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FEDERALISM AND CONTEMPORARY INTERNATIONAL LAW

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UNCLASSIFIED

I. SOVEREIGNTY AND INTERNATIONAL LAW

(A) THE "NEW INTERNATIONAL" LAW AND TRADITIONAL INTERNATIONAL LAW

State as the Unit of International Society

Since the earliest origins of the law of nations, the state has been the subject and concern of international law. In recent times it has become accepted that there may also be other subjects of international law: for example, certain international organizations. In the light of recent developments in the field of human rights, even individuals have become a subject of concern to international law. Nevertheless it remains the case that the parties to all international agreements are states, and developments in international relations, whether in regard to human rights or in other fields, have not eroded the concept of the state as the unit of international society.

Sovereignty as the Essential Characteristic of States

It has long been recognized by international law that before an entity can be acknowledged as a state it must possess independence and sovereignty. Contemporary international law has not altered the traditional concept of statehood as formulated by Judge Anzilotti in the judgement of the Permanent Court of International Justice in 1931 in the Customs Union Case: "Independence...may also be described as sovereignty (supreme potestas) or external sovereignty, by which is meant that the state has over it no other authority than that of international law. The concept of independence, regarded as the normal characteristic of states as subjects of international law, cannot be better defined than by comparing it with the (class of) 'dependent states' ".

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Consensual nature of International Law

Side by side with the continuous emphasis in international law of the importance of the concept of sovereignty, is an increasing emphasis of the notion of consent as the juridical basis of the binding authority of international law. International law is not imposed by an outside authority; it relies for its binding force upon the consent of states to be so bound. The consensual nature of international law does not however, weaken it; on the contrary, it provides its greatest strength, since any law to be effective must reflect the will of the community. Even traditional concepts of international law recognized consent as a principal rationale for the growth of customary principles of international law. Contemporary international law has tended to focus upon the element of consent as of primary importance in relation to principles of international law and as a prerequisite to the development of new customary rules of international law.

The concept of consent as the essential characteristic of international law is stressed in particular by Eastern European jurists. There is broader authority for the concept however, since it is reflected in the statute of the International Court of Justice. Article 38 includes, for instance, among the "sources" of international law, conventions "establishing rules expressly recognized by contesting states". Even custom is described "as evidence of a general practice accepted as law". The consensual character of contemporary international law is stressed in particular in the 1927 judgement of the Permanent Court of International Justice in the "S.S. LOTUS" case where it was stated that "the rules of law binding upon states emanate from their own free will as

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expressed in convention or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims".

Contemporary Attitudes of States: Suspicion about the role of custom

The increasing significance attached to the importance of sovereignty and consent as the basis of relations between states is in part the result of ideological differences among states, since the Second World War, but also owes a great deal to the emergence in the post-war period of many new states which had not had an opportunity, during the period preceding their independence, to participate directly in the formulation of rules of international law. Not surprisingly, such states tend to question principles of international law established before their independence in the light of their own national self-interest.

Clear evidence of these attitudes is found in the following extract from a 1966 report of the Special Committee of the UN on Friendly Relations: Co-operation among States: "...States feared that they would be subject to customary rules of international law which they did not recognise and which they had played no part in framing. Others added that the codification and progressive development of international law...would thus strengthen the confidence of new states in international law and in the legal settlement of disputes... By participating in the formulation of contemporary international law through the process of codification and progressive development, the new states would be able to play a part in bridging the gap which sometimes existed between the present-day international legal order - which was the product of an era when their

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interests had not been combined - and justice".

Treaties as a Basis for Developing International Law

In any event, whatever the causes, it is abundantly clear that the remarkable resurgence of interest in recent years in international law as the means of regulating relations between states has been closely connected with the wide variety of law-making activities in the UN family, nearly all of which have been directed towards the elaboration of multilateral conventions or treaties as the most certain means of codifying and developing international law. Customary law remains of great importance, but states are very conscious of their role in its formulation. Treaty law has substantially displaced customary international law as the preferred basis for the regulation of activities on the international plane. Treaties, necessarily, rely for their efficacy on consent. Post-war activities in the UN and the specialised agencies and in other international organizations have reflected these trends and significantly contributed to the treaty making process. The result is a vast and complex network of interlocking treaty relationships, voluntarily entered into, which has a substantial impact upon the daily activities of states.

The Nature of Treaties: States as Parties

In the post-war period states have not refrained from committing themselves to treaty obligations through fear of infringement on their sovereignty. On the contrary, precisely because the nature and extent of the obligations assumed by treaty are more clearly spelled out and circumscribed, states are more readily prepared to accept treaties and conventions as a means of voluntarily undertaking commitments, for in

so doing they reaffirm their sovereignty.

It is relations between states, and between states and international organisations, which are the subject of this network of treaties. Rarely have the constituent parts of federal states entered into treaty relationships, and then only with the approval of the central authority. Moreover, the trend has been away from this practice, and there is no evidence of new developments in the opposite direction. The entities which daily contract with one another on the international plane are states. Private contracts, far less in number and scope, are not infrequently entered into by entities other than states, but these contracts or arrangements are not regulated by or considered binding in international law and are not, for example, subject to registration with the UN pursuant to Article 102 of the Charter.

Treaties preferred to custom in contemporary law

Under the traditional law of nations, custom rather than convention was the primary source of international law. Contemporary international law, on the contrary, places more emphasis upon conventional (treaty) law and, while continuing to recognise the importance of customary international law, tends to stress its consensual nature. The cause of this change in emphasis - and the result - is an increasing emphasis on statehood as the prerequisite to status in international law; sovereignty as the essential characteristic of statehood; consent as the juridical basis for international law; and cooperation and good faith as the foundation for friendly relations between states.

(b) The Trend Towards International Co-operation

Law-making on the international plane is organized, channelled, encouraged and accelerated through the UN and its related international organizations. The foundations of a world order are being laid through the development of a wide-ranging intricate network of treaties supplemented by non-binding regulations, declarations and recommendations based on the general recognition of the interdependence of states and the consequent mutual need for common efforts to develop the rule of law on the international plane.

Much of the work of the Specialized Agencies of the UN is carried forward not on the basis of legally binding commitments by members states, although this has occurred to a great extent, but rather on the basis of the recognition of a common need to co-operate in order to regulate international intercourse on such matters as world health standards, labour standards, telecommunications regulations, exchange of meteorological information, etc. This recognition in practice of the desirability of international co-operation has become accepted by the UN as a duty, if not a legally binding commitment, to co-operate. One of the Charter principles being studied by a special legal committee of the UN is "the duty of states to co-operate with one another in accordance with the Charter". The studies of the special committee of this principle are not yet complete but the work already carried out provides ample evidence of a general recognition of the desirability of co-operation among states on the basis of their own self-interest and their common welfare. This duty to co-operate is exemplified in the procedures adopted by the UN for the development and codification of international law. Instead of leaving it to the stronger states to develop law by precedent and custom,

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a settled practice has developed in many areas of the law in obvious need of clarification, development or codification are elaborated by means of draft international treaties, which are presented to states for their acceptance. This process clearly reflects the three principles of sovereignty, consent and cooperation. Indeed the very concept of a multilateral treaty as a means of regulating affairs between states reflects to an equal degree the community that sovereign states, lacking a supra-national authority, can regulate their affairs only by consent and cooperation.

