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Canada and the United States in the World Community: Perceptions of the Role of International Law and Organization

Introduction

The observations which follow reflect purely personal perceptions and do not purport to represent the views of the Department of External Affairs nor, obviously, the Faculty of Law at the University of British Columbia.

I propose to begin by discussing the role of International Law and then turn to the Role of International Organization, citing some illustrative examples of Canadian perceptions of both.

Before doing so I will offer as background some observations on apparent differences in perception of the law, as distinct from its role.

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Perceptions of International Law

Some obvious examples of differing perceptions are as follows:

- the exchanges of notes between Canada and the USA in 1970 over Canada's Arctic legislation, which reflected sharply divergent perceptions of the law;

- Canada's interpretative statement accepting the 1972 Stockholm environmental law principles as reflecting received customary international law, and the USA statement expressing reservations;

- Canada's announcement a year ago that it is proceeding towards ratification of the 1977 Geneva Protocols on Humanitarian Law, and the US President's statement to Congress that Protocol II was "fundamentally and irreconcilably flawed" and the USA would not ratify it;

- Differing perceptions of the role of law, rather than its content, [redacted] when, on September 19, 1985 Canada broadened its acceptance of the compulsory jurisdiction of the International Court of Justice, whereas on October 8 of the same year the US terminated its acceptance of the Courts' jurisdiction.

Perceptions of International Organization

Some examples of differing perceptions are:

- The USA has withdrawn from UNESCO while Canada has not, and the USA refused to send a representative of Cabinet rank to the recent UNCTAD VII Ministerial Conference, whereas Canada was represented by the responsible Cabinet Minister.

- The significant differences in perception concerning the role and importance of the UN and the nature and extent of support for it are sufficiently well known not to need documentation.

The question we are to address, however, is not the positions of the two countries on issues of international law and organization, but US and Canadian perceptions of the role of international law and organization, a more fundamental and, perhaps sensitive question. I propose now to examine some representative examples of action by Canad from which Canadian perceptions may possibly be deduced.

The Role of International Law

It is difficult to examine this question rationally without givir some consideration to the nature of international law, one of the most abstruse and controversial subjects known to lawyers. That question will therefore be dealt with in my concluding comments, so as to provide first a foundation for a practical or pragmatic approach base on concrete cases. (It also, of course, raises the possibility of

The Relevance of International Law

It is my perception that whatever the doctrinal basis of international law, successive Canadian governments have always treated it as relevant, not merely as a basis for regulating Canada's relations with other states but as a means of protecting and advancing Canada's interests. In that sense, Canada may share certain perceptions considered common to great powers. In an article included in the collection of essays edited by Macdonald, Morris and Johnston in 1974, which were dedicated to the very topic of this address, I expressed the following views, which I quote without apologies in light of the recent experiences of Biden and Bork:

> "Canadians appear to have realized at an early stage in the evolution of the Canadian nation state that it would be necessary to modify both internal 'empire' law of the British Empire and international law in order to lay the basis for Canada's gradual and peaceful evolution from colony to nation. The temerity of Canadian politicians and statesmen is surprising in retrospect when one considers the extent of the changes they wrought. Certainly there was no precedent for their action in consistently moving towards independence by peaceful means, policies bold and inventive in concept, however gradualist in implementation. The development of the Canadian nation state has continued to reflect these early characteristics of willingness to bend both constitutional and international law in order to achieve acceptable accommodations."

To cite only a few examples of Canadian perceptions of the role and significance of international law, it is well known that Sir Wilfred Laurier pressed for autonomy at the Colonial Conferences of 1897, 1902 and 1909, and introduced a bill in 1910 for the creation of a separate Canadian navy (which did not, incidentally, materialize).

Stacey points out also that while the 1909 Boundary Water Treaty was technically an Anglo-American agreement, the Commission it established was purely Canadian-American.

Later, the Canadian government of the day insisted on being represented in its own right at the Paris Peace Conference after World War I; on signing the Versailles Treaty on behalf of Canada; and on being separately admitted to the League of Nations. Canada's signature in 1923 of the Halibut Treaty with the United States without British participation is commonly cited by historians as an important step towards nationhood.

Canada's leading role at the 1926 Imperial Conference leading to the Statute of Westminister of 1931 is too well known to need emphasis but Stacey asserts that it "placed Canada's parliament on an equal footing with that of the United Kingdom". Not so long afterwards Canada, unlike Australia and New Zealand, declared war on Germany independently of the United Kingdom after Hitler's attack on Poland.

What was Canada up to in all these activities? In this progression of steps towards independence, was Canada attempting to abide by the rules or attempting to shape them? Both, I suggest, much as Canada has continued to do ever since. Perhaps, Canadians perceive the role of international law as the vehicle for conferring-or recognizing - Canada's independence. If so was it perceived as an obstacle to be surmounted or as a system of norms needing modificatio It seems clear that the objectives were not merely domestic or

parochial but were aimed at no less than the achievement of constitutive legal effects on the international plane in which the role of international law was, ultimately, determinative. I suggest that this was the Canadian perception throughout this nation-building period.

To turn to more recent example examples, everyone in this audience is aware of the continuing evolution of Canadian constitutional practice. To quote again from the same article in Canadian Perspectives:

> "The Canadian provinces have been accorded something tantamount to, while falling short of, a right of legation through their separate offices in London, Paris, and in Washington, while provincial representatives are more now included in the offices of a number of Canadian embassies in other countries. One would search in vain for a precise rule of constitutional or international law fo such a development."

