THE ROLE OF THE INTERNATIONAL LAW COMMISSION AND THE CARIBBEAN CONTRIBUTION

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I. Introduction

The International Law Commission of the United Nations completed its Sixty-First Session in August 2009, and will shortly embark upon the formal work of its Sixty-Second Session. The current sessions of the Commission last for approximately ten weeks, and during this period, the 34 members are expected to be resident in Geneva, Switzerland, to work on a daily basis on the Commission's agenda. The basic role of the Commission is derived from Article 13(1)(a) of the United Nations Charter. That provision, which itself can be traced back to a Resolution of the League of Nations from 1924, indicates that:

> *"The General Assembly (of the United Nations) shall initiate studies and make recommendations for the purpose of:*
>
> *(a) Promoting international cooperation in the political field and encouraging the progressive development of international law and its codification."*

The *travaux preparatoires* concerning Article 13(1)(a) of the U.N. Charter suggest that the Dumbarton Oaks Proposal for a Charter sponsored by the United States, the United Kingdom and the USSR (as it then was) contemplated an article on promoting international cooperation which did not expressly state that the General Assembly should work towards the progressive development and codification of international law. Rather, this dimension of the article was introduced by China, which proposed that "the Assembly should be responsible for initiating studies and

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making recommendations with respect to the development and revision of the rules and principles of international law."[2]

The legislative history also reveals that, from the early days, an important issue concerned the balance to be struck between stability and change in the formulation of the provision. Thus, while China supported both "development and revision" of international law, an Egyptian proposal referred to work that would involve the "determination, definition, codification and development of the rules of international law and morality"; and the four sponsoring powers of the original Dumbarton Oaks proposal opted for a formulation in which the General Assembly would initiate studies for the "encouragement and development of the law."[3] In the end, agreement was reached on the form of words that combined the progressive development of international law and its codification. This formula now guides the day-to-day work of the Commission, and is enshrined in Article 1(1) of the Statute of the Commission:

> *"The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."*[4]

This paper looks at the general impact of the work of the International Law Commission as it seeks to fulfill its role in the progressive development of international law and its codification, in light of the political realities and challenges of the modern era. The paper also considers aspects of the current work of the Commission and mentions certain issues that may be of interest to Caribbean States in the areas of Responsibility of International Organizations and Protection of Persons in the Event of

[2] Quoted in Simma *et al* (eds.), *The Charter of the United Nations: A Commentary* (1995, Oxford), p. 13.
[3] *Ibid.*
[4] General Assembly Resolution 174(II) of 21 November 1947

Disasters – two major topics on the current work programme of the Commission. The paper also reviews some of the points of interaction between the Caribbean and Commission, and touches on some of the ways Caribbean representatives may enhance their performance at the Commission.

II. The Impact of the Commission: A Summary

(a) General

One measure of the performance of the International Law Commission is its output in terms of draft treaties. Among others, the following notable treaties have had their origins in the work of the Commission:

(a) The four Geneva Conventions on the Law of the Sea (1958);

(b) The Vienna Convention on Diplomatic Relations (1961);

(c) The Vienna Convention on Consular Relations (1963);

(d) The Vienna Convention on the Law of Treaties (1969);

(e) The Vienna Convention on the Succession of States in respect of Treaties (1978);

(f) The Vienna Convention on the Succession of States in respect of State Property, Archives and Debts (1983); and

(g) The Vienna Convention on the Law of Treaties concluded between States and International Organizations or between International Organizations (1986).

(h) The Convention on the Law of the Non-navigational Uses of International Watercourses (1997); and

(i) The United Nations Convention on Jurisdictional Immunities of States and their Property (2004).

With respect to most of these treaties, the practice has been for the Commission to submit completed drafts to the General Assembly, for the drafts ultimately to be adopted at codification conferences organized by the Assembly. The mere listing of these treaties provides an indication of the scope of the contribution, but it does not fully reflect that contribution. This is so because, in the first place, some of the treaties prepared by the International Law Commission have sometimes themselves been used as the basis for work in respect of subsequent treaties: because these subsequent treaties build on the work of the Commission, some credit should be given to the Commission even though the treaties are not formally attributable to the Commission.

