INTERVENTIONS BY J. ALAN BEESLEY IN COLLOQUIUM ON THE PROTECTION OF THE ENVIRONMENT AND INTERNATIONAL LAW, HAGUE ACADEMY OF INTERNATIONAL LAW, JULY 14-16, 1973

M. BEESLEY: It is rather difficult to know exactly which problem to address oneself to in a colloquium of this sort, especially because of the reason outlined to us by yourself, Mr. Chairman, and by the several rapporteurs.

We seem to have very quickly achieved a certain consensus on some points, the chief of which may be the fragmented and somewhat incomplete nature of whatever we mean when we talk about International Environmental Law. I would like to come back to that point, "What is Environmental Law" at the end of what I propose to say, when I would like to put a question to the rapporteurs.

It does seem to me, through listening attentively as I have, that it is obvious that one must have an integrated approach to international environmental law, and I would suggest that this presupposes an inter-disciplinary approach. It seems also that there is a trend in what some of the speakers have said to the effect that the law has developed largely in response to catastrophes and that the law is therefore more responsive and perhaps remedial than preventative. It would seem also that there is general agreement that there is need for a global approach. It is obvious that the problem is one which involves everyone, and this in turn raises the question which has been put in various specific terms just recently as to who is to be the object of the law, and who is to be the subject of the law. Certainly humanity as a whole, however, is involved in the very nature of the problem.

Many of these points were made by you yourself, Mr. Chairman, and one point you made, which I think is becoming apparent by implication in statements of other speakers, is that what may be required here is not merely an intellectual awareness of the problem and an intellectual engagement, but perhaps engagement of the spirit. The question of the whole philosophy which one must adopt vis-à-vis this problem arises. We have heard some excellent explanations of a series of inter-related points: that this problem is every man's problem; that at the same time the problem varies as between States at different levels of development;

... 2

that the common link perhaps is a need to start managing the environment, particularly the marine environment; and to manage the biosphere as a whole, although we might apply different management rules to different situations; and we must overcome the fragmentary feature of the law by adopting a comprehensive approach, and therefore an integrated approach and, therefore I suggest, an inter-disciplinary approach. This raises for me and has raised for several years the problem of what is the role of law in this field and what is the role of the lawyer.

I can assure you that my own experience over the last three to four years bears witness to the fact that these are very controversial questions. Opinions were sharply divided, for example, on what Stockholm ought to do and ought not to do about the state of the law. This remained a controversial question right up to the close of the conference and there are very genuinely held differences of view on this question. There are those who feel it is quite dangerous to attempt to develop a public international law through the normal methods of utilising the U.N. for law-making on the international plane; namely the development of legal principles and proceeding from there to conventional law. There is a very widespread school of thought, shared I know by many people around this table, that this matter should be left essentially to State practice because of the complexities of the problem and because the danger of developing a rule which might have application somewhere, but not elsewhere. Merely to look at the problem of a river basins is to be aware of a kind of danger which can arise. Nevertheless, the problem of inadequate and fragmentary law exists and something has to be done about it. It can be left to the economists, in which case we can almost assume that the problem will simply continue and increase. It can be left to the ecologists in which case we may be in danger of stopping technological progress. It is easy to say that it can be left to governments, but that of course ignores the whole problem of what governments should do and to what stimuli they should react. As Jean-Pierre LEVY has pointed out we haven't even defined the environment, let alone the law of the environment.

...3

I share his pre-occupation with that problem, but I have it also with respect to outer space for example, and we've gone on without having defined outer space, to at least develop a series of multilateral rules which will one day have application, even though at present we still see unilateralism in outer space under the guise, of course, of multilateralism. So I think we can proceed one way or another without having defined what the environment is. I don't think we can proceed very far without beginning to define what the law of the environment ought to be. I would like myself to simply offer /a few comments on the question of law making on the international plane in this field. *I would like to suggest that a few moments of *(new para) attention on the role of the Stockholm Conference might help focus our discussion. I had no doubt myself as to what Stockholm ought to do.I felt that it was an opportunity to develop certain basic legal principles drawn from the multi-disciplinary and inter-disciplinary approach which was an essential aspect of the Stockholm Conference, every stage of it. It did, in the event, prove possible to do this; it also proved extremely difficult to do it. Nevertheless, without going into the substance, as I understand the programme as having reserved substance to this afternoon in general terms and tomorrow in more specific terms,--nevertheless, if one looks at the Stockholm Declaration one sees certain legal principles, extremely important ones, reflected in that document. If one looks at the Declaration of Marine Principles one sees also further legal principles, and similarly with respect to the statement of objectives on the need to manage ocean space. Interestingly, it was actually only at Stockholm that we/really focused on the inter-relationship between poverty and the environment and, indeed, between apartheid and the environment, and I think this simply points out the conclusion already expressed by other speakers, that we are talking about the human condition here and that when we talk about the environment we must focus upon that, even though ultimately we may be concerned perhaps with activities far removed in outer space.