While the quotation is now out of date, the point, I suggest, is of continuing validity. The article refers to Canadian practice concerning "administrative arrangements" between Canadian provinces an states of the USA; to the "accords cadres" between Canadian provinces and France as well as other states, based on umbrella treaties betweer Canada and such states; and to the modalities of Canadian participatic in Francophonie conferences, of which we have had a very recent examp in Canada. Whose permission did Canada seek for such action? Where, incidentally, was the traditional Canadian timidity and lack of sense of purpose or identity we are always hearing about? Unorthodox, yes, but timid and unimaginative? Hardly.

As for the perception of the role of international law, clearly it was not envisaged as a series of rigid norms beyond Canada's ability to develop or expand.

The Role of Unilateralism

Let us examine some other unorthodox examples. It will be recalled by this audience that in 1970 Canada submitted a new declaration of acceptance of the jurisdiction of the International Court of Justice, which contained the following new reservation:

> (vii) disputes arising out of or concerning jurisdiction or rights claimed by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution in or contamination of the marine environment in marine areas adjacent to the Court of Canada.

Both critics and supporters of the reservation, (which, it will be noted, covered both fisheries and environmental jurisdiction), tended to agree in rejecting the rationale for the submission of the reservation, namely the inadequacy or non existence of a law of the environment or fisheries on the international plane, and the consequential need to develop such law, after which the reservation would be withdrawn. No one would deny, however, that the law has sinc been developed, however inadequately or incompletely, nor that Canada played a very active role in its development, nor that Canada has now withdrawn the reservation - a promise made by one government and honoured by another. Whatever the merits of the Canadian position, tl course of action may be instructive concerning Canadian perceptions o

the role of international law. One such perception might be that international law is highly relevant, that Canada takes its obligations seriously, but considers that it has a right and even, perhaps, a duty to try to develop international law. Another might be that Canada was prepared to act outside or in advance of the law. Whichever perception is correct, both clearly recognize the significant role of international law in determining the status of unilateral action - even its role in achieving decisive constitutive legal effects.

On a related issue, Canada adopted a different stance at the time of the submission of new reservations to the jurisdiction of the International Court, and throughout the controversy which ensued, including the exchanges of notes mentioned earlier. The 12 mile territorial sea was established by Canada at the same time as the passage of the fisheries and environmental legislation. No reservatio was submitted concerning the territorial sea. The reason given was that customary international law had developed to the point that Canac was prepared to litigate the validity of its assertion of a 12 mile territorial sea. Clearly this perception took cognizance of customary law, and of the customary law process. It is fairly well known that there were sharply differing perceptions at the time in Ottawa as to what constituted customary international law on the territorial sea. (If I may personalize for a moment, it is no secret that I submitted letter of resignation, referred to in Clyde Sanger's fascinating book on "The Ordering of the Oceans", to take effect if the government did not agree to submit reservations on the fisheries and environmental jurisdiction and to refrain from doing so on the territorial sea. It

was my perception, as Legal Advisor, that Canada would have to litigate its fisheries and environmental legislation without the reservations, but no one would take Canada to court on the territorial sea. In the event, it did not prove necessary to leave the foreign service as my position - my perception of the law - was accepted by the Canadian government.)

What was the role of international law in this case? A yardstick for measuring the legality of Canada's action? A shelter behind which to hide in the case of controversial acts? A frontier to be pressed back, as the law was developed? All of this? It is difficult to be doctrinaire about differing perceptions of the role of law as a guiding and restraining force, as between great powers and lesser powers in the light of this experience. It would be interesting, incidentally, to hear views as to whether Canada's action reflected the natural law approach on the fisheries and environmental issues - what ought to be and the positivist approach - what is - on the territorial sea. Of equal interest would be the question as to the consistency of Canadian perceptions of the role of law when Canada recently withdrew its reservations, yet went on to enclose the Arctic archipelago within straight base-lines, without any accompanying reservation. Was the la perceived as having constitutive legal effects which were determinative, rather than merely influential or informative?

The Multilateral Approach

It is well to note that Canada has been equally active in developing the law multilaterally on many other issues where it is less obvious that a special or specific Canadian interest was at stake. I can attest personally, for example, to our active - even leading - role in developing the Declaration on Friendly Relations and later, the Definition of Aggression, (regarded as "soft law", at least until the recent decision of the ICJ in the Nicaraguan case) and to our equally active role in developing black letter treaty law, such as the Law of Treaties Convention, (where we did admittedly have a direct interest ir the federal states clause), and so too, with the Outer Space Convention, having participated in each of these law-making exercises. Ted Lee can say the same concerning the Diplomatic and Consular Conventions. Canada has also been deeply engaged in the negotiation of arms control conventions such as the Partial Test Ban Treaty, the Non Proliferation Treaty, the Seabed Arms Control Treaty, and, more recently, the current negotiations on the Chemical Weapons Convention in the Conference on Disarmament.

Canada was also in the forefront in developing the "soft law" of the Stockholm Environmental legal principles, and later, the "hard" la of the London Dumping Convention and the Law of the Sea Convention. the law of the sea more than any other field, Canada's mix of unilateral bilateral and multilateral action was clearly based on a perception of the law as the source of rights and obligations as wel as the normative basis for regulating relations. We sought to develo the law, so it could play both roles. Most recently, Canada was much

involved in the negotation of the Ozone Layer Convention. It is not difficult to perceive a Canadian interest, direct or indirect, in all these law-making activities nor the role of law in regulating relations amongst states in all these fields. Clearly, successive Canadian governments and officials have perceived a national interest in the codification and progressive development of international law. Perhaps in all of these cases the role of law may be perceived as providing the basis for relations amongst states, whether by custom, by convention, or by codification, or by progressive development. Seemingly there is also a continuing Canadian perception of the role of law as relevant to the protection and advancement of Canadian interests. These dual roles need not be in conflict. Ideally, they are complementary.

