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Notes for use by the Hon. Paul Martin,
Secretary of State for External Affairs,
in Opening of a Panel Discussion on the
United Nations, at the 22nd World Congress
of the Junior Chamber International
at the Royal York Hotel, Toronto,
October 30, 1967, at 2:15 p.m.

My interpretation of this topic is that the whole question of the role and future of the United Nations is open for comment. We are here to discuss, not individual issues - although examples and analogies are important, but the basic problems of international organization in the political sphere. Knowing the quality of our panelists, I am sure that the discussion will be both broad and penetrating.

I do not have to emphasize the relevance of this subject, nor its complexity - indeed, to comment on the United Nations and its problems is to comment on every aspect of international affairs today. To assess the probabilities, to uncover the trends beneath the drama of daily events on the international stage is a difficult assignment which requires some measure of international co-operation. Our discussion today is an example of such co-operation, and I am very pleased to be able to participate in it as moderator of this panel.

Rather than try to anticipate the questions which the Panel members may wish to raise, or the subjects which they consider of particular importance, I should like by way of introduction to make some general observations about the nature of international organizations, such as the United Nations.

When we talk about the nature of international organizations we must first consider the nature of their

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members. They are sovereign States. These States may have agreed to certain restraints on their freedom of action by accepting treaty obligations as contained, for example, in the United Nations Charter in addition to the restraints imposed by international law, but they are not thereby relinquishing their sovereignty. On the contrary, the U.N. Charter recognises their sovereign equality and independence just as many domestic constitutions guarantee the fundamental freedom of the subjects regulated by them. The analogy cannot be carried too far. There is a difference between the kinds of restraint which the U.N. or other international organisations can place upon their members and the kind of restraints upon the freedom of the individual imposed by domestic law. The difference relates to the enforceability of the restraints.

There is no better assurance of the enforceability of the law than that its subjects wish it to be enforced. Even though the sanction for breaking international law may be weak, international law still retains its strength because it is founded upon the will of the community and is affirmed by states, in their day to day practice in a wide variety of fields.

A further question is whether there is a contradiction between the concepts of the supremacy of international law and the protection of domestic jurisdiction. It is largely a

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Western thought, perhaps not universally accepted, that international law is supreme. This is what we call the Rule of Law. It is true that the United Nations Charter lays down specific safeguards concerning the domestic jurisdiction of every sovereign state. We all know of classic cases where states have maintained that certain matters are beyond the competence of the U.N. because they relate to matters solely of domestic jurisdiction. We know, too, of cases where states do not appear to be willing to abide by the decisions of the Security Council even where such decisions are clearly not matters of domestic jurisdiction. The impression is created of a rather lawful community of nations, unwilling to submit to the rule of law.

This is hardly true because states do accept every-day treaty obligations which they recognise as binding obligations under international law. States also recognise principles of customary international law as binding upon them. The members of the U.N. have agreed to the predominant treaty obligations enshrined in the Charter - principles which are almost universally accepted as principles of customary international law. What these member states have done then is to exercise their sovereignty by voluntarily accepting for the common good certain restraints on their freedom of action. This kind of subjection to international law is essential to the orderly development and strengthening of the Rule of Law.

While states may appear to retain complete freedom of action, in reality they do not act - as indeed they cannot act - entirely as they please. A kind of irresponsible freedom of action may have been possible in the days when war was regarded as an instrument of policy. But we all know that this attitude would be disastrous today, when war anywhere could lead to universal annihilation. In the circumstances new ways had to be found to moderate the exercise of state sovereignty and to make states more responsible in their international acts. The role of the U.N. is crucial in this respect.

I said earlier that members of the United Nations, even while retaining the right to determine their policies as they see fit, are subject to the obligations they have assumed under the Charter. All of us know that everyone must abide by community standards, the laws, or suffer the consequences. Similar arrangements exist internationally with the difference that the consequences are perhaps not as obvious or direct. States are not jailed, but they may be fined or ostracized, with various degrees of severity. This brings me to my final point.

An international organization - and I am talking of the United Nations now - has two main functions. First of all, it is a means of making the present system of sovereign states operate more effectively, by providing new

agencies for co-operation, by creating improved channels for the negotiation of differences and, generally, by establishing a better framework for the conduct of relations between sovereign states. Secondly, the United Nations is a means of moving - in step with international law - in the direction of a new international order transcending nationalism. The U.N. is an organization which not only can make more effective the traditional methods of conducting international relations, but which also can help transform those relations by working out new standards of international behaviour.

The more effectively the U.N. can succeed in developing new standards of international behaviour and accepting the peaceful and just settlement of all international disputes, the closer we will come to attaining in our time an international order based upon the Rule of Law.

