Canadian Centre
For Foreign Policy
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Centre canadien
pour le développement
de la politique étrangère

CANADIAN COUNCIL ON INTERNATIONAL LAW
29TH ANNUAL CONFERENCE

Kim Carter, Yasir Naqvi, and Katherine Wood
December 2000
Ottawa, Ontario

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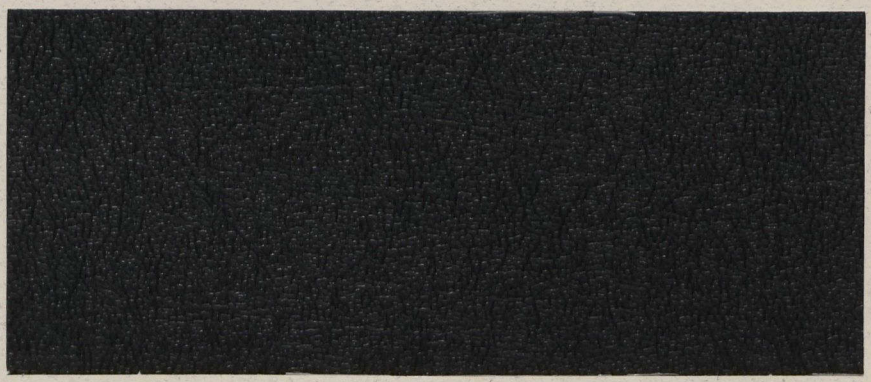

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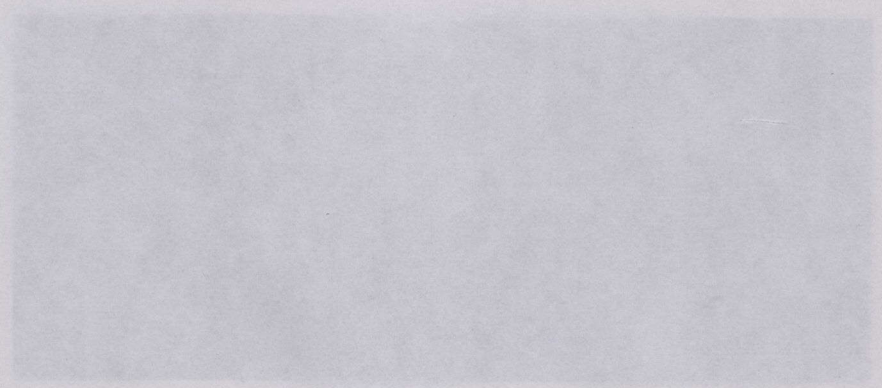

Canadian Council
on International Law

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de droit international

CANADIAN COUNCIL ON INTERNATIONAL LAW

POLICY OPTIONS PAPER

Prepared for the Canadian Centre on Foreign Policy Development
December 2000

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1. INTRODUCTION

The Canadian Council on International Law is the largest non-governmental organization in Canada devoted solely to the discussion, dissemination and development of international law. Each year it holds an Annual Conference in Ottawa which is attended by over 250 professors of international law, private practitioners, government lawyers, academics, diplomats, students and policy developers.

The Conference theme is usually broad but permits exploration of specific areas of interest, such as international human rights law, international trade law and international criminal law.

The theme of the 2000 Annual Conference was, 'Looking Ahead: International Law in the 21st Century'. This theme supported the exploration of what direction leading academics and practitioners anticipated international law would take in the next 10 to 20 years. Individual panels discussed areas ranging from the impact of technology on national borders through the changing interface between international politics and international law to the response of states to human migratory pressures.

The Canadian Council on International Law's mandate to encourage discussion, dissemination and development of international law makes its annual conference a natural, non-partisan forum for the exploration of issues of interest to institutions such as the Canadian Centre for Foreign Policy Development. The active participation of student members at the annual conference facilitates a forward looking, cutting edge approach to many issues, while academic participation promotes intellectual rigour and practitioners demand useful and pertinent practices. The combination of these interests ensures that all aspects of an issue must be fully examined to satisfy a knowledgeable, diverse and committed audience.

This policy options paper is designed to summarize various presentations and panels from the perspective of policy options which the Canadian Centre for Foreign Policy Development may wish to explore. Each panel or presentation summary concludes with a paragraph on policy options where the rapporteur briefly highlights issues which in her or his opinion the speakers have raised, directly or inferentially, as areas of potential interest for policy development. As such the policy options do not reflect the views of the Canadian Council on International Law nor any one individual.

This policy options paper has been prepared by three members of the Canadian Council on International Law, Kim Carter, Yasir Naqvi and Kate Wood. Kim Carter is the President of the Canadian Council on International Law, Yasir Naqvi, who articled with Flavell Kubrick and Katherine Wood, who articled with the Department of Justice, are both completing their Bar Admission Course in Ottawa, Ontario (further biographical information can be found at Appendix III).

CCIL 29th ANNUAL CONFERENCE, 26-28 OCTOBER 2000, OTTAWA

REPORT ON OPENING ROUNDTABLE: INTERNATIONAL CRIMINAL COURT

The International Criminal Court: Progress to Date and Prospects for the Future

1. SPEAKERS –
   - Moderator: Sharon Williams, Osgoode Hall Law School, York University
   - Speakers:
     Irwin Cotler, Member of Parliament, Mount Royal, Special Advisor on the International Criminal Court.
     Warren Allmand – President, Rights and Democracy
     David Chuter – Balkans Secretariat, Ministry of Defence (UK)
     Darryl Robinson – Department of Foreign Affairs and International Trade.

2. OVERVIEW

The Roundtable provided an excellent opening and set the tone for the high level of discussion for the Conference. The panelists, each from their unique perspectives, commented on the successes and failures of the Rome Conference and the Rome Statute of the International Criminal Court. Numerous thoughts and suggestions regarding the ICC's future prospects were offered and discussed.

3. DISCUSSION

Goals of the ICC

The panel was clear in expressing the hope that the Permanent International Criminal Court will be able to overcome the difficulties encountered by the International Ad Hoc Tribunals for Rwanda and the former Yugoslavia. The panelists, although varying in their degree of optimism, were unanimous in their hopes that the ICC will be effective in the battle against impunity and in deterring future international war criminals.

Irwin Cotler, commenting on how the creation of an International Criminal Court was overdue, offered an excellent summary of the underlying Nuremberg principles of the ICC. In doing so he identified numerous purposes of the ICC – i.e. to end the culture of impunity, to deter international crimes, to protect international peace and security and to counter the failure of national systems to bring international war criminals to justice. He believes that the ICC also strives to remedy the limitations of the Ad Hoc Tribunals, to provide for enforcement (non-military), to provide redress for victims, to counter historical revisionism, to provide a model of international justice, to protect against gender violence and to protect children in armed conflict.

Jurisdiction

Highlighting points of interest within the Rome Statute, each panelist commented on the ICC's jurisdiction. Darryl Robinson explained the complimentary nature of the Court's jurisdiction and the crimes that fall within it. Warren Allmand noted that while the ICC is a huge step forward in that it will have automatic and internal jurisdiction over all Member States, there are shortcomings that still exist. For example, although the Prosecutor, a State Party, and even the Security Council can trigger an investigation, the ICC still remains a court of last resort – as long as the State is investigating, the ICC does not have jurisdiction.

A further jurisdictional shortcoming noted by Mr. Allmand is the fact that the ICC does not have jurisdiction according to the custody of the accused, nor according to the nationality of the victim. Rather, the ICC's jurisdiction is based on the nationality and territory of the accused. Mr. Allmand said that this explains American opposition to the ICC as the USA believes that it should not be subject to international or other laws. That is, the USA finds it unacceptable that an American soldier (or civilian) could be tried in a non-US court. In response Irwin Cotler noted that the complimentary jurisdiction of the ICC was supposed to address this concern of the USA's.

Prof. Cotler noted that the issues of the ICC's jurisdiction can lead to forum shopping – when a perpetrator runs from their crimes and depending on where they run, they can be convicted or acquitted. It was noted that ICC ratification is helping to eliminate this issue by raising national consistency. Mr. Robinson supplied the latest statistics: the Rome Statute needs 60 ratifications to enter into force, and currently there are 21 ratifications and 115 signatures.

Defining Crimes and Elements

Darryl Robinson spoke of the latest news of the Rome Preparatory Commission. On June 30, 2000 the Prep Comm adopted by consensus the Rules of Procedure and Evidence of the Rome Statute. He reads this exciting development to mean that the definitions of the various crimes and their elements are recognized by the world as a whole.

Warren Allmand criticized the defining of the crime elements by the Prep Com as this, in his opinion, weakens the Statute. He sees the ICC as bound by the codification of these definitions whereas usually the courts are empowered by a Statute to decide and define the elements of crimes. On the other hand, Mr. Robinson finds that the definitions update and clarify the language of the law and provide guidance and a consistent framework for prosecution. He notes that defined elements will always be criticized for being too vague and or restrictive, but that as a world statement the Prep Com's work remains impressive.

Lessons to Learn from the ICTY

David Chuter, drawing from his experience with the ICTY, shared his thoughts how the ICC 'can get it right'. First, for the ICC to work properly, it must be supported by national governments. Practical support includes a willingness to open borders, to share evidence and even to share the accused. He cautioned that we should not be quick to assume everyone will cooperate. Second, he warned against abuse of the ICC by nations and lobby groups for their own purposes. Indeed, groups lobbying for ICC action paralyzed the ICTY and Mr. Chuter suggested that the ICC should ensure the responsible behavior of non-governmental organizations. Third, he warned that the ICC would not be able to cope with all the perpetrators. That is, justice is asymmetrical and is unlikely for all the victims, especially where there are ethnic and religious divisions. Finally, he warned that we should be prepared for professional and academic negativity towards the ICC over the next two years, as we wonder why we don't yet have world peace.

As to the concrete lessons that the ICC can learn from the experience of the ICTY, David Chute made the following suggestions. First, prove the crimes took place. Evidence must be collected from scratch, witnesses must be found and protected, and one cannot rely on media or groups for evidence because they have agendas. Second, link the crimes to someone you think is responsible. Somehow the link must be made to the superiors who gave the orders. Third, the ICC will need people with very special skills – familiar with political, military and criminal analysis, but also with a legal background. These people must come from all the ICC Member countries, whereas right now most are Western anglophones. Finally, the ICC will need many judges of different nationalities, all with a background in international criminal and human rights law.

