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INTERNATIONAL LAW IN A CHANGING WORLD: SOME COMMENTS ON THE VALUE OF THE OLD AND THE NEW

Speech by the Honourable Paul Martin,
Secretary of State for External Affairs,
to the Toronto Branch of the International
Law Association, October 14, 1964.

The topic I have chosen to speak on is wide enough to embrace all international law. The theme of my speech is change -- not violent change, not revolutionary change, but change in its everyday aspect, what has come to be known as the process of peaceful change. But I do not propose to try to survey the entire span of international law, as it links East and West, newer countries and old, yesterday and tomorrow, the world of armaments and a world without arms, a world where the laws of war are as extensive as the laws of peace, and a world without violence and war. This would be far too ambitious a task for this brief address.

But what I can do is seek to share with you some of the insights which I have gained in my office of Secretary of State for External Affairs, about the meaning of international law for Canada, about how we see it in its strength and how we see it in its weaknesses; about when and how we strive for change so as to overcome the inadequacies of the existing rules and when and how we seek to conserve the achievements and values of the past.

In Canada, our experience is hardly unique. A settled country, an established land, Canada is not besieged by the problems of the newer states struggling to find themselves in the community of nations, seeking to determine their obligations and their rights, their privileges and their responsibilities. As an independent state, Canada has shared in the development of international law in its most crucial years, the two generations which have given rise to the beginnings of a new international order based on multilateral co-operation through world-wide institutions which have risen from the devastations of two World Wars.

We in the West regard international law as our inheritance. It has largely sprung from the postulates of Western authors and the practice of Western states. We were thus mainly responsible for the corpus of present-day international law. In this body of doctrine and rules we find a great deal to our liking. We also find much which we do not like. But what of the attitude of the newer states? If you could share my experience in dealing with representatives of the newer countries, you would, I know, also share the striking and

unmistakable impression that they place as great a value on the rules and principles of international law as we do in the West, if not a greater.

The newer countries show the highest interest in the progressive development of international law. They have participated most actively in the General Assembly, in the International Law Commission and in diplomatic conferences and other bodies in the development of new international instruments. Theirs is a positive influence on the evolution of international law. They want change; they want to work for change; but most of them are wise enough "to make haste slowly" in their endeavours to shape international law and international institutions in accordance with the interests of all states including their own.

It is true that most of the newer countries have shown reluctance about resorting to compulsory arbitration. Very few have accepted the compulsory jurisdiction of the International Court. There is a preference, a quite understandable preference, for regional organizations and methods, for negotiation rather than arbitration, for treating disputes as political, rather than as legal. We hope and we expect that this attitude will change as these states begin more and more to feel that they are having a say, and are participating fully in the evolution of the international legal order.

But we must not be impatient because the new countries show reluctance to submit their disputes to third-party settlement. Even in the West, we have not ourselves fully acquired the habit of thinking about international problems in respect of the rights and duties of the states concerned. Almost every political problem is also a legal one; almost every legal problem is a political one. Was the Suez problem legal or political? Is the Cyprus question legal or political? What about the problem of the recognition of Communist China? What about the Berlin problem? Are these legal or political?

The fact is that international relations do not give rise to political problems which have a legal aspect, any more than they give rise to legal problems which have a political aspect. In my view, the basic distinction between disputes that are legal and disputes that are political is the readiness of the states concerned to regard them as legal, to consider them in terms of international law. But reluctance to think about and articulate problems in legal terms is not necessarily due to lack of interest in or respect for international law. It may arise because the realities of the issue are obscured, not clarified by defining them in legal terms. Or the reluctance to litigate may be due to a belief that the law, as it is, is unjust or inadequate and must be changed. Some states are bound to ask themselves the question whether, in a society where enforcement of international law is not universally or uniformly accepted, each state is justified in reserving to itself the right to that freedom of action which many other states assert and maintain.