In this regard, the relationship between the four Geneva Conventions on the Law of the Sea, and the 1982 Montego Bay Convention (or the Law of the Sea Convention) comes readily to mind. Matters concerning the regulation of activities in the sea are now, generally speaking, governed by the Montego Bay Convention, which was drawn up after more than a decade of negotiations among States at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and in the Seabed Committee of the United Nations.

What is sometimes insufficiently appreciated, however, is that several parts of the Montego Bay Convention draw direct inspiration from three of the treaties on the law of the sea originally prepared by the International Law Commission in Geneva. These treaties -- the Convention on the Territorial Sea and Contiguous

Zone, the Convention on the Continental Shelf and the Convention on the High Seas, provided the basis for many rules in the law of the sea from 1958 until they were overtaken by, or incorporated into, the rules in the Montego Bay Convention.

Particularly with reference to the Convention on the Territorial Sea and Contiguous Zone, and the Convention on the High Seas, the basic template created by the International Law Commission prevails in the law today. Thus, in the current discussions about piracy off the coast of Africa, or in the past debate about Caribbean Shiprider agreements with the United States of America, rules originating from the Commission have been at issue. Also, on one reading, the rules applied by the arbitral tribunal in the maritime delimitation case between Trinidad and Tobago and Barbados (the so-called "Flying Fish Case") have their roots in the Convention on the Continental Shelf drafted by the Commission. For, in this case, an underlying issue concerned the significance of the equidistance/special circumstances rule in continental shelf delimitation, a rule that was incorporated in Article 6 of the Continental Shelf Convention, and famously discussed by the International Court of Justice in the ***North Sea Continental Shelf Cases***[5]

In some scholarly work, there has been a tendency to suggest that the International Law Commission is best able to provide draft conventions on issues that are of a technical nature. And it is further suggested that the General Assembly and other organs of the United Nations are suitably equipped to handle political and economic issues. The relationship between the Geneva Conventions on the Law of the Sea and the Montego Bay Convention is often highlighted on this

[5] ICJ Reports (1969), p. 4

point. So, the Geneva Conventions, which represented in significant respects codification of the existing law were technical treaties, while the Montego Bay Convention, and particularly those parts pertaining to Part XI on the deep seabed regime, was seen as requiring treatment through the political organs of the United Nations. Although there is some basis for this dichotomy, it should not be taken too far.

To be sure, the International Law Commission is a technical body. Article 2(1) of the Statute of the Commission indicates that the members "shall be persons of recognized competence in international law", and surely it would be difficult for members to carry out the mandate of the Commission, noted above, without expertise in this area of the law. But, the distinction between technical, legal issues on the one hand, and political and economic issues, on the other, has its limitations. This is so not least because on most issues of international relations, legal issues will have clear political and economic dimensions. Thus, the rules incorporated, for instance, in the Continental Shelf Convention – even though sometimes perceived as technical rules – are very much statements of economic and political positions. Eduardo Jimenez de Arechaga, a Uruguayan member of the Commission from 1960 to 1969, implicitly made this point in relation to Article 2 of the Continental Shelf Convention. Article 2 stipulates in part that:

> "(1) *The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.*
>
> (2) *The rights referred to in paragraph 1 of this Article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf without the express consent of the coastal State."*

This formulation, which formed the basis for the ICJ's conclusion in the ***North Sea Continental Shelf Cases*** that shelf rights inhere to the coastal State *ipso facto* and *ab initio* in both treaty and customary law is really a rule designed to protect the interests of developing countries.

The distinction between technical rules on the one hand, and political and economic rules, on the other, is also weakened by the mandate of the Commission. As already emphasized, this mandate is twofold: progressive development and codification. As far as codification is concerned, it would be possible to argue that the primary function of the Commission is to identify the *lex lata* on particular points and set them down for consideration by States. But this cannot reasonably be said about progressive development: on the contrary, progressive development will, by its very nature, require members of the Commission to pursue policy considerations and to demonstrate why one set of policy options may be superior to alternative solutions to a particular issue. In this context, the Commission may be perceived as a policy making body, but one that is subject to the authority of States and the political organs of the United Nations.

