

THE USAGE OF *LEX FERENDA* IN INTERNATIONAL LAW

PARK KI-GAB

School of Law, Korea University, Korea

Email: kgpark@korea.ac.kr

Abstract

The purpose of this article is to identify more clearly the term “lex ferenda”, or “the law which is being sought to establish” and its antithesis “lex lata”. The research originates from two questions. First, is the term “lex ferenda” used by scholars only as academic terminology, or is it employed also by States, Courts, and the United Nations International Law Commission (ILC) for practical or diplomatic purposes? Second, what is the relationship between “progressive development of international law and its codification” and “lex lata and lex ferenda”? The article analyzes scholars’ teaching, the practice of States, domestic and international jurisprudence.

Keywords: *lex ferenda, lex lata, the UN International Law Commission, International Court of Justice, codification, progressive development of international law*

Received: 16 May 2026

Revised: 20 July 2026

Accepted: 30 July 2026

In “Notes from Underground”, a novella published in 1864 by the Russian novelist Fyodor Dostoevsky, the underground man lives in a single underground room and writes for 40 years, trying to find human beings’ true consciousness.¹ According to a comment on this convoluted novella, there are two types of human beings’ lives – “a normal life” and “a living life” – and this novella puts an emphasis on the latter. Only those who are conscious of themselves as being human beings can live “a living life”, which is how they can, and at the same time must, exist in our society.² Does the sympathy with this dichotomy allow us to think of “an ideal law if it exists/a law to be proposed”, namely “*Lex ferenda* (or *de lege ferenda*)” that has no existence in reality, yet unlike the “current law/law in place”, namely “positive law (*lex lata* or *de lege lata*)”? “*Lex ferenda*” may be an answer to that question.³ It lexically means ‘law to be proposed’, which is not positive law that is legally binding.⁴ An antonym of *lex ferenda* is *lex lata*, which means

* This article is a developed and substantially updated version of the author’s 2018 UN Audiovisual Library Lecture published in Korean in the *Korean Journal of International Law* (2019), which received the Korean Society of International Law’s Best Article Award that year.

1 Dostoevsky, F. (2004). *Notes from underground* (R. Pevear & L. Volokhonsky, Trans.). Vintage Books. (Original work published 1864). Part 1, Chapter VIII.

2 Seog, Y.-J. (2018, June 2–3). Mapping Dostoevsky (21) St. Petersburg: Rebellion (written in Korean). *JoongAng Ilbo S Magazine*, Vol. 17, p. 17.

3 “*De lege ferenda*” has a lexical meaning of “with a view to *lex ferenda*.”

4 “*Lex ferenda* means ‘law to be proposed.’ The law considered to be normatively preferable when the existing rule of law causes an unclear or undesirable result. *Lex ferenda* is thus a proposed law or proposed interpretation of law rather than a statement of law in force as reflected by positive sources of authority.” Fellmeth, A. X., & Horwitz, M. (2009). *Guide to Latin in international law*. Oxford University Press. p.168. <https://doi.org/10.1093/acref/9780195369380.001.0001>

positive law. In general, *lex lata* means law that is currently in force, *i.e.* positive law: some scholars prefer a rather stronger nuance of “being sought to establish” or “ought to be”. Michel Virally, a French jurist, said in his paper on *lex ferenda* that “the distinction between *lex lata* and *lex ferenda* is considered to be one of the most fundamental rules in today’s jurisprudence and has become a legal thought to which no one raises questions anymore.”⁵

Based on the same logic, *lex ferenda* is distinguished from legally binding treaties, customary international law, and general principles of law, and it is also different from gentlemen’s agreements that have a political binding effect upon the parties thereto. The relationship between *lex ferenda* and soft law will be discussed later, but the answer would depend on how the concept and scope of soft law is defined. Furthermore, the main reason why *lex ferenda* becomes a source of discussion in international law can be found in criticism that some part of contemporary international law does not address the needs of international society.⁶ Michel Virally, who was quoted earlier, pointed out two reasons for the existence of *lex ferenda* in international society. First, from the perspective of a “legal technique”, it is a result of codifying unwritten customary international law for clarification. Second, it is also attributable to a “political reason” as States intentionally continue to adopt recommendations/resolutions of international organizations that are not legally binding but contain therein the same or similar provisions.⁷

Is it possible to invoke *lex ferenda*, which is not positive law, in the real world unconditionally? In a strict interpretation of “law” as in a maxim, “*Ubi societas ibi jus*” (where there is society, there is law), it only means legally binding norms. However, in a broader sense, it also

5 “La distinction entre *lex lata* et *lex ferenda* nous apparaît aujourd’hui comme l’une des règles les plus fondamentales de la science du droit et un acquis de la pensée juridique qui ne saurait être remis en question.” Virally, M. “A propos de la *lex ferenda*”, in Reuter, P.G. (1981). *Mélanges offerts à Paul Reuter (Le droit international: unité et diversité)*. Paris : A. Pedone. p. 519. However, Hugh Thirlway introduces a different view held by, for example, Myres McDougal and Rosalyn Higgins that such a distinction is not important or unnecessary if international law is considered process-oriented not as a system of rules and precepts. Thirlway, H. (2001). Reflections on *lex ferenda*. *Netherlands Yearbook of International Law*, 32, 3–26. pp. 12–13. <https://doi.org/10.1017/S0167676800001148>

6 Kim, S. W. (2013). A review on the constitutionalization of international law. *The Korean Journal of International Law*, 58(4). p. 74; Jenks says, “Law aims to stabilize and protect vested rights, but it needs to have flexibility to accept gradual changes. Otherwise, it cannot protect itself in the rapidly changing environments”. See more: Jenks, C.W. (1958). *The Common Law of Mankind*. Stevens and Sons Limited. pp. 200–201. We should also note an opposing view that emphasizes the stabilizing role of *lex lata*.

7 Michel Virally illustrated this using treaties codifying customary international law: Treaty rules are *lex lata* for parties but may remain *lex ferenda* for non-parties. As customary international law evolves independently, new customary rules may become *lex ferenda* for treaty parties where they diverge from the treaty. Virally, M, *supra* note 5.

includes a range of ethical, political, and social norms such as religious precepts, ethical codes, and political commitments. Here is where a pessimistic view or concerns are raised that expanding the scope of law will have adverse effects of undermining or destroying the uniformity of application of law, and *lex ferenda* in addition to soft law, a grey area in international law, will further diminish the unity of international law. In a paper that contains a critical analysis of pathological phenomena of international law, a French lawyer, Prosper Weil, argued that the distinction between *lex lata* and *lex ferenda* is still important and necessary. He also warned that if such a distinction becomes blurred, the normative nature of international law will face a crisis.⁸

Bearing in mind issues with *lex ferenda* as discussed above, this paper focuses on the following two questions:

First, it is certain that the term “*lex ferenda*” was coined by scholars. Then, is it still an academic term or has it become an international law term in a substantial meaning that States also use? The reason for asking this question is that the same term can have different purposes or contexts/backgrounds when it is used as an academic term compared to when it is used as a diplomatic predicate. Second, what relationship do “progressive development of international law” and “codification”⁹ specified in the Statute of the United Nations International Law Commission (ILC) have with *lex lata* and *lex ferenda*?¹⁰ In other words, are the equations of “progressive development of international law = *lex ferenda*” and “codification = *lex lata*” established? This question was raised out of doubt whether it is logically correct to use *lex ferenda* in place of “progressive development of international law” in statements of States or ILC’s official documents. The author will look into the usage of *lex ferenda* through inductive and empirical methodologies to find out answers to these questions. Usage by scholars will be discussed briefly, and the analysis will mainly focus on related State practice, e.g. diplomatic documents, cases of domestic and international courts/tribunals, and ILC’s official documents. This will be followed by a suggestion of minimum standards or indicators for perception necessary to understand and use of terminology *lex ferenda*.

However, this paper will not address the philosophical question as posed by Prosper Weil on whether it is appropriate to use *lex ferenda*

8 Weil, P. (1983). Towards relative normativity in international law. *American Journal of International Law*, 77(03). 413–442. p. 441. <https://doi.org/10.2307/2201073>

9 Article 13(1)(a) of the Charter of the United Nations.

10 For explanation about Article 15 of the Statute of the ILC, see this paper 2. 3. ILC’s Official Documents.

considering the current legal order of international law in its entirety. This is because, if we start from the premise that our society continues to change and that it will also be inappropriate for positive law to fail to cater to the accompanying demands and conflicts, the discussion will most likely surrender to the subjectivism of the author. The purpose of this paper is to analyse who is using the term *lex ferenda* and how, and in what context, and to suggest its significance in an objective manner.