Now it also seems self-evident here that as in no other field of the law there is and must be an interpenetration between municipal and international law. There is simply no way of avoiding it and therefore we have to always take a kind of dualistic approach to this problem and we must avoid over simplification by any suggestion that there is one and only one single panacea. This is a field in which we must proceed on many levels simultaneously, nationally, regionally, and multilaterally, by both customary and conventional law-making processes. These processes must be integrated to the extent possible. Speakers have referred to the difficulties of adopting merely a legal strategy. I am one of those I think who could be accused of having focused on the legal strategy, but I have also always been aware through all the preparations to Stockholm in which I have been involved, as I was also involved at Stockholm Conference, and in the law of the sea where I have also been involved since the beginning of the present preparations, that the legal strategy is only one amongst the many that must be utilised to really achieve any success in this very complex field.

I have sometimes referred to the 1909 Boundary Waters Treaty between the United States and Canada as a kind of landmark, a breakthrough in the sense that at that early stage, relatively early, these two countries recognised the duty not to pollute the boundary waters between them. But I have also referred to it as an example of how a purely legal approach can fail because, for a variety of reasons and in spite of the establishment of a most imaginative and effective institution, the International Joint Commission, the two countries did manage to thoroughly pollute the Great Lakes, with the result that we now have had to negotiate a new treaty (which many of us hope will be implemented effectively, whether or not funds are forthcoming immediately). This example illustrates that to develop the law is not enough; but it doesn't, I suggest, point to the conclusion that the lawyer should come along behind the other decision-makers. I have no doubt whatsoever that the lawyers must be policy-makers here. They must be decision-makers. They must not merely sit waiting to be consulted. They must be very active

...5

in ensuring that the law keeps pace with technology. Although technology, I think, is not exactly the author of the crime; I suspect very often that it is simple greed and that we choose to blame technology. Technology is a neutral thing, we can utilise it in the way we wish.

Where does this lead us? If we look at the Stockholm Conference we can see that it did lay down certain legal principles. Looking ahead to what we are going to discuss, I think we can take it as common ground that those principles which have been referred to IMCO should be developed into technical rules while the basic law-making must fall to the Law of the Sea Conference. This is explained so adequately in Jean-Pierre LEVY's treatise, which has been distributed to us, that I do not need to reiterate it. It also seems evident that with respect to the marine environment, there must be a basic restructuring of the law and that much of the new law must be founded on the Stockholm principles. I think the reason why the lawyer must be an activist in this field is partly that the law has proven so inadequate, it has fallen so far behind. It has been so fragmentary, we have tended to say, well what branch of the law are we talking about now, is it nuisance, are we talking about tort law or is it state responsibility, or shouldn't this really be private International law or possibly municipal law, shouldn't we be worrying about making remedies available in our municipal courts. Well of course, all of these questions should be addressed along lines which I shall try to take the opportunity to discuss later. I think there can and should be an acceleration of movement on all these questions. This requires conscious decisions on the part of the people involved, and by the people involved I mean the lawyers because they are not merely the most knowledgeable concerning the law or its absence, they are the ones who must decide how to advise and whether to wait until a problem presents itself on their doorstep. It seems to me that the lawyer here must be much more of an activist than is the traditional view of the lawyer's role. My personal view of course is that the

lawyer concerned with International Law must always be an activist because the law is never in an quiescent state, it is always developing, always changing, and merely to keep abreast of the law the lawyer must be an activist. But in this field particularly, while we needn't take the warnings of the alarmist as the basis for our activities, we musn't listen too much either to those who would say the problem is so over-stated that we can all relax about it. The potential problem is with us and the potentialities are obvious and it seems to me that our path is clear. We must try to develop the law, bearing in mind of course that we are not operating in a vacuum. There is some law on which we can build, as has been referred to by some of the rapporteurs and other speakers this morning.