Although most of the conventions drafted by the International Law Commission over the years are of practical significance, from the standpoint of the lawyer the Vienna Convention on the Law of Treaties may possibly take pride of place. Today, there are more than 108 States Parties to this treaty, and numerous rules in this treaty about treaties are now regarded as binding on all States. The framework provided by the Vienna Convention on the Law of Treaties amounts to a universal language which provides the basis for day-to-day inter-State communication. This has, of course, been of significance to the Caribbean, and is likely to become increasingly so. For example, the Caribbean Court of Justice, in the first case under its Original Jurisdiction – ***Trinidad Cement Limited and TCL (Guyana) v. The Cooperative Republic of Guyana*** (2009) -- was called upon to interpret the meaning of Article 222 of the Revised Treaty of Chaguaramas, pertaining to whether, and in what circumstances, a national company of Guyana may bring a case to the Court against the Government of Guyana. Not surprisingly, in reaching its conclusion in this case, the Caribbean Court of Justice relied on the rules of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, rules that had their origin in the work of the International Law Commission.

Similarly, in a series of cases, including the **Case of the Territorial Dispute between the Libyan Arab Jamahiriya and Chad** (1994) and the **Maritime Delimitation and Territorial Questions Case (Qatar v. Bahrain)** (1995), the International Court of Justice expressly accepted that the Commission's rules on treaty interpretation have the status of customary international law.

(b) Customary International Law

This last point brings to the fore another way in which the Commission contributes to international law. The development of international law is usually part of a deliberative process, sometimes with iterative elements. Where the Commission presents a draft convention for consideration, it is open to the General Assembly to accept or reject the draft, or to make amendments to some parts thereof. In some instances, the draft will be accepted in a relatively short time period, while in others, it may be subject to years of deliberation and delay. For this reason, and bearing in mind the detailed manner of the Commission's procedures, the pace at which the Commission's work becomes binding treaty law has sometimes been criticized by States and scholars alike. Simultaneously, however, the deliberative processes of the Commission and the General Assembly will sometimes mean that draft rules prepared by the Commission pass into the *corpus* of customary international law even before the draft documents prepared by the Commission open to States for final approval or ratification as binding instruments.

This, no doubt, is now old hat for lawyers dealing with international law questions. Rules of customary international law are derived from State practice and the sometimes mysterious phenomenon of *opinio juris.* In its work on the progressive development and codification of rules of law, the International Law Commission will frequently be called upon – either through its individual members or as group – to make comments on whether a particular pattern of behaviour has achieved the status of a custom: this requires the Commission to consider State practice and *opinio juris* in considerable detail. When the Commission makes statements in the form of Draft Articles or otherwise, these constitute evidence of what the law may be: thus, the work of the ILC is perceived as a material source of customary law. In its work, the Commission is mindful of this fact, and in several instances, the Commission is careful to record in its commentaries on Draft Articles whether or not it believes a particular rule should be regarded as part of the *lex lata.*

With respect to the power of Draft Articles to become rules of customary law before they are adopted by States in treaty format, special mention may be made of the Draft Articles on State Responsibility prepared by the International Law Commission and adopted by the General Assembly in 2001. The Draft Articles had a long period of gestation, and it is still to be decided whether they will assume the form of a treaty.[6] But it is fair to say that some of the rules in the Draft Articles now reflect customary international law.[7] For example, Article 25 of the ILC Draft provides for the possibility of a State invoking necessity as a ground for precluding wrongfulness if certain conditions are met.[8] In the ***Gabcikovo-Nagymaros Project*** case, the International Court of Justice found that necessity was not properly invoked, but made this comment on the Commission's draft article:

> *"The Court considers ... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness ofan act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission ...conditions reflect customary international law."*[9]

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[6] A number of U.N. General Assembly Resolutions have taken note of the Draft Articles and have commended them to the attention of Governments: see, e.g., Resolution 56/83 of 12 December 2001, and Resolution 59/35 of 2 December 2004. In Resolutions 62/61 of 6 December 2007, the General Assembly mandated that the question of the Draft Articles be put on the agenda of its 65th Session in 2010, with a view to further examining whether the Draft Articles should be put in the form of a treaty.