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(c) Sovereignty as the basis for international peaceability

It can be seen that the basis of these varied activities within the UN system is not, as many had hoped in the immediate post-war years, an acceptance of supra-nationalism or a rejection of nationalism, but a vigorous assertion of the sovereignty and equality of all states.

Sovereign Equality - a basic norm

The principle of sovereign equality of states enshrined in the Charter of the United Nations is not in itself a traditional principle of international law but is a composite of the two fundamental and traditional principles of sovereignty and equality. The framers of the Charter showed great foresight in basing the Charter on the combination of these two principles for they have together characterized the whole post-war development of international law both within and outside the UN.

State Sovereignty - a Charter principle

The thread linking traditional concepts of international law and contemporary concepts is state sovereignty. The principle is enshrined in Article 2 of the United Nations Charter which provides that "the organization is based on the principle of the sovereign equality of all its members". The same article provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. The article further lays down that "nothing in the Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state". The concept linking all these basic principles of the Charter is that of state sovereignty; sovereignty, subject only to limitations voluntarily accepted, through treaties

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or membership in international organizations.

Equality of States - a Charter principle

The second of the fundamental Charter principles, equality of states, is of special importance to the non-aligned world, who refuse to take a second place to other states, including the nuclear powers. Again and again major pronouncements of the UN, of legal as well as political significance, such as the declaration on colonialism, the declaration on sovereignty over national resources, the declaration on non-intervention, the declaration and subsequent treaty on outer space, have affirmed the juridical equality of states. Again and again the newer states as well as the older small and middle powers, have endeavoured to redress the imbalance between the strong and the weak, between the rich and the poor, between the have and the have-nots by asserting the same principles which have been accepted as principles of domestic law in all civilized societies, the notion of juridical equality.

(d) The Eclipse of Half-States and Dependencies

Earlier concepts according recognition to varying levels of sovereignty and independence possessed by various forms of dependencies have given way to a universal demand for full statehood as the only acceptable basis for membership in the international community. Half sovereignties such as colonial territories, protectorates and other forms of dependent status are tolerated as entities on the way to statehood, but full statehood has become the unique prerequisite for membership in the international community.

Further principles of international law affecting federalism

Federal states are enjoined to submit to the same rules of international law as unitary states, and are not allowed by those rules to plead their internal law as a defence to state responsibility. The central authorities of federal states are answerable in international law for the delinquency of their component parts.

Federal states which formerly allowed their component units a degree of international personality, as a carry-over of their sovereignty prior to federation, have gradually tended to centralise control over foreign policy as international relations have moved from the traditional subjects of war and peace exchanges of diplomatic envoys, rights of legation, etc. to the extraordinarily complex and interconnected range of political, economic, technical, social, military and legal considerations which today are included within the term foreign policy.

General economic trends and developments frequently transcend the traditional state structure; they tend to ignore not only state boundaries but attempts at national control, sometimes requiring a merging of forces

not only within states but as between states, in order to provide the kind of economic strength that single states do not alone possess. Far from there being any modern trend towards the fractionalization of states or towards the development of new concepts of half-states or states within a state, contemporary tendencies appear largely to favour the strengthening of the state, the strengthening of planning on a broad scale, and the coordination of policy, rather than decentralization and divisiveness. The trend is mainly towards larger and more encompassing federations.

With the decline and virtual disappearance of the whole range of dependencies and semi-independent entities extending from protectorates and mandates at one end of the scale to dominions of the Commonwealth at the other, concepts of sovereignty have clarified and sharpened. Only two types of status receive continuing recognition under contemporary international law: fully sovereign states and colonial territories on the way to independence. As a result, international law is no longer cluttered up with the rationalization of various levels of sovereignty. While certain protectorates continue to exist, the notion of entities having varying degrees of international personality has virtually disappeared in practice and in theory. There seems little reason to expect that the international community would welcome a reversion to earlier concepts of semi-sovereign or partially sovereign entities, particularly if such entities were to claim the right to separate representation in the UN and its associated international organizations.

(c) Sovereignty as the Exclusive Basis for Membership in International Organizations

While member states voluntarily relinquish a measure of their sovereignty to UN organs pursuant to their treaty obligations contained in the Charter, sovereignty nonetheless remains the cornerstone of the UN's edifice.

There is no suggestion anywhere in the Charter that states members share their external sovereignty on the international plane either with one another or, in the case of federal states, as between the constituent part of such states. On the contrary, the UN is founded on the principle of one state having one vote, with no differentiation as between states (except, of course, in the Security Council, where the affirmative vote of the permanent members is required for certain types of action). Federal states have no more and no less power than unitary states. There is no recognition either in the Charter or in the general principles of contemporary international law of any concept of states within states. Under the provisions of Article 3 of the Charter, membership in the UN is open only to states. In practice, the only exception has been the special case of Byelorussia and the Ukraine, the circumstances of whose admission to the UN were unique. Statehood is the hallmark and the prerequisite of membership in the international community.

The same principles governing the general criteria for membership and participation in the UN have carried over into the specialised agencies of the UN and the other members of the UN family of international organizations. Their membership requirements are, briefly, as follows:
IAEA (Stat. Art. IV, Para. B) : 'states members' of the UN or of specialised agencies who ratify within ninety days, other states upon approval of the General Conference after recommendation of the Board of Governors.
IBRD (Arts of Agreement, Art. 1): 'countries'. ICAO (Convention, Art. 93): 'contracting states' who ratify the Convention. UNESCO (Const. Art. 2): members

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of the UN (automatic membership) or nations 'states' who are admitted after a recommendation of the Executive Board by a two-thirds vote of the General Conference. FAO (Const. Art. 2): 'nation'. WHO (Const. Art.3): 'membership ... shall be open to all states'. ILO (Convention, Arts. 1-9): 'states', associate membership available to 'territories or groups of territories'. UNO (Const. Art. 3): 'territories and countries, under certain conditions. IBF (Arts. of Agreement, Art. 2): 'countries'. IMF (Const. Art. 3(1): 'any sovereign country'. ITU (Convention, Art. 2): original membership, 'country or group of territories'; later membership, UN member 'country' or non-UN member 'sovereign country'.

It will be seen that in some cases associate membership is open to territories or groups of territories. These provisions were intended (and have since been so implemented) to cover the cases of colonial territories not yet independent. In some few cases decisions have been made by specialised agencies to accept as full members colonies which had become responsible for the conduct of their international affairs. In no case, however, has any member of the UN family of international organisations admitted to membership a unit of a federal state, (apart, of course, from the special exception of the Ukraine and Byelorussia). Thus, only one criterion is now applied for full membership in international organisations, namely, statehood. The overseas territories and remaining dependencies which have been granted observer or associate status in international organisations have become anachronisms. Their number is steadily diminishing and constitutes only a handful today.