At the same time as the newer countries have been seeking to develop and change international law, the attitude of the Soviet Union and its allies towards this subject has also been changing. At one time, the very existence of international law was doubted by Soviet writers. At other times they thought of international law as being of several different types, and partly as a temporary set of rules governing relations between Communist and capitalist states

in the period preceding the total victory of Communism. But in recent years we have begun to see, in international law as in other spheres, signs of a change in the Soviet Union, of a growing acceptance that there is only one international law which is of general validity for East and West. It is not surprising that the Soviet Union sees the content of this international law as containing principles favouring Soviet interests. The Soviet Union has borrowed heavily from traditional nineteenth century concepts in its role of a great power with far-flung and complex interests.

For the U.S.S.R., international law would seem to perform a triple role in the modern world. The first role is to protect the interests of the Soviet Union as a state among states, as a state in its international dealings with other countries, as a state concerned about the protection of its borders. The second role of international law is to serve as an arch, upon which common interests of East and West can be built, a span between competing societies and ideologies, an instrument of so-called "peaceful co-existence". The third role of international law is to act as a wedge by which Soviet political and ideological aims are furthered at the expense of the Western powers. Falling in this category would be Soviet advocacy of the legality of "wars of liberation" against colonialism. This, of course, is a simplification of the Soviet attitude, as each function or role obviously overlaps with the others.

It is particularly in its first role, the protection of a great power's interests, that the Soviet Union seems in some respects to be heading towards a conservative approach - most recently in its attitude towards the rules relating to the conclusion, termination, suspension and revision of treaties. In the International Law Commission, we have accordingly seen members from both Communist and Western countries agree on rules which firmly uphold the sanctity of treaties. The Soviet Union has even supported a restrictive definition of the controversial doctrine of clausula rebus sic stantibus, and we have heard little in recent years about "unequal treaties". It is also in connection with international law in this first role that the Soviet Union is an ardent advocate of the doctrine of state sovereignty. I will be discussing this later in my statement. It remains to be seen whether the Soviet attitude towards international law as an instrument for protecting its national interests will influence, as I believe it has already begun to influence, the Soviet Union's attitude toward international law in its role as an instrument of what they call peaceful co-existence, and whether it will temper the Soviet Union in its efforts to use international law for revolutionary purposes.

What conclusion do I draw from this analysis? I believe that the nations of the world have arrived at a point where virtually all states see value in the concept of a general corpus of international law, valid for all states, Eastern and Western, Communist and capitalist, old and new. Although they have had little say in its formulation, the newer states see value in it in its role of protector of the interests of smaller powers. The U.S.S.R. has come to see positive value in it as protector of its interests as a great power and as an instrument for peaceful co-existence. The Western states see international law as a framework for a developing international legal order and as an instrument for peace, for the peaceful settlement of disputes and for peaceful change.

It is, therefore, evident that all countries of the world have come to share a common interest in international law and in its development into a body of rules which satisfactorily regulate the various and often conflicting interests of states in a modern society.

For all of these states, struck by the impact of technological, scientific and economic change, a question which arises over and over again is: do the individual rules of international law adequately meet the requirements of a specific situation? To what extent should the older rules be preserved? To what extent should we reject the old and pursue the new? To what extent is change possible? To what extent is it desirable?

I should like to illustrate how such questions as these arise for a country like Canada and how we try to answer them. I shall do this by referring to three particular fields of international activity where the question of the value of the old and the new has recently arisen and where the Canadian Government has had to formulate important aspects of its foreign policy in the light of changing norms and principles of international law. These are, first, the Law of the Sea, second, the concept of state responsibility, and third, friendly relations among states.

To take first of all the Law of the Sea -- here is a field of international law where we have seen dramatic changes in the past generation. At the Hague Codification Conference in 1930, Canada, along with other Commonwealth members, was a staunch supporter of a three-mile limit for all purposes and not just for the territorial sea; we were strong advocates of the "sinuosities rule" for determining the starting-point of the territorial sea and we favoured a relatively narrow closing-line for bays. But under the effect of modern technological methods of fishing, Canadians from both the east and west coasts have become concerned about the need to protect our own fishing interests in our adjacent waters. Our coastline is surrounded by great bodies which in some cases thrust into our heartland. The law of the nineteenth century and the law of the greater part of the twentieth century was not adequate to protect our interests and our needs. Nor was it adequate to protect the interests of many other states. In the post-war period, we have seen startling changes. First, the acceptance of the straight-baseline system as a method for determining the starting point of the territorial sea. In a decision of historic importance the International Court of Justice in 1951 shook the foundations of the Law of the Sea by recognizing the legitimacy of the straight-baseline system in certain types of cases. For Canada, this decision had particular significance because of the unusual features of our coastline -- in particular its highly indented configuration.