[7] The first sentence of the Commentary to the Draft Articles on State Responsibility indicates that some rules, but not all, are intended to be accepted as customary law: *"These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts": Draft Articles on Responsibility of States for Internationally Wrongful Acts – General Commentary*, in *Yearbook of the International Law Commission*(2001), Vol. II, Part Two, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, UN Doc. A/CN.4/Ser.A/2001/Add.1 (Part 2), p. 31.

[8] Article 25 states: *"(1) Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a)is the only means of the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
(2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity."

[9] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at paras. 51-52.

Significantly, this decision of the International Court of Justice was delivered before the Draft Articles had been completed by the Commission, and had been adopted by the General Assembly. The Commission, in its subsequent commentaries, included the Court's comments as part of the evidence that the rule of necessity had become a part of customary law. Even after the Court had affirmed the status of the rule in draft Article 25, the Commission was cautious. The Commentary set a substantial review of the evidence concerning the rule, and concluded:

"On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."

Since the adoption of the Draft Articles on State Responsibility by the General Assembly, the International Court of Justice referred to its position in the ***Gabcikovo-Nagymaros Project*** case, in the 2004 Advisory Opinion on the ***Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory***. In the latter case the Court also referred to draft Article 25 of the Commission in terms that implied acceptance of this rule as customary law.

More generally, the importance of the Draft Articles is also apparent from the fact that in the period between 1973 (when the Draft Articles were first provisionally adopted) and 2007, there were more than 130 instances in which international courts, tribunals and other bodies referred in their decisions to the Draft Articles or commentaries.[10] This is not the place to embark upon an assessment of whether

[10] *Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Report of the Secretary General,* U.N. Doc. A/62/62, 1 February 2007, para. 5, and U.N. Doc. A/62/62/Add. 1, 17 April 2007.

the various draft Articles were accepted as customary law or not; the point is just that in international litigation, they have been given considerable attention. This is a measure of the impact of the work of the International Law Commission.

Still with reference to the role of the Commission in influencing customary law, it should also be noted that the very act of pulling together instances of State practice and analyzing them also assists in promoting the law. States may find it convenient to refer to draft articles of the Commission and, in some instances, to apply those draft articles in their practice. This then contributes to the State practice, and so, with the passage of time, draft articles and statements from the Commission contribute significantly to the development of the law. Here, it is also to be noticed that States may actually rely in their practice on approaches put forward in ILC Draft Articles and in related statements, even though these Draft Articles and statements were originally made by the Commission *de lege ferenda*. In other words, proposals for the development of the law may become statements about the positive law based on the reactions of States to the Commission's work. Writing about codification efforts more generally, O'Connell, in his *International Law* puts the matter in the following terms:

> *"Customary law is notoriously lacking in precision and definition. Hence there is a tendency towards reducing its rules to writing in the form of codes. Various bodies have been engaged in this work... The undertaking is valuable if only because it highlights the areas of agreement and disagreement. Obviously any expectation that draft codes will commend themselves to states as declaratory formulations of law is misplaced, and hence a problem arises of distinguishing those propositions which are lex lata from those which are lex ferenda. The distinction may not... be very sharp, and it may be the codification itself which*

transforms a rule de lege ferenda into one de lege lata. The rule may merely have been awaiting exposition to gain the necessary conviction for a rule of law."[11]

Finally, on the question of the importance to be attached to the work of the Commission in influencing the formulation of customary law, statements of members of the Commission on points of law may be regarded as having weight with reference to Article 38(1)(d) of the Statute of the International Court of Justice. This refers, *inter alia*, to "the teachings of the most highly qualified publicists of the various nations", and states that these teachings may be subsidiary means for the determination of rules of law. The history of the Commission, and the practice of the General Assembly with respect to the election of members of the Commission, strongly suggest that at any one time the Commission will include among its members some of the most highly qualified publicists of the various nations, persons with "teachings" that may be relied upon as material sources of the law.

III. Some Issues from the Current Work of the Commission

The following items are on the current work programme of the International Law Commission:

(a) Responsibility of International Organizations;

(b) Reservations to Treaties;

(c) Protection of Persons in the Event of Disasters;

[11] D.P. O'Connell, *International Law* (2nd ed., 1970, Stevens & Sons, London), p. 29

(d) Expulsion of Aliens;

(e) The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*); and

(f) Immunity of State Officials from Foreign Criminal Jurisdiction.