Canada's next steps

From his vantage point as 'Special Advisor on the International Criminal Court' for the Federal Government, Irwin Cotler discussed Bill C-19, currently in Committee in the House of Commons that is designed to raise the public consciousness about the ICC. Drawing on the Bill, Prof. Cotler suggested Canada and Canadians can undertake the following to promote and support the Rome Statute: first, identify those states that are open and willing to sign and ratify the Rome Statute, second, use Canada's good offices and multilateral connections to promote ratification; third, secure a like-minded group and use to broaden the scope and power of the ICC; fourth, engage Canada's Cabinet Ministers as to the issues; fifth, engage other Parliamentarians in the international arena and finally, mobilize civil society.

4. CONCLUSIONS/POLICY OPTIONS

- The ICC's lack of jurisdiction over the custody of the accused, and over the nationality of the victim could be reviewed by Canada. Such a change to the ICC's jurisdiction may help to garner American support for the ICC. Likewise, Canada can emphasize

the positive aspects of the ICC's complimentary jurisdiction in its discussions with the USA, as this also was supposed to address the USA's concerns.

- Canada should maintain a degree of skepticism during the first years of the ICC. Canada should be prepared to support the ICC through its tough initial years, despite a lack of cooperation on the part of other states, a lack responsibility on the part of lobby groups, and a lack of instant and equal justice for all victims.

- Canada should push for the responsible behavior of non-governmental organizations and lobby groups. This will protect the ICC from being abused as a venue for the causes of certain groups.

- Canada should use its good offices and multilateral connections to promote ratification of the Rome Statute and to engage Parliamentarians of other nations.

- Canada should provide the ICC with investigators, analysts and judges with the special skills needed in the areas of military, political, criminal and legal analysis. To do so, the Cabinet, as well as civil society must be engaged and mobilized.

- Canada must encourage other nations to also provide the ICC with personnel so as to maintain a mix of participating nations. Doing so will strengthen the institution by aiding in the collection of evidence and witnesses, improving the analysis and application of the evidence to the law, and by bolstering the international community's perception as to the legitimacy of the Court.

- Bill C-19 should be supported by government and civil society.

CCIL 29TH ANNUAL CONFERENCE, 26-28 OCTOBER 2000, OTTAWA

KEYNOTE ADDRESS – NEW DIMENSIONS OF INTERNATIONAL RESPONSIBILITY: STATE, CORPORATE AND INDIVIDUAL

1. SPEAKER: Professor James Crawford, Cambridge University

2. OVERVIEW: Professor Crawford reviewed the changing nature of rights and responsibilities in the international sphere and how, over time it moved from an emphasis on state's rights and responsibility to individual rights and, most recently, individual responsibilities. He considered whether or not the next step would be organizational rights and responsibilities at the international level.

3. DISCUSSION: International law is a system that operates only with the consent of those subject to it – until recently states. International law has traditionally approached the question of rights and responsibilities in a fragmented way; that is separating rights from responsibilities. The domain of international responsibility, until recent times, has remained solely that of the state.

   This must be seen from a historical perspective. When the Treaty of Westphalia was signed in 1648 treaties were bilateral. The first multilateral treaty was not entered into until 1850. States continued even until the 20th century to be interested in bilateral, reciprocal arrangements benefiting state entities, not organizations or individuals. The treaty establishing the League of Nations can be seen as embodying a set of rules for collective security protecting state, not individual, interests. The statute of the International Court of Justice (ICJ) from the 1940's reflected the concept of states' rights and responsibilities. Only states were the 'holders of rights' and entitled to appear before the ICJ to seek recognition and enforcement of those rights. The emphasis continued to be on states' rights rather than the rights of individuals in the international sphere.

   The Barcelona Tractor case however raised the issue of interests other than those of the state and whether interests existed which states could not look after. The International Law Commission's (ILC) work on a Draft Code of State Responsibility began from a position of bilateral state responsibility but moved beyond this with the concept of general states interests in an effective public order regime. Other states could seek cessation and declaratory relief if the rights of their citizens were violated.

   The development of international human rights law over the past 50 years began, as with international law generally, with the establishing of norms and rights. Initially these rights were seen as not 'enforceable' in international fora Over time however, at the state level, mechanisms developed to hold states accountable for violations of these internationally recognized human rights. This eventually applied to the conduct of a state within its own borders when dealing with its own population. The 'enforcement mechanisms' ranged from human rights

commissions that could only impose political censure through regional courts of human rights which could grant relief to individuals and require legislative changes in a country's legal system.

The International Criminal Court (ICC) can be seen as further development of this process. Building on the example of Nuremberg where individuals were held responsible for gross and systematic violations of well established provisions of international humanitarian law the ICC statute provides for individual – not state – responsibility for serious violations of individual internationally established rights. It is interesting because it creates no separate set of individual or state responsibilities. In essence two aspects of the public order system have developed separately. Individual rights have developed principally through international human rights law; the mechanism for holding individuals responsible for violations of certain of these rights is found in the ICC statute.

The area where a 'lacunae of responsibility' still exists is in the area of corporate responsibility. International corporations have national rather international personality. A multi-national corporation exists legally as a series of national corporations. There does not exist at this time an international law of corporate rights or responsibilities. In recent years, for a number of reasons, there has been a move towards enhanced international responsibility (international arbitration etc). This hopefully will continue. At this time however an international civil justice system does not seem necessary as a complement to the recently developed international criminal law system.

4. CONCLUSIONS/POLICY OPTIONS: The areas of state and individual responsibility for violation of states and individual rights have developed differently but both currently have international enforcement mechanisms in place. The area that is still developing is that of international corporate rights and responsibilities. Further enhancement of recognized international standards and an international mechanism of direct enforcement is still some time in the future. Support for further research in this area could be productive both in identifying the extent and consequences of the lacunae and in developing international norms for consideration.

CCIL 29th ANNUAL CONFERENCE, 26-28 OCTOBER 2000, OTTAWA

REPORT ON PANEL ON INTERNATIONAL LEGAL THEORY – FEMINISM, ECOLOGY AND CRITICAL THEORY: NEW PERSPECTIVES INTERNATIONAL LAW IN THE 21st CENTURY

1. SPEAKERS: Michael M'Gonigle, University of Victoria - Moderator
   Kerry Rittich, University of Toronto
   Ed Morgan, University of Toronto
   Douglas Johnston, University of Victoria – Commentator

2. OVERVIEW: This panel emphasized the unity of diversity. From an analysis of the relationship between Edgar Alan Poe's writings and comparative international legal critical theory to the application of the ecological political economic model to international development the underlying theme was that depending on the analytical approach selected quite different conclusions can be drawn from the same set of facts. Understanding the different international legal theories of not only academics but also politicians and diplomats can be critical in developing effective bilateral and international agreements.

3. DISCUSSION: The presentations themselves were diverse and must therefore be dealt with individually.

   Feminism and International Law: This presentation highlighted both the different interests of feminist legal analysis and its different approach to international law. Starting with the 1991 Charlesworth article as a theoretical base, it went on to analyse women's participation in international environmental law decision making. The multilateral treaty making process was presented as unsympathetic to women's' voices. Women in general were seen to be more active and effective participants in 'soft' rather than 'hard' international legal instruments. The challenges of being an active proponent of a feminist analytical approach while participating as a governmental representative in a delegation were discussed. The conclusion was that women generally, and women with a feminist analytical approach were active and effective in areas such as international environmental law particularly when treaties were designed to build community rather than simply resolve conflict. The reality however is that even with the progress over the past 20 years there still exists significant problems. Whatever theoretical approach you adopt the environmental condition of women has declined over that time. One project currently under consideration is measuring the impact of women's' participation in negotiations and in policy making in delegations.

   The Third Way: This presentation centred on a 'third way' approach. The issue raised was whether international conferences on the rights of women really reflected the constituency and concerns of the vast majority of the world's women. All women do not see the notion of gender equality in the same way. The

United Nations conventions on women usually deal with issues of women's' reproductive rights of women's' right to be safe from violence. Until now economic conditions, poverty, and employment rights have not generally been the focus of international conventions dealing with women's' rights. A new project is the Centre for Economic Gender Justice. Institutions such as the International Labour Organization and the World Bank are doing analysis in these areas. The World Bank is taking into account economic gender justice in deciding what projects to support. Economic gender justice has a multidisciplinary approach – it involves not only labour issues, or trade issues, but also development issues and impacts in a host of other areas. Careful analysis must be done to determine what economic gender justice requires. Traditionally labour and employment oriented (i.e. pay equity) there is now a subtle shift toward the right to participate in an entrepreneurial fashion in a free market economy. The test must always be however what does gender justice – including economic gender justice- require.

Literary Theory and International Law: This was an entertaining intellectual exercise that highlighted that you can use almost any basis for critical legal analysis. Edgar Allan Poe's literature of terror was used as the basis for analysing the decision in a United States extradition case *Achmed v. Turner* . Both the story of Poe and the case can be seen as examples of inquiries that ultimately are deflected from the truth. In both the literary and the legal approaches little assistance was found in the various descriptions/doctrines put forward by participants. Eventually decisions that should be objective, truthful and reasoned may be made for subjective, illusionary and instinctive reasons.

Social Theory and International Law: Ecological Political Economy: This critical legal theory can be applied to international development models, international economic regulation and even to the creation of states. It encompasses the forces of globalization and unsustainability. It is based on analysis of broad social systems and encompasses not only state actors but also other participants who, together with governments, manage the commercial affairs of states. The theory has a normative basis and has a social theoretical approach as its underpinning. Political economy encompasses not only how products are exchanged and wealth created but also how political, economic and legal institutions are regulated. It reaches out to areas not normally part of legal theory such as the role of nature in creating wealth. It compares both nomadic and highly centralized Western models. In industrial societies institutions depend on a high flow of energy and resources. They reflect an extractive model that requires a significant degree of centralization and hierarchy. The general political economic model is linear not recirculating. It is unsustainable. Sovereignty is seen as a concept that delegitimizes non-centralized spaces and economies. Historical sovereignty and extractive economies are linked. The question today is whether sovereign control of territory and resources has now become and impediment to a safe and sustainable economy. Are states so enmeshed in their centralized economic development models that they cannot adapt to a model of sustainability? If the current high-growth model is both unsustainable and unreformable, this leads to a

'crisis of legitimacy' for the international legal processes which have created and maintain that model. A new model of economic development is required - one that will call for new political and legal processes to sustain it. Ecological political economy is one such model.

