to a combination, at a qualitatively high regulatory basis, of the rules of a specific branch of international law or norms of distinct branches and fields governing close, interrelated relations in accordance with the level of juridical mindset achieved in a given historic period and the norms are themselves more precisely formulated. Achievement of such a more coherent, clear and a better quality of the rules of proper conduct in itself has a positive impact on the effectiveness [1] of international law as a whole.

Research Methodology: In the present article authors present summery of conducted research, where research problem was formulated, a good empirical base accumulate, an opportunity to focus on the research process and to draw conclusions that would reflect real situation in the best possible way using: introduction-hypothesis, deduction- predictions, observation- nest of predictions, etc. was given.

RESULTS AND DISCUSSION

The International Law Commission (hereinafter - "ILC" or the "Commission"), which was established more than 65 years ago on the basis of UN GA resolution 174 (II) of 21 November 1947 plays a central role in the codification process [2].

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Commission’s functions include codification and progressive development of international law. According to the Statutes of the international law Commission adopted in 1947, the term "codification" is defined as "a more precise formulation and systematization of the law in those areas where there are rules, established by extensive practice of states, precedents and doctrine" and "progressive development" is defined as "the drafting of projects of Conventions on issues that are not yet governed by international law or on which the law is still not yet developed enough in the practice of States" [3]. One can see from these definitions that the terms "codification" and the "progressive development" are closely related in terms of their legal contents. Moreover, the codification of international law is inevitably accompanied by progressive development.

To date, the ILC has considered (including topics still in the process of consideration) a little more than 50 subject-areas. On the whole, the Commission has made and continues to make a significant contribution to the development of the international law of the sea, the international criminal law, the law of treaties, diplomatic and consular law, State succession under international law, liability under international law. In recent times, the Commission has paid particular attention to the problems of international environmental law [4].

Despite of the above-mentioned positive aspects of the activities of the ILC, today the question arises, on whether the 67-year work of the Commission is enough time allowing to assess its effectiveness? On the one hand, yes, on the other hand - not. It is not enough time because it is difficult in the context of one single paper to assess objectively the Commission’s contribution to the development of international law, as well as the extent of the effectiveness of its work on the choice and the codification of the norms of the chosen subject-areas. This task is complicated in light of a number of unwelcome criticism raised against the activities of the Commission. For example, Professor I.I. Lukashuk believed that the Commission had become a victim of its early success [5]: having started with the drafting of the major global Conventions, codifying the main branches of international law, the Commission proceeded to analyze other more marginal, yet complex topics, the outcome of which may be only doctrinal materials and draft codes, belonging to the so called “soft” law. Professor I.I. Lukashuk also indicate that twice the increase in the number of members of the Commission resulted in the reduction of the overall professional level of the Commission, as compared with the past and this has had a negative impact on the work of the International Law Commission. It is held in mind that at different times the composition of the Commission included 15 members, 21 members (1956), 25 members (1961) and 34 of the members (since 1981).

It is in this context that ought to be assessed the activities of the Commission relating to the creation of the so-called "soft" law, which represents a transitional link between customary law and international treaties. “Soft” law documents in many cases contribute to the codification process; however, it should not be used as a means of avoiding the drafting by the Commission of draft codes of a binding nature. The practice of adoption of declarations or guidelines, which are subsequently not specified in the form of binding international treaties, represents a negative trend in the work of the International Law Commission, which "slows down" the process of codification and progressive development of international law. So, in 2006, the Commission has completed its groundbreaking work on two important themes: "the fragmentation of international law" and "unilateral acts." The result: the UN General Assembly just took note of them and archived in the shelves [6].

A further aspect of the Commission’s work, to which it is worth paying attention, is the fact that the fate of many of the documents (that have taken the ILC so much time to draft) remains a very vague one: States are often not ready to adopt binding international treaties, on the basis of these Draft Articles. For example in the subject area of international responsibility, the cornerstone of international law, ILA has worked on four Draft Articles. However, there were only adopted as annexes to UN GA resolutions [7-10]. The UN GA indicated that it needed more time to think about the final outcome of these documents. This has pre-determined a cautious approach to these drafts on the side of the UN member States.

