

Role of the Sixth Committee and International Law Commission in International Law-Making

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Introduction

The United Nations is looked as a “legitimate institution for creating a global legal order for international cooperation”.¹ Article 13(1)(a) of the United Nations Charter demands the General Assembly to ‘initiate studies’ and ‘make recommendations’ for the progressive development and codification of international law.² To fulfil the purposes of this mandate, the Sixth Committee of the General Assembly (hereinafter referred to as “C6”) deals with various international law issues and is the primary forum for the consideration of legal questions in the General Assembly.³ Additionally, the International Law Commission (hereinafter referred to as “Commission”) was established by the General Assembly in 1947 in furtherance of the duty laid down in the aforementioned article.⁴ The Commission plays a vital role in international law making due to the expertise of its members and empanels subjects suggested by the General Assembly and topics selected on its own accord.⁵ Essentially, these two bodies are delegated the responsibility of the development and codification of international law and this paper will render the relationship between the two in the process.

The first section of the paper will briefly cover the functions of the two bodies and the second section shall further explain the relationship between them. Subsequently, the third section shall analyse and delineate the role played by the C6 and ILC in the consideration of the recent agenda of “Immunity of Social Officials from Foreign Criminal Jurisdiction”.

¹ Shibata A, “International Law-Making Process in the United Nations: Comparative Analysis of UNCED and UNCLOS III” (1993) 24 CWILJ 1

² Charter of the United Nations, art. 13(1)(a), 1 UNTS XVI, 1945

³ Permanent Mission of Switzerland to United Nations, ‘The GA Handbook: A practical guide to United Nations General Assembly’, (2011)

⁴ Statute of the International Law Commission, 1947

⁵ Edwin Hoyt, ‘The Contribution of the International Law Commission’, (1965) 59 ASIL

Roles of the Sixth Committee and the International Law Commission

Sixth Committee of the United Nations General Assembly

The Sixth Committee of the UNGA is also referred to as the Legal Committee of the General Assembly.⁶ It is considered to be the primary committee of the General Assembly that deals with legal matters.⁷ The C6 majorly considers subjects pertaining to public international law that are requested by the General Assembly. However, it is not precluded from taking up matters relating to only public international law but is allowed to explore subjects under private international law like trade and international commercial law.⁸ Moreover, it plays a vital role in formulating internal rules and laws for the United Nations and is the foremost organ for such consideration.⁹ Apart from its policy functions, the C6 carries out certain quasi-legislative functions in two broad senses. First, it is the foremost organ to which internal legal issues are referred for advice. It also makes proposals for amendments of the internal rules of the United Nations.¹⁰ In the second sense, the C6 actively participates in the process of international law-making as it administers submissions and recommendations of subsidiary bodies in light of the mandate prescribed under Article 13 of the Charter. Additionally, it is on the advice of the C6 that major diplomatic conferences are held for negotiating and adopting multilateral treaties.¹¹

International Law Commission

The International Law Commission was formed in 1947 by the UNGA under resolution 174(III) in furtherance of the mandate decreed under Article 13 of the UN Charter.¹² It consists of thirty four members who are premiers in international law with a broad spectrum of expertise and knowledge in the field.¹³ The primary goal of the Commission is envisaged under Article 1 of its Statute, i.e. promotion of the progressive development of international law and its

⁶ Arnold Pronto, ‘The Work of the Sixth Committee of the United Nations General Assembly in 2011’, (2011) 36 South African Ybk Intl L

⁷ UNGA Rules of Procedure of the General Assembly, Rule 98 UN Doc A/520/Rev 15 (1984)

⁸ Arnold Pronto, ‘The Work of the Sixth Committee of the United Nations General Assembly in 2011’, (2011) 36 South African Ybk Intl L

⁹ Permanent Mission of Switzerland to United Nations, ‘The GA Handbook: A practical guide to United Nations General Assembly’, (2011)

¹⁰ Arnold Pronto, ‘The Work of the Sixth Committee of the United Nations General Assembly in 2011’, (2011) 36 South African Ybk Intl L

¹¹ ibid

¹² UNGA Resolution 174 III (17 November 1947)