The usage of *lex ferenda* will be discussed below in four categories: positions of scholars; case law of various international tribunals, including the International Court of Justice (ICJ), and domestic courts; ILC's official documents; and statements by States regarding the results of the work of the ILC.

1. Scholars

In academic literature, *lex ferenda* is being discussed in two aspects. First, it is analyzed what significance *lex ferenda* has in modern international law in general. Second, the term is used in analyses of certain principles or terminologies of international law. Articles that primarily focus on *lex ferenda per se* include "A propos de la *lex ferenda*" by Michel Virally from France,¹¹ and "Reflections on *lex ferenda*" by Hugh Thirlway from the U.K.¹² In addition, in the mid-1980s, a modern meaning of *lex ferenda* was one of the pending issues in international law discussed in round table meetings of great scholars.¹³ Sir Jennings said in his essay, "however difficult it may be to draw the line in a particular matter between the *lege lata* and proposal *de lege ferenda*, and however much the line may be difficult to identify at a given moment precisely because it is shifting, it is vital that the existence of that boundary should always be insisted on in the teaching of international law."¹⁴

Below are some examples of *lex ferenda* being referenced in specific contexts by scholars. In the early 1930s, Politis criticized the principle of unanimity that was commonly used for making decisions at international conferences. However, Sir McNair refuted his argument by comparing the principle of unanimity to *lex lata*, and the decision by majority to *lex ferenda* when he said "but we must not confuse the *lex lata* and *lex*

11 Virally, M., *supra* note 5.

12 Thirlway, H. (2001), *supra* note 5.

13 "To what extent are the traditional categories of *lex lata* and *lex ferenda* still viable?" in Cassese, A., & Weiler, J. H. H. (Eds.). (1988). *Change and stability in international law-making*. Walter de Gruyter. pp. 66-92.

14 Jennings, R. Y. (1984). Teachings and teaching in international law. In J. Makarczyk (Ed.), *Essays in international law in honour of Judge Manfred Lachs*. Martinus Nijhoff Publishers. p. 128. https://doi.org/10.1163/9789004678880_022

ferenda. Today (1930s) international relations are rooted in the principle of unanimity.”¹⁵ *Lex ferenda* is frequently mentioned in each subject of *Encyclopedia of Public International Law* published by Max Planck Institute in Germany. For example, Sir Michael Wood, who wrote for the subject of “Teaching of the Most Highly Qualified Publicists”, said “...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 to be.”¹⁶ Owada from Japan, a former ICJ judge, made it clear in his article on ‘Peaceful Change’ that the function of the ICJ as a judicial institution and other international tribunals is in principle to apply the existing law (*lex lata*) not the law that needs to be (*lex ferenda*).¹⁷ O’Keefe, who reviewed the 1972 European Convention on State Immunity (EC SI), pointed out that the reason for low participation of European countries in the Convention was that some of the most important provisions still had a progressive tendency of *lex ferenda* as of 1972, when the Convention was adopted.¹⁸ In addition, Hofmann discussed the issue of whether, under international law, a person has the right to claim compensation from the responsible State for damage suffered due to a violation of international humanitarian law or international human rights law during the 2nd World War. In doing so, he distinguished between *lex lata* and *lex ferenda*.¹⁹

It is not difficult to find the reference to the term *lex ferenda* in lectures of publicists contained in *Recueil des cours de l’Académie de droit international de La Haye* (RCADI, Collected Courses of the Hague Academy of International Law), especially where key principles or terminologies of international law are discussed. For example, attempts are being made to conduct analyses by distinguishing between the rules of international law that are currently in force and those that are not in the following areas of international law: rights and duties of

15 McNair, A. D. (1934). International legislation. *The Iowa Law Review*, 19(02). p. 733.

16 Wood, M. (2017). Teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute). In *Max Planck encyclopedia of public international law*. Oxford University Press, para.15.

17 Owada, H. (2007). *Peaceful change*. In *Max Planck encyclopedia of public international law*. Oxford University Press. para. 37.

18 O’Keefe, R. (2021). European Convention on State Immunity (1972). In A. Peters & R. Wolfrum (Eds.). *Max Planck encyclopedia of public international law*. Oxford University Press. para.22 <https://doi.org/10.1093/law:epil/9780199231690/law-9780199231690-e1039>

19 Hofmann, R. (2013). *Compensation for personal damages suffered during World War II*. In R. Wolfrum (Ed.), *Max Planck encyclopedia of public international law*. Oxford University Press. <https://doi.org/10.1093/law:epil/9780199231690/law-9780199231690-e274>

States,²⁰ transition processes of rules of international law,²¹ relationship between treaties and customary international law,²² legal nature of *jus cogens*,²³ significance of the work of codification of the ILC,²⁴ relative normativity of international law,²⁵ non-navigational uses of international watercourses,²⁶ relationship between State responsibility and liability for injurious consequences arising out of acts not prohibited by international law,²⁷ and others.

There are also some essays that discuss whether the International Criminal Court (ICC) should only consider *lex lata* to comply with the principle of legality, or it should also take into account *lex ferenda* based on inner morality.²⁸

2. Jurisprudence of International/Domestic Courts

2.1. International Court of Justice (ICJ)

The usage of *lex ferenda* in cases of the ICJ can be categorized into three types. The first type is where the ICJ has expressed a major premise that it would base its decision on *lex lata*, not *lex ferenda*, as a court that interprets and applies law. The second type is where there is an argument

- 20 Gidel, G. (1925). Droits et devoirs des nations: La théorie classique des droits fondamentaux des États. *Recueil des cours de l'Académie de droit international de La Haye*, 10, 537–600. p. 541. <https://referenceworks.brill.com/display/entries/HACO/A9789028604728-04.xml>
- 21 Virally, M. (1983). Panorama du droit international contemporain. Cours général de droit international public (Volume 183). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. p.362. https://doi.org/10.1163/1875-8096_pplrdc_A9789024732487_01
- 22 Dinstein, Y. (2007). The interaction between customary international law and treaties (Volume 322). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. pp. 243–428. https://doi.org/10.1163/1875-8096_pplrdc_A9789004161016_02
- 23 Alexidze, L. (1981). Legal nature of *jus cogens* in contemporary international law (Volume 172). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789024727780_02
- 24 Schachter, O. (1982). International law in theory and practice general course in public international law (Volume 178). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. p. 97. https://doi.org/10.1163/1875-8096_pplrdc_A9789024732319_01
- 25 Thirlway, H. (2002). Concepts, principles, rules and analogies: International and municipal legal reasoning. *Recueil des cours de l'Académie de droit international de La Haye*, 294, 265–405. pp. 387–391. <https://www.hagueacademy.nl/publications/page/26/?term=&author=&cat=collected-courses>
- 26 Cafisch, L. (1989). Règles générales du droit des cours d'eau internationaux (Volume 219). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. pp.178 –226. https://doi.org/10.1163/1875-8096_pplrdc_A9780792321408_01
- 27 Dupuy, P. (1984). Le fait générateur de la responsabilité internationale des États (Volume 188). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789024732913_01
- 28 Arajärvi, N. (2010). Between *lex lata* and *lex ferenda* – Customary international (criminal) law and the principle of legality. *Tilburg Law Review*15(2), 163–182. <https://doi.org/10.1163/22112596-90000011>; Arajärvi, N. (2014). *The Changing Nature of Customary International Law*. Routledge. pp.124–126.

over whether a rule or principle of international law applicable between the contending parties, or to the issue for which an advisory opinion is sought, is customary international law, and the court has mentioned *lex ferenda* as a ground to deny its legally binding effect. The last type is where *lex ferenda* is not mentioned in the judgment but is used either in a separate or dissenting opinion.

2.1.1. *Announcement of the principle that the court is to apply lex lata, not lex ferenda*

The ICJ, in some cases, announces solemnly that the Court excludes *lex ferenda* from subjects to be reviewed as a judicial organization that interprets and applies law. A case in point is “*Fisheries jurisdiction case*(1974).”²⁹ *Lex ferenda* is mentioned both in the ICJ’s judgment on the merits and separate opinions of the judges. In the judgment, the Court first explained that coastal States’ unilateral extension of their fisheries jurisdictions is one of the most significant pending issues, and stated its view that “... various proposals and preparatory documents produced in this framework, ... must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law.”³⁰ It went on to express its stand as a judicial organ that “the Court, as a court of law, cannot render judgment *sub specie legis ferendae*,³¹ or anticipate the law before the legislator has laid it down.”³² This position was reaffirmed 50 years later in Advisory opinion on “*Obligations of States in respect of climate change*(2025)”. The Court cited the same sentence as follows: “... This limit is inherent in the Court’s judicial function because the Court, as a court of law, cannot render judgments *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”³³

Judge Singh, who made a declaration in “*Fisheries jurisdiction case*(1974)”, said as follows, quoting the aforesaid judgment. “The

29 *Fisheries Jurisdiction (UK v. Iceland, Federal Republic of Germany v. Iceland)*, Merits, Judgment, ICJ Reports, 1974. A brief summary of the case is as follows: The 1958 and 1960 Geneva Conferences failed to agree on the breadth of the territorial sea and fishery limits, leaving the issue unresolved until the Third UN Conference on the Law of the Sea. In the early 1970s, Iceland unilaterally extended its exclusive fishery zone to 50 nautical miles, a claim rejected by the UK and Germany as legally non-binding on them.