This is why, as Secretary of State for External Affairs in Canada, I place so great an importance on the role of the United Nations in settling disputes. I doubt whether a new international order, if we are to achieve such a thing, will result from radical action by the world community. It will slowly emerge from the workings of the international institutions we have today. We must make them work. We must strengthen our capacity for bringing about peaceful change and for developing international law. If we succeed, the Rule of Law will emerge

from our strengthened international dealings. If it does not emerge this way, we cannot be optimistic that it will emerge at all.

I should now like to call on each of the distinguished panelists to make some introductory remarks before we have an exchange of views.

conducting diplomatic relations. They drew up a document which codified international custom and practice in this field and which, to a degree, broke new ground by settling points of law which had, until then, been disputed. The Convention has now been ratified or acceded to by the overwhelming majority of states and is looked upon by them as declaratory of international law in this field.

If any of you remain skeptical about the true role of the Vienna Diplomatic Convention, let me assure you that it is regarded by all its signatories, and many of the Warsaw Pact countries are among its signatories, as authoritative on many points of the law covering the donduct of diplomatic intercourse. Even more importantly, they behave as if they feel themselves bound by the Convention. It is only at the risk of doing serious harm to their relations with other states and at the risk of severe sanctions from other states that a government will break its provisions. In fact, when its provisions have been violated, states have backed down from their position when the rules of the Convention have been pointed out to them. The record on compliance with this Convention, as indeed with the other great international conventions, has been good.

It may be objected to this that the reason for common compliance with the Convention is that it is merely

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declaratory of pre-existing agreements as to the contents of the rules of diplomatic intercourse. But let it not be forgotten that while agreement on these rules may have been reached before the actual codification, agreement had to be reached among states, and at that point international law was formed. It should also be remembered that law is always a reflection of the common will. If it lacks general supports, it is unenforceable. I need only cite the well-worn example of the American experiment in prohibition. Therefore to say that the Convention is not law-making is invalid; it is no less law-creating by being a reflection of general consent. The very act of drafting an agreement must inevitably lead to a meeting of the wills.

This element of consent is very important. Lacking proper means for enforcing international conventions, consent becomes basic. That is why, in drafting conventions, we must be careful not to commit ourselves beyond what the nations subscribing to them are prepared to carry. It would have been pointless, for example, to include in the Diplomatic Convention the obligation to permit emergency services to enter chancery premises without permission in the event of urgency. Quite simply, few countries would be willing to accept the trust of the host country at face value: there just isn't the good faith required for such acceptance.

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So it is clear that, in drawing up these conventions, we must not commit ourselves beyond the point to which we are prepared to go.

This point beyond which we are prepared to go is sometimes set by domestic considerations as well. A case in point is the Vienna Convention on Consular Relations which was drawn up under conditions similar to those of the Diplomatic Convention. Once again, it is an attempt to regulate and codify international custom and practice regarding the conduct of international intercourse - this time, of course, in the field of consular relations. Yet it has not been possible, until now, for Canada to ratify the Convention. Why? Primarily this is because the Convention goes beyond what Canada, the Federal Government, is able to undertake. Our ratification, as a consequence, is dependent upon the agreement of the provinces to implement the domestic legislation required to comply fully with the Convention. Until now, it has not been possible to obtain this agreement, though we hope that it will be forthcoming shortly. It can be seen therefore that there is a problem, in drawing up conventions of this sort, of not committing ourselves beyond what we can carry domestically.

While on the subject of multilateral conventions, I must mention one more recent example of an effort to codify

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the internationally accepted norms of behaviour in a field. I am thinking now of the Convention on the High Seas, adopted on April 29, 1958. This document, as I have said, collates existing law on this subject and makes a declaration of freedom of navigation, of freedom to fish, of freedom to fly over, to lay cables under, and to navigate upon the high seas. It is undeniable that this Convention is of the greatest significance since the high seas are an area in which states frequently come into conflict and which even today concern a significant portion of international law. To relate back again to what I have just said about not committing ourselves beyond what we can carry, it should be noted that no convention has yet defined territorial waters. There is nothing surprising in this. We have simply not yet reached the point where states have agreed substantially on the extent of territorial waters. To draft a convention would therefore be meaningless.

The best example of international conventions is of course the Charter of the United Nations. More than any other it can be considered in terms of legislation in as much as compliance with its Charter is almost a duty that can be demanded of the nations of the world since membership in the United Nations is today practically a sine qua non of statehood. More than any other convention it is backed by an elaborate system of sanctions for non-compliance, though

the effectiveness of these is a matter of conjecture. And more than any other international convention it is law-creating in as much as it contains express provisions on procedures to create new international law. I will repeat that the Charter of the United Nations is the finest example we have today of an international convention as the source of international law.