At its 61st Session, the Commission continued with the traditional format of examining reports prepared by Special Rapporteurs on the items of its current work programme. Thus, the Commission received detailed reports on items (a) to (d) above, undertook work in a special Working Group on item (e) and made brief reference to the work contemplated under item (f). In most instances, reports from Special Rapporteurs contain draft articles for consideration by all members of the Commission; when the ideas underlying these draft articles are accepted by a majority of members of the Commission, the draft articles are submitted to the Drafting Committee on that particular topic, for further consideration and for technical drafting. The resulting draft articles are submitted to the Sixth Committee of the General Assembly for consideration and comments by States.

In its recent work, the Commission has also had to respond to a request from the General Assembly for a statement on the Commission's role in promoting the rule of law. The Commission has also considered the introduction of new topics to its agenda. Two items that have been incorporated concern the Most Favoured Nation Clause and the issue of Treaties Over Time. Other proposed topics at early stages of development include: the Formation and Evidence of Customary International law and the Protection of the Atmospheric Environment. There has also been a preliminary proposal for the Commission to consider the topic of Fair and Equitable Treatment in International Investment Law.

The current agenda is therefore not insubstantial. In this section, I propose to offer comments on two topics that may be of special interest to the Caribbean – Responsibility of International Organizations and Protection of Persons in the Event of Disasters. This selection is personal, and it is also based on the work undertaken by the Commission within the last three years. Accordingly, this is a largely subjective selection of issues. With respect to Responsibility of International Organizations, however, there are several issues of principle that touch on areas of international law that should be of interest to Caribbean lawyers, while with respect to Protection of Persons, some emerging issues will have day-to-day, practical importance throughout the Caribbean Region.

(a) ***Responsibility of International Organizations.*** The Commission's work on the topic of "Responsibility of International Organizations" was started at the 54th Session in 2002. At the 61st Session, the Special Rapporteur, Professor Georgio Gaja, presented his Seventh Report on the Subject.[12] The Seventh Report was designed to address all the outstanding issues to be considered on this topic, so that a full set of Draft Articles could be submitted to the General Assembly for consideration on "first reading." The outstanding issues addressed in the Seventh Report and considered by the Commission included, among several other things, a significant lacuna in the draft articles, the question of self-defence, and the matter of countermeasures.

The significant lacuna in the Draft Articles on the Responsibility of International Organizations arises as follows. The Draft Articles on State Responsibility are expressly concerned with the responsibility of a State to other

[12] UN Doc. A/CN.4/610

States. The Draft Articles on the Responsibility of International Organizations are expressly concerned with the responsibility of an International Organization to States or International Organizations. But neither the State Responsibility Draft Articles nor the International Organization Draft Articles sets out the rules that should apply when an International Organization seeks to invoke State responsibility for a wrongful act: in short, the question of State responsibility to International Organizations has fallen between the two stools. Should this gap be filled in the Draft Articles on the Responsibility of International Organizations?

On the one hand, there would be value in ensuring that the two sets of Draft Articles, taken together, cover fully the terrain in respect of responsibility as far as both States and International Organizations are concerned. But there are at least two counter-arguments. In the first place, in a document concerning "the responsibility of International Organizations", one does not automatically expect to find rules concerning the responsibility of States *to* International Organizations. The insertion of State responsibility rules in the current draft is, in other words, not logically compelling, though it would assist in filling a significant gap in the Commission's work on international responsibility taken as a whole. Secondly, reference should be made to the mandate of the Commission on this topic. The Commission, as a group, has proceeded from 2002 on the basis that the mandate does not necessarily require incorporation of State responsibility rules in the Draft Articles on International Organizations: this may not amount to formal acquiescence to interpret the mandate in a particular way, but the fact that only a minority of the members of the Commission have argued that the mandate includes State responsibility to international organizations cannot be ignored.