The second development of historic importance is the growing acceptance of the fishing-zone concept in international law. Only a few years ago, there were some who denied the legitimacy of claiming fishing limits extending beyond the territorial sea to a distance of 12 miles. Today there are many countries, Canada among them, which have established exclusive fisheries jurisdictions. Since the last war, we have also seen the birth and acceptance of the doctrine of sovereignty over the resources of the continental shelf. We have seen the birth of new rules for determining the closing-lines for bays. We have also seen many countries depart from the three-mile limit for the territorial sea.

The international law of the sea has accordingly become transformed in a generation --- not without struggle and not without creating uncertainties and areas of dispute. But, through the labours of a number of countries (with Canada, I may say, at the forefront), the rules of the sea have changed and are changing to respond not just to the interests of the great maritime powers but to the needs of all states, including many of the newer ones. Canada was the first country to propose the concept of a separate fisheries jurisdiction, in the form of a fishing zone beyond the territorial sea extending 12 miles from the baselines. We originated this proposal in the international field; we laboured for it for many years in the United Nations, in two international conferences and in more restricted meetings and discussions which we initiated. When these efforts to obtain international agreement failed, Canada, like other countries, established a 12-mile exclusive fishery zone unilaterally, and we are now negotiating with countries whose fishing is affected by this decision in order to work out a satisfactory adjustment of their interests.

Thus, the Law of the Sea is an area in which Canada found the existing rules inadequate and where we have, accordingly, strived to change them. Even in this field, however, we have found value in some of the existing concepts. Canada has retained a three-mile territorial sea because we believe that this classical or traditional rule adequately meets the interests of states in respect of their requirements for a territorial sea, while at the same time doing minimum damage to the doctrine of the freedom of the seas. But many states have not found this rule satisfactory, and, taken in isolation from new developments in the international Law of the Sea, we, too, would consider it inadequate. But the new rules about straight baselines, the new rules about bays and the exploration of the continental shelf, and the growing acceptance of the concept of a fishing-zone -- all these developments help Canada to protect its interests in its adjacent shores without making it necessary for us to depart from the traditional concept of a three-mile territorial sea in which we continue to see value.

Another area of international law where there have been demands for change is the responsibility of states for harm caused to the rights of nationals of other states. This subject raises sensitive questions concerning nationalization of property and compensation for injury or damage to aliens.

In this field, the question of the adequacy of the rules of international law has arisen in acute form. Mr. Justice Harlan, in the celebrated Sabbatino case in March 1964, aptly described the demands and pressures for change:

> "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is of course authority, in international judicial and arbitral decisions, in the expressions of national governments and among commentators, for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate and effective compensation. However, Communist countries, although they have, in fact, provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives

> of the newly independent and under-developed countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interests and are inappropriate to the circumstances of emergent states."

Thus, the subject of state responsibility presents analogies to the Law of the Sea. In both cases, a number of countries insisted and cont to insist that the existing or traditional rules are inadequate and must be changed. In both cases, numerous attempts have been made over the years to reach international agreement on the rules concerned. At the Hague Codific Conference in 1930, a major but unsuccessful effort was made to draw up an set of rules or code of behaviour for states in respect of the rights of al within their territorial jurisdiction. The subject was discussed in other of the League of Nations. More recently, the problem has been examined fro varying standpoints, in the United Nations Sixth Committee and Second Commi The latter body has struggled for years with the question of permanent sove ty over natural resources.