Clear demarcations of jurisdiction and sovereignty are more than ever needed in contemporary international society in order to channel resources, marshall efforts and coordinate policy with a view to withstanding the political, economic and sometimes military pressures which beset states today. Not surprisingly, the trend in the world today is towards a single sovereignty

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on the international plane. Therefore, [illegible] is indivisible in international law just as [illegible] is indivisible in international politics.

(f) Future Trends Concerning Membership in International Organizations

The UN is founded on the principle of juridical equality. In spite of the necessary and desirable recognition, in certain very limited circumstances, of the political and military inequality of states, (for example, in the provisions for permanent seats and veto power of certain states in the Security Council, and in the provisions in the draft non-proliferation treaty for security guarantees by the nuclear powers), the principle of juridical equality of states, of "one state one vote" is firmly enshrined in the United Nations. It would be to fly in the face of strongly held views of member states and long established principles to assert that federal states are "more equal" than unitary states. Yet this would be the result if they were permitted more than one seat and more than one vote. Such issues go far beyond the formal requirements of statehood for membership in the UN. They raise questions which could undermine the very philosophical basis of the UN and the developing world order.

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(g) State responsibility and treaty obligations

Under well-settled principles of state responsibility, states are responsible to one another under international law for the performance of the treaty obligations they incur and for wrongs they commit. It is equally well-settled law that an international delict by a federal state or by any part of the federal state calls to the government of the state for redress. A state cannot hide behind its constitution in order to evade international responsibility. For example, article 46 of the International Law Commission's draft Convention of the Law of Treaties provides: "A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest."

The government of a federal state could therefore be put in an untenable position if, on the one hand, "formal" obligations were incurred without its knowledge and consent by a member of the federation, while, on the other hand, the federal government was obliged to accept responsibility for the performance of such undertakings in spite of the fact that its constitution does not permit their being incurred without its consent.

Since the government of the state as a whole is responsible for the performance of international treaty obligations, it follows that it ought to be consulted before such obligations are incurred. In the Canadian context if a province ought not to have the right to commit another province and, even less, the state as a whole, to a treaty obligation. On the basis of logic alone, and leaving aside questions of good faith and the desirability of co-operative federalism, such action would be incompatible with the basic principles of federalism and would pose new problems in the field of international

law. As a minimum, the knowledge and consent of the Government of the country as a whole is required as a prerequisite to any action of this nature by one of the constituent parts.

The only other alternative, that the province is itself internationally responsible for performance of its own "treaty" commitments (or commitments incurred through participation in international conferences), would raise a number of fundamental questions relating to its status under international law, including for example its capacity to sue or be sued. The Constitution of the International Court of Justice permits such action only by "states" and the development of new criteria would require either that a province become an independent sovereign state, or that international treaties and practice be radically altered. The principles of state responsibility provide another compelling reason why the principles of federalism are founded upon recognition of the need for a single indivisible international personality for the federal state. Statehood is the criterion for international responsibility, and half-states, quasi-states or states within states cannot be brought within the purview of the principles of contemporary international law.

XI. TREATY MAKING AND CONTRACTS BY INTERNATIONAL LAW

(A) Formal and Informal Agreements - Their Juridical Similarity

At one time the form of an agreement appeared to be of considerable significance in differentiating between important treaties and routine transactions and in distinguishing between agreements governed by international law and those not. It has in the modern era, become well settled that the form of an international agreement is not itself determinative of its juridical status. The terms "treaty", "agreement", "protocol", "convention", and a variety of similar expressions are broadly understood in an international context to comprise any international agreement binding upon the parties in international law without regard to the actual form or character of the agreement. The Permanent Court of International Justice, predecessor of the present International Court of Justice, stated in the Customs Regime Case, that "from the standpoint of the obligatory character of international agreements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocol or exchange of notes". The definition of "treaty" adopted by the International Law Commission, a subsidiary organ of the UN General Assembly, responsible for drafting proposals for codifying international law, is as follows: "treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

Under these definitions, which may be taken as declaratory of international law, exchanges of notes between an embassy and a foreign

ministers have as much legal effect and create obligations under international law which are no less binding than a formal treaty concluded between Heads of State.

This same concept is expressed in the following way by a leading author:

> "A treaty is an agreement between States, governed by International Law as distinct from Municipal Law, the form and manner of which is immaterial to the legal consequences of the Act... The name given to the instrument is immaterial provided the parties have contractual capacity in International Law, and provided their agreement is intended to create rights and obligations, or to establish relationships governed by International Law". [1]

There therefore appears to be no basis in international law for statements purporting to distinguish international agreements from treaties on the grounds that the latter term is generally reserved to designate the more solemn, almost majestic agreements, which are liable to have a direct effect on the political relationship between two states, whereas an agreement is restricted to a more modest purpose without specific bearing on political relations.

Thus, the key to determining whether or not an agreement creates

[1] O'Connell "International Law" 1965, p. 211.

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binding obligations under international law is not the degree of formality of the agreement but rather whether it is "governed by international law". In order to determine whether an agreement is governed by international law it is necessary to consider a number of factors. Chief of these, however, is whether the agreement is concluded between entities which are themselves subjects of International Law. Agreements between states fall within this criteria, and it is generally accepted that agreements between states and international organisations also fall within this criteria. When two states make an agreement with each other, the agreement is generally to be regarded as a treaty. Accordingly, if their intention is to make only a contract or a "gentlemen's agreement" they would have to make their intention clear.

(B) Capacity to Conclude Treaties

The International Law Commission has proposed the following formulation in its draft convention on the Law of Treaties on the issue of Capacity of States to Conclude Treaties: "1. Every state possesses capacity to conclude treaties. 2. States members of a Federal Union may possess the capacity to conclude treaties if such capacity is admitted by the Federal Constitution and within the limits there laid down."

The general discussion at the 1968 Vienna Conference of the UN on the Law of Treaties reflected the following main points:

(i) There was complete endorsement of the International Law Commission's position that treaty-making by a unit of a federal state is possible only if authorised by the constitution of the federal state;

(ii) The conference was divided on whether it was appropriate to insert a statement of this character in a convention on the Law of Treaties, the majority upholding the view of the International Law Commission that such an article was not inappropriate;

(iii) The conference was divided on whether a clause should be added expressly providing for reference to the federal authorities by any foreign state in the event of uncertainty on the part of such a state as to the existence of the powers in question. By a closely divided vote the conference considered that such an article was not necessary. Many states were of the view that such a clause would be superfluous and would in any case be subsumed within the principle of non-intervention;

(iv) The phrase "members of a federal union" was substituted for the term "states members" to avoid the confusion between "states" which alone are the subject of the draft law of treaties, and parts of federal states; thus Paragraph 2 of Article 5 was revised to read "members of federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down".

In view of the wide ranging differences of views and division of vote during the conference on this article it is not certain the

article will receive the necessary support for its approval at final reading of the second session of the Law of Treaties Conference in 1969.