30 “In this framework” indicates the 3rd UN Conference on the Law of the Sea, ICJ Reports 1974, p. 24, para. 53.

31 “Under pretense of what is to be proposed as law” or “done with intent to improve or otherwise alter the current law”.

32 ICJ Reports 1974, pp. 24-25, para. 53. However, Judge Petréñ quoted the abovementioned sentences and criticized that the majority opinion failed to appropriately understand the rights and obligations of the parties to the dispute under the two Exchanges of Notes between the UK and Iceland concluded in 1961 and 1973, respectively, which served as the governing law in this case. *Dissenting opinion of Judge Petréñ*, ICJ Reports 1974, pp. 157-158.

33 ICJ, *Advisory Opinion on Obligations of States in respect of Climate Change*, 25 July 2025, para. 100.

question of the extent of fisheries jurisdiction which is still one of the unsettled aspects could not, therefore, be settled by the Court since it could not “render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”³⁴ Besides, five judges, including Judge Forster, who submitted a joint separate opinion, considered the proposals and preparatory documents mentioned in the judgment as *de lege ferenda*.³⁵

A separate opinion of Judge Guillaume attached to the Advisory opinion on the “*Legality of the threat or use of nuclear weapons(1996)*”³⁶ is yet another example where *lex ferenda* was mentioned to indicate the duties of the Court. He criticized that it was not appropriate for the Court to consider more of natural law or *lex ferenda* rather than practice and *opinio juris* of States while it was trying to find customary law applicable to this case in different areas, such as international environmental law, the law of reprisals, international humanitarian law, and the law of neutrality.³⁷

2.1.2. Judgment on the legal nature of certain rules of international law

Below are cases where the ICJ specified in its judgments whether rules of international law that are at issue are legally binding customary international law or simply *lex ferenda*. A case in point is “*North Sea Continental Shelf cases(1969)*”.³⁸ The parties to the dispute were divided over whether the median line for opposite coastal States and the equidistance line for adjacent States under Article 6 of the 1958 Geneva Continental Shelf Convention were customary international law. The ICJ ruled that the said provision was of the nature of *lex ferenda*, even though legally binding between the parties *inter se* as it provided for rights and obligations under a treaty, not customary international law.

“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.”³⁹

In this case, Judge Ammoun expressed consent to the majority opinion of the Court in his separate opinion by explaining that Article 1 (definition), Article 2 (exercise of rights of the coastal State) as well

34 Declaration of Judge Nagendra Singh, ICJ Reports 1974, p. 40.

35 “It is true that, as the Court’s Judgment indicates, the proposals and preparatory documents made in the aforesaid context are *de lege ferenda*.” Joint Separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, ICJ Reports 1974, p. 49, para. 12.

36 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Report, 1996.

37 *Separate Opinion of Judge Guillaume*, ICJ Reports 1996, p.67, para. 1.

38 *North Sea Continental Shelf cases (Federal Republic of Germany/ Denmark, Federal Republic of Germany/ Netherlands)*, Judgment, ICJ Reports 1969.

39 ICJ Reports 1969, p. 39, para. 62.

as Article 6, paragraph 2 (application of the principle of equidistance between adjacent States) were the results of the “progressive development of international law”, hence *lex ferenda*.⁴⁰

The Advisory opinion on the “*Legality of the threat or use of nuclear weapons*(1996)” also discusses the legal nature of certain rules of international law. The Court determined that a rule of international law prohibiting the use of nuclear weapons was not yet *lex lata*, and implicitly considered such rule as *lex ferenda*. The relevant part of the said Advisory opinion reads as follows:

“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.”⁴¹

Meanwhile, Judge Schwebel emphasized in his dissenting opinion that “we should not confuse the law we have with the law we need” without necessarily mentioning the term, *lex ferenda*. In this sentence, “the law we need” appears to indicate *lex ferenda*.⁴² In addition, Judge Weeramantry argued in his dissenting opinion that the rule of international law prohibiting the threat or use of nuclear weapons was *lex lata*, not *lex ferenda*, in stark contrast to the majority opinion.⁴³ This will be discussed in further detail later in this paper.

2.1.3. Reference to *lex ferenda* in a separate or dissenting opinion without making reference thereto in the judgment

References to *lex ferenda* in separate and dissenting opinions not in the judgments do not seem to follow a standard pattern. Because Judges submit separate or dissenting opinions for different purposes, e.g. to refute the judgment, which is a majority opinion, or to supplement what is not properly discussed in the judgment or to take a different approach from the majority opinion while agreeing therewith.

First, the usage of *lex ferenda* only in separate opinions, not in the judgment, is as follows. In “*Barcelona Traction case*(1970)”,⁴⁴ Judges Sir Gerald Fitzmaurice and Ammoun submitted separate opinions. They mentioned *lex ferenda* while exploring whether the State of the shareholders of a company of foreign nationality may exercise diplomatic

40 Separate opinion of Judge Ammoun, CJ Reports 1969, p. 124, para. 24.

41 ICJ Reports 1996, p. 255, para. 73.

42 “More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principles. It is accordingly the more important not to confuse the international law we have with the international law we need”. *Dissenting opinion of Judge Schwebel*, ICJ Reports 1996, p. 311.

43 See the sixth point under next paper on Meaning and Roles of *Lex Ferenda* of this paper.

44 *Barcelona Traction, Light and Power Company, Limited*. ICJ Reports 1970.

protection, and, if so, whether such a right is derived from customary international law. Judge Sir Gerald Fitzmaurice reviewed the law of the State of incorporation together with a “genuine link” between the ownership and control, etc. as a criterion to determine the nationality from the perspectives of *lex lata* and *lex ferenda*.⁴⁵ Judge Ammoun looked into whether the State of the shareholders who suffered damage has the right of diplomatic protection and said, “(teachings of international law) do not consist solely of proposals *de lege ferenda*. They often constitute a statement of the rules of positive law.”⁴⁶

Judge De Castro, who served as a Judge at the ICJ in the 1970s, made several references to *lex ferenda* in his separate and dissenting opinions. He expressed his view in his separate opinion in the “*Advisory opinion regarding Namibia (1972)*”⁴⁷ that the resolution adopted by the *Institut de Droit International* regarding the interpretation of Article 22 of the Covenant of the League of Nations on the mandate system was more of *de lege ferenda*, hence undependable.⁴⁸ In his separate opinion in the “*Advisory opinion on Western Sahara (1975)*”,⁴⁹ he discussed the significance of nomadism under international law and argued, “considerations ... from the ethological point of view and even *de lege ferenda*, cannot make up for the lack of unity of the tribes and the non-existence of any entity capable of legal assessment.”⁵⁰

Second, *lex ferenda* was referenced in dissenting opinions, not in the judgment, as follows. Judge De Castro submitted a dissenting opinion in the Advisory opinion on the “*Review of the judgment of the United Nations Administrative Tribunal (1973)*”.⁵¹ He pointed out that Article 11 of the Statute of the United Nations Administrative Tribunal, which provides for the ICJ’s right to review a judgment made by the said Tribunal,

45 Judge Sir Gerald Fitzmaurice mentioned *lex lata* and *lex ferenda* as follows: “...On this matter (author’s comment: the proper test of the rights to claim internationally should be that of where the real weight of interest lies) I associate myself (*de lege ferenda* however) with much that is contained in paragraphs 57-70 of my colleague Judge Jessup’s Opinion”. Separate opinion of Judge Fitzmaurice, ICJ Reports, 1970, p. 83, para. 33; See: *supra* note 29.

46 *Separate opinion of Judge Ammoun*, ICJ Reports 1970, p. 316, para. 23.

47 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.

48 “It has been pointed out that the function of the Institute is only *de lege ferenda*, and that consequently one cannot seek support from this quarter for interpretation of Article 22 of the Covenant”. *Separate Opinion of Judge De Castro*, ICJ Reports 1971, p. 203.

49 *Western Sahara, Advisory Opinion*, ICJ Reports 1975.

