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Supplementary Paper

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An address by the Minister of National Health and Welfare, Mr. Paul Martin, made to the International Law Association, at the Faculty Club, McGill University, Montreal, March 30, 1954.

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It was with much pleasure and, I can confess, some trepidation, that I accepted the invitation of your President, my good friend Max Cohen, to address this dinner meeting of the International Law Association. As a lawyer interested in the development of international law, the establishment of a Canadian Branch of this Association -- one of the oldest and most respected bodies devoted to the study and advancement of international law -- seems to me to mark an important step forward in encouraging an appreciation of the importance of International Law in this country.

It is a privilege to speak to a group of lawyers about some of the current problems in international law. Most of these, I think you will agree, have arisen either during the deliberations of the United Nations and its subsidiary organs, or as a result of these deliberations.

As many of you may be aware, I have had the good fortune from time to time to serve on Canadian delegations to the United Nations. In this capacity I have had an opportunity to study at first hand the interplay between the rule of law in international relations and the dictates of political expediency. I have watched, sometimes with dismay -- a feeling which you may have shared -- the attempt, on the part of some states to make international law subservient to their political aims.

I need hardly point out to the members of this group that this is a practice directly contradictory to the customary view, namely, that international law provides the standards at which national policies should be aimed. Perhaps if I recall one or two incidents from my experience at the United Nations, I may better illustrate what I have in mind.

In 1946, on the occasion of the first session of the United Nations General Assembly in London, I had the honour to be present at a dinner given by the Lord Chancellor. It was attended by most of the lawyers participating in that opening Session. They represented many countries and a variety of legal systems. As a distinguished jurist of the Soviet Union, Mr. Andrei Vyshinsky made an address on that occasion which I still remember vividly because of the impression it created. In the light of the many important statements he has subsequently made on behalf of his country, Mr. Vyshinsky's after-dinner speech in 1946 was of particular interest.

In essence, Mr. Vyshinsky's talk was a fervent plea for the restoration of the primacy of law in international relations. Speaking as a lawyer, he said that the lawyers around the Lord Chancellor's dinner table constituted a group who could appreciate the importance of this plea. As a gathering of lawyers, they all spoke the same language. To them he expressed an unequivocal conviction that the peace and security of the world were inseparable from international law.

What a contrast between these professional protestations after a hearty meal and Mr. Vyshinsky's subsequent diatribes on practical problems intimately related to the rule of law in international affairs!

One illustration, among many, arose during the discussions of the prisoner-of-war issue in the Korean armistice negotiations. The debate concerned Article 118 of the Geneva Prisoners-of-War Convention which provides that:

> "Prisoners-of-War shall be released and repatriated without delay after the cessation of hostilities".

In the debate at the seventh session of the United Nations, Mr. Vyshinsky, as the representative of the Soviet Union, insisted that this obligation was absolutely unconditional and that all prisoners must be repatriated, if necessary by force. Canada, in common with other Western countries, took an entirely different view, based on the ground that the right to be repatriated after the Geneva Convention, is a right which is provided for the benefit of the prisoner himself, not of his state, and therefore applies only to those prisoners who desire repatriation. Any reasonable interpretation of the Convention supports the conclusion that no force can be used to effect their return.

However, to Mr. Vyshinsky the literal meaning of Article 118 was the only possible interpretation. According to him, the Article had to be read as requiring the detaining powers to release and repatriate all prisoners-of-war the cessation of hostilities no matter what the prisoners might wish and no matter what deprivations might await them on their return home.

Replying to Mr. Vyshinsky's arguments on that occasion I read to the First Committee of the Assembly the following passage from his own book, "The Law of the Soviet State":

> "The practice in international relations of granting persecuted foreigners the right of asylum rests on an international custom of over a thousand years' standing."

Since this debate took place I have wondered whether I was not doing Mr. Vyshinsky an injustice by referring to this passage since it may be confined to the case of political refugees.