¹³ Statute of the International Law Commission, art. 2(1), 1947

codification.¹⁴ However, this objective is not precluded to only public international law and can be extended to subjects of private international law.¹⁵ Furthermore, the functions of the Commission are expatiated under Article 15 of its Statute: to prepare drafts conventions on subjects which have not been regulated by international law or been sufficiently developed as state practices; to systematically formulate rules in which there have been enough precedents, doctrines and practice¹⁶ and; consider drafting proposals and multilateral conventions submitted by the member states or bodies of the United Nations.¹⁷

Evidently, the International Law Commission plays an essential role in international law making and in undoubtedly the most important subsidiary body. However, it is not the only professional organ of the United Nations to fulfil this mandate.¹⁸ The responsibility of international law making is also distributed to other subsidiary organs like: Committee on Relations with the Host Country; Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization; United Nations Commission on International Trade Law; United Nations Programme of Assistance in the Teaching, Study, Dissemination, and Wider Appreciation of International Law and; Ad hoc Committees established by the GA in the context of the work of C6, such as the Ad Hoc Committee on measures to eliminate international terrorism. All these committees coordinate regularly with the Commission while the C6 supervises all these activities.¹⁹ This is because the scheme of Article 13 does not confer autonomous power on the General Assembly due to which the aforementioned bodies play a vital role in fulfilling the mandate while the C6 acts as a central point linking them to the member states.²⁰

¹⁴ Statute of the International Law Commission, art. 1, 1947

¹⁵ Statute of the International Law Commission, art. 1(2), 1947

¹⁶ Statute of the International Law Commission, art. 15, 1947

¹⁷ Statute of the International Law Commission, art. 17, 1947

¹⁸ Shabtai Rosenne, 'The Role of International Law Commission', (1970) 64 AJIL

¹⁹ ibid

²⁰ Franklin Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' (2006) 49 German YB Int'l L 107

Brief Background of the Contribution of the ILC

International law has significantly developed since the establishment of the International Law Commission. The subjects and agendas considered under international law have widened due to which the membership of the Commission has increased from fifteen, in 1947 to thirty four.²¹ The matters chosen by the Commission are broadly divided into two categories: (i) Subjects that are referred by the United Nations General Assembly; (ii) Subjects that the Commission has itself decided to work on.²²

It is observed that the matters referred by the General Assembly take up immense time of the Commission, majorly during the earlier sessions, without any constructive conclusion. The subjects are duly worked on by the Commission and debated in their sessions but are not adopted nor implemented by the General Assembly.²³ For example, the General Assembly had asked the Commission to prepare a draft declaration on the ‘Rights and Duties of States’ in their first session.²⁴ After the submission of the draft, the General Assembly merely noted it and sought comments from national governments. Additionally, only a few states had submitted their comments on the declaration which was considered to be insufficient for adoption. Therefore, this draft was not adopted and squandered all the efforts of the Commission.²⁵ Similarly, the Economic and Social Council had requested the Commission to prepare a draft convention on the ‘Elimination or Reduction of Future Statelessness’ in 1961.²⁶ Post the submission, this draft was discussed in an international conference and was open for ratification. However, only five states ratified it leading to a second failure of the efforts of the Commission.²⁷ Lastly, the General Assembly had asked the Commission to formulate a draft on the principles of international law rendered in the Charter and Nuremberg Judgement.²⁸ Additionally, the Commission was asked to prepare a draft code on the offences against humanity²⁹ and consider the establishment of an international judicial organ to prosecute people charged with international law violations³⁰. These topics were discussed extensively by

²¹ Statute of the International Law Commission, art. 2(1), 1947

²² Edwin Hoyt, ‘The Contribution of the International Law Commission’, (1965) 59 ASIL

²³ ibid

²⁴ UNGA Resolution 174 II (1947)

²⁵ Edwin Hoyt, ‘The Contribution of the International Law Commission’, (1965) 59 ASIL

²⁶ UNGA Resolution 319 B III (August 1950)

²⁷ Edwin Hoyt, ‘The Contribution of the International Law Commission’, (1965) 59 ASIL

²⁸ UNGA Resolution 177 II (21 November 1947)

²⁹ UNGA Resolution 36/106 (10 December 1981)

³⁰ UNGA Resolution 260 B (III) (9 December 1948)

the Commission and draft codes were also formulated. The final draft was submitted to the General Assembly leading to no action for a long time and again squandering the efforts of the Commission.³¹