4. CONCLUSIONS/POLICY OPTIONS: The different critical approaches highlight how important an understanding of various parties governing legal theory is when trying to develop international consensus. Three areas of potential policy activity for the government of Canada which arises from this panel presentation are:
    a) sponsor an international workshop on legal theory to increase understanding of the different approaches used to facilitate more effective international treaty making:
    b) support projects which look at the participation of women and the impact of that participation in the development of 'hard' and 'soft' international law to assist in ensuring international law making from a Canadian perspective is truly inclusive; and
    c) direct study towards the impact of sovereignty on sustainability.

PANEL ON THE FUTURE OF INTERNATIONAL DISPUTE RESOLUTION

"THE FUTURE OF INTERNATIONAL DISPUTE RESOLUTION"

1. Speakers

Christopher Thomas (moderator), Jean Allain, Raed Fathallah and Janet Walker.

2. Overview

The panel was focussed on a discussion of the evolution and the future of international dispute resolution. Over the years the principles surrounding international disputes have varied. The decisions on the international sphere have taken on a more binding effect. In addition, private parties are given the opportunity to commence proceedings against governments under international treaties and agreements.

3. Discussion

Jean Allain discussed the continued evolution of international adjudication. International law is finally moving towards a system based on rule of law. The trend in last 100 years could be best summarized in three stages: (i) the influence of NGOs resulting in the creation of an arbitration system under the *Hague Convention*; (ii) the establishment of an international court in the post war era (firstly as the Permanent Court of International Justice and later as the International Court of Justice); and (iii) the 'legalization' of international relations through development and codification of international law. Mr. Allain opined that the establishment of the United Nations has seen an explosive growth in multilateral treaties (such as the *Genocide Convention* and the *Vienna Convention on Law of Treaties*). In addition, States have moved towards an acceptance of the legitimacy and effectiveness of international courts. Some treaties even have their own dispute settlement mechanisms, such as the Law of the Sea Tribunal under the *United Nations Law of the Sea Treaty*, which gives the tribunal compulsory jurisdiction over disputes relating to the law of sea. Another key example is the binding dispute settlement mechanism under the WTO. All members of the WTO are subject to the dispute settlement mechanisms and are unable to opt out of the system.

Raed Fathallah analyzed the development of the investor-state arbitration. International commercial arbitration is a popular mechanism to resolve commercial disputes, as it is efficient, flexible and conducted by experts. The International Centre for Settlement of Investment Dispute (ICSID) was created by the World Bank to facilitate resolution of international investment disputes. The ICSID operates under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*ICSID Convention*), where disputes are resolved through conciliation and arbitration. Awards are also granted pursuant to the *ICSID Convention*. Similar arbitration procedure is provided for under *NAFTA* Chapters 11 (investment) and 14 (financial services). *NAFTA* allow an investor from a member state to commence a proceeding, if the Member State is in violation of provisions under Chapter 11. The investor is allowed to commence arbitration either pursuant to the *ICSID Convention* or the *UNCITRAL Arbitration Rules*. Mr. Fathallah was of the opinion that international arbitration has

increased in its popularity because it ensures neutrality, no diplomatic intervention and development of international legal institutions. In that regard, *NAFTA* arbitration panels would provide substantial guidance.

Janet Walker discussed the revitalization of national courts in matters relating to international commercial disputes. The rules of arbitration are based on regimes developed in the 20th century. However, the rules of procedure in the domestic courts are constantly amended and reflect the present reality. Ms. Walker noticed three trends favouring the domestic court system. First, there is a move towards litigation in domestic courts rather than international arbitration as domestic courts are increasingly flexible (parties can define their case), maintain confidentiality (courts grant protective orders, deemed and proprietary undertakings), uphold neutrality, and judgements are easily enforceable in the domestic jurisdiction. Second, domestic systems permit ordinary citizens to get involved in actions relating to international investment. Finally, some domestic court systems allow for the possibility of class action suits against multinational corporations.

4. Conclusions/ Policy Options

The panellists agreed that international arbitration plays a strong role in the resolution of international commercial and investment disputes. However, it was stressed that further clarification of the rules is required to enhance the efficiency of the arbitration system. The arbitration system, as it currently stands, attracts distrust among the general population. The confidentiality and secrecy surrounding arbitration panels and decisions gives the impression of backroom deals and cover-up. Clarifying arbitration rules (especially under *NAFTA* Chapter 11) will also provide enhanced transparency. It is important that public participation is facilitated in arbitration panels and domestic courts through education and support.

CCIL 29th ANNUAL CONFERENCE, 26-28 OCTOBER 2000, OTTAWA

REPORT ON PANEL B-1: PUBLIC INTERNATIONAL LAW

Changing Interface between International Politics and International Law

1. SPEAKERS

- Moderator: Don McRae, University of Ottawa
- Speakers:
  Stephen Toope, McGill University
  Michael Byers, Duke University
  Neta Crawford, University of Massachusetts

2. OVERVIEW

The panel began with an academic and theoretical discussion of the legal theory basis of international law and how international norms may impact on international actors, particularly the political actors. The discussion shifted to the importance of international law in relation to the understanding and conduct of international relations; that is, the impact of international law on the practice and politics of international relations. Interesting questions were raised as to the exact intersection of the two fields and whether there was a struggle over which would be able to best shape international legal structures. The role that the USA plays in the intersection of international relations and international law, particularly in light of the upcoming US election, was also debated at length.

3. DISCUSSION

<u>At the intersection of international law and international relations</u>

Stephen Toope shared his view that there is currently a shift in international legal perspectives to include concerns with politics. Professor Toope noted, and Neta Campbell agreed that international 'relationists' are increasingly interested in international legal and the effect international politics may have on international law. Likewise, international lawyers are becoming more interested about how international law affects the practice and politics of international relations. Michael Byers also commented on the natural synergy and sustainable interest between the two fields. Indeed, the panel was unanimous that the intersection between international law and international relations is increasing in importance.

Professor Toope suggested that in addressing this intersection, the question that international lawyers have begun asking is 'how' – how do international legal norms actually impact the international actors? Professor Campbell, in response, suggested that

the "why" questions were more important than the 'how'. She sees the 'how' questions as focusing on the process, while 'why' questions focus on the states and actors as units. Professor Byers suggested that the 'why' questions regarding institutions are questions that address questions of law and procedure. Professor Byers noted that the very act of asking larger, open questions might help to expand international lawyers' perspectives.

All the panelists agreed that the debate between international law and international relations could only make a positive contribution to each other's field if the participants 'keep their feet on the ground'. This especially applies to international legal theorists who must ask real questions related to the real world. Meanwhile, there are many streams of international relations theory, the positivists being the majority, where the main concern is the empirical and the practical. The empirical research carried out by international relationists is another area that benefits the international legal field.

There is much that both disciplines can offer the other. International relations can offer various theories and approaches to empirical research. As international law and international relations are asking much the same questions, they should share the tools for answering them. International law can build the future institutions, as law is aware of the importance of procedure, fairness and checks and balances. On the other hand, international relations offer the content for the institutions. Together both work together to understand the international community, to articulate international social values and the common good and to construct a better world.

Challenges at the Intersection

Commenting on the problems and discomfort that international lawyers have with the language of international relations theory, Professor Toope identified a major challenge faced by those working in inter-disciplinary areas – the need to treat the other discipline as "other" yet recognize and respect its nuances and impact. Agreeing, Professor Campbell commented on the false antagonism between international law and international relations. She does not see the issue as whether one discipline or the other will 'win', but rather how they work together in international situations (i.e. the Pinochet release as an example). She proposed that the answer to how international relations and international law work together would always boil down to a matter of power. Indeed, she remarked that power is what international relations is all about.

Professor Toope commented that power can't be understood in a one dimensional way; rather it is a field of multi-economies, of multi-states, and of numerous influential roles and relations. He suggested that international lawyers needed to pay attention to where power has the greatest effects.

On the subject of power, Michael Byers raised the matter of the USA and the fact that the USA knows that it is the hegemony. He noted the US impact on international law, as well as the impact of international law on US politics. Commenting on how the USA always employs international law and international relations to its own advantage, Professor

Byers cautioned that Canada would benefit from having a better understanding of the debate between the two disciplines. He also suggested that Canada must defend and strengthen a public international law model that is more than just a US version of international law. Yet Neta Campbell found that the USA still needed to justify its actions in international law. In this way, international law continues to act as a check on the hegemony.

Regarding the US effect on international law, Professor Byers suggested that the USA's opposition to the *Rome Statute* of the International Criminal Court is mainly based on the US public's ignorance of international issues. While the USA is isolationist, Professor Byers thought that the USA might still be angered if the ICC goes ahead without it. He believes that the USA should be coaxed into participating in areas where it wants to be engaged. Professor Campbell and Professor Toope, on the other hand, stated that the ICC should be made as strong as possible, ignoring the hegemony, and that the USA opposition will shift over time following the shift in the internal dynamics of the USA.

4. CONCLUSIONS/POLICY OPTIONS

- Canada should gain a better understanding of the debate that exists at the intersection between international relations and international law.

- Canada must defend and strengthen a public international law model that is more than just a US version of international law. To do this Canada should encourage and promote new and independent theoretical thinking by Canadians in the area of international law and international relations. Canada should also encourage other countries to do the same.

- While Canada should encourage international lawyers to expand their perspectives by asking larger and open questions, international legal theorists should be reminded to 'keep their feet on the ground'. The questions asked must be real questions relating to the real world.

PANEL ON INTERNATIONAL TRADE LAW

"DIPLOMATS, TECHNOCRATS OR DEMOCRATS: ADVANCING TRADE AGREEMENTS IN THE NEXT DECADE"

1. Speakers

Don Buckingham (moderator), Catherine Curtiss, Christine Elwell, and Mel Annand.

2. Overview

The purpose of the panel was to discuss the future direction of international trade law. The international trade regime has evolved through three key stages: (i) the diplomatic stage that resulted in the creation of the *General Agreement on Tariffs and Trade* (*GATT*) and formalized the notion of free trade; (ii) the technocratic period (1950 to 1999) that focused on the technical aspects of the free trade agreements, such as reduction of tariff and non-tariff barriers; and (iii) the transparency period where non-governmental organizations (NGOs) are taking positions and demanding changes to the trade structure and agenda.

3. Discussion

Catherine Curtiss discussed the role of U.S. businesses and foreign companies in trade related matters. The United States Trade Representative (USTR) is the key actor responsible for trade regulation in the U.S. The USTR is a cabinet level position within U.S. Presidential administration and also acts as the chief trade negotiator. In recent years, the USTR has initiated various public outreach programs. For instance, through the public input program 42 solicitations were sought on issues relating to various free trade regimes. In addition, the USTR web site has become a bank of valuable policy documents considered in U.S. trade policy. However, according to Ms. Curtiss, few U.S. companies and trade associations have gotten involved in the consultation process. The primary reason for non-involvement is lack of information. Trade negotiations tend to be slow and at a government-to-government level. There is a perception that the trade policy agenda does not directly relate to the immediate needs of businesses. Furthermore, governments have different interests than private companies at trade negotiations. These factors combined have resulted in low participation of commercial interests in the area of trade policy.