The International Law Commission has also dealt with the matter i form or another almost since its inception. There has been evidence of a st desire on the part of Communist states to move the subject away from the traditional body of rules relating to damage to aliens to one involving the more general nature of state-responsibility -- that is, the general princip underlying inter-state obligations, for example, to refrain from aggression. It remains to be seen to what extent the traditional rules relating to damag to aliens will find expression and be confirmed in the present work of the Commission.

At the present time, I believe that no clear consensus has emerged from these attempts at reformulation and progressive development. Whether these efforts will succeed, when they have failed in the past, remains to be seen. What I wish to underline, from the standpoint of my present inquiry, is that whatever does emerge in the future is bound to be based in large measure on fundamental principles which have not and should not be jettisoned In this area, Canada, along with many other countries, sees considerable valu in the older rules as providing a fair and just basis for adjusting the inter of the states concerned. Even the most recent practices of the Communist st the principal denigrators of the concept of state responsibility for damage t aliens, and the principal protagonists for change, reflect the resilience and continuing utility of some of the traditional concepts.

The Soviet-bloc countries have on numerous occasions been persuaded in spite of their doctrinal protests, that it is in their own interest to agr to a reasonable settlement of property claims and disputes. They have, in fa behaved on occasion very much as if they considered themselves governed by wh they might otherwise describe as outmoded and capitalistic concepts of proper rights.

Let me illustrate this last point by some reference to Communist practice. A little-known instance of the Soviet Union having granted what might be regarded in effect as compensation was the case of the Petsamo Nickel Mines. In this instance, the Soviet Union, as part of the peace-treaty settlement with Finland in 1944, agreed to pay to Canada $20 million in compensation for nickel mines of Petsamo located on territory which was ceded to the U.S.S.R. under the peace treaty. These mines were owned by a subsidiary of the International Nickel Company of Canada.

Another case involving questions of state responsibility of an Eastern European state in the post-war period was the El-Al Israeli Airlines case arising out of the shooting down of an Israeli aircraft by the Bulgarian Air Force. An unsuccessful attempt was made by certain states to invoke the jurisdiction of the International Court at The Hague in order to adjudicate the claims of various nationals whose relatives had perished as a result of this irresponsible act of the Bulgarian Government. Even though it was not possible to reach a judicial settlement in the World Court, various countries concerned, including Canada, were able, through diplomatic negotiations, to obtain compensation on behalf of their nationals.

In the post-war period there have been some 50 agreements concluded between Western governments and Eastern European governments providing lump-sum settlements of claims for property nationalized or confiscated in Eastern Europe. These agreements provided only partial settlement, sometimes over 90 per cent, but in some cases less than 10 per cent, of the value of the claims outstanding. They were usually negotiated in a context where it was the prevailing state of relations between the two countries in economic and political matters which largely determined the outcome of the negotiations. The claimant state was responsible for distributing amongst its nationals as it saw fit the lump sum obtained from the East European government. It has been said that such agreements are as little indicative of the rules of international law as are compromise arrangements made by a defaulting debtor to avoid bankruptcy indicative of the extent of the debtor's legal liability under domestic law. We would agree with this up to a point. Although the Communist countries may not agree, it seems to us, first, that underlying these arrangements is an implicit recognition of some obligation to reach an accommodation and, second, that the accommodation in turn is consistent with the traditional principles of state responsibility.

Canada believes that these existing rules continue to be an adequate basis for regulating the interests of states. The Government announced a few months ago that Canada and Hungary had reached a preliminary agreement looking towards negotiations on a lump-sum settlement of nationalization claims of Canadian citizens outstanding against Hungary. The international law purist might view such lump-sum negotiations with some distaste. But, of necessity, Canada has had to take into account the realities of state practice and state attitudes.