It is perhaps idle to attempt to postulate Canadian perceptions of the role of international law from the few examples quoted. The Canadian unilateral/multilateral process of moving from colony to nationhood would seem to reflect a perception of the key constitutive role of international law in conferring status and recognizing rights and duties. Canadian unilateral and multilateral action on the Arctic and other environmental and fisheries legislation might be seen as reflecting similar perceptions, but also, perhaps a recognition of the possibilities for progressive development to protect Canadian interests. It is necessary to take note, however, of the perception which I do not share - that Canada has on occasion been prepared to ~~flaunt~~ flout or disregard international law. Certainly we were not fearful of trying to shape it - sometimes in directions favourable to Canada's special interests, but often in pursuit of a wider shared interest.

To put Canada's position in perspective it may be helpful to recall Lybia's claim to the Gulf of Sirte and the USA response to it, and Iran's action in the Straits of Hormus , and the USA response, in the light of the Corfu Channel case. There may well be a Canadian perception that such acts are not the preferred way to develop international law. Nonetheless it behooves us to consider whether, when we sought to develop the law and not merely to act outside it, it was because we are not a great power and thus unable to do so with impunity. That is not my perception, for reasons I shall now attempt to address.

Why then did Canada play an active role in the negotiations on traditional fields of law, such as the Convention of the Law of Treaties, and the Conventions on Diplomatic and Consular Relations? Was there a perception of a generalized Canadian interest in the codification and progressive development of international law? Such a perception of an important role for international law need not, of course, exclude the advancement of specific national interests. Was there also perhaps a broader Canadian perception that the codification and progressive development of international law is, per se, in the Canadian interest, because it is the role of law to provide the framework and indeed the basis for relations amongst states? That was my perception during all these years of law-making. One could argue, as I have mentioned, that such a perception is merely that of a state which could not, in any event, adopt a policy that might is right and make it stick. One could also argue, however, from Canada's activism in these fields, that there was and is a perception that it is in the

enlightened self interest of every state, large or small, rich or poor, to recognize that international law provides the best and ultimately the only basis for regulating relations amongst states. In other words, that is the role of law.

Human Rights

The whole area of the international law of human rights is a special one, precisely because of the changing role of international law vis a vis the individual, whereby the individual has gradually come to be accepted first as an object and then, most would say, as a subject of international law, and the impact of this development on states has been considerable.

Why has Canada been so involved in the development of human rights law and humanitarian law? One could perhaps justify a passive or neutral action by Canada in these fields, on the basis of national interest, but not, I suggest, the kind of continuing commitment by Canada that Canadian governments have for many years given to the progressive development of the law. (Incidentally, in these fields more than most, Canada may be perceived as having based its position on the natural law approach to international law. It is possible, perhaps, that complaints and criticisms of Canada's human rights record, and even, recently, its position on humanitarian law, might result in a more positivist approach). What has been and continues to be the Canadian perception of the role of international law in these fields? Is it a perception based on recognition of the need for the

development and adherence to the rule of law? Not merely for its own sake, perhaps, but because it's in Canada's wider interest that states regulate their relations by agreed norms? It is my personal perception that the Canadian approach goes beyond this broad goal, and seeks to achieve agreement on how states should treat their own nationals. Canada's activisim on the Helsinki Accords is a case in point. In this field, more than most, there is an interpenetration of municipal and international law, and Canada does not seem willing to accept that international law merely reflects the mix of national laws. That, in any event, has always been my perception, particularly during my two terms as Legal Advisor.

The interpenetration of national and international law which is so evident in such fields as the law of the sea, and so typically Canadian on certain aspects of Canadian constitutional law, is all pervasive in the related fields of human rights and humanitarian law. To cite only one example, R v. Singh, quite apart from its far reaching implication for Canadian domestic law, has had an international impact as well. The amendments recently proposed to Canada's Immigration Act concerning the admission of Refugees would virtually incorporate by reference the Text of the 1951 Refugee Convention. The 'right to space" predicted by Macdonald and Johnston would no longer seem to be intellectual futurism.

It is becoming increasingly simplistic in some fields to attempt to distinguish between great power perceptions and middle power perceptions because of the rapid development of the law in the field of human rights law, where the conduct of every state may be exposed and

examined within the UN system. Another example is the increasing incidence - at least until very recently - of terrorism, kidnapping, hostage-taking, and hijacking. Great powers are not immune, but neither are middle nor small powers. Here at least the role of law seems clear. All would seem to need the protection of agreed norms. In any event, that would seem to be the Canadian perception, for Canada has been active in developing the law in all these fields.

International Trade Law

What of trade law? Leaving aside UNCITRAL, where we are presumably all in accord concerning its merits, what about UNCTAD and GATT? No country has been more active than Canada in pressing for the launching of the Geneva multilateral trade negotiations known as the Uruguay Round, nor more actively engaged in the negotiations. Certainly Canada has vigourously pursued the bilateral trade option with the USA, but, as pointed out earlier today by Leonard Legault, never to the exclusion of the multilateral option. Interestingly, although GATT "contractual" law is not regarded as public international law, Canada has pressed in both the bilateral and multilateral trade negotiations for binding dispute settlement mechanisms. What does this tell us about Canada? That we are not a great power? Yes, of course. We meet with the seven major industrialized countries, but Canada is not an economic giant such as the USA, Japan, or the EEC. Leaving aside the Canadian motivation, Canada has repeatedly called for the rule of law in GATT, and for a return to the basic GATT principles. The mere fact that this is so suggests a perception of some role for

law in this field, whether out of reasons of narrow self-interest or based on broader perceptions - the basic concept of the rule of law itself. I was delighted earlier today to hear Leonard Legault discuss the bilateral trade agreement in terms of the rule of law.

