

***Lex Ferenda  
in  
International Law***

**Presented by**

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# Plan of presentation

- Introduction: definition and questions
- *Lex ferenda* in the jurisprudence
- *Lex ferenda* in the ILC documents
- *Lex ferenda* in the practice of States
- Six conclusive points

# Introduction

# Approach to this topic

- Is the term '*lex ferenda*' used not only by scholars, but also by States?
- In the Statute of the ILC, there is no mention on '*lex lata*' and '*lex ferenda*'. But the ILC uses internally these two terms. (see next screens.)
- What is the relationship between "progressive development of international law and its codification" on the one hand, and "*lex lata* and *lex ferenda*" on the other hand?
- I will briefly enumerate relevant cases, the ILC's works and practice of States.
- At the end of this lecture, I will identify six conclusive points that can help to identify more clearly the term '*lex ferenda*'

# The ILC's methods of work (20<sup>th</sup> session, 1968)

"A single consolidated procedure based on its Statute has been evolved by the Commission out of the need to incorporate elements of both *lex lata* and *lex ferenda* in the rules to be formulated."

(Yearbook of the ILC, 1968, vol.II, p.240, para.41)

# The criteria for the selection of the topics

(50<sup>th</sup> session, 1998)

- (a) the topic should reflect the needs of the States in respect of the progressive development and codification of international law;
- (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and
- (c) the topic should be concrete and feasible for progressive development and codification.

The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. (related to *lex ferenda*?)

# Definition

- ***Lex lata*** : the law which is presently in force; the law as it 'is'.
- ***Lex ferenda*** : the law which is being sought to establish; the law to be proposed; the law as it 'ought' to be.
- ***De lege ferenda***: with a view to *lex ferenda*

# Definition (continued)

- *Lex ferenda*
  - ✓ is not a positive law.
  - ✓ is a notion that evolves over time.
  - ✓ reflects a certain value - inherently subjective nature
- *Lex ferenda* is not similar to :
  - ✓ formal sources of international law: namely treaty law, customary international law and general principles of law
  - ✓ gentlemen's agreement
  - ✓ soft law (\*the answer might be different depending on how narrowly or widely "soft law" is defined.)

# Role of *lex ferenda*

- ✓ Improving existing law
  - ✓ Filling possible legal gaps
  - ✓ Possibly replacing an existing law by another desirable law.
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- In domestic legal system, the role of *lex ferenda* is limited, because domestic courts are called upon to decide whether certain standards of behavior have become binding law.

# Examples of *lex ferenda*

- First group: *lex ferenda* became *lex lata*:
  - *Jus cogens* after the 1969 VCLT
  - Exclusive economic zone (EEZ) around 1980's
- Second group: *lex ferenda* remains as it is:
  - Prohibition of the threat or use of nuclear weapons
  - Principle of solidarity
- Responsibility to protect (R2P) still remains as doctrine

*Lex ferenda*  
in the jurisprudence

# Domestic & international jurisprudence

- The term "*lex ferenda*" appears in domestic jurisprudence: for example, South Africa, Spain, UK, USA
- "*Lex ferenda*" can also be found in jurisprudence of international courts and tribunals, for example:
  - ✓ International Court of Justice (ICJ)
  - ✓ International Tribunal for the Law of the Sea (ITLOS)
  - ✓ European Court of Human Rights (ECHR)
  - ✓ Inter-American Court of Human Rights (IACtHR)

# ICJ's three modes of use

- The ICJ uses the term '*lex ferenda*' in three different ways:
- First, for the clarification or limitation of its jurisdiction
  - ex) 1974 *Fisheries jurisdiction cases*
- Secondly, for the verification of legal nature of a specific norm
  - ex) 1969 *North Sea Continental Shelf cases*
  - ex) 1996 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion
- Thirdly, it appears only in separate or dissenting opinions, not in the judgment itself.

# 1<sup>st</sup> Mode: for the clarification/limitation of its jurisdiction

## *Fisheries Jurisdiction cases (1974)*

"In the circumstances, the Court, as a court of law, cannot render judgment, *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down."  
(para.53.)

## 2<sup>nd</sup> Mode: for the verification of legal nature of a specific norm (1)

- ***North Sea Continental Shelf cases (1969)***

"Article 6 of the Geneva Convention on Continental Shelf was proposed by the ILC with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law." (para.62.)

## 2<sup>nd</sup> Mode: for the verification of legal nature of a specific norm (2)

### *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996)*

"The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other." (para.73)

# 3<sup>rd</sup> Mode: it only appears in separate or dissenting opinions, not in the judgment

- For example,
- Separate opinion of Judge Fitzmaurice in *Barcelona Traction, Light and Power Company, Limited*. ICJ Reports 1970.
- Separate opinions of Judge De Castro in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council's Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971; *Western Sahara*, Advisory Opinion, ICJ Reports 1975.
- Dissenting opinion of Judge Oda in *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, ICJ Reports, 1982.