(v) Trends in Treaty-Making in Federal States

During the post-war period, a large number of new states have come into being as a result of the termination of their colonial status. A number of these states have adopted federal constitutions. It is interesting to note that none of them has provided for treaty-making powers for the component units of the states in question. For example, such states as Argentina, Burma, India, Malaysia, Mexico, Venezuela, Yugoslavia, all of which have federal constitutions adopted since World War II, do not permit the federal units of their respective federations to enter into treaties.

In some of the older federations, which had resulted from the union of previously independent entities, the component units have retained within the new federal structure certain of the treaty-making powers which had formerly appertained to them. Even in the case of these older federal states, however, the trend has been towards less frequent and more circumscribed use of the already limited treaty-making power possessed by the component units.

(d) The Principle of Control

It can be seen that the principles of federalism, as they have been developed in the last few decades and embodied in the constitutions and practices of federal states, have tended to recognise the necessity, under the principles governing international intercourse, for the government of the state as a whole to possess the treaty-making power. It is noteworthy also that in the older federal states, there is contained in their constitutions the principle of control by the central authority, so that even where the component units do possess the treaty-making power, it is exercised in practice in close association with the federal authorities, and with their consent.

(c) Conclusions

1) An international agreement, whether described as a "treaty" or not is defined by the criterion of its binding nature under international law. There is no basis in law for the proposition that one type of binding international agreement can be signed only by sovereign states and others by entities such as parts of a federal union.

2) There is no trend, either in the constitutions of new federal states or in the evolution of older ones, toward a treaty-making capacity by parts of federal unions. On the contrary, the trend in new federal constitutions is unambiguously in favour of a unique central power in the external field; similarly, in older constitutions, it is in favour of increasing centralization. Every federal system provides for federal control over the exercise of the external power because in the absence of such a provision the component parts would become, in effect, half-states. Since the units of the federation would have no authority within the federal system superior to them in relation to external matters they would then act as do fully sovereign states, independently in their fields of competence. Such practices would of course constitute a complete negation of the whole principle of federalism.

A) What The Constitution Says

The British North America Act does not deal directly with the subject of treaty-making. The assumption in 1867 was that the treaty-making power was, and would remain, part of the prerogative power to conduct foreign affairs which vested with the Sovereign and was exercised on the advice of her British ministers. The only provision of the British North America Act referring to treaties was Section 132 which provided that the Canadian Parliament (not the provincial legislatures) "shall have all the powers necessary and proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising out of treaties between the Empire and such foreign countries."

This provision became obsolete as Canada gradually acquired the treaty-making capacity in its own right, during the period 1877 to 1931, as part of the Royal Prerogative Powers in respect of Foreign Affairs which devolved upon the Crown in right of Canada.

The change was brought about almost entirely by custom, convention and recognition.

At first Canada was not consulted in the negotiation of any treaty affecting her interest. Subsequently, Canada was consulted, but her advice was not necessarily accepted. Later the advice of Canada was invariably taken. Then Canada became the prime negotiator of its own treaties, but the sole signatory remained a representative of the British Government. Later, a Canadian representative signed such treaties together with the British delegate. Finally, Canadian delegates alone negotiated and signed treaties of concern to Canada.

The process was a lengthy one. However, throughout the development of Canada's status to that of an independent state, and throughout the series of Imperial Conferences held during the period of transition from colony to fully sovereign nation, it was the Government of Canada (and not those of the

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revinces) that participated in the consultations. Later, it was decided t the 1923 Imperial Conference that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent from all governments"; the Governments referred to were the governments of the Dominions, not those of their constituent parts.

The development by custom, convention and precedent of the federal power to enter into treaties was crystallised by a judicial finding in the above Convention Case (1937) in the celebrated opinion of Chief Justice Duff:

> "As regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion Executive and the Provincial Executives that this authority (to enter into international agreements) resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a Province represent the Crown in respect to relations with foreign Governments. The Canadian Executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs."

The devolution of the treaty-making power to the Governor-General was confirmed in 1947 when, on the advice of the Canadian Government, the King issued Letters Patent delegating to the Governor-General "all powers lawfully belonging to me in respect of Canada". The official press release on that date described the new Letters Patent as follows:

> "By the introductory words of Clause 2 of the new Letters Patent the Governor-General is authorized to exercise, on the advice of Canadian Ministers, all of His Majesty's powers and authorities in respect of Canada. This does not limit the King's prerogatives. Nor does it

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anticipate any change in the present practice under which certain matters are submitted by the Canadian Government to the King personally. However, when the new Letters Patent come into force, it will be legally possible for the Governor-General, on the advice of Canadian Ministers, to exercise any of the powers and authorities of the Crown in respect of Canada, without the necessity of a submission being made to His Majesty. (The new powers and authorities conferred by this general clause include, among others, Royal Full Powers for the signing of treaties, Ratifications of Treaties and the issuance of Letters of Credence for Ambassadors.) There will be no legal necessity to alter existing practices. However, the Government of Canada will be in a position to determine, in any prerogative matter affecting Canada, whether the submission should go to His Majesty or to the Governor-General.

The new Letters Patent revoke and supercede the existing Letters Patent and the existing Royal Instructions. The Royal Instructions have been incorporated in the new Letters Patent which have been issued under the Great Seal of Canada."

It is significant that the press release, and the Letters Patent to which it refers, contains no suggestion that the prerogative powers in foreign affairs passed to the Lieutenant-Governors of the Provinces. The devolution was clearly and expressly to the Governor-General (i.e. the Government of Canada). It is significant also that no exception was taken to the Letters Patent or to the press release by the Provinces.

It has been suggested that since the Canadian Constitution has come into being to some extent as a result of precedent, that is to say the development of custom and convention, the Constitution is however less clear or valid than

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it might otherwise be. This conclusion is based on a mistaken interpretation of the process of constitutional development.

It is of course true that while the British North American Act remains the basic document of the Canadian constitution, the Act was not exhaustive and much of the Canadian constitution is unwritten. Not only were even most of the constitutional provisions intended to govern the functioning of the new dominion ever expressly set out in the Act itself. Obvious provisions not so expressed, and of major importance in relation to prerogative powers, including the foreign affairs prerogative. Moreover, the Act makes no mention of responsible government, the Cabinet system, the status and role of the Prime Minister, the party system, nor is the office of Governor-General constituted by the Act. The office is entioned, but the incumbent is appointed by the Royal Prerogative. No mention whatever was made of the Prime Minister or his Cabinet in whom the real executive power resides. The language of the preamble to the Act and the evident intention of the drafters was to impart into the Canadian constitution the whole system and apparatus of government developed prior to 1867 both in Great Britain and in North America. Indeed the preamble to the Act makes this explicit in stating that "whereas the provinces of Canada and Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion under the name of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom..."

Accordingly, the Act does not spell out the limits of the prerogative of the Crown. No mention is made of the duty resting on the Governor-General to ensure that there is at all times a Prime Minister and Cabinet in office, in keeping with the principle of continuity of government. No mention is made of the Supreme Court of Canada or of its constitutional role. Nothing in the

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Constitution makes reference to the basic constitutional principles of the supremacy of Parliament and the rule of law.