Gradually, the General Assembly recognized this issue and acknowledged that the subjects taken up by the Commission on its own accord were more useful and appropriate for adoption and ratification. Some interventions by the General Assembly to consider certain topics have also been beneficial for the development of international law. For example, the General Assembly had asked the Commission to consider the regime of territorial waters with the segment on high seas which proved to be very beneficial.³² Furthermore, it has encouraged the Commission to take up matters related to subjects that are already under consideration for a wider and focused development of the topic under international law. For example, the General Assembly requested the Commission to consider topics pertaining to intergovernmental and interorganizational relations, special missions and immunities. Therefore, after successive failures in the initial years, the General Assembly suggests topics very cautiously while encouraging the topics that are taken up by the Commission on their own accord. The relationship between the two have been demarcated clearly where the Commission is seen as a body which performs functions like informing, advising and explaining which is widely appreciated.³³

³¹ Edwin Hoyt, ‘The Contribution of the International Law Commission’, (1965) 59 ASIL

³² ibid

³³ Shabtai Rosenne, ‘The Role of International Law Commission’, (1970) 64 AJIL

Role of the C6 and ILC in International Law Making through the Agenda: “Immunity of State Officials from Foreign Criminal Jurisdiction”

The agenda of ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ was recommended by the Working Group of the United Nations in 2006 for the Commission to take up in its long-term programme.³⁴ At the Commission’s fifty-nineth session, the topic was officially incorporated in their programme and Mr. Roman Kolokdin was appointed as the Special Rapporteur who was later replaced by Ms. Hernandez. Subsequently, the Sixth Committee of the General Assembly took note of this decision in December, 2007.³⁵

Till date, sixteen draft articles were proposed through the reports of the Special Rapporteur divided under three parts. Under the first part, the first article dealt with the scope of the immunity that would apply to state officials from criminal jurisdiction of another State. The article also refers to people on diplomatic missions, consular posts, special missions, international organizations and military forces of the state to qualify for immunity. Subsequently, draft article 2 defined state officials and other terms pertaining to the agenda. The second part deals with immunity ‘*ratione personae*’.³⁶ Draft article 3 under this part lists the people who enjoy this immunity namely: Heads of State, Heads of Government and Ministers from Foreign Affairs. Moreover, article 4 defines the scope of immunity of these people. It says that they enjoy immunity only during their term of office from all acts performed under private or official capacity during or prior to their term of office. Further, part 3 deals with immunity ‘*ratione materiae*’.³⁷ Draft article 5 under this part says that all state officials (as defined under article 2) would enjoy immunity from prosecution under foreign criminal jurisdiction.³⁸ Additionally, draft article 6 describes the scope of this immunity. It says that the immunity will be applied only with respect to acts performed in official capacity and will also continue after the terms of the state officials have ended.³⁹ Further, draft article 7 lists crimes under international law (exceptions) in respect to which immunity ‘*ratione materiae*’ would

³⁴ ILC, ‘Report of the International Law Commission on the Work of its 58th Session’ (2006) UN Doc A/61/10

³⁵ UNGA Resolution 62/66 (6th December 2007)

³⁶ ILC, ‘Report of the International Law Commission on the work of its 63rd Session’, (2011) UN Doc A/66/10

³⁷ ibid

³⁸ ibid

³⁹ ILC, ‘Report of the International Law Commission on the work of its 64th Session’, (2012) UN Doc A/67/10

not apply: crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance.⁴⁰

The concluding articles focus more on the procedural aspect of invoking the immunity. Draft article 8 talks about the consideration of immunity by the forum state and renders that the forum state should consider immunity as soon as they are aware about the act of the foreign official.⁴¹ Subsequently, under draft article 9, the courts of the forum state needs to exercise jurisdiction on the state official without any prejudice, in accordance with the prevailing laws and determine immunity according to the provisions of this draft convention. Further, draft article 10 pertains to the invocation of immunity.⁴² It states that a country may invoke immunity of any of its officials from foreign criminal jurisdiction before the other state exercises jurisdiction through writing in accordance to procedures accepted by both states. On the other hand, draft article 11 considers waiver of immunity and renders the procedure for the same. Further, draft articles 12, 13, 14, 15 and 16 talk about the technicalities of the transfer of proceedings, necessary notifications and information exchange, consultations and guaranteeing fair treatment of the official.⁴³

