



**PERMANENT MISSION OF JAMAICA
TO THE UNITED NATIONS**

STATEMENT BY

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ON

**AGENDA ITEM 78:
REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-SIXTH SESSION**

**SIXTH COMMITTEE
UNITED NATIONS GENERAL ASSEMBLY**

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General

Jamaica continues to attach considerable importance to the work of the International Law Commission (the ILC), bearing in mind the special role played by this body in the progressive development and codification of International Law. In carrying out its mandate, the ILC is central to the promotion of the rule of law in international affairs and, together with other institutional agents such as the International Court of Justice, provides authoritative guidance on the meaning and significance of diverse State actions in a multiplicity of areas. Given the significance which Jamaica attaches to the work of the ILC, we are heartened that the Annual Report of the Commission reflects forward movement on a number of topics. We reiterate our support for the Commission, its members and the members of the United Nations Secretariat who contribute significantly to the work of the Commission.

With reference to its broad mandate, Jamaica notes a tendency on the part of the Commission to not identify rules and approaches that may represent progressive development as distinct from codification. To some extent, this tendency is justifiable, for many rules and approaches identified by the Commission may incorporate both elements of progressive development and codification. Similarly, some rules and approaches may in fact reflect codification in the perspective of one State, but progressive development in the perspective of another. In the circumstances, the work of the Commission in putting forward rules for consideration by States would be unduly hindered if the Commission were to attempt to classify each and every rule or approach. That said, however, Jamaica takes this opportunity to encourage the Commission, and its Special Rapporteurs on particular topics, to identify items of progressive development as distinct from codification in cases where this is appropriate. This will, we believe, help States to form a clearer picture of the balance between the *lex ferenda* and the *lex lata* in any particular scheme of rules recommended by the Commission. Naturally, this cannot be done with respect to all rules and approaches, but we would hope that the very helpful commentaries normally presented on individual topics would be mindful of the value of identifying the current status of proposed rules.

Programme of Work

During the course of the year, the Commission has addressed, in one form or another, at least ten topics of International Law. Jamaica commends the Commission for adopting, on second reading, draft articles on the Expulsion of Aliens, and on first reading draft articles on Protection of Persons in the Event of Disasters. We also note that progress has been made with respect to topics concerning the following:

- Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties;
- Protection of the Atmosphere;
- Immunity of State Officials from Foreign Criminal Jurisdiction;
- Identification of Customary International Law;
- Protection of the Environment in relation to armed conflicts;

- Provisional application of treaties;
- The Most-Favoured-Nation Clause.

The Commission has also decided to place the topic of Crimes against Humanity in its programme of work, and to include the topic, *Jus Cogens*, in the long term programme.

These topics represent a diverse range of issues, with treaty law and environmental issues, among others, receiving proper attention. Jamaica wonders, however, whether in preparing the programme of future work the Commission would consider introducing additional topics that fall within the spheres of International Investment Law, International Human Rights Law and laws relating to economic development. These areas of International Law often present important technical questions that would benefit from the careful attention that the Commission pays to topics within its purview.

Expulsion of Aliens

Jamaica supports, in broad terms, the main approaches taken in the draft articles on Expulsion of Aliens. The draft articles offer a thoughtful reconciliation of divergent policy perspectives concerning expulsion, balancing in significant measure the rights of aliens on the one hand, and the sovereign prerogatives of the State on the other. The underlying approach is sound: the State has the right to expel aliens, but this right is circumscribed in defined ways to protect the rights of individuals, and especially the vulnerable. The draft articles offer sound provisions in respect of the human rights of aliens, prohibit both collective and disguised expulsion, prohibit expulsion for the confiscation of assets, and bar expulsion if, for instance, it would lead to the person subject to expulsion facing torture or inhuman or degrading treatment.

We take the view that these draft articles could form the basis of a draft convention on expulsion. This is not to say that all the draft articles currently have our unquestioned support. We are mindful, for instance, of the case in which an alien may live for many years in State X; the alien may have been socialized in State X but may have opted, for reasons of national pride, to retain the nationality of State Y. Should this person be vulnerable to expulsion from State X to the same degree as persons with tenuous links to State X? The draft articles may not provide a definitive solution to this question. Also, if the term "sex" is taken to include "sexual orientation", in Article 14, it is possible that the prohibition on discrimination on grounds of sex in that draft article will be in conflict with the national law of some countries.