It is clear, therefore, that the Canadian constitution is in part written and in part unwritten, and thus is not restricted to those provisions which are set down in writing in the BNA Act. The constitution is, however nonetheless real for being partly in unwritten form. It is an inaccurate view of constitutional law to maintain that because a particular constitutional point is not enshrined in the written constitution, it thereby loses validity. This would apply only in the case of a country with a complete written constitution, if there is such. The whole history of constitutional practice has made clear that an unwritten constitution is fully capable of providing the necessary certainty of the law and the essential safeguards which are the function of every constitution. To suggest that those areas of constitutional development which are unwritten are therefore blurry or uncertain is to ignore the basic and long settled principles of constitutional practice. In the light of these considerations it cannot be argued that this or that provision of the Canadian Constitution is not clear simply because it is not contained in a written document. In particular, it is not justifiable to contend that it is unclear where the external power resides in Canadian constitutional practice because no specific provision on this subject is contained in the BNA Act. In fact it has long been established that Canada has a treaty-making power and that it is exercised through the Government of Canada. This principle has never been questioned. Recently, however, it has been suggested that this power is shared with the provinces or that it ought to be shared with the provinces and it is even suggested that the provinces may have an exclusive treaty-making power in certain fields. These allegations are not supported by Canadian constitutional practice.

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The position is correctly expressed by Lord McNair in the following language:

"Normally, it is the federal government that exercises the totality of international capacity to conclude treaties and it is the exception to find any of the member states being permitted to participate in this function. From this point of view the United States of America, the Dominion of Canada, and the Commonwealth of Australia may be regarded as belonging to the pure type, in which the whole treaty-making capacity is vested in the federal government; the member states or provinces possess no such capacity, although their cooperation may be required for the purpose of implementing a treaty ..." **

The essence of this position is recognized in the following concl[usion] of Mr. André Patry in his study: "International Capacity of Federal States"

"Bref, c'est en vertu d'une pratique constitutionelle en partie fondé[e] sur une interprétation plutôt restrictive de la personnalité des provinces que l'Etat Fédéral a assumé en toute exclusivité l'exercic[e] des compétences internationales ..." (page 65).

The same general position is repeated in another passage:

"Le droit international classique ne reconnaît, on le sait aucune personnalité véritable aux Etats membres des fédérations".

Mr. Patry goes on, however, to question whether these principles still app[ly] to postulate new principles of federalism or international law (exactly w[hich is] not clear) as the basis for a different conclusion:

"Mais il appartient d'abord à l'état fédératif lui-même de concéder, par la constitution, l'exercice de certaines compétences internatio[nales] aux collectivités-membres".

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(b) Internal Competence and External Sovereignty

The argument is sometimes made that the provinces should have the external sovereignty that goes with their internal competence under the British North American Act. It is important, therefore, in considering this demand to be aware of its implications, on the basis of the actual provisions of the British North American Act.

There is no dispute as to the status of the British North American Act of 1867 as the basic constitutional document of theCanadian constitution. It provides for the division of legislative powers as between the Parliament of Canada and the provincial legislatures in Part VI (Section 90-5 inclusive).

Section 91 provides that "it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the Peace, Order and Good Government of CCanada in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the legislatures of the provinces". (It is noteworthy that section 92 makes no reference to the prerogative power of the Queen but refers only to "the legislature" in each province). Section 91 goes on to list, "for greater certainty, but not so as to restrict the generality of the foregoing Terms of this Section", 29 classes of subjects falling within "the exclusive legislative authority of the Parliament of Canada". Significantly, the section closes with the provision that any matter coming within the classes of subjects enumerated in this section shall not be deemed to come within the class of matters "of a local or private nature" listed as belonging exclusively to the legislatures of the provinces" in section 92.

Section 92 provides that "in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects" thereinafter enumerated. Fifteen classes of subjects are listed.

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ixteenth sub-section concludes with the clause [illegible] all matters merely local or private nature in the province".

Section 93 provides that "in and for each province" the legislature exclusively make laws in relation to education, subject to the provisions ined in four sub-sections dealing with denominational schools, separate ls, and dissentient schools. (It should be noted that the powers are not exclusive to the provinces; sub-section 4 provides that "in case any such incial Law as from Time to Time seems to the Governor-General-in-Council isite for the due Execution of the provisions of this section is not made, n case any decision of the Governor-General-in-Council on any appeal under section is not duly executed by the proper provincial authority", then such case "the Parliament of Canada may make remedial laws".)

Section 94 provides simply that the Parliament of Canada may make visions for the uniformity of all or any of the laws relative to property civil rights in Ontario, Nova Scotia and New Brunswick, and of the court cedures in the three provinces, but that any such act requires provincial islation to be made effective.

Section 95 provides for concurrent powers of legislation respecting iculture and immigration. The language of the section is quite specific in iting the powers of provincial legislation "in each province" and provides such law shall have effect as long and as far only as it is not repugnant to act of the Parliament of Canada.

A reading of these sections makes abundantly clear that the vinces have merely local powers. Leaving aside the nature of classes igned respectively to the Parliament and the respective provincial legislatures, h terms are used in section 91 as "between the province and any British foreign country, or between two provinces" occurring in Section 91,

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in the classes of subject assigned to Parliament,
ub-section 13 - ferries,
which is in sharp contrast with the language used in assigning classes of
subject to the provinces; where such as, e.g.:

Section 92:

sub-section 2 - taxation and revenues; "within the province"

sub-section 6 - prisons; "in and for the province"

sub-section 7 - hospitals; "in and for the province"

sub-section 8 - municipal institutions; "in the province"

sub-section 12 - solemnising marriage; "in the province"

subsection 13 - property and civil rights "in the province"

ub-section 14 - administration of justice; "in the province"

ub-section 10 - local works and undertakings (excluded from provincial competence are steamships, railways, canals, telegraphs and other works "connecting the province with any other or others of the provinces or extending beyond the limits of the province"; also excluded are steamship lines "between the province and any British or foreign country"; a further exclusion from provincial competence are such works as are declared by Parliament "to be for the general advantage of Canada or for the advantage of two or more of the provinces").

There is no hint anywhere in these key sections of any external
extra-territorial powers for the provinces. The basis for any such claims
st therefore lie outside the specific language of the British North America
t.

Apart from the British North America Act, it is necessary to consider
so, in determining whether there is any basis in the argument that internal
mpetence carries with it external sovereignty, the series of consultations
ld within the British Commonwealth which led to the gradual attainment of
tonomy of the Dominions. In particular, it is noteworthy that the Statute
Westminster of 1931 provides in Section 3: "It is declared and enacted that
e Parliament of a Dominion has full powers to make laws, having extra-territorial

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[illegible]ertions." It is noteworthy that this power was not given to the legislature [illegible] province.

It is argued nonetheless that the mere inclusion of a class of [illegible]bject within provincial powers carries with it the necessary related external [illegible]vereignty. No legal basis is cited either in the British North America Act in Canadian constitutional law for such a proposition; it is simply asserted.