Overall, then, it is perhaps not surprising that the Commission on first reading did not accept the wider mandate that would have included State responsibility to international organizations. In practice, however, this will not mean that the area omitted in the Draft Articles will be forgotten by the law: some aspects of the Draft Articles on State Responsibility (to States) will no doubt be applied by analogy to State Responsibility to international organizations. The lacuna in the work of the Commission will not imply a lacuna in general international law.

At a fairly late stage in the deliberations concerning international organizations, the question arose whether international organizations have the right of self-defence. In the Draft Articles on State Responsibility, which formed the basis for the proposed rule on self-defence for international organizations, Article 21 stipulates that:

> *"The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."*

So, self-defence rules in the Charter are retained in the Draft Articles on State Responsibility. But should they be preserved for international organizations? One of the arguments against accepting this right for organizations stems from the language of the U.N. Charter, which in Article 51 refers to self-defence as a right for States. A second argument concerns the circumstances in which this right would be applicable: whereas with a State there will be territory which is vulnerable to attack, in the case of organizations, this seems less likely. And, thirdly, there may have been the fear that precluding wrongfulness when organizations use force in self-defence would possibly encourage some instances of the use of force by organizations.

On the other hand, self-defence is described in Article 51 of the Charter as an inherent right, thus implying that it should be available for organizations comprised of sovereign States. It is also recognized as a customary law right, which exists independently of the terms of Article 51, so the reference to States in this article does not necessarily rule out the possibility of international organizations having a customary law right to self-defence. Furthermore, although there will be limited instances in which organizations will be able to rely on the concept of self-defence, occasionally organizations do administer territory and deploy troops, so they may, in fact, need to protect their agents and persons in administered territory. For these reasons, Article 20 of the Draft Articles on the Responsibility of International Organizations includes a provision on self-defence that largely reflects the terms in the State Responsibility Draft Articles:

> *"The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law."*

Finally, the matter of countermeasures was extensively debated at the last session of the Commission. Again, the starting point is to be found in the Draft Articles on State Responsibility. Those draft articles accept that in certain limited circumstances States may take countermeasures against each other as a lawful means of correcting breaches of international law.[13] But, it must be said, these

[13] Articles 22, 49-54.

articles have their critics, and especially from the point of view of small States with vulnerable economies, it is difficult to support the policy behind the concept of countermeasures. For, in practical terms, if a small State suffers from a breach of international law, it may well not be able to take countermeasures against the State that is in breach because of the power relations involved. Also, where countermeasures are allowed, they could lead to an escalation of conflict between States as each takes retaliatory action against the other; this can happen even in circumstances where the law requires countermeasures to be proportionate.

Consequently, there is a body of opinion opposed to countermeasures both within and without the Commission. For the completion of the first reading, the Commission has opted to retain provisions on countermeasures as far as the responsibility of international organizations is concerned. Hence, Articles 21 and 50 to 55 presuppose that States and international organizations may take countermeasures against international organizations, on certain terms which reflect, to some extent, the approach taken in the State Responsibility Draft Articles. Perhaps the strongest argument for allowing the possibility of countermeasures against organizations is that this appears to be justified by the *lex lata.* In the ***Air Services Arbitration***, admittedly a case involving State to State relations, the arbitrators had to assess whether negotiations towards judicial settlement could serve to bar the application of countermeasures. The tribunal observed that countermeasures could still be applied:

"This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-

day International Law States have not renounced their right to take countermeasures in such situations."[14]

The point for emphasis here is that for the Tribunal in the ***Air Services Arbitration***, the States had to do something to demonstrate that they had renounced the right to take countermeasures. Which prompts the question: what, precisely, have States done to renounce their right to to take countermeasures against international organizations? Also, although the practice is scarce, some international organizations indicated to the Commission that they had no objections in principle to the possibility of organizations being vulnerable to countermeasures (or presumably having the right to take countermeasures) in appropriate circumstances.[15] In addition, it may be noted that the U.N. Committee on Economic, Social and Cultural Rights in its General Comment No. 8 (1997), on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, adopts a restrictive attitude to the implementation of sanctions (and by extension countermeasures). But even here, the Committee does not proceed on the assumption that international organizations cannot take countermeasures or that countermeasures cannot be taken against them.

The provisions on countermeasures in respect of international organizations are, however, careful to take into account the relationship that may exist between an organization and its member States or other member organizations.