I suggest that the Stockholm Conference provides us with a kind of breakthrough if we want to treat it as such, and that as an outcome of these multi-disciplinary approaches certain fundamental legal principles were laid down. I think it is fully within our grasp and our competance to develop these principles further into binding treaty law if we are not too frightened of the problem, which presupposes of course a willingness to work for accommodations, because the law of the environment must be based essentially on good neighbourliness, which is another way of saying on co-operation. By this I don't mean "I will co-operate with anyone who agrees with me," I mean that we must in this field, more than in any other, recognise that there are new problems to deal with, as well as old ones, and that new approaches must be developed. We must go through the painful exercise of rejecting some of the traditional concepts we have held so dear to our hearts. I won't refer to which ones today but I would like to tomorrow.

If I may, I would just like to conclude with a question to anyone who wishes to answer it at any stage, but perhaps particularly to Professor GOLDIE, as to what the role of the lawyer ought to be in this field, or if he doesn't like that question, what the role of the law ought to be in this field.

M. BEESLEY: I am sure other speakers are having the same difficulty as I am in keeping the subject in somewhat water-tight compartments because I find very often comments made on the first point relate to those on the second and even the third, but I shall try as I did yesterday to restrict myself to the particular point under discussion. As I understand it we are still on obligations and responsibilities, we are not yet on the topic of progressive development.

I would like firstly to say that I find myself in agreement with much of what has been said by each of the two previous speakers. What troubles me a little bit in the approaches taken by many to this subject is that there is a tendency to take an "either-or" approach. There is a tendency either to focus upon the need to develop international law, public international law, or the suggestion that it is better to leave it to a mixture of private and public and of municipal and international law, essentially custom in other words. On the other hand we have heard already this morning the suggestion that perhaps we should attack the problem by means such as standard-setting. Then we have heard a slightly different suggestion that it is possible and it is indeed essential to attack the problem in another way. Now my own view is, as I said yesterday relatively briefly, that one has to work on several levels at once and in several different ways on this rather elusive and and difficult series of problems which we think of when we talk about environmental law. Certainly, I agree with what was said by Mr. ARANGIO-RUIZ this morning, because we must make use the precedent of WHO, and by that process work towards the system developed by the ILO standard-setting. Certainly this came out of Stockholm, standard-setting is one of the essential approaches that we must develop. Of course while we use the WHO precedent, it is largely co-operation, with little enforceability. Ultimately we can persuade people to move to the ILO approach and then there is something more than co-operation involved. The ILO works really on a system of sanctions of a sort. In any event the member States of the ILO certainly do treat the ILO Conventions as binding. Though I do not think I would disagree with what was said at all on this aspect, on the other hand I think that side by side with

....2

the co-operation and standard-setting approach and intimately linked with it, is the whole question of what are the basic principles on which we found these standards, other than just the rightto life and the quality of life. I am afraid we cannot do that or go very far in that direction without some very clear regard to the other aspect, legally binding obligations, which is raised by the Trail Smelter case and the other cases we have discussed, and particularly by the Stockholm Conference principles. It troubles me that the Stockholm Conference has come and gone and lawyers are not sufficiently alive to the legal content of the Stockholm Declaration on the Human Environment. We have heard of a certain amount of discussion at this colloquium of the declaration but as a generality there has not been sufficient attention focused on these very fundamental legal principles. There are three and they can be stated very simply: the duty of a State not so to utilise its territory as to injure the territory of other States, or the common beyond anyone's jurisdiction. The second, as I at least would put it, although it is rather watered down as it came out of Stockholm, is the duty to ensure compensation for damage done, expressed as the duty merely to develop the law. But you can certainly see some of the history of the development of that principle, very clear cut proposals by certain countries stating it far more unequivocably; the principle accepted was a compromise but at least it points the direction. Then of course, there is the third principle, the duty to consult concerning actions which may have an environmental impact either on other countries or on the areas beyond any country's jurisdiction. To my mind, I do not see any clear choice requiring that we go either for the Stockholm approach or the standard setting approach. Let's do both. In the marine pollution field, although I am getting a little into the next subject area, obviously we have to work with IMCO for example in standard setting, but also at the same time trying to develop hard law. I won't say the other things that I would like to say because of the time element, but I would like to address

myself to the point made by Ambassador SEIDENFADEN yesterday, or rather to the question he raised.

