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THE LAW OF THE SEA CONFERENCE: THE DEVELOPMENT OF NEW PRINCIPLES OF INTERNATIONAL LAW

I have no doubt that everyone here is aware that yesterday was an historic date for the USA but I am not here, however, to indulge in any improprieties of the implications, if any, of the USA election on Canada's Law of the Sea interests. I would, however, like to draw/to your attention that yesterday was a historic date for Canada of another sort entirely in the somewhat narrower context of the Law of the Sea. I refer to the tabling in the House of Commons of the Notice of the Order-in-Council that the Canadian Government proposes to promulgate to extend the 200 miles fisheries limits of Canada. This action by the Canadian Government is of considerable importance in terms of its potential resource benefits to Canada. On the East Coast, fishing zone 4 includes 5,200 square miles of ocean space. On the West Coast, Zone 5 includes 128,000 square miles. These zones, together with three coastal zones proclaimed in 1971 in the Gulf of St. Lawrence, Bay of Fundy and Queen Charlotte Sound, together comprise 237,600 square miles of ocean space to be subject to Canadian fisheries jurisdiction. In addition, the Canadian Government intends to establish a 200 mile fishing zone in the Arctic by next March 1 which would include another 421,000 square miles.

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I do not, however, propose to discuss resource aspects of the 200 mile fisheries limits but rather to address the more strictly legal question of the manner and means whereby a principle of international law is developed, chrystalized and accepted into the body of customary or conventional international law, since this is the focus and underlying objective of all of the diplomatic activities in which Canada has been so deeply engaged for so many years in the field of the Law of the Sea.

NATURE OF INTERNATIONAL LAW

I am aware that in speaking to today's audience I must begin by giving some form of definition to the term international law. I recall that in a lecture I gave in Toronto some years ago X on the subject of international law and the use of force, I began by quoting the response of the Prince of Wales to the question concerning his views on modern civilization when he/said to have replied 'Its a great idea - when is it going to begin'. According to the Austinian approach to law, there is no such thing as international law since there is, ultimately, no sanctions whereby international law can be enforced except, of course, in certain relatively rare and strictly defined circumstances involving the use of force authorized by the Security Council pursuant to the treaty obligations assumed by member states of the UN under the UN Charter. As a general postulate, international law is enforceable only by consent. I am aware that this sounds almost ludicrous to black letter

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lawyers accustomed to the highly developed institutional system on the domestic plane involving both civil and criminal courts, police, law enforcement officers and a penal system permitting the imposition of a variety of penalties for the purpose of enforcing the law. On the international plane, while there is an International Court of Justice and a variety of other mechanisms available for third party settlement of disputes, the acceptance of the jurisdiction of the Court or any of the other binding settlement procedures is subject to the consent of individual states. There are no policemen, no provisions for the imposition of fines and no prisons. There is not even an international legislature in the usual sense of the term for the purpose of laying down the laws to be applied, although there are a variety of mechanisms which do in fact fulfill this function on the international plane, including, for example, the Law of the Sea Conference, a point to which I shall return. Nevertheless, if one views the law-making and law-enforcing process from the broadest perspectives, then it is a widely accepted concept that no law is enforceable, ultimately, except by the consent of the community it seeks to regulate. Unenforceable law is a bad law. I have had occasion to point out in the past that usually when people criticize international law for its weaknesses, they are usually complaining in reality either about the ineffectiveness of the UN or the primitive stage of development of international law.

Possible Substitute

Admittedly, international law can govern only through the consent of those it purports it maintains to regulate. This is equally true, however, in the final analysis of any system of law. When law does not reflect the whole of the community it seeks to regulate, the law becomes unenforceable. Thus, ultimately, the enforceability of any system of law depends upon the consent of the community to be regulated by law. On the domestic plane, we have by mutual consent erected a highly sophisticated superstructure for the enactment and enforcement of law. On the international plane, we have really only barely begun the process and have not, for example, wholly abandoned the right of self help - the right to use violence. Yet, it is a demonstrable fact that the vast majority of the activities of states is regulated by legal principles treated as binding. That this is so is, I suggest, attributable increasingly to the recognition of the peoples and governments of the world, by their inter-dependence and their self interest in developing an international ..world order.

I should, however, like to make two basic points at this stage. No system of international law of which I am aware has been able to prevent outbreaks of violence, such as murder, rape, armed robberty and kidnapping, in spite of the existance of a highly developed legal institutional system,

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including legal constraints involving the courts, law-making legislatures, police, prisons and effective means of punishment, including even the death penalty in some jurisdictions. Secondly, whatever institutions or mechanisms are devised to develop the law, whether by legislative means or by custom, there remains both a need for certainty in the law, coupled with flexibility in application to particular situations and the inability to fulfill these imperatives in a wholly perfect way. International law is particularly susceptible to the difficulties in the prevention of the use of force and it may well be that the use of force will be the last area of activity by nation states which is ultimately subjected to effective legal constraints. International law is also peculiarly susceptible to difficulties in determining the law with precision and ensuring the application of general principles to particular situations. Nevertheless, there is a dynamic and evolving process on the international plane of the development of law by custom, coupled with highly sophisticated methods of developing the law through the elaboration of agreed bilateral and multilateral treaties. It is against this background that I wish to offer the following comments.