Evolution of the formulation of these Articles (Role played by the ILC and C6)

After the Special Rapporteur was appointed, a preliminary report on the agenda was submitted to the Commission at the sixtieth session in 2008. This report outlined the question of immunity of state officials from foreign criminal jurisdiction and talked about the range and scope of issues pertaining to it.⁴⁴ Subsequently, the Commission debated on the topic to define the scope of immunity, the officials to be covered and nature of acts that fall under the immunity. The second report of the Special Rapporteur was submitted in 2010 at the sixty-second session of the Commission but was only considered in the next session.⁴⁵ The report laid down issues pertaining to the scope of immunity and the third report submitted in the sixty-third session addressed the procedural aspects of immunity grants, i.e. the timing, invocation and waiver.

⁴⁰ ILC, ‘Report of the International Law Commission on the work of its 68th Session’, (2016) UN Doc A/71/10

⁴¹ ILC, ‘Report of the International Law Commission on the work of its 71st Session’, (2019) UN Doc A/74/10

⁴² ILC, ‘Sixth Report of the Special Rapporteur Ms. Hernandez in the 71st session’, (2019) UN Doc A/CN.4/729

⁴³ ILC, ‘Sixth Report of the Special Rapporteur Ms. Hernandez in the 71st session’, (2019) UN Doc A/CN.4/729

⁴⁴ ILC, ‘Preliminary Report of the Special Rapporteur Mr. Roman Kolokdin in the 60th session’, (2008) UN Doc A/CN.4/601

⁴⁵ ILC, ‘Second Report of the Special Rapporteur Mr. Roman Kolokdin in the 63rd session’, (2011) UN Doc A/CN.4/601

Parallelly, the Sixth Committee encouraged the Commission to continue giving priority to this topic.⁴⁶

In 2012, at the sixty-fourth session, the Commission appointed Ms. Concepcion Hernandez as Special Rapporteur who submitted a preliminary report.⁴⁷ Subsequently, in the sixty-fifth session, the second report was submitted to the Commission which presented six draft articles pertaining to the : (i) scope of the topic; (ii) concepts of immunity and jurisdiction; (iii) difference between immunity *ratione personae* and *ratione materiae*; (iv) identification of basic norms under immunity *ratione personae*. At this stage, the Drafting Committee got involved who were required to suggest the Commission on whether the draft articles need to be adopted after which articles 1, 3 and 4 were provisionally adopted.⁴⁸

At the sixty-sixth session in 2014, the Commission was presented with the third report of the Special Rapporteur which analysed normative elements of the immunities, the concept of State Officials and a criteria to determine such officials. As a result, two draft articles were presented covering both these subjects. Subsequently, the draft articles were referred to the Drafting Committee after whose report the Commission provisionally adopted draft articles 2(e) and 5.⁴⁹

In the sixty-seventh session in 2015, the fourth report of the Special Rapporteur was presented which consisted of two draft articles dealing in detail with the scope of immunity *ratione materiae* and defined the ‘acts performed in official capacity’. Subsequently, these articles were referred to the Drafting Committee.⁵⁰ Later, in the sixty eight session, the subjects were debated on and the draft articles were provisionally adopted. Additionally, the fifth report of the Special Rapporteur was also submitted which rendered draft articles that were also provisionally adopted by the Commission.⁵¹ Later, in the seventieth session, the Special

⁴⁶ ILC, ‘Third Report of the Special Rapporteur Mr. Roman Kolokdin in the 63rd session’, (2011) UN Doc A/CN.4/646

⁴⁷ ILC, ‘Preliminary Report of the Special Rapporteur Ms. Hernandez in the 64th session’, (2012) UN Doc A/CN.4/654

⁴⁸ ILC, ‘Second Report of the Special Rapporteur Ms. Hernandez in the 65th session’, (2013) UN Doc A/CN.4/661

⁴⁹ ILC, ‘Report of the International Law Commission on its work in the 66th Session’, (2014) UN Doc A/69/10

⁵⁰ ILC, ‘Fourth Report of the Special Rapporteur Ms. Hernandez in the 67th session’, (2015) UN Doc A/CN.4/686

⁵¹ ILC, ‘Fifth Report of the Special Rapporteur Ms. Hernandez in the 68th session’, (2016) UN Doc A/CN.4/701