Fortunately there is no need to rely on Mr. Vyshinsky's own book to rebut the arguments he put forward on the prisoner-of-war issue. A treaty must be

interpreted in the light of the purpose which it is to serve and few treaties exist whose purposes are so obvious as those of the 1949 Geneva Convention on the Treatment of Prisoners-of-War.

This Convention is designed for the protection of prisoners-of-war and their humane treatment at all times. The categorical language of Article 118 was intended to prevent the detention of prisoners long after any military necessity for their captivity has disappeared.

At the same time the drafters of the Geneva Convention did not wish to place an obligation on detaining powers to extend permanent asylum to all prisoners-of-war unwilling to be repatriated. The reason for this is obvious -- traditionally each state grants asylum at its own discretion and its freedom of choice in this regard cannot be fettered. The Geneva Conference therefore decided that no obligation could be placed on the captor country to grant asylum. It was clearly recognized, however, that states were not meant to be prohibited from granting asylum where it is reasonable to conclude that prisoners-of-war would suffer persecution if they were returned and if the prisoner himself opposes repatriation so strongly that it can be effected only by using force.

Speaking on this subject during the debate in the Assembly I expressed the Canadian position in these words:

> "The Indian draft resolution..affirms the right of all prisoners-of-war - under the Geneva Convention of 1949, the well-established principles and practice of international law and the relevant provisions of the draft armistice agreement - to release and repatriation. The right of repatriation is admitted without equivocation.
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> The right of repatriation is one thing; the use of force in its implementation is something else. It is inconceivable to admit that such force was contemplated by those who drew up the Geneva Convention; and such an interpretation will certainly not be endorsed by the vast majority of this Assembly."

As you know, the Soviet claim of forcible repatriation was not endorsed by the Assembly. The Indian Resolution was adopted overwhelmingly and the principle of non-forcible repatriation which it embodies has now been successfully carried out in Korea.

Now let me turn to a discussion of certain recent developments in international law which are of particular interest to Canada. I propose to deal primarily with the work being done by the United Nations in promoting the progressive development and codification of international law.

In doing so, I am mindful of the fact that your Association was originally founded in 1873 to study "the Reform and Cofidication of the Law of Nations" and still maintains a close interest in this general subject. I should like also to offer a few observations on the Canadian

attitude towards legal problems in the United Nations from my own experience and to touch on certain problems of a direct and practical nature which have arisen from Canadian participation in NATO and in the United Nations action in Korea.

At the outset, it might be helpful to explain why the United Nations has undertaken the admittedly difficult task of codifying and extending international law and how it is seeking to carry out these aims. In the past, codification has been largely the work of special conferences or private associations. Your own Association, for example, was responsible for defining - in 1890 -- the York-Antwerp Rules on General Average.

Commencing with the work of the League of Nations Committee of Experts it has now become generally accepted that the systematic codification and development of international law can only be effectively accomplished by a permanent body of experts, who are furnished with the necessary facilities for research and may call on all governments for comments and assistance in compiling material. In my opinion this development is the result of the urgent need to extend the rule of law as a principal means of avoiding interstate conflicts in a world where national relationships have become increasingly complex.

This, of course, does not in any way lessen the need for studies and projects undertaken by private groups -- particularly in the field of private international law -- where a great deal remains to be done.

There are two principal instruments by which the United Nations is carrying out this task -- the International Law Commission and the Sixth (Legal) Committee of the General Assembly.

The International Law Commission consists of 15 members who are chosen for their recognized competence in international law. It has two principal duties:

(1) the ascertainment, in a systematic form, of the existing law; and

(2) the development of the law in the wider sense by filling gaps, reconciling divergencies and formulating improvements in fields where there has already been extensive state practice.

I need not underline the fact that the Commission's duties illustrate very precisely the nature of international law itself. It is not a law which can be imposed upon states but a law which they accept either by express agreement or by practical recognition and application in their dealings with one another. Consequently if we are to be realistic about this we are bound to agree that any principle of international law which it is sought to invoke should be one actually accepted as binding between nations and must -- like any other form of law -- be proved by satisfactory evidence.