It has been a long and a painful process achieving as much as we did in terms of what people are calling soft law --the results of Stockholm. Now even there I question whether it was all such soft law. If we recall the precedent of the Declaration of Outer Space and the subsequent treaty, it will be recalled that at the time of the declaration on outer space, the United States representative made clear that as far as the USA was concerned, the declaration reflected existing international law. Now that is one way, in answer to Ambassador SEIDENFADEN, of attempting to translate a mere principle into existing law--by saying that in so far as we are concerned is law. If I can put on my official hat for a moment, that is precisely what Canada did in Stockholm. During the closing plenary session, when most States expressed reservations about the declaration, we focussed on the legal principles and said that in so far as we were concerned they reflected existing international law, and we asked other States to make a similar statement. We even said that with respect to the principle which was not accepted and which was later worked out in a compromise resolution, a rather weak compromise formulation in New York on the duty to consult. So that is one way of doing it. It certainly is not the only way.

The other way, which I would like to talk about this afternoon, if I can be given a few minutes, is simply taking the principles and embodying them in a draft treaty and then negotiating them in the appropriate forum. This is what a number of States have tried to do. For example, with respect to marine pollution, I will respect the directive of the president and I will not go into the substance, but there are a number of treaties which have been tabled in sub-committee 3 of the Seabed Committee which attempt to do precisely that, namely take these basic principles and translate them into binding treaty obligations. I could take the colloquium through the Dumping Convention and show just how it was done there with respect to two or three key principles, including, interestingly, the duty to notify or consult. Immediately, after

...4

Stockholm was unable to accept the principle on notification, we got it into the convention in London on dumping. Most interestingly, in a very strong worded article. Once again, that is why I said what I did yesterday, that the role of the lawyer is the key. If there had not been people who were committed, who were pressing for the inclusion of that principle, it would have been awfully easy at many stages of the operation to say "Oh well, there is a little resistance, let us forget it, let us come out with the least common denominator". I am afraid that in this field what the first speaker said is very relevant, we have to look to the future, but on the other hand, there are so many problems and also so many pressures for non-development of the law, that it is a most difficult process and it requires a degree of commitment.

As to precisely how it can be done in a particular field, I hope I can have five minutes this afternoon to go over one draft treaty without any wish at all to try and sell it to anyone, but only as an example of how some of the very points raised in this discussion can be handled in a treaty. For example, the problem of a forum for citizens to sue in. It doesn't need to be left wholly to the eventual and uncertain development of municipal law, it can be put in treaty form that States have an obligation that they accept, an obligation to provide a forum for recovery for damages done. Now that is only one narrow point, but I am referring to it for illustrative purposes. I certainly agree that the compensation and liability aspect is one which lawyers can appropriately handle, but I would be very concerned if that were all we concentrated on. We have to concentrate on the preventive aspect in terms of hard law. We have to also concentrate on the more positive side of standard-setting and gradually raise the level, or at least preventing the continuing deterioration of levels, and we have to do that by means that are not solely legal, nor are they normally solely non-legal. Obviously, we have to take an over-view, a comprehensive approach, and one of the ways of doing it is actually negotiating draft treaties.

M. BEESLEY I seem to be the author of my own wrong in having suggested that everybody leave just before I begin to speak. Perhaps it will turn out to have advantages. Firstly, I would just ask that those who address themselves to the Trail Smelter case might also address themsleves to the development of the Trail Smelter principle as reflected in principle 21 of the Stockholm Declaration, where for example two points emerge. Firstly, the area beyond the limits of national jurisdiction, that is to say the commons, is also covered and not merely other States. So if it ever was a narrow principle it isn't in that sense. Secondly, it is not merely a classic State responsibility principle, if it ever was, because as was the case with the Trail Smelter decision the principle covers also activities "within their jurisdiction or control,"--not merely State activities. I would just like to draw these point to everyone's attention in case we lose sight of the breadth, and thus the importance, and thus the significance in our discussion of principle 21 of the Stockholm Declaration on the Human Environment.