Bilateral treaties bear a closer analogy to the private contracts of individual citizens. In this case, they reflect only the will of the parties and their agreement on each point. Here, there is no question of majority decision; we are in the presence of a real contract, which may even contain sanctions for non-compliance. They come about when two states seek to promote an interest peculiar to themselves. The question therefore arises whether they, in fact, constitute international law. It would, I think, be fair to say that many of them are not in fact sources of international law, regulating as they do a purely personal agreement, although controversies as to their interpretation may raise points of law.

It is equally clear, however, that other bilateral treaties may be regarded as law-creating. This situation arises when the inability to create a multilateral convention is met with a network of bilateral agreements that substitute

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for legislative provision. Look, for example, at the solution of the problems of getting fugitive criminals back for trial. Because of the differences in the criminal laws of different states and in the differences in the conception of political as distinct from criminal offences, it has not been possible to achieve a general international convention on extradition. What we have instead is a series of bilateral agreements which, in their scope and subject matter, give birth to international law.

Before passing on to another source of international law, I would say a word about the significance of treaties and conventions as creators of international law. It is, I think, undeniable that the Treaty creating the Organization of American States was the source of a good deal of international law. It was, after all, the need for complying with its terms that gave rise to the Cuban blockade. Every signatory state of that Treaty has put into effect an economic and political blockade of Cuba. Is it not significant that the one state in the hemisphere not a member of the OAS is not participating in that blockade?

As to the law-creating character of resolutions of the United Nations General Assembly, there are two points of view on whether they are or not rules of international law. The Soviet bloc has tended to take the position that they

are law and should be observed as such. Their view is probably based on an over-enthusiastic opinion of the United Nations as a great legislative body. To the extent that this point of view is sincere, it ignores, I think, the realities of the current attitude toward sovereignty and is too optimistic in its appraisal of the United Nations Organization. Other countries, on the other hand, and Canada is among these, do not regard the resolutions as law-creating: they see them rather as norms of behaviour, as expressions of will, or as goals to be achieved. This realistic approach may be more appropriate to the present state of the international community. Quite simply, the United Nations is not able to go beyond the position in which resolutions are to be considered as anything more than expressions of good intentions. [International law still depends, after all, upon common consent for its force; and the nations of the world are not about to surrender any more of their sovereignty to a law-making body like the General Assembly than absolutely necessary.]

The specialized agencies, on the other hand, are continually generating regulations. While these are not, strictly speaking, really laws, they must be considered in the same category since they do prescribe norms of behaviour among states. We do see, in this area, a generally more

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favourable approach by states, a willingness to accept internationally agreed upon regulations as binding upon themselves. This is attributable to three factors. First, these agencies are dealing with technical matters which are not as likely to arouse public sentiment and upon which a surrender of sovereignty is not as likely to be noticed. Secondly, there is probably a feeling that the growing interrelationships among states would not be possible without the delegation of some degree of sovereignty. Thirdly, and I may be overly optimistic about this, but it is just possible that the common acceptance of these regulations is the result of a growing recognition by states that they must be prepared to surrender some of their rights to absolute self-determination if they are going to co-exist.

Another prominent source of international law is custom which has, historically at any rate, been a major source of international law. By custom we mean rules which have acquired legal significance as a result of their application by states over a prolonged period and their recognition as legal rules. Many of the great international conventions are really codifications of customary international law. The importance of custom is given formal recognition by the Statute of the International Court of Justice which permits the Court to apply "the general

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principles of law recognized by civilized nations".

At the risk of sounding like a professor of international law, I want to recall for you the theory you were no doubt taught when you were studying international law. There are two essential elements which are implied by custom. One is the material element which consists in prolonged repetition and is the physical act, known as usus by the theorists. The other is the psychological element, the opinio juris sive necessitatis, which is the belief in the obligatory character of the usage thus created.

I mention these points because I think they are essential to an understanding of the problems encountered when one talks of custom, as a source of international law. The first difficulty is that of establishing what custom is. The first element, the physical act, is relatively easy to observe. There is, of course, some problems in knowing the extent of an act and in determining the length of the period of repetition. But how do you determine the psychological element How do you know how a state is thinking How do you determine its opinion when there probably was no conscious decision on the meaning of its act Does one consider only the opinion of the states acting or that of the observers as well These then are some of the obstacles in establishing the content of customs of international law.

The second main difficulty encountered is that of the ideological argument between the newly emerging states and those which have been members of the international community for some time. The new countries have not had the

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opportunity of participating in the physical act of custom creating. This is not important since even some of the oldest states have not participated by positive acts. Yet they, at least, have been observers, have in theory been able to protest; they have, in a word, participated in the opinio juris sive necessitatis. This the new nations have been unable to do and they, as a result, are skeptical about the value of custom as a source of international law. Only a few years ago Indonesia, for example, was claiming that it could not be bound by the customary rules of international law. However untenable this argument may seem to us, it must appear eminently fair to those who until recently were non-participants in the world community.