50 *Separate Opinion of Judge De Castro*, ICJ Reports 1975, p.165.

51 *Application for Review of Judgment No.158 of the UN Administrative Tribunal, Advisory Opinion*, ICJ Reports 1973.

was being criticized as being a “hybrid procedure” or “pseudo-advisory opinion” from a *de lege ferenda* point of view.⁵²

In the judgment on the “*Nuclear tests case (1974)*”,⁵³ five Judges, including Judge Sir Humphrey Waldock, submitted a joint dissenting opinion regarding the Court’s approach to the case. They argued that the Court should not determine whether the legal principle at issue is *lex lata* or *lex ferenda* nor whether such a principle exists or not in *limine litis*, where the parties to the dispute have yet to sufficiently voice their opinions regarding the legal merits of the case.⁵⁴

Judge Oda submitted a dissenting opinion which was longer than the Judgment in the “*Continental Shelf case (1982)*”,⁵⁵ in which he went over the development history of the concept of the continental shelf and pointed out that scholars had failed to clearly distinguish between *lex lata* and *lex ferenda* regarding such concept, aggravating the confusion.⁵⁶ Furthermore, he added that the ILC had never expressed doubt that the draft of the Convention on the Continental Shelf being worked on in the 1950s was *lex ferenda*.⁵⁷

In the “*Delimitation of the maritime boundaries in the Gulf of Maine area case (1984)*”, Judge Gros submitted a dissenting opinion against the majority opinion of the Chamber, which consisted of five Judges.⁵⁸ He quoted sentences of the judgment on the “*Fisheries jurisdiction case (1974)*”, which was mentioned in this paper, but requested that the Court play different roles. He argued that the Court should now discover an appropriate concept of the continental shelf amid evolution of the law of the sea rather than depending on the past concepts of the continental shelf defined in the 1958 Geneva Convention on the Continental Shelf, “*North Sea continental shelf cases (1969)*,” or “*UK-France continental shelf*

52 Dissenting Opinion of Judge De Castro, ICJ Reports 1973, p.113, para. 4.

53 *Nuclear Tests, Judgment*, ICJ Reports 1974.

54 “It can in no way mean that the Court should determine in *limine litis* the character, as *lex lata* or *lex ferenda*, of an alleged rule of customary law and adjudicate upon its existence or non-existence in preliminary proceedings without having first afforded the parties the opportunity to plead the legal merits of the case.” *Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock*, ICJ Reports 1974, p. 367, para. 112.

55 *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, ICJ Reports, 1982.

56 *Dissident opinion of Judge Oda*, ICJ Reports 1982, p. 161, para. 30.

57 “...the United Nations International Law Commission endeavoured to establish a *lex ferenda* for the monopolistic exploitation by coastal States of offshore submarine resources. ...The Commission never questioned the advisability of endorsing it as a basis of positive *lex ferenda*”. *Dissident opinion of Judge Oda*, ICJ Reports 1982, pp. 178-179, para. 37. It appears that the phrase ‘positive *lex ferenda*’ used by Judge Oda does not mean provisions of an international treaty that reflects customary international law, but treaty provisions that are effective only among the parties.

58 *Delimitation of the Maritime Boundaries in the Gulf of Maine Area (Canada/ USA)*, Judgment, ICJ Reports, 1984.

case(1976).”⁵⁹ Given such argument, it seems that he raised an objection on grounds that the approach taken by the Chamber to lead the majority opinion to an “equitable result” while it was addressing the request from Canada and the U.S. that the continental shelf and exclusive fisheries zone be divided by a single maritime boundary was too subjective.

2.2. *Other international tribunals and domestic courts*

Cases where *lex ferenda* is mentioned, except for those of the ICJ, include cases of the International Tribunal for the Law of the Sea (ITLOS), the European Court of Human Rights, the Inter-American Court of Human Rights (IACtHR), and the Special Tribunal for Lebanon. Domestic courts of the Republic of South Africa, the United Kingdom (UK), and other foreign countries also mention *lex ferenda* in their rulings. Those cases are categorized into two groups: first, where *lex ferenda* is mentioned while the courts review general matters, e.g. their roles and directions of making judgments as judicial organizations as in the case of the ICJ; and second, where *lex ferenda* is mentioned as part of the discussion on the legal nature of rules or principles applicable to a specific case.⁶⁰

2.2.1. *References to lex ferenda in relation to the court’s roles and directions to make judgments*

In the “*Advisory opinion requested by the Sub-regional Fisheries Commission (SRFC)(2015)*,”⁶¹ the ITLOS rejected the argument that the request from the SRFC was related to *lex ferenda*, not *lex lata*, and, therefore, fell outside the scope of the duties or authorities of the Tribunal.⁶² Judge Paik pointed out in his separate opinion that, although the Tribunal should not apply soft law or *lex ferenda*, the majority opinion did not fully consider the strengthened flag State responsibility related to IUU fishing activities, which is one aspect of the development of international law of the sea for the past 20 years.⁶³

Domestic cases of the Republic of South Africa also demonstrate some examples of making reference to *lex ferenda* in relation to an overall

59 *Dissenting opinion of Judge Gros*, ICJ Reports 1984, p. 375, para. 23.

60 The domestic cases analyzed hereafter are an illustrative sample and non-representative.

61 This case deals with rights and obligations of the flag State and the coastal State in cases where a vessel has committed illegal, unreported, and unauthorized (IUU) fishing activities in the Exclusive Economic Zone of third party States. *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission, ITLOS case No.21 (2015)*. Article 138 of the Rules of the ITLOS provides that the Tribunal may give an advisory opinion.

62 *Advisory Opinion*, para. 73–74. ITLOS case No. 21 (2015), para. 73–74.

63 *Separate opinion of Judge Paik*, ITLOS case No. 21 (2015), para. 22. What is interesting is that Hugh Thirlway considers flag State rule as “a rule to which lip-service is paid as a desirable development, without ever being accepted in practice”. Thirlway, H. (2001), *supra* note 5, p. 9.

direction for judgments of the courts.⁶⁴ In this case, the ruling was rendered while the accused person was not given legal assistance from the State, *e.g.* representation by a lawyer, which he could not afford for himself. The superior court reviewed whether there had been any error under procedural law. The court determined that the issue to be reviewed in this case was *de lege lata*, not *de lege ferenda*, even though fairness and justice are such significant elements. This suggests that the court considered fairness and justice as considerations under *lex ferenda*, not an explicit element under positive law.⁶⁵

Meanwhile, there is an example where *lex ferenda* was mentioned in a separate opinion, not in the judgment, of a Judge who participated in the trial. In 2001, Judge A.A. Cançado Trindade of the Inter-American Court of Human Rights (IACtHR) reviewed the development of the international compulsory jurisdiction embodied in treaties in the Inter-American region from the perspective of *lex ferenda* in two similar cases.⁶⁶

2.2.2. *References to lex ferenda in the course of discussing the legal nature of specific rules or principles*

The European Court of Human Rights ruled on a case where an applicant tried to pursue an action against a foreign government, but his application was rejected in accordance with the doctrine of State immunity.⁶⁷ In this case, the issue was whether such rejection violated paragraph 1 of Article 6⁶⁸ of the 1950 European Convention on Human Rights. The Court reviewed the legal nature of the results of the ILC's work that served as a basis for Article 12 (Personal injuries and damage to property) of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.⁶⁹ The Court looked into the codification process of the provision, especially the ILC's commentaries, reactions of States at the 6th Committee of the UN General Assembly, and preparations to adopt the draft articles as an international convention.

64 *South Africa v Rudman and Johnson*, Appeal Judgment, Case 18/90, 17 September 1991.

65 *Ibid.*, para. 24: "When the question concerns the law as it should be ideally (*de lege ferenda*), notion of basic fairness and justice, of common and fundamental ideas of fairness and right, are of course a prime considerations. But where, as now, the enquiry concerns the law as it is (*de lege lata*) this is not so."

66 *Case of Hilaire v Trinidad and Tobago*, Preliminary objections, IACHR Series C no.80, IHRL 1463 (IACHR 2001), 1st September 2001, Inter-American Court of Human Rights; *Case of Constantine and others v Trinidad and Tobago*, Preliminary objections, IACHR Series C no.82, IHRL 1465 (IACHR 2001), 1st September 2001, Inter-American Court of Human Rights. *Separate opinion of Judge A.A. Cançado Trindade*, para. 34.

67 *McElhinney v Ireland*, Judgment, Merits, App No.31253/96, ECHR 2001-XI, 21st November 2001, European Court of Human Rights, Grand Chamber.