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[14] Para. 95

[15] Draft Articles on international Responsibility of International Organizations, in *Report of the International Law Commission on the Work of its 61st Session, 4 May to 5 June and 6 July to 7 August, 2009*, U.N. Doc. A/64/10, 2009, p. 148. See also responses of the WHO and UNESCO, cited in U.N. Doc. A/CN.4/609, Section II.1.

Accordingly, the draft rules on the responsibility of international organizations make it clear that a member State or member international organization cannot take countermeasures against a responsible international organization unless:

(a) the countermeasures are not inconsistent with the rules of the responsible organization; and

(b) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible organization under Part Three of the draft articles (concerning the content of international responsibility).[16]

(b)Protection of Persons in the Event of Disasters

The Commission began its work on the topic of Protection of Persons in the Event of Disasters in 2007. At the 61st Session, it received the Second Report on the topic from Special Rapporteur Mr. Eduardo Valencia-Ospina. The Report set out what has been described as a "rights-based" approach to the question, identified different stages of disasters for the purposes of law and management, considered various definitions of the term "disaster" as reflected in multilateral instruments and elaborated at some length on the significance of solidarity and cooperation in international relations.

Given that various parts of the Caribbean are exposed to hurricanes and vulnerable to the risks of earthquakes, this is a topic of considerable interest to the region. It is also a topic in its early stages, and so, Caribbean States would be well-advised to formulate positions that reflect our collective perspectives.

[16] Draft Article 51.

One issue that has been raised in various interventions by ILC members merits attention at this juncture. Within the Commission, there appear to be mixed views on the question whether States may use force to ensure that a country which has faced a disaster must accept outside assistance. As a matter of law, this question is in some respects related to the question whether States may be subject to humanitarian intervention (or invention to prevent or terminate gross abuses of human rights). In recent years, including in 2005, the United Nations General Assembly has given support to the concept of the "Responsibility to Protect", by virtue of which humanitarian intervention may be permissible in some circumstances. Against this background, one question is whether the concept of the Responsibility to Protect can be extended from the context of gross human rights abuses to the area of humanitarian assistance in cases of disaster. The Secretary General of the United Nations has indicated that the concept of Responsibility to Protect may not be so extended, but some States have not formally accepted the Secretary General's position. And within the Commission, some members seem inclined to apply the idea of Responsibility to Protect to disaster situations.

Arguments in favour of a right to intervene to provide assistance are not based exclusively on the Responsibility to Protect. This is so because a State may argue that, whether or not the Responsibility to Protect has passed into customary law, there is an independent right of intervention in disaster situations. Or, alternatively, a State may argue that, for the future, any treaty coming out of the work of the Commission on disaster relief should specify, as part of the progressive development of the law, that the right of intervention is allowed.

The majority sentiment in the Commission at this time appears to be against a right of intervention for humanitarian purposes. The main arguments against the right to intervene here turn on the fact that the use of force justified under the United Nations Charter does not seem to allow intervention for disaster relief. In addition, allowing the use of force in these circumstances would be contrary to State sovereignty and would lead to cases of abuse. Also, this would be a right available mainly to powerful countries, rarely exercisable – if exercisable at all – by small counterparts. Moreover, if this right is incorporated into a future draft, as progressive development, there would be serious problems identifying the threshold point for intervention, a difficulty that has bedeviled attempts to delineate human rights abuses that "shock the conscience of mankind." It is suggested, therefore, that there could be a Caribbean approach on this point, and it would be to oppose the development of the putative right to humanitarian intervention in the context of disaster relief.

Another point to be anticipated in future work on this topic concerns the duty to co-operate in the event of a disaster. One provision of the draft articles already adopted by the Drafting Committee (after considerable discussion) sets out a duty on States affected by disaster to co-operate with other States and organizations, including private entities:

"For the purposes of the present draft articles, States shall co-operate among themselves and, as appropriate, with:

(a) Competent international organizations, in particular the United Nations;

(b) The International Federation of the Red Cross and Red Crescent Societies; and

(c) Civil Society."[17]

The question, however, is what should happen if the affected States does not co-operate. The notion of duty implies that the affected State will incur State responsibility if it chooses not to co-operate with others. To be sure, the draft article proposed refers to co-operation, "as appropriate", but it still contemplates a legal duty in some (undefined) circumstances. Caribbean States may wish to consider whether the language of duty is correct here: in the face of a disaster, a State may not wish to have an obligation to co-operate. It may wish to have an option: this would allow the affected States a free hand to determine the way it seeks aid and the sources thereof.