*Lex ferenda*  
in the ILC documents

- The term "*lex ferenda*" appears in the ILC's official documents (Yearbook, Annual Report to UNGA, special rapporteur's report and Memorandum) since its beginning of works:
  - ✓ Arbitral procedure (Yearbook of the ILC, vol. II, 1952)
  - ✓ The law of the Sea (Yearbook of the ILC, vol. II, 1952)
  - ✓ The law of Treaties (Report of the Commission to the UNGA, 1959)
  - ✓ State responsibility, etc.
- However, in this lecture, I will make comments on the recent works done by the ILC.

# Identification of CIL (2<sup>nd</sup> reading draft conclusions, 2018)

## Conclusion 14(teachings)

Para. (3) "...First, writers may aim not merely to record the state of the law as it is (*lex lata*) but also to advocate its development (*lex ferenda*). In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be."

(2<sup>nd</sup> reading draft conclusions (2018), Commentary)

# Identification of CIL

The 3<sup>rd</sup> report on the identification of international law recognized that “writings remained a useful source of information and analysis for the identification of rules of customary international law, although it was important to distinguish between those that were intended to reflect existing law (*lex lata*) and those that were put forward as emerging law (*lex ferenda*).”

(ILC Report, 2015, p.36, para.70)

# Protection of the environment in relation to armed conflicts

"The view was also expressed that some rules under the law of armed conflict relating to the protection of the environment did not seem to reflect customary international law. The Commission would therefore have to consider to what extent the final outcome would contribute to the development of *lex ferenda*."

(ILC Report 2015, p.102, para.144)

*Lex ferenda*

**in the practice of States**  
**(about the recent ILC's works)**

# Immunity of State officials from foreign criminal jurisdiction

- **Draft Article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply)**

Several delegations urged the ILC to indicate to what extent the draft articles constituted an exercise in codification (reflecting *lex lata*) and where they engaged in progressive development of international law (reflecting *lex ferenda*). Even some delegations asserted that the ILC had gone beyond codification (*lex lata*) and progressive development (*lex ferenda*) to propose 'new law'.

(Topical summary of the discussion held in the 6<sup>th</sup> Committee, 2017, A/CN.4/713, paras. 30-31)

# Immunity of State officials from foreign criminal jurisdiction

## Draft Article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply)

A delegation said that, concerning the question of immunity of State officials from foreign criminal jurisdiction, his Government's view was that there was no rule of customary international law (*lex lata*) governing the question as a whole. In approaching the question as *lex ferenda*, a balance had to be struck between the need for stability in international relations and the need to combat impunity for grave crimes that violated international law. (UNGA 6<sup>th</sup> Committee, 2017)

# Identification of CIL

## Draft Conclusion 15 (Persistent objector)

A State's comment: "the doctrine of the persistent objector is one of the most controversial issues in the theory of customary international law. Our government considers that this doctrine has substantial implications for the norm-creating process in international law, therefore requiring further review with great caution."

Another State's comment: "His/her Government affirms the existence of the "persistent objector" principle as stated in draft conclusion 15, paragraph (1) and considers its existence to be *lex lata*."

(UNGA 6<sup>th</sup> Committee, 2017)

# Provisional application of treaties

## Concerning draft guideline 4(form of agreement):

Several delegations asked for further explanations as to when a resolution of an international organization should be considered and agreement on provisional application of a treaty. While some delegations requested the Commission to further clarify when “a declaration by a State or an international organization that is accepted by the other States or international organizations concerned” could serve as a legal basis for provisional application, others urged the Commission to delete the references to provisional application by unilateral declaration in subparagraph (b) and the relevant commentary (paragraph 5) because such references addressed by hypothetical scenario only.

(Topical summary of the discussion held in the 6<sup>th</sup> Committee, 2017, A/CN.4/713, para.10)

# Protection of the atmosphere

## **Draft Guideline 9 (2) (Interrelationship among relevant rules)**

In 2017, during the UNGA 6<sup>th</sup> Committee discussion, some delegates stated regarding paragraph 2 of draft guideline 9, that it constituted “progressive development of international law”, others noted it stated the obvious: in every area of international law, new rules should be developed harmoniously in relation to other rules of international law.