I would agree that an impartial adjudication of such claims by an international tribunal -- as was common during the pre-war years -- might have been preferable, but, failing that, the Canadian Government cannot overlook the interests of individual Canadian claimants who are understandably anxious

to achieve at least partial compensation for their losses. They are not unlike the creditors under domestic law who prefer to make a compromise arrangement with their defaulting debtor. In agreeing to resort to the technique of the lump-sum settlement, Canada is not waiving any rights under the traditional rules of state responsibility. During such negotiations we intend to press vigorously for a full recognition of the rights of individual Canadian claimants to just compensation for their losses at the hands of the nationalizing government. I do not consider that compromise settlements of this nature on the international plane affect the underlying principles of customary international law any more than a compromise settlement out-of-court affects rules of legal liability under domestic law.

It is, I think, encouraging to note the support for traditional rules which has been forthcoming from some of the developing countries. This is not a matter of abstract reverence for old rules. It is a very practical matter of self-interest for countries in great need of foreign capital for development of their economies. There may be some differences of approach between the capital-exporting country and the capital-importing country, but there is an area of common ground. Each side is anxious to facilitate the orderly movement of capital investment across national borders to their mutual advantage. Traditional principles have been found to be highly relevant and useful in adjusting differences which arise.

I would not wish to give the impression that Canada regards the existing international rules of state responsibility as satisfactory in all respects. In negotiating a lump-sum payment with Hungary, it is necessary for Canada to follow the rule that claimants must be Canadian citizens both at the time the injury was suffered and the claim presented. The only exception to this rule of nationality concerns claims resting on specific treaty provisions. This may not be a fully satisfactory rule in all instances. It might cause hardship and even seem arbitrary. Unfortunately, in the present state of law and practice, there would be no possibility of states broadening the principles governing state responsibility. Given the sometimes cautious, sometimes doubtful, sometimes negative attitude of certain states to the principles of liability for damage to aliens, we must strive to conserve what we have in the existing rules and recognize that the possibilities for broadening them so as to place greater responsibility on states are very slender and remote.

To sum up Canadian experience in respect of the principles of state responsibility, I would say that we are not pessimistic. We see no cause for alarm in the apparent state of disarray on rules of state responsibility. We see no cause to believe that it will be necessary to abandon the existing rules and principles. We may be far from a universally-agreed code, but many of the traditional rules for respecting the interests of aliens are enjoying surprising vitality, consistent with the needs of a changing world.

My third illustration of the problem of change in international law is of a more general character. Less than two weeks ago, the United Nations Special Committee on Friendly Relations and Peaceful Co-operation Among States concluded its work in Mexico City. The conference dealt with general principles of international law relating to the maintenance of peace, order and security

with a view to providing guidelines for the work of the Sixth Committee of the General Assembly. At this meeting, 27 representatives of the Western, Communist and non-aligned countries endeavoured to achieve a common outlook and a common understanding on such topics as the threat or use of force, the peaceful settlement of disputes, the principle of non-intervention, and the sovereign equality of states. Although, not unexpectedly, a consensus could not be reached on most subjects, it is clear that the Mexico City conference showed signs of change or a moving away from three extreme conceptions of international law: that of some of the newer countries, demanding a change in the existing Charter provisions through the adopting of broad and generally political rather than strictly legal interpretations; that of the Soviet Union, pursuing an approach to international law more in keeping with the third rather than the first two roles I mentioned earlier, that is, using international law as an instrument of Soviet international revolutionary objectives; and, finally, that of some Western powers, advocating the development of Charter machinery but on the whole resisting the development of Charter principles.

Typical of the first approach was the view expressed by some developing countries that provisions of international law or treaties considered no longer to correspond to current requirements could not be invoked to restrict a nation's right to dispose of its natural wealth. Another example was the view that the concept of sovereign equality had come to encompass the concept of economic equality.

Such positions were, however, the exception. Even when put forward, they were usually complemented and tempered by a trust in the political and other organs of the United Nations and in the Specialized Agencies as the source of orderly change through international co-operation. In seeking change in the Charter system, these countries are equally anxious that they should not weaken the external structure, the United Nations system itself. They are showing an increased realization that institutions draw their strength from the principles under which they operate and that wholesale and arbitrary calling into question of the validity of these principles can only weaken the structure for maintaining the peace.