68 Para. 1 of Article 6 (Right to a Fair Trial): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

69 Article 12 of the ILC's 'Draft Articles on Jurisdictional Immunities of States and Their Property'.

As a result, it concluded that the provision at issue was not derived from the progressive development of international law or *lex ferenda*, but a result of codification work firmly based on related State practice.⁷⁰

The Special Tribunal for Lebanon was established by UN Security Council Resolution No. 1757 (2007) to address the assassination of Rafik Hariri, then Prime Minister of Lebanon, which occurred on February 14, 2005. The Tribunal mentioned the term *lex ferenda* during its deliberation on whether legal persons may also stand trial before it for contempt of court, *i.e.* whether the Tribunal has *ratione personarum* thereon.⁷¹ The Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon,⁷² which serves as a constitutive charter for the Special Tribunal for Lebanon, provides that “there is hereby established a Special Tribunal for Lebanon to prosecute persons responsible for the attack of 14 February 2005...”⁷³ In this provision, whether “persons” included not only natural persons but also legal persons was at issue. Some judges argued that where a legal person has committed contempt of court, it should be subject to *ratione personarum* of the Tribunal. However, the Special Tribunal confined *ratione personarum* of Article 1 of the above Agreement only to natural persons by ruling that “such argument falls within the purview of *de lege ferenda*, not of *de lege lata*, over which the Tribunal has jurisdiction.”⁷⁴

Among domestic cases in the U.K., there is one where *lex ferenda* was mentioned while the court reviewed the legal nature of certain international rules that the plaintiff presented as an applicable law.⁷⁵ The court considered whether the U.K., as an asylum State, was under an obligation to exercise diplomatic protection for a person it has recognized as a refugee when he/she suffered injury in another country. In this case, the court referred to Article 8, paragraph 2 of the Draft Articles on Diplomatic Protection adopted by the ILC in 2006 on second reading, which mentions the possibility for an asylum State to exercise diplomatic

70 *McElhinney v Ireland, Judgment, Merits, App No.31253/96, ECHR 2001-XI*, 21st November 2001, European Court of Human Rights, Grand Chamber. para. 11.

71 *Amicus Curiae Prosecutor v. New TV SAL and Al Khayat (Kharma Mohamed Tahsin)*, Decision on motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment, Case no STL-14-05/PT/CJ, F0054, ICL 1001 (STL 2014), 24th July 2014, Special Tribunal for Lebanon.

72 Annex to Resolution 1757 of the UN Security Council.

73 Article 1(Establishment of the Special Tribunal), para. 1.

74 “However preferable *de lege ferenda* it might be to have corporations answer to charges of contempt, this preference does not suffice to solidly ground the Tribunal’s jurisdiction *de lege lata*”. Ruling referred to in *supra* note 64, of this paper, para. 68.

75 *R. and Office of the UNHCR (intervening) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Home Affairs, Appeal decision*, 12 October 2006, UK, England and Wales, Court of Appeal, Civil Division.

protection.⁷⁶ However, based on the commentaries to Article 8 of the said Draft Articles as well as the seventh report of the Special Rapporteur, the court concluded that the U.K. government is not required to take appropriate measures for a refugee who has suffered injury in a foreign country as Article 8 is of the nature of *lex ferenda*, not *lex lata*.⁷⁷

2.3. United Nations International Law Commission (ILC)'s official documents

Official documents of the ILC are categorized into at least four types: reports submitted by a Special rapporteur for each subject based on the Statute of the ILC; memoranda prepared by the Secretariat upon request from the ILC; report of the ILC submitted to the UN General Assembly to report the results of the ILC's work on an annual basis; and yearbook of the ILC, which includes records of the plenary meetings, reports of Special rapporteurs, and annual reports. The term *lex ferenda* is mentioned in reports prepared and submitted to the ILC by Special rapporteurs and in statements made by ILC members during plenary meetings.⁷⁸ However, those references are too personal and subjective to be used as objective materials. On the contrary, annual reports submitted to the UN General Assembly are adopted through review during the ILC's plenary meetings. This suggests that those documents are more objective, and that how *lex ferenda* is used therein can be deemed ILC's practice.

2.3.1. Statute of the ILC

The ILC, as an organ under the UN General Assembly, has declared in Article 1 of its Statute that “[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification,”⁷⁹ to achieve “progressive

76 Draft Article 8(Stateless persons and refugees) para. 2: “A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.” *Official Records of the General Assembly, 61st session (2006), Supplement No.10 (A/61/10)*.

77 “Paragrap 118 of the Judgment: Article 8 is, in the argot of international lawyers, *lex ferenda*, that is, proposed law, as opposed to *lex lata* (existing law, law already laid down)”. *Supra* note 64, para. 118. For your reference, in the commentary to Article 8 of the Draft Articles on Diplomatic Protection of the ILC, it is expressly explained that the said Article mirrors progressive development of international law, and a high standard needs to be set to acknowledge an exception to a traditional rule, *de lege ferenda*. See the following: “(2) Draft Article 8, an exercise in progressive development of the law, departs from the traditional rule... (7) ...the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*.” in *Report of the ILC, 2006*, p. 36.

78 Records of plenary sessions show that members of the ILC usually mention *lex ferenda* when they argue over specific and detailed phrases or expressions in the course of revising the text. For example, Lauterpacht observed that a draft on maritime resources combined uncontroversial statements of existing law with “two controversial proposals *de lege ferenda*”. Likewise, Zourek argued that accepted rules on international arbitration had been altered by surrounding them with new *de lege ferenda* elements. Yearbook of the ILC, 1953, Vol. I, p. 138, para. 19; p. 298, para. 45.

79 Article 1, para. 1 of the Statute of the ILC.

development of international law” and “its codification” provided in Article 13, paragraph 1(a) of the Charter of the United Nations. The Statute defines “codification of international law” and “progressive development of international law” in Article 15 as follows:⁸⁰

“In the following articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft convention on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”

In accordance with Article 15 prescribed above, the Statute of the ILC contains two provisions on the procedures for “progressive development of international law” (Articles 16 and 17) and seven provisions on the procedures for “codification of international law” (Articles 18 through 24), hence more weight being put on the latter. There exists a close link between *lex ferenda* and “progressive development of international law” as the former is understood as law that has yet to exist, but would be ideal if it does, while the latter can be achieved regarding “subjects which have not yet been regulated by international law or law that has not yet been sufficiently developed in the practice of States.”⁸¹ Furthermore, it seems that there is also a possibility of “codification” involving *lex ferenda* in “more precise formulation and systematization” of rules of international law.

The Yearbook of the ILC in 1968, which was the 20th anniversary of the establishment of the Commission, represents a significant shift in methodology. The Yearbook explains that, in retrospect, the distinction between “progressive development of international law” and “codification” as provided in the Statute of the ILC has not been kept in the Commission’s practice, and that “a single consolidated procedure” that attempts to formulate the rules by putting together elements of both *lex lata* and *lex ferenda* has been developed. This was reiterated in the ILC Yearbook after a decade.⁸² Taking one step further, the ILC set a more

80 For history and process of change of Article 15 of the Statute of the ILC, see: Crawford, J. (2014). The Progressive development of international law: History, theory and practice”, *Unity and Diversity of International Law: Essays in honour of Professor Pierre-Marie Dupuy*. Brill. pp. 3-22.

81 Examples of related work of the ILC include ‘International liability for injurious consequences arising out of acts not prohibited by international law’ and ‘Protection of the atmosphere.’

82 *Yearbook of the ILC*, 1968, Vol. II, p. 240, para. 41.; *Yearbook of the ILC*, 1977, Vol. II, Part Two, p. 130, para. 112.

precise standard to select topics in its 50th session in 1998, which was the 50th anniversary of its foundation, as follows:

“(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.”⁸³

The last part of the above citation, “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”, appears to be directly related to *lex ferenda*. However, even if the ILC duly takes into account the passage of time and the demands of the international community, finding such topics will not be as easy as it seems (one exceptional example might be the topic of “Sea-level rise in relation to international law’ done by the Study group).⁸⁴ This is because it would be difficult for States to agree on what is a new development and whether there exists urgency that warrants response in this already pluralized international society.

2.3.2. *Annual reports of the ILC*

There is no reference to the term *lex ferenda* anywhere in the Statute of the ILC,⁸⁵ but it is sometimes referred to in the Report of the ILC to the UN General Assembly. The 1952 Report explains that, “with regard to other aspects of the subject (which means Draft of Arbitral Procedure, author’s note) the draft has taken into account both the lessons of experience and the requirements of international justice as a basis for provisions which are *de lege ferenda*.”⁸⁶ The 1953 Report explains two different aspects of the results of the said work in the first part of the commentary to the final drafts as follows:

83 Recommendation of the Working Group on the long-term programme of work, *Report of the ILC*, 1998, Vol. II (2)), p. 110, para. 553.