Protection of Persons in the Event of Disasters

The draft articles prepared by the Commission on the Protection of Persons in the Event of Disasters raise a number of important issues. By taking a rights-based approach to disaster mitigation and protection measures, these draft articles show considerable sensitivity towards individuals in need of aid and assistance in the face of disasters. Jamaica does,

however, have some reservations about the actual import of some of the provisions in the draft. In the first place, the draft articles tend to conflate the idea that cooperation is important in international affairs with the concept of an *international legal duty to cooperate*. More specifically, Jamaica accepts that all States *should* cooperate in international relations on a wide range of matters, including, to be sure, on matters of disaster mitigation and prevention. But, we believe that this is different from accepting that if a State does not cooperate it is in breach of a legal duty. The draft articles imply or assert not only that States should cooperate, but that they *must* cooperate. We view this approach as progressive development in the law, but it is progressive development that could compromise the sovereign will of States.

Secondly, Jamaica has reservations in respect of Article 12 of the draft articles. Here again, the underlying issue turns on the distinction between items that are important and desirable, and items that are required as a matter of law. Article 12(1) places each affected State under a duty not only to ensure the protection of persons, but also to ensure “provision of disaster relief and assistance on its territory.” The legal mandated duty means that if the affected State – a State in the midst of a national disaster – fails to ensure the provision of disaster relief and assistance, it is in breach of International Law and liable for damages. This seems to be an unintended consequence of a draft that seeks to promote help for countries in the midst of calamity.

Thirdly, we continue to have reservations with respect to the question of consent addressed mainly in draft Article 14. We agree with the terms of draft Article 14(1) to the effect that the provision of external assistance requires the consent of the affected State. This follows from elementary considerations of sovereignty. We are yet to be convinced, however, that draft Article 14(2) represents either a statement of the current law or a statement of desirable policy. As to the law, our understanding is that a State may indeed withhold consent to the entry of other States or organizations on its territory or may decline to accept assistance from other States or organizations. And as to policy, the challenge in draft Article 14(2) turns on the interpretation of “arbitrarily” in the context of disaster relief. The affected State may not wish to accept assistance from a particular State for reasons having to do with suspicions of the putative assisting State, or for reasons having to do with the affected State’s sense of national pride. For the affected State these reasons would not be arbitrary; but, from the perspective of other countries, they could well be. Thus, the approach recommended by the Commission is undermined, in some measure, by the fact that the draft articles do not state whether the standard of arbitrariness is to be assessed objectively or subjectively.

With respect to these draft articles, Jamaica also wonders whether an assisting State may force an affected State to accept assistance in the context of disaster relief. The disaster may prompt widespread loss of life, the affected State may decline offers of help (arbitrarily or not), and the assisting State may then decide to use force to impose its will on the affected State. Humanitarian considerations suggest that this imposed remedy is to be accepted. But, if it is, this could mean that State A could intervene in State B, using the existence of a disaster in State B as a pretext for the intervention. If humanitarian intervention in the context of disaster

relief is to be accepted in the law, this should only happen as a result of extensive deliberations, and after States accept the need to create an exception to the rules on the use of force in the United Nations Charter. We note that the draft articles helpfully point out in draft Article 19 that “the present draft articles are without prejudice to the Charter of the United Nations”; but this statement does not unequivocally bar the use of force to provide assistance to States in the context of disasters.

Customary International Law

Finally, Jamaica views with considerable interest the work of the Commission on the Identification of Customary International Law. With reference to the 11 Draft Conclusions presented to date by the Special Rapporteur, Jamaica offers the following comments and observations:

- (1) We agree that to determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law. We also accept that the two-stage approach – identifying the general practice and, as a separate step, assessing whether the practice is accepted as law – is an appropriate way of addressing the identification of customary international law rules.
- (2) Though the term “accepted as law” is used in Article 38(1)(b) of the Statute of the ICJ and is acceptable for the Draft Conclusions, we believe that the Draft Conclusions should also refer expressly to the concept of *opinio juris*. This reference should not be confined to the commentaries on the Draft Conclusions. The term *opinio juris* is widely used by the International Court of Justice and in the literature of International Law: its exclusion from the Draft Conclusions would need to be fully justified: saying that it is not expressly referred to in Article 38(1)(b) is not sufficient justification in our view for its exclusion from the Draft Conclusions. If this were to be sufficient, it would mean that the term “customary international law” should also be changed in the Draft Conclusions, for Article 38(1)(b) refers not to customary international law, but to “international custom”.
- (3) The Special Rapporteur does not intend to address fully the question of *jus cogens* (Draft Conclusion 1), but the Commission has placed this on its long term programme of work. *Jus cogens* rules are customary international law rules, but given their peremptory character, they require additional elements to those of ordinary customary international law rules. The case could be made for the inclusion of the identification of *jus cogens* rules in the current project.
- (4) Draft Conclusion 7 offers an indicative list of manifestations of practice – presumably these are items that are sometimes referred to as material sources of custom. One interesting possible item not expressly stated concerns pleadings by States before

international, regional or national tribunals. Pleadings are in some respects specific to particular cases, but often they incorporate State perspectives on given questions, and are as such manifestations of practice. But views in pleadings may also vary from case to case, and as such may not have much weight attached to them. It may be that a Draft Conclusion on pleadings could bring out special features of this item as a manifestation of practice.