Christine Elwell discussed the evolution of NGOs and the development of international trade law. The NGOs have been involved in the development international law for some time (for instance they actively participated in the 1992 UN Rio Conference on the environment). The NGOs have common characteristics, as they are usually non-profit, independent from government and political parties, act in public interest, and operate in both the activist and academic sphere. Ms. Elwell stressed that there is a link between social and public policy versus trade and investment. Several trade cases, such as the *Salmon* case (under the U.S.-Canada *Free Trade Agreement*), the *Tuna* case (under the

GATT), and the *Beef Hormone*, *Periodicals* and *Shrimp-Turtle* cases (under the WTO) have considered issues of environment and culture as they relate to trade and investment. Significant change took place at the WTO Ministerial Conference in Seattle in 1999. According to Ms. Elwell, the NGOs helped in the failure of the Conference. Various groups were able to bond together to bring forth issues of social concerns on the trade agenda. These recent developments have ushered in a new era where NGOs should be consulted in matters effecting social policy. The government, especially DFAIT, should take into account the views of the NGOs so that an inclusive trade policy could be developed.

Mel Annand discussed the role of governments at the WTO, by analyzing trade disputes that in effect have resulted in the prohibition of export subsidies. In the past year, the WTO dispute settlement panels have considered (in the *Aircraft*, *Dairy Milk* and *FSC* cases) various export subsidy schemes that potentially distort trade. The WTO panels have given a broad interpretation to the *Subsidies and Countervailing Measures Agreement*, whereby measures are evaluated based on the country's domestic practice. These cases have resulted in a "domestic benchmark", *i.e.*, export subsidies are not measured against an international standard, but against the domestic measures that regulate the domestic market. Essentially, one should treat a business involved in exports in a similar manner as one that is only conducting business within the domestic market. According to Mr. Annand, the message is that countries should not provide any special advantage for the export market. All countries should compete, in the international sphere, on an equal footing without any special benefits targeted towards the exports.

4. Conclusions/Policy Options

The discussion in the panel revolved around transparency and increased participation of non-government actors (*i.e.*, corporations, trade associations and the NGOs). The growing complexities of trade disputes, with their wide impact on social and public issues, necessitate consultation among all sectors of the society. The binding nature of trade disputes have required governments to amend their laws in order to conform to their international trade obligations. An increased participation of NGOs and other groups would facilitate better understanding and proliferation of trade policy amongst ordinary Canadians. The Canadian government, in particular DFAIT, should encourage participation from these groups.

CCIL 29th ANNUAL CONFERENCE, 26-28 OCTOBER 2000, OTTAWA

REPORT ON PANEL C-2: INTERNATIONAL HUMAN RIGHTS LAW

Subject: Globalization and Economic and Social Rights

1. SPEAKERS
   - Moderator - Kerry Buck – Department of Foreign Trade and International Trade
   - Speakers:
     David Onyalo - Canadian Labour Congress
     Ton Zuijdwijk - Department of Foreign Trade and International Trade

2. OVERVIEW

The panel's discussion focused on the positive and negative effects of globalization on trade, economy, people and labour. The panel also touched on the question of whether the increase in globalization may increase the international community's awareness of human rights norms, such as the right to development and economic, social and cultural rights. Finally, the panel discussed the difficulties and solutions in interpreting and enforcing economic, social and cultural rights at both the Canadian domestic level and at the international level.

3. DISCUSSION

Labour Rights and the Threat of Globalization

Mr. David Onyalo discussed the contributions that unions and labour groups have made to the language of civil rights. It is unions that have raised awareness of maternity rights, sexual harassment, increase in gender responsibility, and the concept of 'social condition' as a right. Unions recognize the importance of linking economic, social and cultural rights to civil rights and workers rights. With the links made and the growth in economics, there have been improvements - there has been a growth in union membership, social welfare, and health care.

Mr. Onyalo views globalization, free trade, de-regularization and increased taxes as clear threats to advancements in social welfare and human rights. In free trade, multinational corporations have the clear advantage over workers. This is a major threat to civil liberties and human rights, as a multinational corporation cannot guarantee proper distribution of wealth, safety of land or workers. Further, with increased globalization, international trade agreements are asking for privatization of education and health. Such requirements could also reduce the overall standards of living. Mr. Onyalo feels that to mitigate these threats, labour standards of unions should be included in free trade agreements.

Linking Human Rights and Trade

Mr. Ton Zuijdwijk notes that from a purely trade perspective, human rights and trade are seen as two solitudes. But Mr. Zuijdwijk proposes that there exist links and norms between the two. He suggests that the International Labour Organization (ILO) played a major role in developing international labour norms. While many advocates and leaders wanted the World Trade Organization (WTO) to address trade and labour issues, the ILO had already expressed the international norms on many of these issues. Nevertheless, issues of trade and the environment, of intellectual property, and competition law, are being dealt with by the WTO. Meanwhile, the labour side of the North American Free Trade Agreement (NAFTA) did attempt to incorporate human rights norms regarding occupational safety, health, child labour, and women's rights, but these norms were fairly limited. Mr. Zuijdwijk views the relationship of human rights and trade as being in a state of flux, and so the debate will go on. He believes that if the WTO gets more involved in human rights issues, then the relationship between the NAFAT, WTO and the ILO will have to be worked out.

In response, Ms. Buck commented on the risks of transferring jurisdiction over human rights issues to trade bodies when you already have human rights treaties in place. The United Nations Economic, Social And Cultural Rights Committee is working with the WTO and World Bank to try and inform the work of these bodies as to the crosscutting nature of these rights.

Interpretation and Application of International Norms in Canada

Mr. Zuijdwijk believes that Canada should link labour standards to trade rules by interpreting trade rules (such as the WTO rules) in a manner consistent with existing human rights and international labour norms. A direct conflict between these should be avoided. Mr. Zuijdwijk believes that Canadian judges are very capable of interpreting Canada's international obligations in a consistent way with the applicable norms. In response, Mr. Onyalo noted that while federal and provincial human rights commissions can implement domestic human rights rules, no one can apply and implement international human rights laws. The provinces in particular can deny application of international human rights labour laws because it was the federal government that signed these documents.

A comment from the audience addressed this issue in light of the NAFTA side-agreement that asked states to respect standards that did not exist in Canada. The discrepancy was noted in that Canada does not recognize economic, social and cultural rights in our domestic human rights codes and yet is a supporter internationally. It was suggested that Canada should recognize that international law could help create these rights in our domestic law. If economic, social and cultural rights resonated better domestically, then Canada would appear more legitimate at the international level.

Following on the comment, Ms. Buck noted that civil and political rights are being used to open the doors to economic, social and cultural rights in our own domestic laws. For example, "social condition" is now being argued to be a ground of discrimination. The recent Baker case, wherein the Supreme Court of Canada stated that Canadian actions

should be 'informed' by international Conventions to which Canada is party, was raised as opening new arguments for economic, social and cultural rights in Canada. Canada must identify and clarify the relationship between customary law and international law and the status of an unincorporated treaty in Canadian law; both of which can be accomplished by bringing such arguments before the Canadian courts.

Enforcing the Rights

The difficulty in identifying the exact nature of economic, social and cultural rights has generated an overall reluctance on the part of states to create an Optional Protocol under the International Covenant on Economic, Social and Cultural Rights. It was suggested that perhaps the member states should undertake 'general comments' to clarify the elements of the rights as this would facilitate their enforcement.

The unenforceable capacity of WTO and ILO rulings was discussed. There is a general discomfort, however, with WTO attempting to enforcing economic, social and cultural rights norms at all. A suggestion was that instead of carrying the burden alone, the WTO could create a joint Committee with another body that has experience in the area of human rights (such as CEDAW or the CRC). A further suggestion for improving the WTO's purpose and function addressed the nomination to appellate bodies at the WTO. This was seen as an area in which Canada could and should increase its intervention at the WTO.

4. CONCLUSIONS/OPTIONS

- Labour groups and unions, along with the labour standards they put forward, should be included in free trade agreements.

- Canada should link labour standards to trade rules by interpreting trade rules (such as at the WTO) in a manner consistent with existing human rights and international labour norms. A direct conflict between these should be avoided.

- By drawing on international law in the area of economic, social and cultural rights, Canada should inject economic, social and cultural rights within Canadian domestic law, thereby gaining legitimacy at the international level.

- The Canadian government and Canadian international lawyers should bring arguments before Canadian courts so as to clarify the relationship between customary law and international law and the status of an unincorporated treaty in Canadian law

- Canada and other member states of the International Covenant on Economic, Social and Cultural Rights should undertake 'general comments' to clarify the elements of the rights, as this would facilitate their enforcement.

- The WTO could create a joint Committee with another body that has experience in the area of human rights (such as CEDAW or the CRC).

PANEL ON INTERNATIONAL ENVIRONMENTAL LAW

"INTERNATIONAL ENVIRONMENTAL LAW AND RESOURCE MANAGEMENT: TRENDS FOR THE FUTURE"

1. Speakers

Silvia Maciunas (moderator), Owen Saunders, Dr. Darren Goetze, and His Excellency Philemon Yang

2. Overview

The Panel's focus was to discuss the future development of international environmental law. There has been significant movement to negotiate multilateral treaties that are geared towards the convservation of resources. The aim of preserving the environment could at times be at odds with other international regimes, such as trade treaties. A clear understanding of various overlapping interests is required to better facilitate the creation of international environmental law.

3. Discussion

Owen Saunders discussed issues surrounding transboundary water. Water is an intimate part of culture throughout the world. In particular, it is an integral part of the Canadian identity. Thus Canada has made significant contributions to the development of Water Law. Mr. Saunders raised two aspects of water's legal regime that merit discussion. First, transboundary water historically has played an important role in the bilateral relationship between Canada and the U.S. The 1909 *Boundary Water Treaty* was the central focus of the relationship between the two countries. The treaty was visionary as it dealt with issues such as watercourse and shed riparian rights and pollution (albeit briefly). The Joint Water Commission, between Canada and the U.S., is actively promoting a healthy environment for the Great Lakes. The Commission, recently, has focused on four main issues: (i) climate change; (ii) cumulative effects of environmental degradation; (iii) ground water; and (iv) international trade law. Second, aspects of water law require a multilateral approach. The *Dunabe Dam* case decided by the International Court of Justice, between Hungary and Slovakia, considered sustainable development and continuing environmental obligation as related to water. Essentially, the decision creates international jurisprudence on ways and means to manage international water.