84 In its 70th session in 2018, the ILC suggested ‘Sea-level rise in relation to international law’ as a topic for the long-term programme of work, and heard views and responses from States concerning this topic during the 73rd session of the 6th Committee of the UN General Assembly in 2018. Although relevant States’ practice is insufficient, the majority of Member States supported this long-term program of work proposed by the ILC. See: *Report of the ILC*, 2018, pp. 326.

85 The Report of the ILC that the Commission submits to the UN General Assembly every fall is incorporated into, and published as part of, the *Yearbook of the ILC*, Volume. II after several years.

86 *Yearbook of the ILC*, 1952, Vol. II, Chapter II (Arbitral procedure), p. 59, para. 16.

“The present draft on arbitral procedure has a dual aspect. While in some matters, which are of a fundamental nature, it does no more than codify the existing law of international arbitration, in other respects its provisions are in the nature of a formulation *de lege ferenda*, of what the Commission considers to be desirable developments in the field of arbitral procedure.”⁸⁷

The attempt to adopt the Draft Convention on the Law of the Sea back in the 1930s during the era of the League of Nations was not successful, but such an effort had still been an important task for the ILC since its earlier days. In the early 1950s, the ILC made some very innovative suggestions regarding fisheries in the high seas, e.g. establishing compulsory jurisdiction to settle international disputes, and fishing on an equal footing by coastal and third States within 100 nautical miles from the baselines. The Commission also explained that “an authoritative statement of the legal position on the subject, both *de lege lata* and *de lege ferenda*, by the General Assembly is indicated as a basis of any future regulations which may be adopted.”⁸⁸

In addition, discussion on *lex ferenda* is also found in commentaries to different draft articles as well as summary records of the plenary sessions in areas where the ILC has worked on, e.g. in relation to entry into force of a treaty,⁸⁹ reservation,⁹⁰ and severability⁹¹ in the area of the law of treaties; immunities while in transit through the territory of a third State in the subject of representatives of States to international organizations;⁹²

87 *Yearbook of the ILC*, 1953, Vol. II, Chapter II (Arbitral procedure), pp. 201-202, para. 15. However, the ILC mentions that there is not always a clear distinction between those two, which are sometimes blended.

88 *Yearbook of the ILC*, 1953, Vol. II, Chapter III (fisheries), p. 219, para. 103. Suggestions made by the ILC were adopted in the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas with significant modifications.

89 In Article 21 (Entry into force) of the Draft Articles on the Law of Treaties submitted to the UN after second reading in 1966, the ILC believed that it would not be appropriate to expressly mention *lex ferenda* in relation to whether there should be a time lag between a State's consent to be bound by a treaty and entry into force thereof. *Yearbook of the ILC*, 1966, Vol. II, p. 210, para. 5.

90 Draft Articles provisionally adopted by the ILC in the early 1960s, Article 19 (Acceptance of and objection to reservations), para. 4: “An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.” Paragraph (21) of the commentary mentions, “Para. 4 proposes, *de lege ferenda*...” *Yearbook of the ILC*, 1962, Vol. II, p. 180, para. 21 of the commentary to Article 19.

91 Regarding Draft Article 46 (Separability of treaty provisions for the purposes of the operation of the present articles) provisionally adopted by the ILC in the early 1960s, the commentary explains, “as the proposals of the Commission concerning the right to claim the partial nullity or termination of a treaty are to some extent *de lege ferenda*.” *Yearbook of the ILC*, 1963, Vol. II, p. 211, para. 1 of the commentary to Article 46.

92 Paragraph (4) of the commentary to Article 43 (Transit through the territory of a third State) of the Draft Articles on Representatives of States to International Organizations on first reading: “Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*.” *Yearbook of the*

consent as a ground for precluding the wrongfulness in the area of State responsibility;⁹³ and obligation to cooperate in the area of the law of non-navigational uses of international watercourses.⁹⁴

Among the works that the ILC is working on recently, the Annual reports sometimes include references to *lex ferenda*. For example, about the topic of the “Identification of customary international law”, on which the Commission’s work was initiated in 2012 and concluded in 2018 when the Draft Conclusions were adopted on second reading at the 70th session and submitted to the General Assembly. In the commentary to the Draft Conclusion 14 (Teachings),⁹⁵ there are references to *lex lata* and *lex ferenda* as follows:

“(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.”⁹⁶

It is worth mentioning that the content cited above was referred again in 2024 in the commentary to the Draft Conclusion 5 (teachings) of the topic on ‘Subsidiary means for the determination of rules of international law’.⁹⁷

The second example is related to the topic of “Protection of environment in relation to armed conflicts”, on which the ILC’s work began in 2013 and finalized in 2022. The Report of the ILC in 2015, which summarizes the discussion at the plenary meetings of the ILC, reveals that there were views within the Commission that some rules related to this topic did not reflect customary international law, and therefore the Commission was required to consider to what extent its

ILC, 1969, Vol. II, p. 218. The same is also mentioned in paragraph (4) of the commentary to Draft Article 78 (Transit through the territory of a third State) on second reading. *Yearbook of the ILC*, 1971, Vol. II, Part One, p. 330.

93 In the commentary regarding consent, the ILC took the position that the consent should always be express, and tacit or presumed consent cannot be considered to negate the illegality from the perspectives of *de lege ferenda* as well. *Report of the ILC*, 1979, pp. 112–113, para. (14) of the commentary to Draft Article 29 (Consent).

94 Regarding Article 10 (General obligation to co-operate) of the Report of the ILC, which summarizes the results of the plenary meetings of the 39th session in 1987 on the law of non-navigational uses of international watercourses, some members argued that obligation *de lege ferenda* can be proposed. *Report of the ILC*, 1987, p. 21, para. 96.

95 Draft Conclusion 14 (Teachings): “Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.”

96 The 2nd reading Draft Conclusion (2018), Commentary, para. 3. This sentence is also found in a paper the Special Rapporteur has contributed to the Encyclopedia of Public International Law; See: *Supra* note 21.

97 Commentary on the draft conclusion 5 (teachings), *Report of the International Law Commission*, 75th session (2024), *General Assembly Official Records*, 79th Session, Supplement No.10, A/79/10, p. 40.

final output would contribute to the development of *lex ferenda*.⁹⁸ The third example is the topic on “Sea-level rise in relation to international law” which the Working group submitted its final report in 2025. Some members of the Commission emphasized the importance between *lex lata* and *lex ferenda* in the area of the protection of persons affected by sea-level rise.⁹⁹

In most cases, the ILC uses the term *lex ferenda* in its Reports in relation to “progressive development of international law.” What is interesting is that *lex ferenda* is never mentioned in areas where positive rules or principles of international law are clearly established. Besides, in a case where a topic for the ILC’s work requires codification as major part of the work, *lex ferenda* is mentioned in relation to formulation of the periphery rather than the substance, or clarification of any vague area in positive international law.

2.3.3. Reports of a Special rapporteur

As already mentioned earlier, whether *lex lata* or *lex ferenda* is referred to in reports submitted by a Special rapporteur to the ILC depends on his/her inclination and perspectives. In this paper, Reports of some Special rapporteurs submitted in the mid-1950s, in the 1990s, and at present, respectively, will be briefly discussed. First, Sir Gerald Fitzmaurice, who was the Special rapporteur for the topic of “Law of treaties”, stated that some parts of the provisions on “accession” and “entry into force” among the draft articles he suggested in his report to the Commission were of the nature of *de lege ferenda*.¹⁰⁰ G. Arangio-Ruiz, Special Rapporteur for ‘Law of State Responsibility,’ argued in his second Report of 1990 that, regarding pecuniary compensation, the Commission needs to look into *de lege ferenda* in relation to the progressive development of international law so as to find out whether legal “gaps” in related issues can be filled.¹⁰¹ In his third report on the *Identification of customary international law* (2015), Special rapporteur Sir Michael Wood noted that scholarly writings remain valuable for identifying customary international law, provided a clear distinction is made between analyses reflecting existing law (*lex lata*) and proposals advocating emerging law (*lex ferenda*).¹⁰²

98 Report of the ILC, 2015, p. 102, para. 144.

99 Report of the International Law Commission, 75th session (2024), General Assembly Official Records, 79th Session, Supplement No. 10, A/79/10, p. 110, para. 408.

100 The Special Rapporteur said the phrase, “after consultation with” in paragraph 2 of Article 34 (Accession), and Article 41, paragraph 3, which provides that, where a treaty lacks an express provision on the date when the treaty should take effect for a State that has ratified it, the treaty should be brought into force on the day of ratification, are *de lege ferenda*. 1st report (Doc. A/CN.4/101), Yearbook of the ILC, 1956, vol.II. Regarding Article 34, see p. 125, para. 80, and for Article 41, p. 127, para. 104.