The Mexico City meeting also provided evidence that the Soviet Union may be moving toward acceptance, in some respects at least, of a unitary system of international law. For the Soviet Union, the meeting was, in part, a testing ground for the proposal, broached by Chairman Khrushchov in a letter of December 31, 1963, to heads of state and government, concerning border disputes and the means of settling them. This item, as you may know, is now on the provisional agenda for the forthcoming session of the General Assembly. Need I stress the "conservative" aspects of a proposal which aims at freezing existing borders? Is the Soviet Union at the point of groping toward a system of international law which may tend towards stability and not exclusively towards revolutionary change? To what extent will the former inhibit the latter?

In presenting the proposal on border disputes as a practical step towards disarmament, Soviet legal writers sharply reject any implication of supranational authority. Theirs is an inconsistent position because, while constantly advocating the need for change, especially radical change outside

their own borders, they cling to the most conservative notion of modern international law, sovereignty in as absolute a form as it is possible to advocate at the present day. They proclaim this principle in the disarmament field and in connection with the procedures for the peaceful settlement of disputes. Their preoccupation with sovereignty is reflected in their emphasi on negotiations as the fundamental means of solving international disputes. Other modes of settlement are regarded as encroachments upon the sovereignty of states. This conservative doctrinal trend was also seen in the Soviet Union's proposal for the establishment of a list of illegal acts of intervention of a state in the affairs of another.

I could give other examples. It will, however, be clear from this account of Soviet attitudes at the Mexico City meeting that they may have reached a point where, increasingly, they have to choose between continuing to advocate an ideology of revolutionary change and a system of international law whose underlying philosophy is the achievement of stability and peaceful change.

Discussion of the topic of friendly relations is to be continued by the Sixth Committee at the forthcoming session of the General Assembly. While the Mexico City meeting did not, in most cases, reach the stage of formulation because of basic differences in approach, it would appear that certain ground rules are evolving for the development of Charter principles. These represent a compromise between the more extreme positions of East and West and non-aligned countries which I mentioned earlier.

I shall name four of these ground rules. First, notwithstanding the fact that the International Law Commission is the arm of the General Assembly charged with codification of international law, it is a proper task for the Sixth Committee to try to spell out what is the meaning of the Charter provisions or of what is implied in them. This is a proper sphere of lex lata Second, by way of lex ferenda, the Sixth Committee might seek to recommend to governments additional legal rules supported by state practice in the interval since the Charter was written and which are consistent with the Charter. Thir there may be desirable principles of international conduct which are not necessarily ready for inclusion in the international legal system. These principles may as yet be norms of international morality which have not yet crystallized into legal obligations. Finally, in a world of sovereign states, resolutions adopted by United Nations bodies or general conferences represent an important element in the process of evolving international law. Such resolu tions may not always be a reliable guide to international custom, but they actively indicate the way in which custom is evolving.

The present attempt to codify international law in bodies other than the International Law Commission may perhaps be indicative of a certain impatie and haste on the part of the Communists and some of the new countries in approa ing the problem of change. Nevertheless there are portents to be drawn from th Mexico City meeting which suggest that recent attempts to alter significantly the course of development of international law may be subsiding into a more reasonable and critical approach.

I hope, Mr. Chairman, that, from this general account of problems with which Canada has to deal, I have been able to provide some insight into Canadian attitudes and the Canadian approach. I should like to add only this. In my office and in my Department, we are, first of all, students of international law. We try to understand what are the applicable rules and what are the practices of states. Second, we are practitioners seeking to find solutions to international problems through applying the existing rules and precedents. Third, we are our own advocates. We argue our own cases in various informal ways. Fourth, we are often our own judges. We examine the rules to find to what extent they are equitable and fair and to what extent, in our view, there is a need for change and progressive development. We examine the other side's case and we may accept or reject it. Fifth, we are legislators in the various bodies of the United Nations, raising our voice and casting our votes in favour of rules which we believe to be just.

In short, as Secretary of State for External Affairs, I see international law in many perspectives and from many standpoints. I live with it every day. Of Sir Frederick Pollock it was once said that the law was his mistress. Of myself it would be sufficient to say, international law is my constant companion.

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