Secondly, a rather general point. I think I had already made clear that in my view we must take a pluralistic approach to the development of international environmental law and that not every method is suitable to every particular situation. We have to show a good deal of imagination, a good deal of dynamism, I suggested, and we have to be very careful to tailor the particular remedy or the particular preventative measure to the particular situation. Now let me mention, without developing the point, that amongst the many ways of developing international law is State practice including unilateral action. If I can mention a relatively non-controversial example, the Truman Proclamation led within little more than ten years to the development of a new concept, the Continental Shelf doctrine and eventually to the Geneva Convention of 1958. The fact that it is now under attack in certain respects is irrelevant, I suggest. Another example, of course, is the action taken by such countries as the USA and Canada in establishing a 12-mile fishing zone so soon after the failure of the 1960 conference to agree on that limit. I can give a more controversial example, of course, in the case of the Canadian Arctic Waters Pollution legislation,

...2

but I would like to draw to the attention of everyone that there are many ways of developing international law, including unilateral action, and including also limited mulilateral treaties, like the Oslo Convention, which had a tremendous impact upon the London Dumping Convention. I do not think that convention would be nearly as good as it is were it not for the Oslo Convention. The Reykjavik draft was extremely good and it was badly watered down in London, but I think there would have been little left of it if it had not been that a number of States had already got together and willingly abdicated their right to pollute this particular environment.

Now, turning from the general to the specific, I would just like to address myself as quickly as possible, and, I hope, briefly, to one particular draft treaty tabled in the sea-bed committee relating to the preservation of the marine environment. There are other drafts and I hope that Frank NJENGA will have time to speak to his draft. The one I am referrring to is the Canadian draft, and as I said earlier I do not want to attempt to persuade anyone concerning the merits of the draft, but rather to use it for illustrative purposes. Firstly, it is interesting that it is an umbrella convention; it was introduced as one, it has been described as one, it has been framed as one. It is intended to interact with all of the specialised conventions listed by Prof. ODA. It is not simply another marine pollution convention; it is intended as an umbrella convention. As such, of course, it is a comprehensive convention and that aspect appears throughout it. I would like that noted if people have a chance to look at the draft.

Secondly, it attempts to lay down uniform rules for recurring marine pollution problems, such as enforcement, compensation for damage, and settlement of dispute.

The third point to which I attach considerable importance is that it does lay down a basic positive obligation to protect and preserve the marine environment. Although the dumping convention goes someways in that direction this is one area where the dumping convention was watered down a bit. That is not the case with the draft I am referring to, nor the results that have emerged thus far from the sea-bed discussion. I

...3

am referring to here, of course, to article 1 of the draft, which picks up principle 1 of the Stockholm marine pollution principles. Now this is a clear kind of answer, I assume, to Ambassador Seidenfaden's query. This is how I at least see the translation of a principle into a treaty obligation. I do not care if anyone considers this the best way of translating soft law into hard law or not, but this is the mechanism which has been utilised in this case, and it should be of interest that States are doing this kind of thing and indeed are doing it today in Geneva.

The fourth point I would like to make is that in article 2 of the draft, principle 7 of the Stockholm Declaration which refers specifically to the marine environment, is incorporated. It is incorporated in the following language: "States shall take all possible steps to prevent pollution of the sea by substances that are liable to create hazards to human health". I do not want to elaborate on that point but just to note it.

The fifth point I want to make is that in article 2 of this draft, principle 21 of the Stockholm Declaration is incorporated and also the Trail Smelter award to the extent that we were in agreement that it does say something. "States shall ensure that activities under their jurisdiction or control do not cause damage to other States including the environment of other States by pollution of the marine environment."

The sixth point I would like to make is that article 2 sets out a series of specific measures which States may take, and indeed should take, according to the treaty, to preserve the marine environment and these measures are drawn from the Stockholm recommendations, from the Edinburgh principles elaborated by the Institut de Droit International in 1969, from the General Assembly Declaration of Principles on the Sea-bed, and from certain IMCO resolutions. For a kind of overview description of this particular treaty, I would recommend a rather objective source, a secretariat source, namely the article written by J.P. LEVY, which he has distributed to all of us. I do not think I need to dwell on these issues since they are discussed in his article, if people have time to read it.