It is evident from the above citations that, *insofar* as the B[illegible]t is concerned, provincial powers were intended to be limited to matters [illegible] local nature within the province in question. However, even if these [illegible]siderations were not sufficient by themselves, it would be clear from a [illegible]rther examination of the implications of the notion that a province can [illegible]ve extra-territorial competence that such a thesis is not compatible with [illegible] Canadian Constitution.

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The argument, if accepted, [illegible] some far-reaching consequences. An analysis of the classes of subject matter assigned to the provinces compared against the statutes and purposes of the international organizations in the list given leads to the following conclusions on the basis of such a theory:

Section 92:

Sub-section 1 - direct taxation: while there is no constitutional objection to provinces borrowing outside their borders for provincial purposes the sub-section might be used as a basis for maintaining the province could participate in the International Monetary Fund whose membership is limited to states.

Sub-section 5 - management and sales of public land belonging to the province and of the timber and wood thereon: this sub-section might be used as a basis for claiming a right for a province to participate, for example, in the meetings of the Timber Committee of the Economic Commission for Europe.

Sub-section 7 - hospitals, asylums, charities, etc. "in and for the province"; this sub-section might be used as a basis for claiming a right to membership in the World Health Organization and the United Nations International Children's Emergency Fund.

Sub-section 10 - local works and undertakings: in spite of the specific exception of extra-provincial steamships lines, telegraph lines, etc; the theory, which appears to ignore such exceptions, might be

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used in conjunction with this sub-section as a basis for claiming membership in the Inter-Governmental Maritime Consultative Organization, and the International Telecommunications Union; a similarly liberal interpretation of the word 'local' might be used as a basis for claiming membership in the International Atomic Energy Agency and for separate signature of the Test Ban Treaty, and the Non-Proliferation Treaty; for membership in the International Civil Aviation Organization and for signature of the Chicago Convention on Air Navigation and the Outer Space Treaty; and separate representation in the Law of the Sea Conferences and separate signature of the four 1958 Geneva Law of the Sea Conventions.

13 - property and civil rights; this sub-section might be used as a basis for claiming membership in some of the organs of the UN itself such as the Economic and Social Council, or the Human Rights Commission, or for participating in conferences such as the recent Human Rights Conference at Teheran.

14 and 15 - administration of justice and imposition of punishments; these sub-sections might be used (on the basis of the theory in question) for claiming membership in the International Institute for the Unification of Private Law; perhaps even for demanding the right to become a party to the Statute of the International Court of Justice; or for separate representation on the International Law Commission, and the International Court of Justice, in addition, perhaps, to a "Canadian" member).

providing for concurrent powers in relation to "agriculture in the provinces" and "immigration into the province" might be used as the basis for a claim for provincial membership in the Food and Agriculture Organization, and provincial participation in the meetings of the Executive Board of the United Nations High Commissioner for Refugees; or for membership in the Intergovernmental Committee on European Migration (of which Canada is not a member);

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- shared powers in the field of labour relevant to judicial decision might be used as a basis for a claim by a province to separate membership in the International Labour Organization.

Section 93: education; this section is already being used as a basis for a claim to separate membership in the United Nations Education, Scientific and Cultural Organization.

Such organizations as the Universal Postal Union, and the International Civil Aviation Organization might, for the time being, be exempted from such claims, but it is not difficult to foresee that they, too, would eventually be brought into the orbit of the argument that provinces require the right to separate membership in international organizations as such, if only on the basis that exclusion would be discriminatory.

To state such arguments is to show their far-reaching consequences. It is important to appreciate that the problem is not an artificial or unreal one. ~~On the contrary the thesis of provincial external sovereignty based on internal competence has serious and far-reaching implications.~~

It is clear from the foregoing that what is placed in issue by the theories of external sovereignty for provinces is not merely those matters touching on education but the entire range of subjects falling within domestic provincial competence under the BNA Act. If provincial jurisdiction were extended abroad in all fields, where provinces have domestic competence, the provinces would in effect have taken over the majority of the problems involved in contemporary international relations. It becomes the more important, therefore, when such theories are advanced as part of the "new international law" or as a basis for approaching the amendment of the Canadian constitution by fait accompli or precedent, to be aware of the direction in which such theories inevitably lead. Precisely because they are not based

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in logic or law or on existing Canadian constitutional practice, nor on recognized international law, they are particularly elastic. What might now be a theory that internal competence carries with it external sovereignty would later evolve into a theory that, where it had clearly been established that provinces had the right to separate participation in international conferences of one sort, they ought, logically, to be permitted the same right with respect to all conferences of all sorts.

The issue is, therefore, not as to whether a province can attend a "minor" international conference or engage in "technical" relations with another power. The issue is whether Canada is to speak with one voice abroad on a very wide variety of questions which fall under provincial jurisdiction at home, or, in short, whether Canada is one entity in the international community or two or ten or eleven as the case may be. It seems necessary, therefore, to consider the thesis that "precedents" can and are being established in this direction and that this process represents a proper and legitimate basis for revision of the present Canadian constitution.

c. The Process of Creating Precedents

The argument is made that since Canada acquired its sovereignty and independence by custom, convention and practice Quebec can also acquire international status by an analogous series of "precedents". In considering this proposition it is necessary to bear in mind the important role of international law in determining international status in addition to constitutional practice.

It is well settled law that states achieve statehood not only by their unilateral acts, (whether through evolution or revolution, or other means). The acquiescence of other states to their attainment of statehood is the essential prerequisite to membership in the international community. This acquiescence and acceptance of their status is termed, in international law, "recognition". In contemporary practice "recognition" is often achieved by means of admission to the U.N., but this is not an invariable rule, since recognition can be attained by other means, and admission to the U.N. is not looked on by some states as according recognition.

Under long settled rules of international law, international status does not accrue as a result of international action unless such action is:

a) accompanied by a claim to international status; and

b) such status is recognized by other states.

The constitutive act in this process is the recognition accorded

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by states to the international status being asserted. Thus, even an arrangement negotiated by consent at the domestic level which would permit the component units of a federal state to exercise certain powers on the international plane would not necessarily carry with it the powers sought to be created, delegated or conveyed. Other states might not accept the purported international status, because of the possible implications for all states of such a development. (It is of little purpose to point to the "once only" example of Byelorussia and the Ukraine, given the very special circumstances of their admission to the U.N. and the fact that any other attributions of an international personality which they may appear to have in law are very strictly circumscribed in practice.)

Claims to international status by a component part of a federal state which are not founded on constitutional law and practice can place foreign states in the embarrassing position of having to decide whether or not to recognise the status being claimed. The principle of non-intervention is raised if the federal government and the other component parts deny the status being claimed, and it becomes necessary for the foreign state to choose between the competing claims. A further complication is that the principles applicable to recognition of states are not necessarily applicable to claims to limited forms of international sovereignty. In traditional concepts of international law, while there have been many cases of disputed claims to complete sovereignty and independency, situations requiring acceptance of a limited form of sovereignty tended to arise not as a result of a unilateral assertion by the dependency or by a component part of a federal state, but from

the assertion by a colonial power or other superior authority of its relationship with the dependency.