Dr. Darren Goetze explored the emergence of greenhouse emission gases as a commodity. The effect of greenhouse emission gases is an increase in temperature, higher sea level and global meltdown of snow. The impact could be destabilization of the global environment with bleak effect on developing countries. The challenge for the international community is to limit and reduce the use of the greenhouse emission gases. According to Dr. Goetze, voluntary measures, the top-down approach, and market orientated methods are required to effectively tackle the issue. Simply put, a global effort is required to combat climate change. The agreement in Koyoto, Japan is the first step in mitigating the level of carbon in the environment, especially in the developed countries. The agreement takes a market-oriented approach to reduce carbon

levels. Three provisions are of importance: (i) industrialized countries could engage in joint projects in other countries to reduce carbon emissions; (ii) countries could help clean developing countries for credits; and (iii) countries could engage in emission trading, whereby they could buy and sell credits in order to fulfill obligations. Currently, the price of carbon is depressed. Consequently we must wait for an increase in the cost of greenhouse emission gases so they become an effective trading commodity.

His Excellency Philemon Yang shared his views on the *Biosafety Protocol*. The Protocol was adopted in January 2000 in Montreal. The Protocol is a general statement on a number of issues, such as genetically modified food. His Excellency outlined a number of opportunities and challenges offered by the *Biosafety Protocol*. In terms of opportunities, the Protocol applies to all animals (except for animals used for pharmaceutical purposes). It ensures the safety of animals. A Precautionary Doctrine is embedded in the Protocol, whereby countries could decide not to import an animal merely as a precaution (there is no need to rely on definitive scientific information). Furthermore, an importing country, through an Advanced Informed Agreement, could seek a risk assessment from the exporting country, and decide not to import based on the assessment. However, countries are obligated to inform the exporting country of the information required. The Protocol also poses some challenges. It requires the establishment of a Biosafety Clearing House. Essentially, a database containing information about genetically modified organisms. The problem would be to create a system that is accessible to all countries. Another problem is the financial resources required to ensure compatible and effective technology transfer. In addition, the Protocol requires countries to implement a liability regime within two years. Keeping in mind the diverse legal cultures and varying developments in law, it could prove to be difficult to implement a uniform law dealing with liability of companies. The definition of animal safety could also prove to be a difficult task as safety standards vary from country to country. Lastly, it would be hard to achieve consensus on labeling requirements, as there are no universal standards.

4. Conclusions/Policy Options

There was a general consensus among all speakers that there is increased cooperation among countries in the creation of an effective international environmental law. However, it was repeatedly argued that enhanced compatibility is required among environmental and international trade laws. The fear is that international environmental treaties might be at odds with international trade laws (especially under the auspices of the WTO), thus rendering them ineffective. Furthermore, developed countries must ensure that developing countries are involved in the process of environmental cleanup. In effect, developed countries, such as Canada, must be cognizant of the financial needs of the developing countries so that the international environmental regime is truly effective.

CCIL 29th ANNUAL CONFERENCE, 26-28 OCTOBER 2000, OTTAWA

REPORT ON PANEL D-2: IMMIGRATION LAW

Subject: States' Responses to Human Migratory Pressures

1. SPEAKERS
   - Moderator – Robert Décary, Federal Court of Appeal Canada
   - Speakers
     Mendel Green, Green Speigel (Toronto)
     Michael Lynk, University of Western Ontario
     Suzanne Gilbert, Immigration and Refugee Board
     Jean-Francois Bertrand, Bertrand, Deslauriers (Montreal)

2. OVERVIEW
   The speakers reviewed the positive contribution of immigration to Canada and focused on current challenges, particularly those facing refugee claimants seeking entry to Canada. The right of refugees to restitution under international law in the context of the Middle East was also discussed.

3. DISCUSSION

Introduction to the Refugee Process

Mme Suzanne Gilbert provided an excellent introduction to the issues surrounding the immigration and refugee process in Canada. With a look at the evolution of the instruments and processes, the trends in the numbers of accepted immigrants and refugees were highlighted. Now the system is overloaded and Canada faces serious challenges and delays with the system. Setting out a claimant's right from the moment their claim is filed with the federal government, Mlle Gilbert provided a thorough introduction to a complex process.

Mme Gilbert discussed the structure and the multiple layers of claims and appeals of the largest administrative body in Canada - the Immigration and Refugee Board (IRB). Citizenship and Immigration Canada must first decide whether a refugee is admissible and only then may the refugee's claim go to the IRB for a determination on eligibility. To be found eligible a claimant must fear persecution upon return to their country of origin based on one of five grounds set out in the United Nations Human Commission on Refugees (UNHCR) Handbook. The five grounds include membership in a 'particular social group' with immutable characteristics. It does not however include persons fleeing from criminal prosecution. Canadian tribunals have defined 'persecution' as violation of physical integrity, life, torture, repeated and persistent threats to the individual, or the family or group. The fear of the claimant's must be subjective, as well as objectively reasonable.

Immigration and Bill C-31

Mr. Mendel Green, noting Canada's less-than-perfect record of accepting refugees and immigrants and the complexity of the system, was otherwise very optimistic about the positive and valuable effect immigration has had on Canadian society. He felt immigrants are generally more resourceful than other Canadians, with lower rates of both unemployment and welfare dependency. He believes that Canada's main strength is its immigrants and that Canada should emphasize the positive aspects of immigration, including both multiculturalism and tolerance.

In particular Mr. Green was positive about the modern views of refugee protection and decision-making being proposed in Bill C-31. For example, while reaffirming that family reunification is the foundation of Canadian immigration policy, Bill C-31 introduces a new definition of 'family' to include common law and same-sex spouses. Similarly, to address the problem of professionals being selected but then being left without room in their area of the market, Bill C-31 is introducing a more innovative and creative approach by emphasizing flexible skills and experience in a trade. A further positive element of Bill C-31 is greater safeguards such as more stringent and comprehensive medical examinations, and stricter screening for criminals.

The Canadian Reception of Refugees

Introducing a fascinating discussion, Maitre Bertrand summarized the Canadian view of refugees. First, he noted that Canadians acknowledge that problems exist around the world and that there are many people in need of protection and compassion. We also recognize that we share the planet and must face the consequences of others' problems. Second, Canadians realize that there are lots of people abroad that could apply and qualify as a refugee in Canada. Canada does not have a quota or maximum and with open exchange of information (i.e. the internet), the world is realizing the ease of coming to Canada. Third, Canadians are afraid of the cost and numbers of accepting many refugees, but still want to help. Finally, Canadians also know that there is corruption and crime out there. They are afraid of queue jumpers and economic migrants - abusers of the system.

Maître Bertrand offered a number of solutions to address the frustration felt by the Canadian population. The foremost solution is to test the credibility of the claimants and to keep one step ahead of the incoming system-abusers. For example, the port of entry interview could be used more effectively and consistently. With careful translation of the claimant's story, with the possibility of calling overseas to corroborate the story, and with the verification of documents overseas, a claimant's credibility can be tested.

Refugees, Restitution and International Law

Focusing on the Middle East, Mr. Michael Lynk discussed the right in international law to restitution or compensation for refugees. Summarizing the situation in the Middle East and the fate of the Palestinians, he noted that there are still wide gaps between the parties as to the 'final status' of the refugees and their property. The repatriation, resettlement and compensation of refugees require answers as to many questions: who and how many qualify for such remedies? Who would pay? How much is to be paid? By what process should this be done?

The principles of restitution and compensation have long been a part of international law. U.N. Resolution 194 often cited for the existence of the right to restitution, simply re-affirmed pre-existing law. State practices have reaffirmed the right to restitution and compensation, as have various decisions of international bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights.

Mr. Lynk believes that as the land and area are well documented, it would be possible to compensate the refuges in the Middle East. He finds that compensation based on fairness and equity will help with the longer-term reconciliation of the people and will set a valuable precedent. The challenge is that over 30 million Palestinian refugees need a just peace based on fair aspirations of all parties, with a remedy of restitution and compensation that must be both forward and backward looking.

4. CONCLUSIONS/RECOMMENDATIONS

- Canada should emphasize the positive aspects of immigration, including both multiculturalism and tolerance.

- To address Canadian frustrations with the refugee system there must be better ways must be developed to test the credibility of the claimants and to keep one step ahead of incoming system-abusers.

- Canada should support a remedy of restitution or compensation based on fairness and equity for the refugees in the Middle East.

ROUNDTABLE PANEL ON TECHNOLOGY AND INTERNATIONAL LAW

"IS THE INTERNET SUBVERTING NATIONAL BORDERS?"

1. Speakers

Chi Carmody (moderator), Ian Kerr, Sunny Handa, Ysolde Gendreau, Mark Hayes, and Jeff Richstone.

2. Overview

The purpose of the roundtable panel was to explore the impact of technology on international law. The evolution of the Internet is transforming the manner in which states regulate their laws, economy and international relations. In essence, "the national is becoming international, and the international is becoming national". The development of the Internet raises serious legal issues relating to jurisdiction, accessibility, responsibility and government regulation, especially in the areas of taxation and morality. The growing role of the Internet raises the question: Is the Internet subverting national borders?

3. Discussion

Ian Kerr discussed the advent of the technology now known as the Internet. The Internet was initially developed, as technology called "packet switching", to save the cost of telecommunication and to build a network that could survive a nuclear attack. The idea was to share scarce resources (such as mainframe computers), increase communication (thus enhance cooperation), and to annihilate distances. The basic ideology behind the creation of the Internet was to share information, *i.e.*, "information wants to be free". However, the result has been "global anarchic conversation". Mr. Kerr presented the Bernado/Homolka case as the prime example. Despite a publication ban, the information of the trial was available on the Internet posted by the American media outlets. Furthermore, Canadian web sites were set up to share the information in violation of the publication ban. As the authorities shut down the web sites, almost identical sites with similar information were launched immediately, thus effectively circumventing the ban. In addition, *Wired* magazine was stopped at the Canadian border for carrying information about the trial. However, they successfully posted the same information on their web site, which was accessible within Canada. Similar issues were dealt with by Chief Justice Lamer (as he was then), in *Dagenais v. CBC*, where he observed that technology would make it difficult to enforce publication bans. Essentially, the Internet is proving to be a technology for freedom and architecture of control.