The Law of Disarmament

The law of disarmament is virtually unique in the special importance it ascribes to bilateral treaties by the superpowers, but even here the multilateral dimension is significant. In an article published in the Fortieth Anniversary Issue of the UN Disarmament Bulletin, I pointed out that a number of important bilateral arms control treaties had drawn heavily upon the multilateral negotiation process and that every multilateral arms control treaty has drawn on bilateral or plurilateral great power negotiations.

What of the role of law in disarmament? Canada has gradually carved out a distinctive functional approach on arms control through working papers, seminars, workshops and conferences, reflecting a practical pragmatic and very often, a verification-oriented approach. Why does Canada participate so actively in arms control negotiations? There seems to be a perception that it is in the Canadian interest to reduce the number and magnitude of nuclear weapons in the world. Thus every step towards arms control and disarmament, be it nuclear weapons or chemical weapons, is seen to be in the Canadian interest. Why is this taken for granted, by Canadians and non-Canadian alike? Indeed there is a much more basic question here concerning the role of law.

Why should any one in any country be willing to scrap - to actually destroy - weapons in return for treaty guarantees, unless there is some measure of understanding of - and confidence in - the treaty process itself? What is the treaty negotiation process but law-making? Does this suggest a perception of an important role for international law even in this most highly political field? Or do Canadians think of disarmament as something separate from and outside the ambit of international law? That is not my perception. Nevertheless, whether arms control objectives are pursued on their merits or as means towards developing world order based on the rule of law, no one would deny that such arms control treaties as the Partial Test Ban Treaty, the NPT, the Outer Space Treaty, the Seabed Arms Control Treaty, the 1925 Geneva Protocol on Chemical Weapons, the Antarctic Treaty and the ABM Treaty, comprise, together with others, a treaty network that forms an important part of the fabric of international law. Perhaps arms control more than most fields of human endeavor can provide us with insights and perceptions concerning the role of international law. It is in this field that it is most self evident that it is perceived to be in Canada's interests to pursue the difficult and elusive goals of law-making on highly political issues. What then is the perception of the role of law? Is it merely the end product - a kind of full stop to indicate job done? Hardly. Is it a yardstick for measuring the attainment of national objectives? Perhaps, but surely not only that. Is it an end in itself or a means to an end? Perhaps both. No one would argue that the arms control process is driven by principles of international law, much as we might wish that to be the case. Nevertheless, principles of international law may be a part of the

outcome, even if the perception of the role of law might be that it is just an incidental spin-off. If so, then why the importance attached to verification of both compliance and breaches of arms control agreements? At the conclusion of any arms control negotiation the arms control treaty is perceived as the basis for determining the efficacy of the agreement itself. Thus the law - at least conventional law - is perceived as having an extremely significant role in one of the most crucial and politically sensitive areas of international relations. That, at least, is my perception.

International Organization

Mr. Chairman, I propose now to express some of my personal perceptions on international organization, to which I shall attempt to adopt a generic approach. I will not dwell extensively upon the UN family of organizations since it is enough to note that Canada has always been and continues to be in the forefront in developing and refining a functional and pragmatic problem-solving approach to the subjects at issue in such organizations, from the United Nations itsel to the smallest of the specialized agencies. Even in the cases of UNCTAD, UNIDO and UNESCO, Canada has been consistently supportive, albeit not unreservedly so. Indeed, we have been amongst those who have pressed most strongly for reform of the system, with some encouraging successes recently. Perhaps we might merely note my personal perception that Canadians adopt a problem-solving approach i every one of these organizations, and I say this in light of my

personal experience in most of the committees of the UN and nearly all of the specialized agencies, as well as the IAEA.

It is commonly assumed that Canada has a naive approach to the UN and that Canadians are somehow lacking in the qualities of cynicism and sophistication necessary to a realistic appreciation of the UN system. In an overview study of the UN system commissioned by the department of External Affairs for the Fortieth Anniversary of the UN, Geoff Murray writes of the choices for Canada, including:

> "moving in the line of least resistance which to-day is regarded as damage limitation."

He raises the possibility that:

> "the policy and objectives ahead may be more a matter of salvaging the system than reaping tangible benefits in the short term."

He suggests, however that:

> "Given Canada's consistently firm support for the UN ideal and way even since its inception, there are reasons, compelling as ever before, why Canada should now show initiative and leadership in the search for practical and effective ways for revitalizing the UN system."

He argues that "The compensations for Canada from such a course can be quite significant in both moral and material consequences, as they have been in the past." He suggests that "multilateralism, through Canadian activities in the UN system, offers a useful and important avenue for the attainment of Canadian goals". He cites as examples of such activities "policies pursued in favour of disarmamen and arms control, peacekeeping, UN development and assistance, promotion of human rights and revitalization of the UN system". As

balancing factors in Canada's foreign policy he points out the opportunities within the UN system to develop multilateral relationships "manifested mainly in successful North-South efforts at co-operative endeavour for socio-economic ends". Another multilateral opportunity he sees is "to strengthen the standing and role of middle-sized powers", in order to "restore the power balance in the UN system and the stabilizing influence of the middle powers". He insists, however, that if the UN system is to function effectively, "it must apply rigorously the test of practicability" - the test, in my own experience, applied in the specialized agencies in Geneva rather more than in the UNGA in New York. After giving some rather alarming statistics of budget growth, he cites numerous UN successes, including amongst them the codification and progressive development of international law in various unspecified fields of particular interest to Canada. He pulls no punches in citing the failures and criticisms of the UN, including in particular the assertion that it does not mirror the "real world" of economic and military power. In his "balance sheet", however, he comes down firmly in favour of Canadian support for the UN system stemming from Canada's national interests. He concludes that the system is badly in need of reform.