There are many anomalies inherent in contemporary notions of recognition, ranging from the strictly legal observance of pre-determined criteria to highly political approaches based as much upon the nature of political relations with the entity in question as on objective legal criteria. On one point, however, all theories of recognition meet and agree, and that is that recognition is granted when a state deems that it has granted recognition, - not before and not after. Acts consistent with recognition do not constitute recognition, if the author of the acts does not so intend. Similarly, acts not necessarily carrying with them full recognition can be deemed to constitute recognition if the author of the acts so stipulates. (Examples of both types of situations abound in international law). Ultimately however, in practice, reality and legal theory tend to coalesce, and an entity which is able to effectively prove its statehood tends to become recognized as a state. Recognition remains, however, not a mere matter of form. It is an act having specific legal consequences. As a result, it does not tend to occur by an accidental process of equivocal acts.

In considering the possibility of a claim by a province of Canada to international status, it is important to bear in mind that not only states other than Canada would have an essential role to play in according recognition of such status. The federal state itself and its component parts have an equally, if not more important, role.

There is clearly a vast difference between a claim to such rights made by the autonomous Dominions of the Commonwealth to possession of treaty powers and rights to separate representation at international conferences which were accepted, assisted and supported by Great Britain, and a unilateral claim by a province, to an unfamiliar status in international law which is opposed by the government of the country as a whole or the governments of the other provinces. The case for recognition in such a situation is very weak indeed. Participation in conferences of a special nature and outside the U.N. framework would add little to such claims, particularly if the inviting state disclaims any intention to accord such status.

Canada's membership and participation in the League of Nations with the support of Great Britain and other member states pursuant to specific constitutional provisions in the Covenant of the League of Nations can hardly be compared to participation by a province in a non-United Nations conference against the express wishes of the Government of Canada. Similarly, a precedent such as that established by Canada in signing the Canada-U.S. Halibut Treaty of 1923 with the full knowledge, consent and active co-operation of the United Kingdom Government could not be compared, for example, to an alleged treaty which might conceivably be signed by a Canadian province without the consent and co-operation and even perhaps the knowledge of the Government of Canada. Such a unilateral assumption of a right does not thereby create the

(d) The Responsibility of [illegible] in Relation to the Interpretation of Federal Constitutions

The previously mentioned [illegible] on treaty-making powers on the capacity of federal states are an attempt to [illegible] violations of international law would, if accepted by the member states of the UN place an onus on states wishing to have dealings with the component parts of federal states. It is incumbent on such states to be certain that the constitution of the federal state in question clearly permits the kind of activity contemplated, failing which they run the risk of violating the principle of non-intervention.

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(c) contd)

On the basis of the principles of sovereignty, equality, mutual consent and non-intervention coupled with the duty of co-operation, it goes without saying that any foreign state desiring to enter into arrangements with a component part of a federal state cannot restrict its contacts only to the component unit in question. It has a clear obligation in international law to consult with the Government of the federal state before entering upon any course of action which might violate the constitution of the federal state. This obligation is one owed under international law by every state to every other state and it exists irrespective of the wishes of the component part of the federal state in question or the desire of the foreign state to deal with it. To ignore or bypass the Government of the federal state is not a mere breach of protocol. It is a violation of settled rules of international law. State responsibility may well be incurred by such action.

It is obvious that it behoves states to be cautious in the extreme in attempting to interpret another state's constitution, particularly that of a federal state. When the constitution of the federal state in question is in part unwritten the need for caution is all the more great. Obviously the best authority for the interpretation of a state's constitution is the government of the state. To attempt a unilateral interpretation of another state's constitution can constitute interference in its domestic affairs; and to take action based on such an interpretation may, particularly if it runs counter to the known interpretation of the government of the federal state in question constitute a gross violation of the principle of non-intervention. While such possibilities

(4) contd)

may seem highly theoretical, they could well prove to be the inevitable consequence of sequence of events flowing from unfounded claims to international status. If there is a demonstrable need for such constitutional changes, then it is an imperative of both domestic and international considerations that it be brought about by consultation, negotiation and co-operation. Attempts to proceed by unilateral precedent and negotiation by fait accompli are hardly likely to produce the kind of results desired.

right even if willing parties can be found to participate in the act. If there is no pre-existing legal basis whereby such participation in the conference or conclusion of a treaty falls under international law, then the conclusion of such an agreement or the participation in such a conference does not thereby attract international law nor give it any subsequent status under international law. In order for such an act to be what it may purport to be, it must be so recognized by other states. Even more important, however, it must be so recognized by other authorities of the federal state in question. When two jurisdictions compete for authority in the same field, then quite clearly there is a question of recognition as to who has the right under dispute. The authority which has long exercised the right in question understandably has the paramount right until it is upset by the competing authority.

The conflict may appear to be merely a domestic jurisdictional conflict between provincial government and the federal government, a problem not infrequently encountered in the past. The issue is much more serious, however, since it raises questions of international law as well as Canadian constitutional law. On the international plane the issue is quite simply whether there is to be one entity known as Canada, or a series of entities possessing these powers presently exercised only by Canada as a whole.

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(d) **The Responsibility of [illegible] to Take Account of the Interpretation of Federal Constitutions**

The previously mentioned [illegible] constitutes a [illegible] on the capacity of federal states and [illegible] from pleading violations of international law would, if accepted by the member states of the UN place an onus on states wishing to have dealings with the component parts of federal states. It is incumbent on such states to be certain that the constitution of the federal state in question clearly permits the kind of activity contemplated, failing which they run the risk of violating the principle of non-intervention.

...2

(c) contd)

On the basis of the principles of sovereignty, equality, mutual consent and non-intervention coupled with the duty of co-operation, it goes without saying that any foreign state desiring to enter into arrangements with a component part of a federal state cannot restrict its contacts only to the component unit in question. It has a clear obligation in international law to consult with the Government of the federal state before entering upon any course of action which might violate the constitution of the federal state. This obligation is one owed under international law by every state to every other state and it exists irrespective of the wishes of the component part of the federal state in question or the desire of the foreign state to deal with it. To ignore or bypass the Government of the federal state is not a mere breach of protocol. It is a violation of settled rules of international law. State responsibility may well be incurred by such action.

It is obvious that it behoves states to be cautious in the extreme in attempting to interpret another state's constitution, particularly that of a federal state. When the constitution of the federal state in question is in part unwritten the need for caution is all the more great. Obviously the best authority for the interpretation of a state's constitution is the government of the state. To attempt a unilateral interpretation of another state's constitution can constitute interference in its domestic affairs; and to take action based on such an interpretation may, particularly if it runs counter to the known interpretation of the government of the federal state in question constitute a gross violation of the principle of non-intervention. While such possibilities

(d) contd)

may seem highly theoretical, they could well prove to be the inevitable consequence of sequence of events flowing from unfounded claims to international status. If there is a demonstrable need for such constitutional changes, then it is an imperative of both domestic and international considerations that it be brought about by consultation, negotiation and co-operation. Attempts to proceed by unilateral precedent and negotiation by fait accompli are hardly likely to produce the kind of results desired.