Sunny Handa discussed the general themes of copyright law. Copyright can be most succinctly defined as the protection of written and spoken word. The advent of the Internet has seriously affected the enforcement of copyright. Internet mediums such as MP3, Napster and iCraveTV are all considered illegal, as they deal with flow of content. What is important to note is that copyright laws are nationally based, with little universality in the international sphere. There are, however, some minimum standards in treaties under the auspices of the World Intellectual

Property Organization (WIPO) and the World Trade Organization (WTO). Regardless, copyright law is based on two broad categories: (i) positive law theory, *i.e.*, copyright laws are to achieve social utility; and (ii) natural law theory, *i.e.*, universal law directs our conduct. Mr. Handa outlined that there are two methods of protecting copyright: (i) the "copy-right" system, *i.e.*, the right to copy (mostly exercised in the common law jurisdictions); and (ii) the "*droit d'auteur*" system, *i.e.*, the right of the author to control the use of his or her work. The Canadian copyright regime is a combination of utilitarian and economic approach, while the U.S. law is primarily concerned with economics.

Ysolde Gendreau spoke about the infringement of copyright laws resulting from the rise of the Internet. Grave issues arise when copyright violation takes place in a foreign jurisdiction. International intellectual property agreements provide limited remedies to such a problem. Agreements such as the *Berne Convention* and the *Agreement on Trade Related Aspects of Intellectual Property* (*TRIPS*) provide some substantive minimum standards for copyright laws. However, rights are defined broadly, providing wide discretion to countries for enforcement. The conflict of law provisions however minimize some differences between national copyright regimes. Ms. Gendreau pointed out that the lack of a uniform international regime has resulted in regional agreements, such as directives under the European Union, the *North American Free Trade Agreement* (*NAFTA*), and the *Andean Pact*. The greatest challenge is the harmonization between international agreements (the top-down approach) and regional agreements (the bottom-up approach). The international approach, however, will have a greater impact on the proliferation of copyright laws.

Mark Hayes shared his experience in the iCraveTV legal dispute. The iCraveTV dispute raised some serious jurisdictional issues. Essentially, iCraveTV set up a web site to retransmit TV programming over the Internet. The retransmission of a broadcast is not illegal under the Canadian law. However, such retransmission is contrary to American law unless royalties are paid to the copyright holder. iCraveTV was shut down because it was not restricted to the viewers in Canada. This dispute raises the question: Do U.S. courts have the jurisdiction to take action against a Canadian Internet entity that is in violation of U.S. laws? According to Mr. Hayes, this is not a new problem. The retransmission via satellite is also not 'leak proof'. Various approaches could be taken to protect copyright, such as "Zoned Internet", technological protections, and "Whack-a-Mole". However, all these solutions raise some sort of policy concerns that will need to be addressed. Essentially, the Internet is forcing harmonization of copyright laws.

Jeff Richstone discussed how the Internet could be regulated. Courts, especially the U.S. courts, have assumed jurisdiction despite the cross border nature of the issues. The courts, however, are faced with defining the Internet. So far courts have taken the position that the Internet is a means of communication. Thus, they have applied existing communication laws to the Internet. The courts also have taken a broad view of jurisdiction. For example, Yahoo! France was stopped from linking Nazi arms web sites. This did not, however, prevent French residents to access the link from Yahoo! USA site. Similarly, the Alberta Securities Commission took jurisdiction over a web site located in the Cayman Islands. The Commission determined that any Albertan clicking on the web site was in fact conducting business in Alberta. According to the court in the *Zippo*

Manufacturing case, jurisdiction must be determined on an active-passive spectrum. In simple terms, the courts should not assume jurisdiction over passive web sites, while courts should assume jurisdiction over an active web site. For web sites in between, the court should consider the degree of interactivity. This approach has been accepted in Canada in *Braintech Inc. v. Kostiuk.* In essence, Mr. Jeffstone pointed out, that there is no single approach to the proliferation of the Internet and its impact on various international issues. He suggested three options: (i) the top-down approach, *i.e.*, single set of international rules; (ii) the bottom-up approach, *i.e.*, rules based on users' needs; and (iii) the "muddle through" approach, *i.e.*, determine small solutions to various problems.

4. Conclusions/Policy Options

It was clear from the discussion there is ambiguity as to actual effect of the Internet on international law. Some speakers believed that indeed the Internet is subverting national borders, while others opposed such view. However, it was clearly reflected that harmonization in national laws dealing with copyright is required to create legal and economic certainty. Such harmonization of laws would also allow courts to assume jurisdiction in a consistent manner.

12. CONCLUSION

Looking ahead is both fascinating and dangerous for the same reason – simply considering, discussing and proposing options influences the very future at which you are looking. The impact of the discussions at and proposals from the 2000 Canadian Council on International Law Conference can best be assessed in twenty years. Fortunately a high proportion of participants in 2000 were students or young academics and practitioners who will likely attend the 2020 Canadian Council on International Law Conference (or as one panel might have suggested be participating via interactive electronic media) where they will be in an excellent position to make such an assessment.

Interesting and practical policy options were presented by many speakers ranging from developing courses and training for future ICC staff to supporting projects looking at the impact of women and other less traditional players participating in national delegations during international negotiations. Other policy options suggested a project promoting interpretive harmonization between international environmental and international trade law; the development of improved communication mechanisms available outside of Canada to ensure refugees are correctly identified; and taking a leadership role in harmonizing national/international copyright laws as they apply to the Internet.

Any of these policy options may be followed up in panels during the 2001 Canadian Council on International Law Annual Conference – it is certain that other areas of developing international law will be considered, discussed and policy options recommended during that conference.

29th

Annual Conference on International Law

Canadian Council on International Law

International Law

Looking Ahead: International Law in the 21st Century

in the 21st Century

LookingAhead:

International Law

October 26 - 28, 2000

Château Laurier,
Ottawa

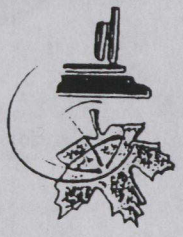
Congrès annuel sur le droit international

Conseil canadien de droit international

Le droit international

Tournés vers l'avenir: Le droit international au 21ème siècle

au 21ème siècle

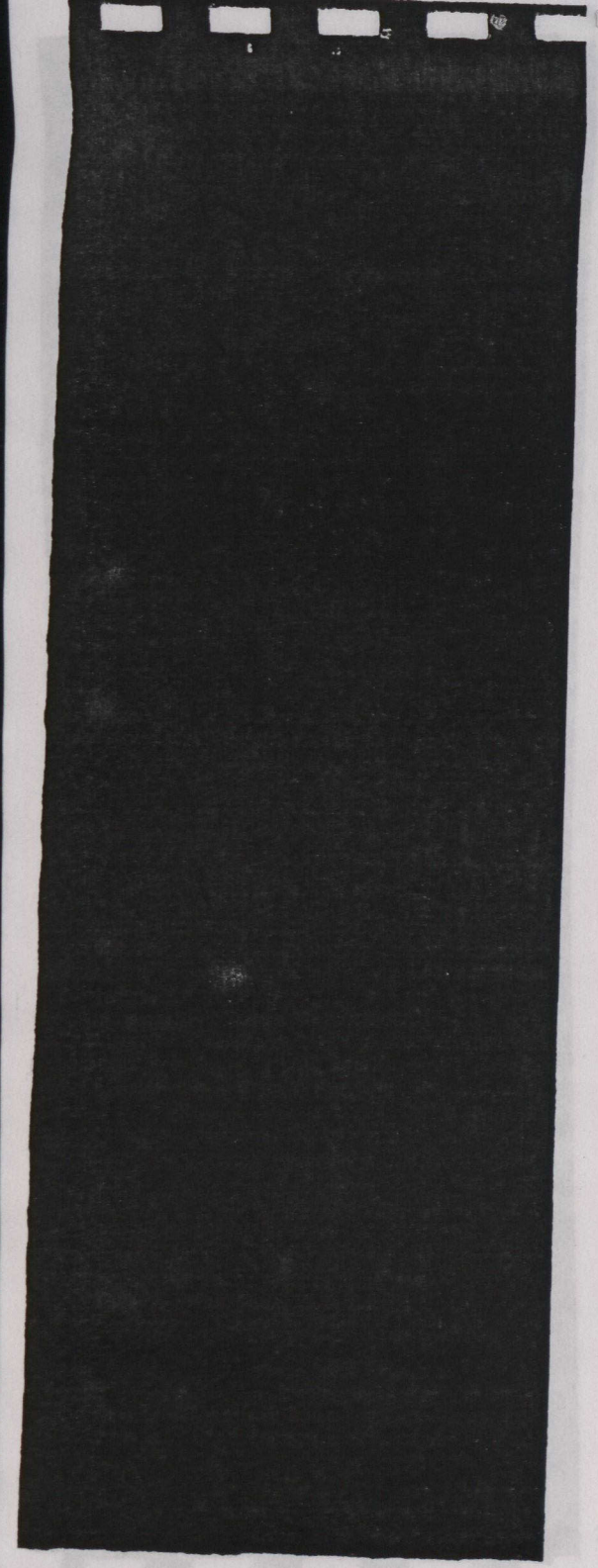


Tournés vers l'avenir:

Le droit international

du 26 au 28 octobre 2000

Château Laurier,
Ottawa



18:00 — **Drawing Room Foyer**

Registration

18:00 - 19:00 — **Burgundy Room**

CCIL Executive Meeting

19:00 - 20:30 — **Drawing Room**

Opening Roundtable: International Criminal Law

Subject: ***The International Criminal Court: Progress to Date and Prospects for the Future***

Moderator: **Sharon Williams**
Osgoode Hall Law School, York University

Speakers: **Irwin Cotler**
Member of Parliament, Mount Royal, Special Advisor on the International Criminal Court

Warren Allmand
President, Rights and Democracy

David Chuter
Balkans Secretariat, Ministry of Defence (UK)