(Topical summary of the discussion held in the 6<sup>th</sup> Committee, 2017, A/CN.4/713, para.25)

# Succession of States in respect of State responsibility

Several delegations underlined the need to carefully study issues of responsibility, by taking into account every specific type of succession. It was suggested that the Commission should make clear whether it is setting out *lex lata* or *lex ferenda*.

(Topical summary of the discussion held in the 6<sup>th</sup> Committee, 2017, A/CN.4/713, para.71)

# **Six conclusive points**

# Conclusive point 1

The term "*lex ferenda*" was invented by scholars, but it is now a practical term which is also used also by States, the ILC and domestic and international courts and tribunals.

However, it should be noted that there are different modes of use of the term "*lex ferenda*" among scholars, domestic and international courts and States.

## Conclusive point 2

*Lex lata* and *lex ferenda* can be understood as kinds of “materials” for the work of the ILC, while the progressive development of international law and its codification are the main “activities” of the ILC.

These two categories are closely related to each other: “codification” is based on *lex lata*, while “progressive development of international law” mainly considers *lex ferenda*, but may also clarify ambiguities of *lex lata*.

## **Conclusive point 2 (continued)**

Concerning the distinction mentioned in Article 15 of the ILC Statute, the ILC admitted in 1956 that the distinction between the two activities can hardly be maintained in preparing the rules on the law of the sea.

However, the ILC has never completely abandoned the distinction between the two activities since its creation up to nowadays.

# Conclusive point 3

In international relations, *lex ferenda* might be invoked by a State or a group of States who share the similar cultural, economic and political backgrounds, common interests or values.

Two additional questions:

- Is "*lex ferenda*" similar to the characteristics of natural law? My personal view is that natural law and *lex ferenda* are not the same because the latter might be based on non-legal or moral considerations.
- Is "*lex ferenda*" a kind of voluntarism? My personal view is "Yes," because *lex ferenda* is based on subjective intention or values of States.

## Conclusive point 4

Many scholars agree that the boundary between *lex lata* and *lex ferenda* is becoming blurred.

However, the evaluation on such phenomenon can be different depending on:

- whether this phenomenon is normal considering the current structure of heterogeneous international society; or
- whether it has only a negative impact on the formation of international law.

## Conclusive point 4 (continued)

For example, French Professor *Prosper Weil* worried that the increasing difficulty of distinguishing between *lex lata* and *lex ferenda* threatens to cause a sort of breakdown in the structure of international law. ("Towards Relative Normativity in International Law", AJIL, vol.77 (1983), pp. 417, 421 and 441.)

However not all international lawyers agree such a pessimistic view.

"Soft law" is partially related to *lex ferenda*, but is not totally identical to *lex ferenda*, because the latter is not a part of current positive legal system, neither creates a legal obligation to States.

## Conclusive point 5

It is difficult to ascertain clearly at what moment *lex ferenda* becomes *lex lata*.

The problem is to determine at what moment a certain rule acquires the status of an existing binding law. Prior to that moment, it forms a part of *lex ferenda* (developing or embryonic law); thereafter it is a part of the *lex lata* (positive law).

## Conclusive point 5 (continued)

We can enumerate several factors that make the distinction between *lex lata* and *lex ferenda* more difficult.

**1<sup>st</sup> Factor)** There are various forms of final outcome of the work done by the ILC, for example draft articles, draft conclusions, draft guidelines, draft principles, etc. We don't know exactly whether a set of guidelines or principles reflect wholly or partially *lex ferenda*.

# Conclusive point 5 (continued)

## 2<sup>nd</sup> Factor)

There are a number of final outcomes of the ILC, initially proposed as a form of international convention, but remaining still as an annex to the General Assembly resolution, that means without legal binding force.

Even more, unfortunately, a number of final outcomes which were adopted as international conventions have not yet entered into force because a lack of sufficient number of ratifications.

# Conclusive point 5 (continued)

## 3<sup>rd</sup> Factor)

The ILC rarely mentions in the relevant commentaries on its 2<sup>nd</sup> reading draft articles, whether a certain provision is based on “progressive development of international law”.

# Conclusive point 5 (continued)

## 4<sup>th</sup> Factor)

As already mentioned, since sometimes States maintain different views on principles and fundamental values of international relations or international law, it is not always easy to reach an agreement over whether a certain rule can be regarded as *lex ferenda* which is ripe for transition to *lex lata*.

## Conclusive point 6

It is mainly up to the international courts and tribunals to resolve the problems of conflicts of norms over time and to draw a sure and clear boundary between *lex lata* and *lex ferenda* in international law.

However, their infrequent involvement leaves a great deal of uncertainty hanging over the separation of the existing law (*lex lata*) and the law that aspires to replace it (*lex ferenda*).

**- The End -**  
**Thank you very much**  
**for your attention !**