IV. CONCLUSIONS

(a) Relations among states are based on respect for the sovereign equality of all states

The consensual nature of international law is a reflection of the great importance attached by states to protecting their sovereignty, subject only to restrictions and obligations voluntarily incurred.

Juridical equality is the foundation stone of the law of treaties since all parties to a treaty must be juridically equal in order to be mutually assured of ability to perform the obligations incurred. Treaty obligations invoke the responsibility under international law of the party incurring the obligation, and only sovereign and independent states can incur state responsibility. Only states can be parties, either as plaintiffs or as defendants to an action in the International Court of Justice. Similarly, membership in the UN is limited to states, and the same standards for membership are rapidly coming into force in the specialised agencies of the UN, as former dependencies achieve full sovereignty and independence. In such organizations sovereign equality is the philosophical basis of the institutions themselves. Each state member votes as one sovereign entity and so open the door to plurality of membership, for federal states would violate the principle of sovereign equality upon which such organizations are founded.

(b) Independent sovereign states are the only members of the international community

The fully sovereign state is the unit of international society; sovereignty and independence are the juridical prerequisites of statehood; and statehood is the sine qua non of membership in the international community. Earlier concepts of varying levels of sovereignty are today anachronistic. Contemporary international law recognizes in practice only fully sovereign states and dependencies under way to independence.

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Former practices permitting [illegible] treaty-making by component parts of federal states have [illegible] powers, even in the case of those few federal states which [illegible] practice with federal control. To postulate new rights in the international law for units of a federal state would run counter to contemporary practice, reverse present trends in international law, and fly in the face of the fundamental principles upon which contemporary international law is based.

As is the case of membership in international organizations, so in the case of treaty-making: contemporary practice and law affirm and reaffirm the fundamental concepts of independence and sovereignty as the essential prerequisites of full participation in international affairs. The post-war evolution of the international community, with its many colonies becoming states, and the virtual disappearance of the half-states and dependencies of the colonial period, have reinforced the importance of these principles. Dependencies have not been interested in acquiring merely internal powers or only external competences; they demand full sovereignty and independence. Thus, a significant characteristic of the evolution of the post-war world is the elimination of half-states from the international scene and the emergence of full sovereignty as the basis for participation in international affairs.

Contemporary international law continues to grant some recognition to the continuing colonial status of certain dependencies, but there is no movement discernable towards the development of new concepts based on the existence of half states, or states within states. Even among the federal states (with the notable exception of Byelorussia and the Ukraine), the movement is away from the notion of half sovereign entities - half sovereign internally or half sovereign externally. Indeed the postulation of external powers for the units of federal states hits directly at the whole basis upon which the post-war

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international community has been developed, through the UN, its specialized agencies and the related international organizations.

(c) Independent sovereign states are the only members of the international organizations (subject to a unique exception Byelorussia and Ukraine.)

The theory that internal competence carries with it external sovereignty leads also to the conclusion that units of all federal states have the right to participate independently in international organizations concerned with subjects on which such units have competence within the federal state. The result, if such a thesis were valid, would be the proliferation of participants in international organizations, which would not only make them unworkable but would contradict the principle of juridical equality of states on which such organizations are based. Federal states would have ten, eleven or fifty seats and the same number of votes, as against the single seat and single vote of unitary states. To permit the component units of federal states to become members of international organizations would open up questions which could threaten the legal and philosophical basis of such organizations. The acceptance of the theories being put forth to justify external powers for the provinces of Canada would have very serious consequences not only the future of Canada but for the future of international organizations.

(d) Unitary and federal states are in the same international juridical position

Because of the consensual nature of international law, the rules of international law tend to reflect the actual needs and wishes of the international community. The principles of sovereignty and equality of states are thus both the juridical basis of international law and at the same time a reflection of the need of states to regulate their affairs in an orderly fashion. It is a corollary of these principles that if a group of states or

dependencies choose to join together in a federation, the result is a single state in the eyes of the international law. Federal states have neither greater nor lesser legal status than unitary states, even where they are the result of the union of fully sovereign states. The theories which would accord greater power in treaty-making and international representation to federal states than to unitary states would understandably meet with great resistance not only from unitary states, but in addition from other federal states which recognize the functional requirement under contemporary conditions for a concerted and coordinated foreign policy. All states are equal in the eyes of the law, and this principle cannot be eroded by federal states assuming powers not accorded to unitary states.

(e) The conduct of foreign affairs in both new and older federal states is the responsibility of the federal government

Earlier practices, developed during an era when international affairs did not present the complex and diverse range of issues which they do today permitted the sharing of both the formulation and implementation of foreign policy amongst the component parts of federal states. Instances of this phenomenon in the 20th century are very few (and in all cases under central controls) and in the actual practice of the federations in question the rights have virtually fallen into desuetude. The explanation for the disappearance of this phenomenon is presumably the increasing pressures exercised upon states today - of an economic, political and sometimes military nature - which require the total strength and total bargaining power of the state to be met effectively, plus the fact that the parts are normally not interested in maintaining sovereign status. Division is synonymous with weakness in international affairs today. Thus, the conduct of foreign affairs in both new and older federations has come to reflect, as a necessity of life, the coordinated view of the country as a whole. Indeed, the pressures which have produced this kind of coordinated

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response from federal states have often resulted in sovereign states associating together in military alliances, political institutions and economic unions. The trend is not towards the whittling away of the power of the states federal state, but rather towards an individual sovereignty on the international plane as the prerequisite to survival.

(f) International cooperation is carried out on the basis of cooperation among states and respect for the sovereign equality of states

Much of international intercourse is based on the need for states to cooperate with one another in common recognition of their interdependence. This practice of cooperation has been recognized as a legal duty upon states in the course of the studies being carried out in the UN by the special legal committee entitled, appropriately, the Committee on Friendly Relations and Cooperation Among States in Accordance with the Principles of the Charter. Such cooperation can only proceed effectively on the basis of good faith, another principle given recognition by the special Committee, and also by the International Law Commission in its studies on the Law of Treaties. Good faith presupposes respect for the principles of sovereignty, equality of states, and non-intervention. These principles are imperatives in the developing world order. The notion that precedents can be established by fait accompli rather than by cooperation and consultation undermines these principles and runs counter to prevailing trends in international law.

(g) Federal states adjust their internal mechanisms so as to allow for participation in international affairs of all their members and parts on the basis of indivisibility of foreign policy and of a single presence in the world

The principles of federalism have evolved considerably over the last few decades, particularly during the post-war period, during which the pace

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and complexity of international relations have increased so markedly. Thus new states have drafted constitutions with internal mechanisms allowing for participation in international affairs by all their members and parts on the basis of one coordinated foreign policy, one indivisible sovereignentity on the international plane, and one voice in international councils. This is the new principle of federalism on which contemporary federal states are forwarded, and it is the only viable alternative for federal states to fractionalism, separatism and disintegration.