Darryl Robinson
Department of Foreign Affairs and International Trade

Daniel Turp
Member of Parliament, Beauharnois-Salaberry

20:30 - 22:00 — **Drawing Room Foyer**

Cocktail Reception
Sponsored by Ogilvy Renault

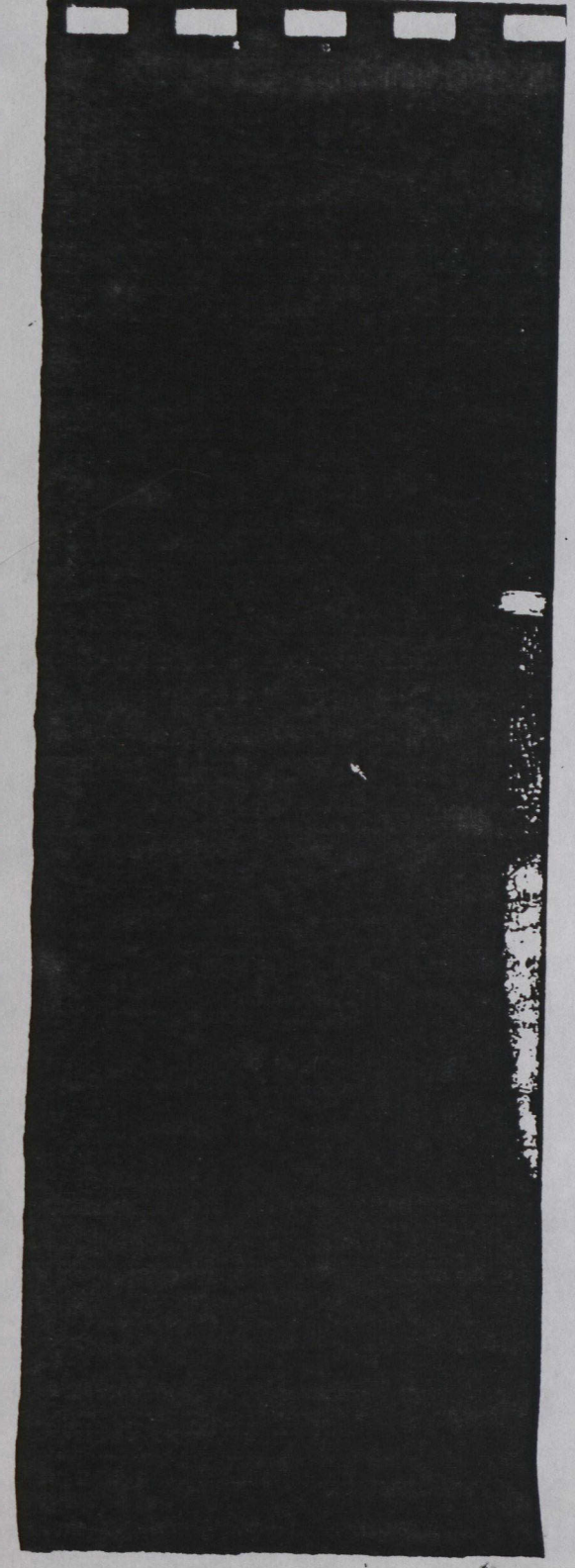
Friday, October 27, 2000

7:30 - 9:00 — **Burgundy Room**

Women and International Law Interest Group Breakfast
(separate registration $15)

Subject: ***Has Feminism Got Anything to Say About the Environment?***

Chair: **Jutta Brunnée**



N... York U...sity

8:00 — **Drawing Room Foyer**

Registration

9:00 - 9:30 — **Drawing Room**

Opening Plenary/President's Welcome

9:30 - 10:30 — **Drawing Room**

Keynote Address

Subject: ***New Dimensions of International Responsibility: State, Corporate, Individual***

Speaker: **James Crawford**
Cambridge University

10:30 - 10:45 — **Drawing Room Foyer**

Break

10:45 - 12:15 — **— Renaissance Room —**

PANEL A-1: **International Legal Theory**

Subject: ***Feminism, Ecology and Critical Theory: New Perspectives on International Law in the 21st Century***

Moderator: **Obiora Okafor**
Osgoode Hall Law School, York University

Speakers:

Kerry Rittich
University of Toronto
"Turning Toward the Market: New Trends in the Making of Gender Equality in International Law and Institutions"

Ed Morgan
University of Toronto
"The Horror Story as a Genre in International Law"

Michael M'Gonigle
University of Victoria
"Ecology, the State, and the Future of International Law"

PANEL A-2: **International Dispute Resolution**

Subject: ***The Future of International Dispute Resolution***

Moderator: **Christopher Thomas**
Thomas & Partners (Vancouver)

Speakers:

Jean Allain
The American University in Cairo
"The Continued Evolution of International Adjudication"

Raed Fathallah
Oxford University
"International Investment Disputes between States and Private Parties"

Janet Walker
Osgoode Hall Law School, York University
"The Revitalization of National Courts as Fora for International Commercial Dispute Resolution through the Hague Judgments Convention and the Transnational Rules Project"

12:15 - 14:00 — **Drawing Room**

Lunch
(in collaboration with the American Society of International Law)

13:00 - 14:00 — ***Luncheon Address***

Subject: ***The Role of NGOs in International Law***

Speaker: **Arthur Rovine**
President, American Society of International Law

14:15 - 15:45 — **— ... Renaissance Room**

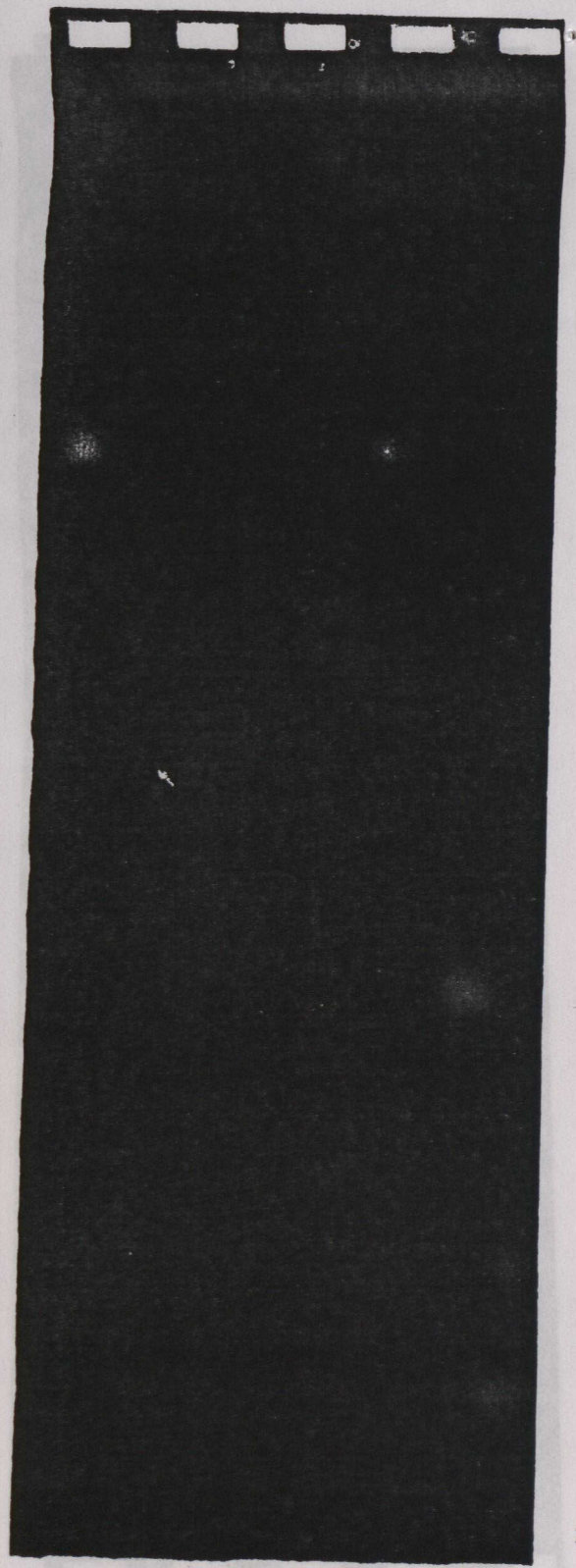
PANEL B-1: **Public International Law**

Subject: ***Changing Interface between International Politics and International Law***

Moderator: **Don McRae**
University of Ottawa

Speakers: **Stephen Toope**
McGill University

Michael Byers
Duke University



PANEL B-2: **Private International Law**

Subject: *Jurisdiction, Choice of Law and Public Policy in the 21st Century*

Moderator: **Kathryn Sabo**
Department of Justice

Speakers: **Geneviève Saumier**
McGill University

John McEvoy
University of New Brunswick
"Canadian Conflict of Laws: Whither Choice of Law?"

Louis Marquis
University of Sherbrooke

Commentator: **Renshan Liu**
South Central University of Political Science and Law (Wuhan, China)

15:45 *Bus transportation from hotel to Lester B. Pearson Building*

16:00 - 17:30 **Cadieux Auditorium, Lester B. Pearson Building, 125 Sussex Drive, Ottawa**

Open Forum with Department of Foreign Affairs and International Trade, Legal Affairs Bureau

17:30 *Bus transportation from hotel to Lester B. Pearson Building*

17:45 - 19:00 **Tower A, 9th floor, Lester B. Pearson Building, 125 Sussex Drive, Ottawa**

Reception hosted by the Legal Adviser, Department of Foreign Affairs and International Trade

19:00 *Bus transportation to National Arts Centre*

19:30 - 22:00 **Le Salon, National Arts Centre, 53 Elgin Street, Ottawa**

Banquet

21:00 - 21:30 **Banquet Address**

[illegible] 2000 [illegible]
New York University

Saturday, October 28, 2000

7:30 - 8:45 **Burgundy Room**

"Future of the CCIL" Breakfast: Report of the Committee (separate registration: $15)

8:45 - 10:15 **Macdonald Room**

PANEL C-1: **International Trade Law**

Subject: **Diplomats, Technocrats or Democrats: Advancing Trade Agreements in the Next Decade**

Moderator: **Don Buckingham**
University of Ottawa

Speakers: **Catherine Curtiss**
Hughes Hubbard & Reed LLP (Washington, DC)
"The Role of Business and Producers in the Development of New Trade Law"

Christine Elwell
Sierra Club (Toronto)
"The Role of NGOs in the Development of New Trade Law"

Denyse MacKenzie
Department of Foreign Affairs and International Trade
"The Role of National Governments in the Development of New Trade Law"

8:45 - 10:15 **Renaissance Room**

PANEL C-2: **International Human Rights Law**

Subject: **Globalization and Economic and Social Rights**

Moderator: **Kerry Buck**
Department of Foreign Affairs and International Trade

Speaker: **David Onyalo**
Canadian Labour Congress

Craig Scott
Osgoode Hall Law School, York University

10:15 - 10:30 Corridor outside Macdonald Room

Break

10:30 - 12:00 **Macdonald Room**

PANEL D-1: **International Environmental Law**

Subject: **International Environmental Law and Resource Management: Trends for the Future**

Moderator: **Silvia Maciunas**
Barrister & Solicitor (Ottawa)