It is interesting to note that the Soviets are, in this case, opposed to the notion that non-participants in the formation of customary law, the newly emergent countries, are free of its obligations. In fact, they are very articulate on the subject and go much farther than we in their regard for custom.

The classical definition of international law always includes a third element - judgments of the international courts and arbitration tribunals - among the sources of international law. When the International Court of Justice was formed, it was seen as the ultimate

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an error in international dispute. We all know that it has failed to live up to the expectations held for it, and its possibilities have been more restricted than we envisaged. The judgments, while useful, are limited and do not match the jurisprudential position attributed to them by modern writers of international law texts. They are law-creating only for the parties who proceed to submit to the jurisdiction and only insofar as the court is prepared to consider itself bound by the ratio decidendi of the earlier decisions. Their real influence is in the capacity of the court to crystallize customs which have become recognized as law, and in the ability of the world's most eminent jurists to give expression to principles that cannot but exert great moral suasion, offering judicial guidance in future issues.

In discussing the role of courts in the formulation of international law, one must not neglect decisions of municipal courts. Those required to decide questions of public law between semi-sovereign constituent elements in a federal system of government, those required to consciously apply international law in a decision, and those whose function it is to apply municipal law, all contribute to this function in varying degrees. I mention

constitutional decisions in federal states because I believe that if we accept the fact that there is a certain identity of principle between public law in general and international law in particular, then it is only natural that some uniformity will arise in the approach to subjects like riparian rights and boundary questions in federal communities and between sovereign states.

Now, you may wonder, does a municipal decision form international law? First, it may constitute an act of evidence of the will of a given state on a certain point. Secondly, the decisions may constitute a form of state practice. But here a word of caution is required, since this view is only acceptable if one can regard the municipal court as an instrument of government. This is a subject I won't go into. And, thirdly, there is a view that the municipal judge has the same role to play as the international judge, in what D. P. O'Connell calls "the process of juristic reflection", whereby what is implicit is made explicit, the municipal decision thereby becoming decisive. I do not wish to over-emphasize the point or to dwell on this matter. I think the point is made that municipal decisions are a source of international law.

I would mention a final source - the works of the great writers on international law. The contributions of

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those authors consist in this: that their writings are evidence of the law and exercise a creative influence on it. However, whereas once they were significant and highly regarded, today they are no longer so esteemed. This is because before there was any substantial body of judicial authority, the writings on international law constituted the only juridic reflection which could be looked to for the evidence of international practice. This function has been taken over by judges, and the role of the writers become more limited; until today the chief usefulness of writers is in the interpretation of judgments and conventions. This is still a considerable role, and the most eminent jurists are still looked to for their opinions even though, as in the domestic forum, this is usually only as a last resort.

Among writings today one must, I think, place in the highest rank the work of the International Law Commission. In the Commission one finds some of the finest legal minds today. It has spoken clearly and logically on a vast array of subjects and has avoided becoming bogged down in political doctrine. As a result, the formulations are highly regarded and often resorted to as expressions of international law free from political influences. I predict a growing

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stature and significance for the Commission. Its preparatory work will probably be the basis for international conventions of the future.

What I have said so far is more or less uncontroversial. While there will always be intellectual debates on the precise nature of international law and upon the contents of the components that make it up, I think we are all pretty well agreed that there is such a thing as international law, as a body of law which somehow regulates relations among states. But there is a great skepticism on the part of most people who think about such things, on whether it works. With these skeptics, I must disagree. To the extent that international law does exist, it is with the consent of the overwhelming majority of all nations and it therefore has the best teeth of any law system in the world. There is no greater assurance of the enforceability of the law than that its subjects wish it to be enforced and, however tempting the prospect, will not breach it. Let us remember when we think of systems of domestic law which are so often regarded as valid because they carry with them sanctions, that when the sanctions need to be applied then the rule of law has broken down. In the international field, the sanctions are weak and imperfect, I grant you. But just because there are no sanctions to speak of, the extent to which the law is followed is made more significant.

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Before I begin to sound content, let me assure you that I am not satisfied with the state of international law today. There is certainly not enough of it. The machinery producing it is not smooth. There are many other criticisms that may be levelled against our body of existing international law.

But what is extraordinary is not that there is not enough of it, it is that there is as much of it as there is. What is extraordinary is not the degree to which international law is breached; it is the degree of compliance.

That there is so much international law; that there is this degree of compliance is an expression of one overriding factor: a desperate need. In an age in which everyone is affected by what goes on outside national frontiers and when a breakdown in normal intercourse is so disastrous, international law is part and parcel of everyday living. We have no alternative but to surrender our absolute sovereignty, and to agree to conduct our affairs according to generally recognized rules that will ensure not only survival but growth. The prospects for the future are clearly for a greater interdependence among states and for even more terrifying consequences if there is a breakdown. If it is true that necessity is the mother of invention, then the prospects for international law are indeed very good.