Rapporteur presented the sixth report which addressed the procedural part of the immunity. The members held a preliminary debate and decided to complete it in the upcoming session.⁵²

Finally, at the seventy first session in 2019, the Commission was presented with the seventh report of the Special Rapporteur. It summarized the debates of the Commission in the previous session with the details of the debate in the Sixth Committee and completed the procedural aspects of immunity and its relationship with the respective jurisdiction. Additionally, it expatiated upon the relationship of the official and the state, the communication between the two; requisite notifications and information to be shared between the state of the official and the forum state and; the legal aspects between the two states particularly pertaining to the transfer of criminal proceedings. Lastly, the criteria for invocation and waiver of the immunity and the procedural rights of the official (fair treatment) were proposed through three draft articles. In total, seven draft articles were proposed to the Commission through the sixth and seventh report of the Special Rapporteur.⁵³

Currently, the work on this topic is still proceeding and are being parallelly discussed by the Sixth Committee. During these years, the Sixth Committee has played a supervisory role where its delegates put forth their views on the draft articles adopted by the Commission. In all three consecutive sessions of the Sixth Committee from 2011-2013, they have encouraged the Commission to give priority on this topic without any interference. In 2019, after the topic was majorly covered through the draft articles, the Committee sought views from the member states on the draft prepared by the Commission, in conjunction with the Special Rapporteur and the Drafting Committee.

Through this journey of international law-making, it is evident that the Commission plays a paramount role. Once a recommendation is made by a Working Group or any organ of the United Nations, the topic needs to be approved and considered by the members of the International Law Commission. Post approval, the topic is noted by the General Assembly after which the process formally begins. A Special Rapporteur is appointed who submits reports to the Commission which serve as a basis for Commission debates on the agenda. In this particular

⁵² ILC, ‘Sixth Report of the Special Rapporteur Ms. Hernandez in the 70th session’, (2017) UN Doc A/CN.4/722

⁵³ ILC, ‘Seventh Report of the Special Rapporteur Ms. Hernandez in the 71st session’, (2019) UN Doc A/CN.4/729

instance, seven reports were submitted by the Special Rapporteur and the Commission discussed the details of the formulation over thirteen sessions. Parallelly, the Sixth Committee discussed the draft articles amongst its delegates and shared their views with the International Law Commission. Finally, when a draft convention is formulated, the Sixth Committee reviews it and seeks signatories and ratifiers on the convention to establish and implement the agenda.

Conclusion

The process of international law-making is clearly detailed and extensive. It involves numerous players who have distinct roles to play. The subsidiary framework followed in the process is clearly demarcated and is efficiently supervised by the Sixth Committee. The legality of the agenda is developed and discussed by the members of the Commission through their debates. Lastly, the reports of the Special Rapporteur and recommendations of the Drafting Committee also play a vital role in this process due to their exclusive functions. The reports that are submitted by the Special Rapporteur in the sessions of the Commission serve as the sole basis for the members to discuss and formulate the agenda into a convention. Moreover, without the suggestion/approval of the Drafting Committee, the draft articles are not adopted (as noticed in the agenda above).

However, this complicated framework is very time consuming and can take up to twenty years to draft a convention.⁵⁴ For example, the agenda of ‘Reservation to Treaties’ took almost eighteen years to be completely adopted. Additionally, the disinterest of the member states to sign/ratify the proposed draft conventions further impedes the process. Due to this aspect, the national interests of the member states supersede the importance of international law development.

Another noteworthy observation in the international law-making process is that the subjects adopted by the Commission on its own accord prove to be more beneficial for international law development than the ones recommended by the General Assembly. Due to this, all recent topics on the Commission’s programme have been adopted by themselves. For instance, all the agendas listed in the 2020-2029 period of the Commission have been adopted on their own

⁵⁴ Arthur Holcombe, ‘Improvement of International Law-Making Process’, (1961) 37 Notre Dame LR

accord. Therefore, it is pertinent that the independence of the Commission is sustained to ensure progressive development of international law.

Overall, the roles played by the Sixth Committee and the Commission are effective in fulfilling the mandate prescribed under Article 13 of the United Nations Charter. The independence of the Commission with the encouragement of the Sixth Committee would be very prolific in the long run. Therefore, it is imperative that a coherent relationship exist between the two bodies for a progressive future of international law development.