-- In the sphere of codification, therefore, the function of the International Law Commission is essentially that of a court; it has to find what the international law is and to present it in a precise and systematic form;

-- However, where there is a divergence of practice or views the Commission considers itself entitled either to choose among conflicting contentions, or, perhaps more reasonably, to formulate a solution which is in the nature of a compromise.

-- Again, an opportunity frequently occurs to examine existing rules of international law in the light of modern developments and to suggest such improvements as may be required in the interest of justice and increased social progress.

Ultimately the Commission's work must be combined with another function -- partly political in nature -- namely, the transformation of the products of its researches into international conventions for adoption by states. This is carried out by consultation with Governments and the eventual submission of draft projects for consideration by the Sixth (Legal) Committee of the General Assembly, which recommends the action that should be taken by the Assembly sitting in plenary session.

And here I might point out in passing that while the Legal Committee is the Sixth Committee of the United Nations General Assembly, and the First Committee handles security and political questions, under the League of Nations the situation was reversed. In the League the First Committee dealt with constitutional and legal questions and the last one with political problems. One unfortunate result of this change in emphasis has been that many items which have had important legal aspects have never come to the Legal Committee. Faulty drafting and ambiguity in the operative words of Assembly resolutions have been inevitable consequences of this.

The list of codification projects on which the International Law Commission has taken recent action includes, among other things, the law of international arbitral procedure and the regime of the high seas.

An obvious and primary purpose of law in international society is to afford a basis for the peaceful settlement of disputes. States have always been able to use international law effectively in this way be setting up a court of arbitration and Canada has employed international arbitration on many occasions, notably in the Trail Smelter Case and the "I'm Alone" controversy.

The importance of international arbitration, in my opinion, lies in these considerations:

-- the more important a dispute, the more important it is to have it settled by a fair tribunal. If it is not possible or desirable to bring it before the international Court, an arbitral tribunal is the logical course;

-- Similarly it is absured to prevent the settlement of a disagreement between states as to their legal rights -- which is embittering their relations -- because one of the parties to the dispute asserts that it is a political question or one of honour or vital interests and therefore not suitable for arbitration;

-- The commonsense of international arbitration is simply this -- if you have a quarrel with someone you can refer it for judgment by mutually acceptable arbitrators and so avoid the unpleasantness of prolonged dispute, repture of relationships or even conflict.

Nor should it be forgotten that in the long history of international arbitration there are very few instances in which the award has not been carried out. Part of the reason for this undoubtedly lies in the fact that frequently a court of arbitration is the most flexible and most desirable tribunal for the settlement of international disputes since the arbitrators may be chosen for their special technical skill and the parties are free to determine the competence of the tribunal and the law which it is to apply.

The purpose of the Draft on Arbitral Procedure which has been prepared by the International Law Commission is not to force states to submit all their disputes to arbitration but rather to provide a uniform procedure to be followed by all states which agree to have recourse to arbitration. It seeks to fill the gaps in existing practice.

The following two provisions of the Draft illustrate this aim:

(1) Determination of Dispute:

Occasionally a deadlock may occur before an arbitral tribunal has been set up, simply because the parties disagree as to the existence of a dispute or as to whether it comes within the scope of the obligation to arbitrate. The Commission's Draft provides for the determination of these questions by the International Court of Justice where no arbitral tribunal is yet in existence.

(2) Validity of the Award:

Again, it may be that, after an arbitral award has been given one of the parties alleges that the tribunal exceeded the powers conferred upon it and that the award is therefore a nullity. In such a case, present international law does not provide any effective means of determining whether the allegation is or is not well founded. In this case the Draft on Arbitral Procedure would empower the International Court to determine the validity of the award.

This arbitral project contains many other interesting innovations and will require considerable study by governments before it can be made the subject of a convention. In the Canadian view, however, it is a valuable contribution towards the codification of

existing law and the development of new law where the present practice is deficient.