Speakers: **Owen Saunders**
Canadian Institute of Resources Law (Calgary)
"Transboundary Water Issues and the Development of International Environmental Law"

His Excellency Philemon Yang
Ambassador of Cameroon to Canada
"Cartagena Protocol on Biosafety: Challenges and Opportunities"

Dr. Darren Goetze
Global Change Strategies Inc. (Ottawa)
"Emergence of Greenhouse Gas Emmissions as a Global Commodity"

10:30 - 12:00 **Renaissance Room**

PANEL D-2: **Immigration Law**

Subject: **States' Responses to Human Migratory Pressures**

Moderator: **Robert Décary**
Federal Court of Appeal of Canada

Speakers: **Mendel Green**
Green & Spiegel (Toronto)
"How Canada Selects the Brightest and the Best and Preserves Family Reunification in the Immigration Process"

Michael Lynk
University of Western Ontario
"Refugees, Compensation and International Law: Principles and Process in the Middle East Peace Process"

Suzanne Gilbert
Immigration and Refugee Board (Toronto)

[illegible] Bertrand Deslauriers (Montreal)
"Canada's Generous but Perplexing Attitude Toward International Protection"

12:00 - 13:00

Lunch (on your own)

12:00 - 14:00 **Courtyard Restaurant**
21 George Street, Ottawa

International Environmental Law Interest Group Luncheon (separate registration: $21.50)

Subject: **Update on International Environmental Treaty Negotiations**

Speakers: **Anne Daniel**
Environment Canada Legal Services

Masud Husain
Department of Foreign Affairs and International Trade

12:00 - 14:00 **Drawing Room**

Students: Careers in International Law

13:00 - 14:00 **Drawing Room**

CCIL Annual General Meeting

14:00 - 15:30 **Drawing Room**

Concluding Roundtable: Technology and International Law

Subject: **Is the Internet Subverting National Borders?**

Moderator: **Chi Carmody**
University of Western Ontario

Speakers: **Jeff Richstone**
Department of Canadian Heritage Legal Services

Mark Hayes
Davies, Ward & Beck (Toronto)

Sunny Handa
Fasken Martineau DuMoulin (Montreal)

Ysolde Gendreau
University of Montreal

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Les commentaires finals du président

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President's Concluding Remarks

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2000 Looking Ahead: International Law in the 21st Century / Tournés vers l'avenir : Le droit internationale dans le 21ème siècle
Bruce Stockfish

1999 From Territorial Sovereignty to Human Security / De la souveraineté territoriale à la sécurité humaine
Johanne Levasseur

1998 Impact of International Law on the Practice of Law in Canada / L'influence du droit international sur la pratique du droit au Canada
Vello Mijal, Johanne Levasseur

1997 Lessons from the Past - Blueprints for the Future / Leçons du passé - Prémisses pour l'avenir
Valerie Hughes, Yves Le Bouthillier

1996 Fostering Compliance in International Law / Promouvoir la conformité au droit international
Yves LeBouthillier, Marcia Waldron, Karine Asselin, Robert Young

1995 Globalism and Regionalism: Options for the 21st Century / Globalisme et régionalisme : options pour le 21ième siècle
John McManus

1994 International Peace and Security / La paix et la sécurité internationales
Kim Carter, John McManus

1993 Aboriginal Rights and International Law / Les droits des auchtochtones et le droit international
Chantal Bernier, Jerome Berthelette, Debra Corber, Roger Jones, Wendy Moss, Andrew Sanfilippo, Irit Weiser

1992 State of sovereignty: the challenge of a changing world - New approaches and Thinking on International Law / La souveraineté étatique : Le droit d'un monde en bouleversement - Nouvelles approches et théories du droit international public
Louise Lussier, Ross Hornby, Paul Lepsoe, Craig Scott

1991 Canada and the Americas / Le Canada et les Amériques
Collen Swords, France Morrisette, John G. Pallascio

1990 Canada, Japan and International Law / Les relations Canada - Japon et le droit international
Armand de Mestral, Chantal Bernier, Maurice Copithorne, Ross Leckow, Andrew Sanfilippo

1989 Preserving the Global Environment / La préservation de l'environnement mondial
Don McRae, Chantal Bernier, Douglas Hamilton, James Spears, Howard Strauss

1988 Canada and Europe: An Evolving Relationship / Le Canada et l'Europe : une relation en constante évolution
Chantal Bernier, J-F Bonin, Paul Dubois, Ton Zuijdwick

1987 Canada-United States Relations and International Law / Droit international et relations canado-américaines
Daniel Turp, Ross Hornby, Chantal Bernier

1986 International Law and Development / Le droit international et le développement
Robert Auger, Scott H. Fairley, Jonathan Fried, Ross Hornby

1985 International Regulation and Deregulation: Emerging Trends in the Role of International Institutions / Réglementation et déréglementation internationale : évolution du rôle des institutions internationales
J.T. Fried, Robert Buchan

1984 The Peaceful Settlement of International Disputes / Le règlement pacifique des différends
Robert Buchan, Gregory Tardi, Armand de Mestral

APPENDIX III – AUTHORS' BIOGRAPHIES

KIM CARTER – is the President of the Canadian Council on International Law and a legal officer with the Canadian Forces serving in the Office of the Judge Advocate General. She received her LL.B and B.A. from York University. She was Director of International Law for the Canadian Forces from 1991 to 1995. In 1993 she was named team leader of the Canadian War Crimes Investigation Team which conducted on site war crimes investigations for the United Nations Commission of Experts looking into allegations of war crimes being committed in the former Yugoslavia.

YASIR NAQVI – is completing his Bar Admission Course in Ottawa, Ontario and after his call will be working at Flavell Kubrick in Ottawa. He graduated *cum laude* with an LL.B. from the University of Ottawa. He obtained both a B.A. and a B.Sc. from McMaster University in Hamilton, Ontario. He is Co-Chair of the Canadian Bar Association (Ontario) Student Division. He has been active in international trade law for several years and has had articles published in that field in the Ottawa Law Review and the Competition Law Quarterly. He is fluently bilingual in English and Urdu as well as being proficient in Hindi. He is a member of the Canadian Council on International Law.

KATHERINE WOOD – is completing her Bar Admission Course in Ottawa, Ontario. She articled with the Federal Department of Justice. She graduated with distinction from McGill University with a LL.B and a B.C.L. She earned a B.A. with distinction from the University of British Columbia. She has been active for a number of years in the promotion of international human rights and was chosen as a McGill University Human Rights Law intern and worked in that capacity in Colombo, Sri Lanka in 1997. She is a member of the Canadian Council on International Law.

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Conflict Prevention and Peacebuilding

Renewing Partnerships for the Prevention of Armed Conflict: Options to Enhance Rapid Deployment and Initiate a UN Standing Emergency Capability. Peter Langille, Global Human Security Ideas and Initiatives. Fall 2000.

Report from the Roundtable on Expert Deployment to International Peace Operations. CCFPD. September 12, 2000.

Canadian Peacebuilding in the Middle East: Case Study of the Canada Fund in Israel/Palestine and Jordan. Tami Amanda Jacoby, University of Manitoba. Fall 2000.

Les Enterprises canadiennes et la consolidation de la paix. Jean-Francois Rioux, Francisco-José Valiente, and Christian Geiser, Université du Québec a Montréal. Le 31 octobre 2000.

Nuclear Weapons and Small Arms

Ballistic Missiles Foreign Experts Roundtable Report. Ernie Regehr, Project Ploughshares and Peter Moore, CCFPD. March 30, 2000.

NATO-Nuclear Weapons Roundtable Report. CCFPD. August 24-25, 2000.

Small Arms and the OAS Roundtable Report. CCFPD. April 28, 2000.

Examen des récentes initiatives gouvernementales et d'ONG concernant les armes légères et appréciation sur leur efficience: proposition pour un indice de sécurité individuelle (ISI). Frances Gaudreault et al. Summer 2000.

Globalization and Firearms: A Public Health Perspective. Wendy Cukier et al. Fall 2000.

Borders

Perspectives on the Borderless World: Issues for Canada. Heather Nicol and Ian Townsend-Gault. Fall 2000.

New Diplomacy

Report from the Roundtable on Just War and Genocide. CCFPD. December 8-9, 2000.

Report from the Ottawa Roundtable for the International Commission on Intervention and State Sovereignty (ICISS). CCFPD. January 15, 2001.

.../2

[1] **Visit www.cfp-pec.gc.ca for more reports and other publications.**

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Children's Rights
Children and Violent Conflict: Meeting the Challenge of Diversity. Erin Baines, Dalhousie University; Barry Burciul, University of Toronto. Summer 2000.

Business and Labour
Canadian Firms, Canadian Values. Canadian Business for Social Responsibility. May 2000.

Africa
Report from the Ottawa Nigeria Roundtable. CCFPD. March 20, 2000.

Asia-Pacific
APEC Media Monitoring Report: A Synopsis of Key Findings from IMPACS' 1999 Youth Internship Project. Institute for Media, Policy and Civil Society. 2000.

Report from the Burma and Drugs Roundtable. CCFPD. May 15, 2000.

Report from the North Korea Roundtable. CCFPD. January 22, 2001.

Report from the Victoria Roundtable on Indonesia. CCFPD. March 13, 2000.

Europe
Report on Cyprus: Living Together in the New Century Roundtable. CCFPD. February 14, 2000.

Americas
Canada, Indigenous Peoples and the Hemisphere Roundtable Report. CCFPD. March 23, 2000.

CCFPD Summary Report: The Americas. CCFPD. Fall 2001.
Rapport de syntèse du CCDPE: les Amériques. CCFPD. Fall 2001.

Threats to Democracy in America. Max Cameron, Canadian Foundation for the Americas (FOCAL). March 3-4, 2000.

Report from the Roundtable on Governance, Civil Society and the Americas. CCFPD. January 28, 2000.

Report from the Roundtable on Canada-Cuba Relations. CCFPD. January 18, 2000.

Look Ahead to Windsor Roundtable Report (OAS). CCFPD. April 26, 2000.

Culture
Commerce International et diversité culturelle: la recherche d'un dificile équilibre. Ivan Bernier, Université Laval and Dave Atkinson. 2000.

Circumpolar Issues
Roundtable on Northern Foreign Policy: Feedback and Look Ahead. CCFPD. February 5, 2001.

Foreign Policy Research
Gendered Discourses, Gendered Practices: Feminists (Re)Write Canadian Foreign Policy. Claire Turenne Sjolander, University of Ottawa; Heather Smith, University of Northern British Columbia; Deborah Stienstra, University of Winnipeg. May and July 2000.