BASIC PRINCIPLES

It is a truism that until relatively recently the Law of the Sea and indeed international law as such was founded upon

two fundamental principles: state sovereignty which, in the case of the Law of the Sea, applied to the narrow marginal termed the territorial sea and the freedom of the high seas which in the context of the Law of the Sea applied to the oceans and to the superjacent air space beyond the territorial sea. I assume you are all aware that the 1958 and 1960 Geneva Conferences on the Law of the Sea revealed strong pressures for the extension of state jurisdiction seawards, whether by means of extending seaward the outer limit of the territorial sea further from shore or through the "functional" approach, advocated by Canada, of establishing a contiguous fishing zone and jurisdiction over the continental shelf limited to its resources and not extending to the waters above. The 1958 Conference was successful in codifying rules of law on a wide variety of issues but it failed, as did the 1960 Conference, with respect to its attempts to reach agreement on the breadth of the territorial sea or the contiguous fishing zone. The 1958 Conference did, however, reach agreement on four conventions including the convention on the continental shelf. That convention represents one of the best examples of which I am aware of the manner in which a new principle of international law is ennunciated, developed, crystallized and accepted into the body of international law. While there are a number of examples of assertions of jurisdiction over the seabed beyond the territorial sea predating the 1945 Trueman proclamation, including the coal mine tunnel in some areas off Canada's East

Coast, the Geneva continental shelf convention represents the culmination of an extremely rapid development of a new legal principle whereby coastal states could assert jurisdiction for certain specific - functional purposes beyond the limits of the territorial sea. Thus, it would not be inaccurate to say that if the Treuman proclamation is the father of the concept and theGeneva Conference the midwife, the continental shelf doctrine is a child of the Trueman proclamation. I am not prepared to say who or what played the role of mother, but some would argue that this role was fulfilled by the states represented at the Geneva Conference engaged in diplomatic relations with the USA on the seabed. I wish, however, to direct my comments to another child fathered by the same parent, namely the 200 mile limit. It is generally agreed that the 200 mile territorial sea and the "patrimonial sea" claims advanced by Latin American states were based upon the Trueman proclamation. It is, incidentally, an interesting historical fact that consideration had been given to Canada and the USA jointly making such a proclamation but Canada decided finally not to join in the proclamation on behalf of Canada because of its possible unforeseeable consequences.

If the two Geneva Conferences contributed to the pressure for more extensive coastal state jurisdiction, the decolonization process did so to an even greater extent as new states questioned the "old international law" and were much influenced

by Latin American doctrines. Another rapidly developing source
inventing
of pressure was technology itself, enabling new types of highly efficient fishing methods, resulting in over-fishing of many stocks, coupled with the construction of larger and larger ships capable of doing more and more damage to the marine environment. The Law of the Sea Conference owes its origins in part to these pressures.

In 1967, the USSR proposed to a number of states that agreement be reached on a 12-mile territorial sea, coupled with a high seas corridor in international straits. Later, in the same year, Malta introduced into the UNGA the concept of "the common heritage of mankind" pursuant to which the seabed beyond national jurisdiction would be reserved for purely peaceful purposes for the benefit of mankind as a whole, particularly the developing countries. The Maltese proposal resulted in the establishment of the UN Ad Hoc Seabed Committee. The pressures for recognitionof increased coastal jurisdiction, including the reaction to Canada"s Arctic Waters Pollution Prevention Act, coupled with the USSR initiative, the counter-proposals to it, relating to fisheries (as well as the territorial sea and straits), and the developments in the UN on the seabed issue, coalesced in 1970 in the expansion of the mandate of the Seabed Committee to encompass the preparations for a Third UN Law of the Sea Conference on a broad range of issues. The Conference began in

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late 1973 in New York. Five Sessions have now been held with the Sixth planned to begin in May 1977.

NATURE OF THE CONFERENCE

The Third UN Conference on the Law of the Sea is a global law-making exercise concerned with important legal, political and economic issues. Since the early stages of the work of the Seabed Committee, the law-making has been directed far more toward progressive development then to codification of international law. The "revised single negotiating text" which has emerged from the Conference gives ample evidence that what is occurring is a major restructuring of international law along new and radical lines. Moreover, the "law reform aspects" of the Conference are coupled with new approaches to international institutions. Both the substance of the new legal regime being negotiated and the composition, powers and mandate of the proposed international seabed authority raise basic questions affecting every state, landlocked as well as coastal.