While I tend to see Canada's interests as being much more directly engaged, I agree with his conclusions. Whether it is WHO action on AIDS or ILO action on asbestos or ITU action on broadcasting frequencies, our interests are at stake beyond any notion of international charity. Be that as it may, no country has been more active in seeking, with considerable success, in company with other

countries from all geographic regions, to improve not only the management and budgetary processes of the UN system but its problem-solving capacity. It is my perception that continuing support of an invigorated UN system remains in the Canadian interest, both for reasons of immediate national self-interest and for broader reasons flowing from the need for world order based on the rule of law. Whether or not Canadians believe that other countries need the protection of the rule of law, it is clear to me that Canada needs it. That is my perception. Multilateralism, particularly in the UN, provides a platform, a forum and a mechanism for the pursuit of these broad goals. This applies to the Francophone and Commonwealth communities of nations, and even to the Group of Seven industrialized countries. None of the participants is more active than Canada in supporting the fundamental purposes which unite these multilateral and plurilateral groups of states.

Whatever successes Canadians are able to achieve in advancing Canada's interest through bilateral negotiations, again and again Canada has pressed for multilateral negotiations and multilateral solutions, whether because of the inherent nature of the problems to be addressed, or because of the increasing interdependence of the nations and peoples of the world, or because Canada has greater negotiating leverage when it can work, multilaterally,together with allies with similar interests, (as I can attest, from law-making experience rangi from the law of the sea to GATT to disarmament) or because of all the reasons.

Earlier this week the Right Honourable Prime Minister Mulroney gave a ringing declaration in support of multilateralism in his opening address in Vancouver to the Commonwealth Heads of Government Meeting. Let us hope, therefore, that the recurring view that multilateralism is useful merely for damage limitation is finally laid to rest. Of course it never is, but it is my perception that the political, security, economic, social and legal imperatives of international relations will themselves ensure that Canada will continue to pursue multilateral and plurilateral solutions to foreign policy problems, while not overlooking the possibilities of bilateral solutions, as in the field of trade. Thus it is axiomatic Canada has been extremely active in the Uruguay multilateral trade round while at the same time pressing for a successful conclusion of the Canada-USA bilateral trade talks. Interestingly, in many of these activities, law-making is the objective, whether they take the form of ILO standards setting, ICAO regulations, IAEA safeguards or new GATT rules.

The Nature of International Society

In order to address adequately the subject of Canadian perceptions of international law and organization it is helpful to consider at least in a cursory way the nature of international society. So much has been written on this issue that it is simply not possible to do justice to it in the time available to us, even if I felt competent to do so. After all, I have only very recently been promoted from Ambassador to Professor. I propose therefore, to revert to the same

expedient I used earlier, of quoting views I have already expressed, however incomplete, inaccurate or out of date as they may be, because it is my own perceptions that I have been asked to give. I intend to quote from an address on the formidable subject (not of my choosing) "War, Peace and Law in Today's Divided World" given at the University of Toronto in 1973 as the Fourth lecture in the Leonard Beaton Memorial series. (The address was published in the French version through the good offices of Albert Legault, in "Etudes Internationales", Volume V, Number 1, in March, 1974.)

The Structure of International Society

"Whatever one's view may be concerning the future structure of the international community, it is essential to any realistic appraisal of the problems giving rise to armed conflicts and any attempt to contain or prevent such conflicts in the future that w recognize the facts of life concerning the present structure of international society.

In recent decades there has been a development of the concept of the international organization as a subject of international law. Similarly, at the other end of the scale, there is increasing acceptance of individuals as proper objects of international law, although little progress has been made as yet in advancing from the legislative phase, which is almost completed, at least in the field of human rights, into the implementation phase. There are even the beginnings (at Canada's instigation) of acceptance of th need to subject multinational enterprises to rules of public international law. Thus, one could argue that at one and the sam time international society is expanding at both ends of the scale not only numerically but substantively by embracing both larger and smaller units than that of the nation-state. A basic fact o life, however, is that the nation-state remains the fundamental unit of international society. The classic principles of sovereignty and non- intervention remain the foundation-stone of the Charter, in spite of the inequality of states built into the Charter system through the device of the great power veto. Thus while some states may be more equal than others, sovereign independant states constitute, for the foreseeable future, the members of international society. I propose neither to justify nor to lament this fact of life but merely to note it, for it is

extremely important to be aware of the relatively primitive state of organization of international society if we are to look realistically at the difficulties of establishing effective constraints on the use of force. There is no reason why an effective world order could not be founded upon the nation-state as the basic unit, assuming that every state were willing to delegate certain legislative and enforcement powers to some supra-national organ. I suggest, however, that we have hardly begun this process of moving from an international society comprising a loosely-knit group of interdependent but autonomous states towards a more well-integrated and closely regulated international community of states.

Even in Western Europe where one may detect signs of a gradual move towards political as well as economic intergration, there remain very strong nationalistic pressures as evidenced, for example, by the emotions aroused by the recent referenda by states considering accession to the European Community. Yet Europe has had a learning period of centuries of "progress" from barbarism tc the "civilization" of the Greek and Roman empire system back to barbarism, through the anarchy of the feudal period to the present model of the typical nation-state, since adopted by other parts of the world. Nothing in the Judao-Christian philosophy suggests the inevitability of the nation-state as the ultimate form of society, but it has come about and it appears to be here to stay. The same may be said with respect to the other great civilizations of Asia Minor, China, India, Egypt and of Central and South America. While theocracies have existed and still do in some parts of the world, none of the great religions are predicated upon or are causally linked with the concept of the nation-state as the ultimate form of human association, but none has prevented its development. None of the ideologies except fascism and communism give preeminent importance to the state, and even communism, at least in theory, pays lip service to international solidarity, an the eventual "withering away" of the state, while capitalism may be showing the way with its development of trans-boundary multinational enterprises. Yet statesmen and politicians the world over find themselves locked, willingly or otherwise, into a structure whose foundation rests ultimately upon nationalism, wit all its evils and all of its benefits."