IV. Caribbean Perspectives: A Comment

There have to date been three Caribbean nationals on the International Law Commission: Ambassador Laurel Francis, Judge Patrick Robinson and myself. All three have been elected as members of the Commission from within

[17] Protection of Persons in the Event of Disasters, in Draft Article 3, in *Report of the International Law Commission on the Work of its 61st Session, 4 May to 5 June and 6 July to 7 August 2010,* U.N. Doc. A/64/10, 2009, p. 330.

the Group of Latin American and Caribbean Countries (GRULAC) at the United Nations, and in each case, the Caribbean nationals elected have been the lone Caribbean representatives, with five or six members been selected from Latin American countries. Where there is one Caribbean national in a Parliamentary procedure with 34 members, alliances of interest, or alliances on legal perspectives, become important. Also, the individual member from the Caribbean may well that it is necessary to assume the position of the all-rounder, as the Caribbean presence needs to be fully reflected in the various committees of the Commission.

The all-rounder will also need to have areas of special interest in order to make a mark, and to preserve the interests of the region on particular topics. And in this regard, I refer to a fascinating comment recently offered by Judge Robinson in respect of the work of the Commission pertaining to the International Criminal Court. Judge Robinson noted that the modern discussions on an international criminal court were based on a proposal made in 1989 by Trinidad and Tobago at the General Assembly.

> *"The proposal was the brainchild for the eminent Caribbean statesman, A.N.R. Robinson, who was at that time the Prime Minister of Trinidad and Tobago. The item was referred to in the International Law Commission. I was then Jamaica's representative to the Sixth (Legal) Committee of the UN, and when I was elected to the International Law Commission in 1991, Marjorie Thorpe, Trinidad and Tobago's ambassador to the UN, specifically asked me to keep a watchful eye on the drafting of the ICC statute by the commission. To that end, I made sure that I was a member of the working*

group entrusted with the task, which was completed in a relatively short time."[18]

Some of the elements of successful Caribbean participation in the work of the Commission are apparent from Judge Robinson's comments quoted here. Thus, although membership of the Commission is on a personal basis, the member needs to remain aware of Caribbean perspectives on various issues of international relations: this awareness may be sharpened by direct exchanges with diplomatic representatives or by other means; even if the representative reaches conclusions that may differ from the formal government viewpoint, he or she should remain informed of that position.

Also, Judge Robinson highlighted the need to be attentive to the work of particular committees within the Commission. This is helpful not only because the Caribbean perspective needs to be put within those specific committees, but also because committee membership is useful in the building of alliances. Naturally, Caribbean members of the Commission need to maintain alliances within the GRULAC; for, on a range of issues, including the centrality of sovereignty, opposition to interventionism, and developmental matters, both history and geographic have created strong, natural linkages among Caribbean and Latin American States. But it must also be emphasized that because the Commission is, first and foremost, a technical body, lawyers will have similarities and differences of perspective as part of the normal course of events.

[18] Robinson, "The ICC and the Caribbean" in *The Sunday Gleaner*, April 11, 2010.

As a result, the matter of alliance-building should not be overstated. On some matters, for example, the lawyer from the Caribbean may well find force in perspectives coming from the United Kingdom, the United States of America, Canada or Australia, for reasons that are linked ultimately to methods of legal training and discourse in the common law. And yet, again, the lawyer from the Caribbean may share marked commonalities as to legal perspective with lawyers from Africa and parts of Asia owing to background and training in the postcolonial environment. Or the Caribbean lawyer may share the links with European counterparts who come to their legal positions with a skeptical eye on power, and a desire to affirm universalistic traditions of human rights. So, the matter must not be oversimplified. There will be similarities and differences that help to enrich the exchanges among members of the Commission and lead to broad-based positions that may be acceptable to many States.