Then there is the question of the Regime of the High Seas which is in need of codification in order to prevent the principle of the freedom of the seas from being transformed into a series of regional and conflicting doctrines. The International Law Commission has undertaken a study of this question with the object of codifying the law of the high seas in all its various aspects.

Of these the continental shelf concept is perhaps the most interesting in view of the great variety of national claims which have been made in recent years asserting jurisdiction and control over the seabed and subsoil of submarine areas contiguous to the coast. A documentation of these various laws and regulations would now fill a large volume but there is as yet no international regulation or firm agreement on the subject. The Commission's Draft Articles on the Continental Shelf are intended to provide a basis for the general acceptance of the continental shelf concept in international law.

With regard to the extent of the shelf, the Commission believes that it should be limited to submarine areas adjacent to the coast where the depth of water does not exceed 200 metres. This represents the present limit of practical exploration and exploitation and also the depth at which the shelf in the geological sense generally begins to slope to the ocean floor.

It should be remembered, however, that this fixed arbitrary limit may work to the disadvantage of many states and a more flexible formula based on the criterion of exploitability may eventually have to be considered. With the advance of scientific and technical knowledge, that which is not exploitable today may well be exploitable in the near future.

The question of fisheries of the high seas has also been under study by the International Law Commission as part of the general topic of the Regime of the High Seas. Three draft articles have now been adopted by the Commission covering the basic aspects of the international regulation of fisheries. The most important provision would impose a duty upon states to accept as binding regulations enacted by an international authority to be created by the United Nations. Here the Commission is to a large extent aiming at the creation of new law which would have far reaching consequences for Canada, one of the principal fishing countries in the world.

Other projects, of course, have engaged the Commission's attention in previous years and remain to be settled. One of these is the proposal for the creation of a substantive international criminal law which would be applicable to individuals and which resulted in the Commission's Draft Code of Offences against the Peace and Security of Mankind. Parallel to this project is the suggestion for the establishment of an international criminal court.

A related problem is the question of defining "aggression". The Charter of the United Nations uses the term but deliberately avoids a definition, leaving it to the Security Council to decide in each case whether a particular act constitutes a threat to the peace or a violation of the peace. All attempts thus far at a definition have failed -- possibly because it is difficult to establish aggression apart from the circumstances in which the act takes place. Not only may the act itself assume innumerable forms but the element of intention is an essential factor. The Canadian view has been that a definition along the lines considered thus far would serve no useful purpose in furthering the aims of the Charter.

At this point I would like to outline briefly the Canadian attitude towards a problem with legal implications which has been discussed from time to time in the debates of the United Nations. It is one with which I am familiar as a Canadian representative during the period when the question was under consideration in the Assembly.

I refer to the question of <u>domestic jurisdiction</u>, which was well illustrated in connection with the items on Morocco and Tunisia and the problem of racial discrimination in South Africa. These two issues pointed up the basic difficulty of reconciling Article 2(7), the domestic jurisdiction clause, with other articles in the Charter -- notably Article 10 which empowers the Assembly to discuss any questions or matters within the scope of the Charter and, except for Article 12, to make recommendations. Article 12, as most of you are no doubt aware, specifies that the General Assembly shall not make any recommendation on a dispute or situation while the Security Council is exercising the functions assigned to it by the Charter in respect of the matter.

Canada has taken a firm stand regarding the competence of the General Assembly to consider certain matters. We maintained, for instance, during the seventh session of the General Assembly in 1952, that the Assembly had authority to discuss any question, even the Moroccan and Tunisian items and the South African racial discrimination issue, provided it had been placed on the agenda of the Assembly. Nevertheless we indicated our respect for the sovereign rights of individual members by clearly distinguishing between the proppiety of discussion of a problem in the Assembly and interference by the United Nations in the purely domestic affairs of a member state.

As Acting Chairman of the Canadian Delegation, I explained our position in this way:

> "..... we feel that a distinction must necessarily be drawn between the right of the Assembly to <u>discuss</u> any matters within the scope of the Charter and its competence to <u>intervene</u>.
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> "..... As I see it, once the General Assembly has decided to place an item on its agenda, it has decided, in effect, that it <u>has</u> competence to discuss it..... We do not believe that the provisions of the Charter are to

be interpreted in such a way as to exclude discussion of an item once it has been placed on our agenda."