The Nature of International Law

In that same address I then went on to attempt to grapple with some of the differing perceptions of the nature of international law. Before I re-iterate my own perceptions, which have not evolved much since, I feel duty-bound to provide evidence of my awareness of more sophisticated approaches. I shall cite only one example, taken from the collection of superb essays on "The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory" edited by Macdonald and Johnston and published in 1983.

In the erudite essay "The Schools Revisited", W.L. Morrison states that while McDougal, Larswell and Chen charge that scholars and others have not adequately formulated the more fundamental problems or performed the necessary intellectual tasks for assistance in establishing and maintaining the appropriate constitutive processes and public order policies, he finds that "when the authors proceed to examine in turn the natural law approach, the historical approach, the positivist approach, the Marxist approach, and the social science approach, each approach is seen to contain a mixed bag of contributions to enlightenment about trans-national law and hindrances to enlightenment arising out of narrowness and confusions." That is an intimidating analysis for someone just in the process of getting used to the title of Professor. Morrison goes on to assert that "Some positivist legal theory correlates with ethical utilitarianism, some sociological jurisprudence with evolutionary ethics, and some realism

with intuition in ethics. Natural law approaches correlate generally with rationalism in ethics." I wish I had said that. What I did say is as follows:

> "There would seem to be as many views of the nature and purpose of international law as there are learned authors writing on the subject. If we look to the origins of international law, then it is quite clear that Hugo Grotius perceived international law as a means of establishing order among nations and restricting war as far as possible. As Bart Landheer remarks in his thoughtful study, "On the Sociology of International Law and International Society", "to Grotius law was to be a motive rather than a technique in international action ... the efficacy of international law depends upon the feeling of responsibility for world order of the major states. In this way, law is first and foremost a moral responsibility as it has been seen by great jurists like Suarez, Vitoria, Hugo Grotius and others". He goes on to suggest that, "The positivist school of international law has attempted to separate law completely from morality; but this trend is again losing ground in a period in which new states are striving to orient themselves in international society."
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> Quincy Wright wrote in 1955, "The discipline of international law is in a state of crisis. As understood by traditionalists it appears to be obsolete, and as understood by modernists it appear to be premature." There is still all too much truth in this statement.
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> Richard Falk states bluntly that after several centuries of thought we remain without an established science of international law, and goes on to say, "There remains considerable doubt as to the character of international law and great controversy as to it achievements and shortcomings."
>
> Kelsen, the great publicist in the Grotian tradition, views international law as a complex of norms regulating the mutual behaviour of states who are the specific subjects of internationa law. He considers that international law is "law" if it is a coercive order, that is to say, a set of norms regulating the behaviour of states by attaching certain coercive acts or sanctions as consequences to breaches of the "rule of law". He admits that international law, while partaking of the same character of national law, differs from it in lacking specific organs for the creation and application of its norms. He likens international law, therefore, to the law of primitive stateless societies and emphasizes its far-reaching decentralization and looks to legitimate self-help for the coercive element. Thus

Kelsen accepts the Austinian concept of law as requiring coercive processes in order to constitute true law, and postulates self-help as the coercive process. In so doing he tends to demonstrate the primitive nature of international society as much as the existence of positive international law. He concludes that the path which international law must follow in order to transform itself from its present state of decentralization to one analagous to that of domestic legal systems is through the establishment and utilization of international tribunals. I question this last conclusion, as I consider the International Court almost irrelevant at this stage of development of international society to the problem of control of the use of force, and I suggest that its habitual use will come about as a consequence of, rather than as a cause of changes in national attitudes.

Myres McDougal is probably the leading scholar identified with the modernist approach to international law, combining legal realism with the systematic policy science pioneered by Harold Larswell. McDougal focusses upon the processes of authoritative decision-making transcending the boundaries of particular territorial communities. McDougal, like Kelsen, accepts the decentralized character of international society but comes to different conclusions. He stresses the decision-maker located in the national system as the prime actor in international law and calls upon these decision-makers to balance national interests against world community interests to the extent that the two perspectives collide. Thus McDougal is at the other end of the spectrum from Kelsen with his stress on law as binding norms.

Stanley Hoffman is critical of those who, like Kelsen, conclude that international law qualifies as law in that it reflects relationships similar to the customs of primitive societies. He concedes that self-help is also the mark of primitive legal systems but suggests that the lack of institutionalization in the case of a primitive society may represent a high degree of integration, whereas in the case of international society self-help merely confirms its non-integration and promotes furthe disintegration. He is critical also of the view of McDougal and other modernists of the function of international law as a "medium for precise communication between international actors". There is no doubt that international law performs such a functior and that this is an important role. Indeed, in a recent publication "World Politics: Verbal Strategy among the Super Powers" by Franck and Weisband, the co-authors advance a persuasive argument to the effect that acts of states may be influenced by the legal rationale developed by other states in defence of their acts. In Hoffman's view, however, "Our proper and fashionable concern for communication system should not make one forget who the communicators are, or what is being communicated: In the international milieu, some communicators have the might to force others to accept messages on which there

is no consensus or the might to reject messages they don't like, and the communicators tend to agree on exchanging only such messages as enshrine their actual habits or serve their convenience." He goes on to say, "International law is the law of a group whose component units have highly institutionalized legal systems and differentiated political institutions; primitive law is the law of a group whose components have have neither; in other words, the meaning of the low degree of institutionalization of international law is not at all the same as that of the low degree of institutionalization of primitive law. Self help is indeed he mark of primitive legal system - primitive from the viewpoint of institutionalization, but the lack of institutionalization can be found, so to speak, at the two extremes on the scale of group integration; at one extreme, it confirms integration, at the other, it confirms non- integration and may promote further disintegration."