...4

The next point I would like to make is that in article 3 the Stockholm recommendation on co-operation is incorporated, laying down the principle,--as close as one can come to laying down an obligation on States,--to co-operate on a global and on a regional basis, to elaborate principles and standards. I think that this is a central part of the approach reflected in this convention, the emphasis on the international approach to international standards. A good deal of discussion is focusing in the seabed committee on that particular issue, as is the case also in IMCO.

The next point I would like to make is that the treaty lays down the obligation not only to refrain from damaging other countries but also the area beyond national jurisdiction. This occurs in a number of places.

Another point I would like to emphasis is that the draft does not only deal with marine-based pollution, but it purports to lay down a specific obligation even with respect to land-based activities. I suggest that this obligation could in time develop into an objective rule of law that could enable States and international organisations to act effectively on that principle. It merely lays down the principle, and of course there is a whole régime which must eventually be developed on that point, and the convention naturally directs itself essentially to marine-based pollution, but it also touches on land-based pollution.

The next point I would like to mention is that it provides in article 5 that States should contribute actively to scientific programmes to gain and disseminate knowledge of pollutants. That is an unusual type of provision in a treaty, and I suppose it will never have the kind of binding force that certain other provisions can have, but it is our best effort to reflect that principle in treaty form.

Similarly, in article 6 the Stockholm recommendations on monitoring and the dissemination of the results of monitoring are picked up and provided for.

Article 7 is probably the most interesting of all of the provisions of the draft because it obligates States to compensate for damage done. Amongst other points it makes the

one I mentioned about the obligation even to provide a forum for nationals of other States when damage is done to them. It also makes clear that not every kind of damage is attributable to States. It goes on to say what happens when it is attributable or where someone is unable to recover,--as mainly State responsibility, ultimately the whole focus is on State responsibility but not only on State responsibility, I think this is a valid attempt to meet some of the difficulties discussed by some of the speakers at this colloquium.

Article 8 lays down the duty to abate. We have not heard much discussion of that problem, but this principle is here reflected.

Article 9 lays down the duty to minimise. This is another point which we have not discussed, one to which I attach some importance.

Article 10 indeed picks up the point made by Prof. ODA and Prof. BOUCHEZ and attempts to suggest as a possible solution to the enforcement problem the concept of concurrent or shared jurisdiction,--not exclusive coastal State jurisdiction and not exclusive flag State jurisdiction. Whether or not it proves to be the panacea, it is an attempt at an accommodation on that issue.

There are no enhancement provisions, a point raised with me privately by Ambassador Seidenfaden which I think is one that we could usefully consider. There are one or two other points listed by Larry Hargrove which are not specifically reflected, for example port refusal, sanctions of that kind; no contingent linkage of benefits under this treaty to benefit from under other treaty provisions. These are interesting ideas worth pursuing, but I think rather more interesting in the extent to which this treaty does take the approach recommended by people such as Larry Hargrove and others who have spoken on this subject.

Article 11 deals directly with the right of intervention. It is essentially the IMCO convention.

Article 12 provides for sovereign immunity in a way that may prove controversial, but it raises the issue.

Article 13 deals with settlement of disputes in a way that I think could be improved, but it at least raises the issue in specific terms.

...6

Finally, article 4 is a controversial one, because it provides that coastal States may take measures on a residual rights basis where international standards are not adequate to meet a particular problem. I do not want to develop that point because it relates to the last part of our discussion, it is as much law of the sea as law of the environment. It is provided, however, that any such action by Coastal States must be based on the objectives of this treaty, in order to eliminate arbitrary action, and that they must not be discriminatory. * Now *(new para) I am not suggesting that this treaty is a model to anyone for anything, but I do think it is the kind of development going on now that should be taken note of, whether in the specific terms of the Canadian Draft or the Kenyan Draft or the Maltese Draft. I think it is of interest that so soon after the Stockholm Conference, much of the results of Stockholm is finding its way into the proposed draft treaty. I would ask, since I do not have any more time, that those who are interested might look at the article by Jean-Pierre LEVY, and if you want to go back a little bit further into the origins of some of these concepts, read Louis Sohn's article in the Harvard International Law Journal, Summer 1973. Almost everything in this draft can be traced to these developments, one or more of these developments, either those relating to the Stockholm Conference or to the earlier discussions preceding it, including the principles of the Trail Smelter case.