- (5) The identification of practice with respect to treaties as a manifestation of practice prompts the thought that more could be said in Draft Conclusion 7 about the relationship between treaties and custom. We note that the Special Rapporteur will address this in his next report, and look forward to the treatment of this important issue.
- (6) Draft Conclusion 7(3) states that inaction is a form of practice. Jamaica accepts this, but we wonder whether the Draft Conclusions will, at a later stage, present discrete conclusions on the significance of inaction. Inaction may amount to acquiescence, inaction together with detrimental reliance may arguably give rise to an estoppel, and inaction because of resource limitations or lack of knowledge may place some States at a structural disadvantage in International Relations. It would be helpful for the Draft Conclusions to address these issues in the text, if feasible.
- (7) Draft Conclusion 7(4) notes that the acts of an international organization may also provide manifestations of practice. As in the case of inaction, though, acts of an international organization may carry differing implications. An act may be *ultra vires*: is the same weight to be attached to this as a lawful act of the organization? Or, the act may be prompted by a narrow majority in the organization: does this matter in assessing the weight to be attached to the act as a manifestation of practice?
- (8) Draft Conclusion 8 indicates that there is no predetermined hierarchy among the various forms of practice. We agree with this as a general statement. We further consider, however, that there may be circumstances in which some forms of practice should be given more weight than others. So, for example, it is arguable that where a State reinforces a statement with conduct "on the ground", the combination of words and action carry more weight than words alone. And, again arguably, in some circumstances, conduct "on the ground" will carry more weight than a simple statement. In the traditional law of title to territory some State action, as distinct from a claim only, tended to provide evidence for purposes of historical consolidation of title. And, in the context of the Law of the Sea, some States seek to reinforce some maritime claims by actions on the ground. Generally, this point could be given further consideration in the Draft Conclusions.
- (9) Draft Conclusion 9(3) may need to say more about the time element in customary international law. It is agreed that if practice is sufficiently general and consistent no

particular duration is required. But what if practice is not sufficiently general and consistent? Would the passage of a long period of time, during which some States adopted one approach while others remained silent on the point, suggest the existence of a rule? The term “custom” in ordinary language implies the element of duration; it is not clear from Draft Conclusion 9(3) whether the Special Rapporteur regards time as entirely irrelevant.

- (10) Draft Conclusion 9 indicates that due regard is to be given to the practice of States whose interests are specially affected. This is consistent with pronouncements in the *North Sea Continental Shelf Cases* (I.C.J. Reports 1969, page 3). It also recalls Judge De Visscher’s comment that :

“Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way.”

As some members of the Commission have argued, it may be difficult to reconcile this approach with the idea of the sovereign equality of States.

- (11) With respect to Draft Conclusion 11, we agree that there are different forms of evidence of *opinio juris*. We note that State pleadings before tribunals of law could also be included in this listing, with the observations noted above in respect of such pleadings also applicable here.

- (12) Draft Conclusion 11 includes action in connection with resolutions of organs of international organizations and international conferences. This is so in some circumstances. But, what if it is widely known that the resolutions of the organ in question are not binding in law? Would the vote of a State for the resolution necessarily indicate anything about the State’s acceptance of a rule of law? This is doubtful. For us, the vote would need to be assessed together with a relevant statement indicating the State’s *opinio juris*.

- (13) The terms of Draft Conclusion 11 raise an important question about the relationship between the “general practice” and “accepted as law” components of the two-step approach. Draft Conclusions 11(1) and 11(2) affirm in different ways that both practice and acceptance as law are necessary components of customary international law. But, given the difficulties inherent in identifying the acceptance of law by States – and arguably the artificiality of seeking to identify belief on the part of States – there are authoritative suggestions that the existence of widespread and general practice should raise a presumption in favour of the existence of a customary rule: see, for example, Sir Hersch Lauterpacht, *The Development of International Law by the International Courts* (1958), at page 380 and Dissenting Opinion of Judge Ad Hoc Sorensen in the *North Sea Continental Shelf Cases* (1969). It may be useful, for the avoidance of doubt, for the Draft Conclusions expressly to state that no presumption in favour of the existence of a

rule of customary international law may be drawn from the existence of general practice alone.

- (14) Jamaica looks forward to the Special Rapporteur's elaboration of issues relating to persistent objection, regional, local and bilateral custom. We are inclined to the view that, although the project is about the identification of customary international law, some attention will need to be paid to the process of formation of customary rules.