Landheer points out that to Max Huber the existence of a certain equilibrium was a pre-requisite for the functioning of international law. According to this view, international law expresses an equilibrium rather than creates one. A slightly different approach is taken by Schwarzenberger who holds that international law does not condition but is conditioned by the rule of force. According to this view, international law expresses power relationships instead of regulating them. There is, unfortunately, considerable validity in both the Huber and Schwarzenberger views of international law which are not, in my view, mutually exclusive. Examples of legal doctrines illustrating power relationships are title by conquest for the acquisition of territory or the exclusion of duress as a ground for invalidating a peace treaty. It is important, however, to note the existence of other rules which are quite different in their origin, such as, for example, diplomatic immunity, which is based upon reciprocity, or air navigation-rules which reflect common interests. The distinctions between actual contemporary state practice concerning the rules of law on the use of force and contemporary state practice on other rules of international law is central, in my view - a point to which I shall return.
My personal perspective is very close to that of Falk, who draws attention to the double nature of international law as an intellectural discipline devoted to the study of order in world affairs and an operative code of conduct capable of exerting varying degrees of beneficial and detrimental influence on the quality of international life. He tends to stress the functions o international law in the light of the characteristic patterns of interaction in the present international system. He suggests tha in order to avoid either cynicism or utopianism it is necessary "to emphasize the limits of legal ordering as an independent variable in the existence of a social system". In other words, h regards law as one of the central elements in the development of

world order, but cautions against expecting too much of it too soon."

Were I giving that lecture today, I would draw upon some of the delightful statements emerging from the MacDougall - Stone occasional exchanges, replete with references to the YMCA as decision-makers, and the brilliantly tongue in cheek - I hope - observations made by Macdonald, Johnston and Morris in their article in the (1973) 51 Canadian Bar Review, pages 316-2332 "International Law and Society in the Year 2000." (As indicated earlier, their predictions on assertions of a "right to space" are already coming to pass).

Madame Chairperson, having attempted to analyze the varying perceptions of the nature of international law by various learned scholars I propose to simplify the subject by making the following analogy drawn from the world of sports. Some see international law as the goal. Others see it as the goal posts through which they must drive the ball of national interests. Others see it as the Rules of the Game. Some see it merely as the score board, a kind of system of communications. Others see it as the umpire. Some, I fear, see it as the foot ball, to be kicked at will. Some see the spectators as being as important as the players, while others ascribe such a role to the reporters, and Julius Stone might say, if he were still with us, and he is sorely missed, that one of his contemporaries who founded a whole school of thought would even assign a role to the hot dog vendors. It

is not easy to be sure how to decide who is a player and who is a spectator.

Madame Chairperson, I am not troubled by all these continuing doctrinal disputes. If I may change the metaphor, for a moment, Gertrude Stein, allegedly said "a rose is a rose is a rose." Well, a rose by any other name may smell just as sweet, but it must be cultivated and tended and nourished and if necessary, safeguarded by thorns which would prick the thumb of those who would pluck or crush it. This is our task. That is my perception.

Conclusions on the Role of Law

At this stage, I feel an obligation to give my own wholly persona views, citing once again my Toronto Leonard Beaton lecture given over 15 years ago.

> "Firstly, there is no doubt in my mind that with respect to the us of force - but not other issues - international law reflects more what "ought to be" rather than what is". Even in the light of tr absence of clear principles of international law concerning constraints on non-international conflicts there is no lack of norms concerning the legality of the use of force. The problem is, as pointed out by Stanley Hoffmann that, "legal norms never constrain all by themselves. Behaviour is restrained (1) either by self-restraint arising out of a sense of duty pure and simple ... or (2) by self-restraint due to the calculation of interest ... or (3) by the actual use of force on behalf of the norm." concur with his view that international law if viewed as a syste or coercion is weak law, particularly with respect to the use of force, the one issue on which restraints on behaviour happen to the crucial issue. I agree also with his view that "the failure of the constraining function has always been at the heart of the weakness of international law. But this failure takes on a new dimension, and constraint a new urgency, at a time when the free

resort to violence means the possibility of total war." I suggest, however, that international society is gradually moving towards the application of Hoffmann's second behavioural norm - self-restraint, due to a calculation of interest, a point to which I shall return.

I am deeply convinced that international law can play and is playing an effective role in the regulation of the conduct of states on a wide variety of complex issues in their relations with one another. States abide by the law because it is in their national self-interest to do so. I am equally convinced that as the law-creating and law-fulfilling processes continue to develop, international law will gradually have an increasing impact in constraining the use of force. There are many reasons why I hold these convictions. Firstly, if we were to consider even matters seemingly marginal to problems concerning the use of force, such as issues relating to the environment, to the law of the sea, to air navigation, to diplomatic intercourse, to international labour standards, to international health standards and a variety of other fields, one is struck by the rapidly developing network of interlocking treaties which bind states to civilized rules of conduct founded upon their common interests. While some of these rules are based on reciprocity, others are based simply on the recognition of the common interest. It is a fact of international life that states do not take their treaty obligations lightly. It is another fact of contemporary international life that the treaty-making process has accelerated under the aegis of the UN to a fantastic degree since the Second World War, to the point that it has almost supplanted the customary law-making process as the legislative system on the international plane. Every state in the world is now bound by bilateral, limited multilateral or universal treaties on a vast range of subjects of great diversity and increasing complexity. No state is obliged to bind itself by such treaties. Increasingly, however, states are finding it in their national interests to do so. This voluntary undertaking of a treaty commitment is admittedly merely the expression of a willingness to be bound to a rule which in most cases cannot be imposed without the consent of the state in question. Nevertheless, states do accept such obligations and in so doing are aware that the acceptance of a treaty obligation is at one and the same time an expression of sovereignty and an acceptance of lessening of the free exercise of that sovereignty. Thus, the inter-dependence of states which we all talk about finds concrete form in the interlocking network of treaties to which I have referred. (Studies have been made, most notably, in the case of Canada, by Allan Gotlieb, indicating the extent to which an examination of treaty relationships reveals the actual relationships between countries.) I have no doubt whatsoever that the international society is gradually becoming integrated into international community by this process of creation and adoption