101 Report of the ILC, 1990, p. 72, para. 345.

102 Report of the ILC, 2015, p. 36, para. 70.

2.3.4. Official statements/Documents of States

It is not difficult to find official statements by States in which *lex ferenda* is mentioned regarding the results of the ILC's work.¹⁰³ Examples include opinions of each State about the draft articles on the law of the sea prepared by the ILC in the 1950s, such as statements by the Swedish¹⁰⁴ and Israeli¹⁰⁵ governments related to the determination of baselines, statements by the Israeli government concerning methods to resolve disputes over the delimitation of boundaries of continental shelf,¹⁰⁶ statements by the Swedish government about the legal nature of rights of coastal States to continental shelf,¹⁰⁷ and statements by the same government about the legal nature of the exercise of rights by coastal States within a contiguous zone.¹⁰⁸ In the 1960s, among the comments from States on the draft articles on the law of treaties was one from the Israeli government. It pointed out that certain wording, such as "promptly" and "as soon as possible," was *de lege ferenda* and did not exist under existing customary international law.¹⁰⁹ The government of Japan was of the view that rules on reservation in general to multilateral treaties were *de lege ferenda*, which should be excluded as they might generate an impression that making reservations are encouraged.¹¹⁰ In addition, regarding the draft articles on special missions, the Japanese government

103 Some scholars consider that, in determining whether results of the ILC's work are the codification of the existing customary international law or progressive development of international law, practice of States is more important than such results *per se*. James Crawford. See: *Supra* note 80, p. 19.

104 The government of Sweden argued that, when drawing baselines, only geographical considerations should be taken into account, not economic factors, which cannot be acknowledged from the perspectives of *lex ferenda*. *Yearbook of the ILC*, 1956, Vol. II, p. 72.

105 The government of Israel said that the judgment of the ICJ in the 1951 *Anglo-Norwegian Fisheries Case*, which was new at that time, needs to be carefully examined to decide what impact it would have on *lex lata* and *lex ferenda* suggested by the ILC as methods to establish baselines. *Yearbook of the ILC*, 1953, Vol. II, p. 258.

106 The Israeli government expressed its views, by using the term, "*lex ferenda*," that it could not accept the method of resolve disputes over delimiting the continental shelf suggested by the ILC. *Yearbook of the ILC*, 1953, Vol. II, p. 259.

107 The Swedish government presented an opinion that the rights given to coastal States as mentioned in the draft articles on the continental shelf prepared by the ILC were *de lege ferenda*, and therefore it would be appropriate for such rights to be incorporated into an international convention. *Yearbook of the ILC*, 1953, Vol. II, p. 263.

108 The Swedish government considered rights – customs, fiscal or sanitary – a coastal State may exercise within a contiguous zone as proposed by the ILC to be *de lege ferenda*, not the existing law, just as have been keenly debated, especially at The Hague Conference of 1930, when a number of States laid claim to contiguous zones of this kind. It concluded that "These claims were no doubt made *de lege ferenda* rather than by virtue of the existing law." *Yearbook of the ILC*, 1953, Vol. II, p. 264.

109 "It is believed desirable to clarify *de lege ferenda* that is a residual rule phrase such as "promptly", "as soon as possible", etc, appearing in paragraphs 3 (d), 6 and 7 (a) of Article 29, as well as in paragraph 3 of article 15..." *Yearbook of the ILC*, 1966, Vol. II, p.295, para. 17.

110 *Yearbook of the ILC*, 1966, Vol. II, p. 303, para. 1-3.

expressed its consent to the proposal to grant diplomatic privileges and immunities also to special missions under certain conditions from the perspectives of *de lege ferenda*.¹¹¹ The Swedish government considered Article 15 of the Draft Articles on succession of States in respect of treaties adopted on first reading, which allowed a newly independent State to formulate new reservations to a multilateral treaty, to be a proposal *de lege ferenda*.¹¹²

Below are some examples of statements by States which include references to *lex ferenda* in relation to recent results of the ILC's work. One of those topics on which the most heated debate is taking place is the topic on the "Immunity of State officials from foreign criminal jurisdiction." The ILC started working on this topic back in 2007 and it is still under discussion. In 2017, the Commission adopted through votes at a plenary meeting the controversial Draft Article 7, which recognized exceptions to immunity *ratione materiae* from foreign criminal jurisdiction enjoyed by State officials.¹¹³ At the 6th Committee of the UN General Assembly, which is a forum where the results of the ILC's work is discussed, some delegations, including from Mexico, raised a question whether the said Article is part of the codification reflecting *lex lata*, or represents progressive development of international law reflecting *lex ferenda*. Another delegation criticized the same article, arguing that the ILC was attempting to make new law outside its mandate.¹¹⁴

More examples show that delegations from States presented different opinions regarding the legal nature of certain results of the ILC's work with express references to *lex lata* or *lex ferenda*. Among them is the Draft Conclusion 15 (Persistent objector) of the topic of "Identification of customary international law," on which the work was completed in 2018.¹¹⁵ The government of South Korea submitted, through the

111 *Yearbook of the ILC*, 1967, Vol. II, p. 387, para. 7.

112 "Paragraph 2 must therefore be considered as a proposal *de lege ferenda*. As such it is not appropriate, because in general reservations are not desirable and practical reasons why additional ones should be allowed in this case are not apparent." Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its 24th session, *Yearbook of the ILC*, 1974, Vol. II, Part One, p. 326.

113 Draft Article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply). As a result of the voting at the plenary meeting of the ILC, it was adopted with 21 votes in favour, 8 votes against, and 1 abstention by those present and voting out of a total of 34 members. See: Park, K.-G. (2018). Current status of the work of the UN International Law Commission of the 69th session in 2017 and the results of discussion at the 6th Committee of the UN General Assembly of the 72nd session [In Korean]. *Korea International Law Review*, 49, p. 219 and below.

114 *Topical summary of the discussion held in the 6th Committee*, 2017, A/CN.4/714, para. 30-31.

115 The Draft Conclusion 15 (Persistent objector): "1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. 2. The objection

Secretary-General of the UN, comments on the draft conclusions on “Identification of customary international law” adopted on first reading in 2016, where it stated that “the doctrine of the persistent objector is one of the most controversial issues in the theory of customary international law.” On the other hand, the government of Singapore was of the view that the same Draft Conclusion reflected *lex lata*.¹¹⁶ Furthermore, when the ILC initiated its work on “Succession of States in respect of State responsibility” in 2017, some States pointed out in their comments thereon that it was important to make clear whether the ILC was working on *lex lata* or *lex ferenda*.¹¹⁷

There are some statements where States do not make express references to *lex ferenda*, but the context shows that they are inferring it. The Draft Guideline 4 on the “Provisional application of treaties”, on which the work commenced in 2012 and finalized in 2021, sets out forms of agreement to provisionally apply a treaty.¹¹⁸ As one of such forms of agreement to provisionally apply a treaty, the ILC is proposing “a declaration by a State or an international organization that is accepted by the other States or international organizations concerned,” with regard to which no practice by a State or an international organization exists yet. Some States criticized such a proposal, saying that it was a “hypothetical scenario only.”¹¹⁹

The topic of “Protection of the atmosphere,” on which the ILC initiated its work in 2013 and finalized in 2021, also had debates among States about the legal nature of the results of the work provisionally adopted by the ILC with some modifications to proposals from the Special rapporteur. For example, the ILC adopted the Draft Guideline

must be clearly expressed, made known to other States, and maintained persistently. 3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).”

116 The first-reading Draft Conclusion 15 received contrasting State responses. Korea viewed the persistent objector doctrine as “one of the most controversial issues” and requiring cautious further review due to its implications for customary international law. By contrast, Singapore expressly affirmed the doctrine, considering “its existence to be *lex lata*”. *Identification of customary international law: Comments and observations received from Governments*, A/CN.4/716 (2018), p. 59.

117 United Nations, General Assembly. (2020). *Topical summary of the discussion held in the 6th Committee*. A/CN.4/714 (2017); *Supra* note 114, para. 71.

118 Draft Guideline 4 (Form of agreement) adopted in the 2nd reading in 2012 is as follow: “In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through: (a) a separate treaty; or (b) any other means or arrangements, including: (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned; (ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned.”

119 *Topical summary of the discussion held in the 6th Committee*, A/CN.4/714 (2017), para. 10.