Finally I would like to mention some problems which have risen out of the conflicts in Korea and our participation in NATO.

The Korean conflict is the first effective example of collective police action taken under the control and authority of an international organization in order to restore peace to an area where aggression had occurred. For the United Nations this action has been conducted by an international field force designated as the United Nations Command and the Armistice Agreement was signed by the Commander in Chief of this unified force.

International unified commands of the forces of several countries are not new. There were, for example, unified Allied commands in the principal theatres of the Second World War and NATO has a unified command structure. However, NATO troops are still national troops, raised, supplied and administered on a national basis. They preserve their political and military identity and seem to possess no more legal homogeneity than did similar troops in World War II despite their integration in the supreme command. The Treaty constituting the European Defence Community envisages what would seem to be the first truly international force, wearing the same uniform, subject to a common code of discipline and owing allegiance to the Defence Community.

The laws of war, however, have developed in the context of wars between states. The Geneva Conventions of 1949, as an example, were signed by states and do not envisage the conduct of hostilities by forces acting under a unified international command. Under the provisions of the Prisoners-of-War Convention, prisoners may only be punished for acts forbidden by the law of the Detaining Power or by international law and must be tried by the same courts and according to the same procedure as in the case of members of the armed forces of the Detaining Power.

If prisoners are to be regarded as being held in the custody of an international military command acting as the Detaining Power, what law is to be applied in trying them for offences and what courts and procedure should be used? Similar problems arise in the determination of responsibility for violations of international law. In the Korean conflict an attempt was made to solve some of these difficulties by the voluntary assumption on the part of the United Nations Command of the obligations created by the Geneva Conventions of 1949.

For the future, it may be necessary to consider the desirability of permitting an international military command itself to become a party to conventions relating to the conduct of hostilities. This possibility is already recognized by the Special Protocol annexed to the EDC Treaty which binds the member governments to facilitate the adherence of "the Community as such" to international conventions on the laws of war. The alternative would seem to be special provisions to take account of situations where a number of states act through the agency of an international command.

Different legal problems arise in time of peace in relation to the status of military forces abroad. Canada, for instance, is a party to the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, which come into force last year. This agreement governs the legal status of Canadian military forces stationed in Europe in fulfilment of our North Atlantic Treaty obligations and contains detailed provisions governing such matters as jurisdiction in respect of offences committed by members of a visiting force, the settlement of claims for damage to property and fiscal immunities.

Tonight it has been possible for me to indicate only a few of the many problems of international law which are of concern to Canada. In doing so I would not wish you to forget the wider significance of these questions which is perhaps most clearly put in the words of St. Augustine..... "Peace is the tranquillity which comes of order."

Lasting peace can only be achieved in the context of law and its realization must therefore depend to a great extent on the increased willingness of states to accept and to apply the principles of international law in their dealings with one another.

In my opinion there is nothing impractical or visionary in this concept of peace through law. In modern civilized states the conviction that a lawful order is essential to their internal government has been long established. I believe that the same morality and respect for law is equally necessary in inter-state relations.

Perhaps the best evidence that international law can function effectively is the work which has already been accomplished by the Permanent Court of International Justice and its successor, the present International Court. As Canadians we can be proud that a countryman of ours now sits on the Court, in the person of Mr. Justice John Read. I might say that it was my privilege to cast a vote in his favour when nominations for the new Court were being considered.

The truth surely is that international law is not just a subject for books but a system that is practised and will continue to be improved and extended, for it is the only means of marking out the sphere within which each state may exercise its governmental powers without trespassing on the sphere of other states. It is the basis for peaceful co-existence and its progress is therefore the only accurate measurement of successful international cooperation. The international lawyer who accepts the fact that peace is inseparable from law and increasingly must be waged with law can do much to further this end, no matter what his nationality or political beliefs.