of conventional legal obligations which in many cases gradually acquire the character of rules of international law."

I went on in that address to examine the effects of the Covenant of the League and of the UN Charter on the use of force, but I won't take up your time with my perceptions on the subject. I did, however, make some comments at a later stage on International Law and the Use of Force, which I will quote in part, as they still reflect my perceptions after fifteen further years of experience.

International Law and the Use of Force

"In the light of my preceding comments concerning international law, one may be tempted to recall the response by the Prince of Wales to the question concerning his views on modern civilization, when he is said to have replied: "It is a grand idea - when is it going to begin?" Usually, when people criticize international law for its weakness, they are complaining in reality either about the ineffectiveness of the UN or about the primitive stage of development of international society. Admittedly, international law can only govern through the consent of those it purports to regulate. This is equally true, however, in the final analysis, of any system of law. When law does not reflect the will of the community it seeks to regulate, the law becomes unenforcible. Thus, ultimately, the enforcibility of any system of law depends upon the consent of the community to be regulated by law. On the domestic plane we have by mutual consent erected a highly sophisticated superstructure for the enactment and enforcement of law. On the international plane we have only begun the process and have not yet wholly abandoned the right to self help - the right to use violence. Yet much of the conduct between states is clearly regulated by legal principles treated as binding. Why is this not so with respect to the use of force?

I should like to make two basic points at this stage: Firstly, r system of national law of which I am aware has been able to preve outbreaks of violence such as murder, rape, armed robbery and kidnapping, in spite of the existence of highly developed legal constraints involving courts, law-making legislatures, police, prisons and effective means of punishment, including even the death penalty in some jurisdictions. Secondly, it is as difficu for the UN and for international law, including UN Charter-law, prevent a state from dismembering itself as it is for domestic l.

to prevent an individual from committing suicide, whether by dangerous driving or other seemingly accidental methods or by a deliberate act."

I should explain to those preoccupied with the Biden syndrome that I cited many authorities for these views. Thus, while they may not be altogether original, they continue to reflect my perception of the fundamental role of international law. I went on to say:

"There is more and more evidence of the willingness of states to join together in regulating their conduct by rules of law applyin to a wide range of human activity. Major resistance continues to be encountered as yet concerning direct constraints upon the use of force. It seems fairly clear that contrary to the expectation after both the First and Second World Wars, international society will not develop into an international community by settling firs the problems of the use of force. The process, in my view, will, on the contrary, be that of regulating so may fields of conduct s effectively that there will be less and less reason to resort to force, and thus less resistance to the gradual acceptance of real constraints upon its use. We in the West have not been in the forefront in perceiving the importance of treaty-making, particularly multilateral treaty-making, as a working tool for th gradual construction of world order. We have continued to defend the customary law-making process on the international plane whil not sufficiently perceiving the long-term benefits of treaty making. A kind of breakthrough occurred, however, with the agreement in the mid-sixties on the Vienna Convention on the law of treaties itself, that is to say, a treaty which approaches the status, together with the Charter of the UN, of a constitution fc the developing world order, for that is what the law of treaties convention comprises, in my view. This treaty represents a virtual tour de force, conbining as it does the basis for certainty and stability in the framework for relations of states with the necessary flexibility to enable these relations to adap and adust as changes occur."

Much the same could be said of the major law making achievement the UN: The Law of the Sea Convention, achieved since the date the ~~frequent~~ foregoing words were spoken. As I said at the outset and repeat now,

am personally quite confident that, while we may never achieve a complete and effective cessation of the use of force internationally, nor have we on the domestic plane, we are already well into the process of creating a system for the regulation of relations between states which will gradually make the use of force less relevant.

Summary: The Role of International Law and Orgnaization

As pointed out in the article I quoted first on "The Perspective of the Legal Advisor",

> "It is central to the advisory function that the legal adviser must attempt to ensure that Canada's role in international affairs is conducted in accordance with recognized principles of international law.
>
> Even from a purely national point of view, international law, as the basis for the developing world order, or even the lesser goal of stable relations between states, benefits all states. Far fro being incompatible with the protection of national interests, adherence to the rule of law may be seen as a specific and valuable form of protection of national interests.
>
> It is the role of the legal adviser to guard against the law bein regarded as a mere instrument of policy, an approach inimical to the very concept of the rule of law. The interests of the international community must, in any event, be taken into account in order to achieve the accommodation of interests which is the prerequisite to the emergence of a new rule of law, however, it i developed, whether by state practice or by multilateral law-making."

It follows from the foregoing observations on the role of the legal adviser that the role of law and organization is not merely to provide the structure or framework for stable relations beween states

but the broader and more ambitious role of ensuring adherence of states to the rule of law, for reasons based on their own enlightened self interest.

THE END