9 (Interrelationship among relevant rules) at the 69th session in 2017.¹²⁰ Paragraph 2 thereof is as follows:

“2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.”¹²¹

States were sharply divided over the above draft guideline. Some saw it as “progressive development of international law”, *i.e. lex ferenda*, while others argued that it is only natural in every area of international law for any new rule to be developed in harmony with the existing rules, *hence, lex lata*.¹²²

As discussed above, it seems that States use the term *lex ferenda*, especially when they raise objections or express their position to make reservations, to the results of the ILC’s work since they are not consistent with the existing rules or principles of international law that those States support.¹²³ Furthermore, statements of States sometimes serve as an important indicator or evidence to determine the legal nature of a draft prepared by the ILC at international tribunals, especially, the ICJ. However, we cannot guarantee that judgments made by States regarding the legal nature of certain articles are all correct or do not change over time. For example, there are some provisions of the draft articles of the UN Convention on the Law of the Sea that were argued to be *lex ferenda* back in the 1950s but have become *lex lata* these days, which is recognized as customary international law. Therefore, when States officially mention *lex ferenda*, it could be something very political and subjective based on their own legal policy direction or argument.

Conclusion

So far, we have looked at how the term, *lex ferenda*, was used in opinions of scholars, judgments of international court/tribunals and domestic rulings of States, official documents of the ILC, and practice of States.

This article examines by whom and how the term *lex ferenda* has been used in international law. We found that this term is employed not only in the academic papers written by scholars, but also in the judgments of international courts and tribunals, and domestic courts,

120 Regarding the Draft Guideline 9, Park, K.-G. (2018), *supra* note 112, p. 212 and below.

121 This para. 2 of Draft Guideline 9 was adopted without any change in 2021.

122 United Nations, General Assembly. (2020). *Topical summary of the discussion held in the 6th Committee*. A/CN.4/714 (2017). para. 25.

123 In a case where multiple States express their position that certain draft articles prepared with the purpose of concluding an international treaty are *lex ferenda*, the ILC seriously consider changing or deleting those parts of the draft at issue.

official documents of the UN ILC, and official statements of States. Its use by such diverse actors indicates that it is not merely an academic term, but that it carries practical, even political, significance. We also found that the different actors who use the term *lex ferenda* attribute slightly different meanings to it. Scholars employ it in an academic context, either to distinguish it from positive law (*lex lata*), or to propose a desirable law for the development of international law. In contrast, international and domestic courts use *lex ferenda* either to clarify a category of law applicable in a particular case, or to justify the refusal to recognize the binding character of a contested rule of international law between States. States also refer to *lex ferenda* when they assess the results of the ILC's work within the 6th Committee of the United Nations; their main motivation is to indicate their intention to oppose the ILC's final works that differ from the rules of international law in force and recognized by their own States, or to reserve their position in this regard. Based on this analysis, the author will explain the role of *lex ferenda* in international law in another article to be published in this journal this autumn. In that article, the author will also address the relationship between "the progressive development of international law and its codification" and "*lex lata* and *lex ferenda*". ●

References

- [1] Alexidze, L. (1981). Legal nature of *jus cogens* in contemporary international law (Volume 172). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789024727780_02
- [2] Arajärvi, N. (2010). Between *lex lata* and *lex ferenda* – Customary international (criminal) law and the principle of legality. *Tilburg Law Review*, 15(2), 163–182. <https://doi.org/10.1163/22112596-90000011>
- [3] Arajärvi, N. (2014). *The changing nature of customary international law*. Routledge.
- [4] Caflisch, L. (1989). Règles générales du droit des cours d'eau internationaux (Volume 219). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9780792321408_01
- [5] Cassese, A., & Weiler, J. H. H. (Eds.). (1988). *Change and stability in international law-making*. Walter de Gruyter.
- [6] Crawford, J. (2014). The progressive development of international law: History, theory and practice. In *Unity and Diversity of International Law: Essays in honour of Professor Pierre-Marie Dupuy*. Brill.

- [7] Dinstein, Y. (2007). The interaction between customary international law and treaties (Volume 322). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789004161016_02
- [8] Dostoevsky, F. (2004). *Notes from underground* (R. Pevear & L. Volokhonsky, Trans.). Vintage Books. (Original work published 1864)
- [9] Dupuy, P. (1984). Le fait générateur de la responsabilité internationale des États (Volume 188). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789024732913_01
- [10] Fellmeth, A. X., & Horwitz, M. (2009). *Guide to Latin in international law*. Oxford University Press. <https://doi.org/10.1093/acref/9780195369380.001.0001>
- [11] Gidel, G. (1925). Droits et devoirs des nations: La théorie classique des droits fondamentaux des États. *Recueil des cours de l'Académie de droit international de La Haye*, 10, 537–600. <https://referenceworks.brill.com/display/entries/HACO/A9789028604728-04.xml>
- [12] Hofmann, R. (2013). Compensation for personal damages suffered during World War II. In R. Wolfrum (Ed.), *Max Planck encyclopedia of public international law*. Oxford University Press. <https://doi.org/10.1093/law:epil/9780199231690/law-9780199231690-e274>
- [13] Jenks, C.W. (1958). *The Common Law of Mankind*. Stevens and Sons Limited
- [14] Jennings, R. Y. (1984). Teachings and teaching in international law. In J. Makarczyk (Ed.), *Essays in international law in honour of Judge Manfred Lachs*. Martinus Nijhoff Publishers. https://doi.org/10.1163/9789004678880_022
- [15] Kim, M.-S. (2018). *Sea level rise and international law*. Samwoo Publishing.
- [16] Kim, S. W. (2013). A review on the constitutionalization of international law. *The Korean Journal of International Law*, 58(4)
- [17] McNair, A. D. (1934). International legislation. *The Iowa Law Review*, 19(02)
- [18] O'Keefe, R. (2021). European Convention on State Immunity (1972). In A. Peters & R. Wolfrum (Eds.), *Max Planck encyclopedia of public international law*. Oxford University Press. <https://doi.org/10.1093/law:epil/9780199231690/law-9780199231690-e1039>
- [19] Owada, H. (2007). Peaceful change. In *Max Planck encyclopedia of public international law*. Oxford University Press
- [20] Park, K.-G. (2018). Current status of the work of the UN International Law Commission of the 69th session in 2017 and the results of discussion at the 6th Committee of the UN General Assembly of the 72nd session [In Korean]. *Korea International Law Review*, 49
- [21] Park, K.-G. (2019). [Article title based on the author's UN Audiovisual Library Lecture (2018)]. *Korean Journal of International Law*
- [22] Schachter, O. (1982). International law in theory and practice general course in public international law (Volume 178). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrdc_A9789024732319_01

- [23] Seog, Y.-J. (2018, June 2–3). Mapping Dostoevsky (21) St. Petersburg: Rebellion (written in Korean). *JoongAng Ilbo S Magazine*, 17
- [24] Thirlway, H. (2001). Reflections on *lex ferenda*. *Netherlands Yearbook of International Law*, 32, 3–26. doi:10.1017/S0167676800001148
- [25] Thirlway, H. (2002). Concepts, principles, rules and analogies: International and municipal legal reasoning. *Recueil des cours de l'Académie de droit international de La Haye*, 294, 265–405. <https://www.hagueacademy.nl/publications/page/26/?term=&author=&cat=collected-courses>
- [26] United Nations, General Assembly. (2017). *Topical summary of the discussion held in the 6th Committee* (A/CN.4/714)
- [27] United Nations, General Assembly. (2018). *Identification of customary international law: Comments and observations received from Governments* (A/CN.4/716)
- [28] United Nations, General Assembly. (2020). *Topical summary of the discussion held in the 6th Committee*.
- [29] Virally, M. (1981). A propos de la *lex ferenda*. In P. G. Reuter (Ed.), *Mélanges offerts à Paul Reuteur (Le droit international: unité et diversité)*. A. Pedone
- [30] Virally, M. (1983). Panorama du droit international contemporain. Cours général de droit international public (Volume 183). In *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne*. Brill | Nijhoff. https://doi.org/10.1163/1875-8096_pplrhc_A9789024732487_01
- [31] Weil, P. (1983). Towards relative normativity in international law. *American Journal of International Law*, 77(03), 413–442. <https://doi.org/10.2307/2201073>
- [32] Wood, M. (2017). Teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute). In *Max Planck encyclopedia of public international law*. Oxford University Press

Author Contribution

The author contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

Conflict of Interest: The author declare no competing interests.

Disclaimer: All claims expressed in this article are solely those of the author and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers. Any product that may be evaluated in this article or claim that may be made by its manufacturer is not guaranteed or endorsed by the publisher.



Copyright: © 2026 by the authors. Licensee VJLS, Ho Chi Minh City University of Law, Vietnam. This article is an open-access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<https://creativecommons.org/licenses/by/4.0/>).