Furthermore, there is another question of a practical nature: whether it remains appropriate and justifiable, at a time when most of the fields of international law have been codified, the continued need for an International Law Commission which is composed of 34 members and annually meets in Geneva for 12 weeks working over the codification and progressive development of a number of topics, when it is already known that at the end, the Commission goes no further than the adoption of only "Draft Articles". This issue gains even more actuality, if one considers that the Commission nowadays prefers to work on such topics, which do not presuppose the development of international treaties, either because UN Member States would not be ready to adopt international
treaties on the basis of these "Draft Articles", or because
the work is conducted in such subject areas in which even
if States adopt an International treaty, one can hardly
expect them to enter in force. For example, the Convention
on the Law of the non-Navigational Uses of International
Watercourses was adopted 15 years ago (in 1997) but has
not yet entered into force until now.

Problems remain also with regard to the internal
mechanisms and procedures of the work of the
Commission. In particular, doubts are raised about the
effectiveness of the Commission's practice in recent times
of nomination of individual rapporteurs instead of the
previous practice of the establishment of working groups.
The fact is that the composition of the Commission is
updated on a regular basis for a number of reasons and
consequently, newly elected rapporteurs need time to log
in to the substance of the issues. In addition each expert
has his individual approach to the conceptual issues of
the topic. All of this has delayed the process of
developing the various topics in the Commission.

Logically there is a different question: what is the
Commission's efficiency in the twenty-first century?
Any response to this question must take into account
also the doctrinal approach to international law, according
to which the codification is designed not only to
consolidate the existing law, but also to improve
it. Indeed the codification must give the law greater certainty
and make more convenient its practical application.
Unfortunately this cannot be said with regard to the
results of the work of the ILC so far. A number of other
trends have contributed to reduce the efficiency of the
Commission in the codification and progressive
development of international law. For example in the last
while, initiatives and concrete proposals on the
codification of international law come and are being
implemented at the summits of heads of States and other
international conferences (including in the field of human
rights and the protection of the environment); often
proposals for new treaties are received from the member
States themselves. For example, Russia has proposed a
draft Convention on the suppression of acts of nuclear
terrorism, on the basis of which the Special Committee of
the UN General Assembly adopted the relevant
Convention.

In this context one should not ignore the efforts
undertaken in the framework of the International Law
Association, where the work is carried out in research
groups or committees, which include international lawyers
and other experts in specific narrow areas of international
law. In many respects the work carried out by this
Association also contributes to the ILC work.

CONCLUSION

Resolution of the problems specified above in the
codification work of the International Law Commission
would require establishing an Intergovernmental Group of
highly qualified experts to provide suggestions on the
ways of enhancing the effectiveness of the International
Law Commission work in the codification and progressive
development of international law. This intergovernmental
group of experts would foremost answer to the
fundamental question: is the international community in
continued need of body of expert such as the ILC to work
specifically on the issues of the progressive development
and the codification of international law. The answer to
this question should be taken into account a number of
circumstances.

In the first place, today, there is no monopoly of the
Commission in the codification and progressive
development of international law. Indeed the Commission
was created in the historical conditions, when there were
no other international organizations involved in
codification of international law and international law
itself was sufficiently homogenous. Today, there are a
large number of specialized international
intergovernmental organizations and bodies, in which is
the process of codification of international law is carried
out, as well as the process of creating of "soft" law.

Secondly, the twentieth century has already created
a large database of treaties and today there is more a
question of the strengthening of its implementation at
the national level [11]; identification of international
customary law and the development of "soft" law, rather
than on the creation of all new and new international
treaties. For example, in the field of international
humanitarian law there is a large number of conventions,
which, first of all, have implemented differently in different
States, which does not allow us to speak of uniform
practice of its implementation; and, secondly, these
Convention have not yet been joined a large number of
States. In the prevailing conditions it was decided and
done a great work on identifying international customary
law norms in the area of international humanitarian law,
which are binding on all subjects of international law
regardless of ratification of specific Conventions [12].

Another argument in favor of the end of the era of
codification of international law is the fact of the
unprecedented growth of "soft" law in the various
branches of international law.

As a whole in the scientific community matures the
awareness of the need to reform the Commission's
activities in order to adapt it to the realities of the 21
century. The authors of the article hope that the above considerations will serve as an impetus for the constructive discussions among scholars and practitioners on the ways to return to the era of greatness of the Commission in the codification and progressive development of international law.

REFERENCES