Recent Developments in International Law*

PAUL MARTIN
Ottawa

Respect for International Law

It was with much pleasure that I accepted the invitation to address this meeting of the International Law Association. The establishment of a Canadian Branch of the Association—one of the oldest and most respected bodies devoted to the study and advancement of international law—marks an important step forward in encouraging an appreciation of the importance of international law in this country.

Most of the current problems in international law have arisen either during the deliberations of the United Nations and its subsidiary organs or as a result of these deliberations. From time to time I have had to serve on Canadian delegations to various sessions of the United Nations General Assembly. In this capacity I had an opportunity to study at first hand the interplay between the rule of law in international relations and the dictates of political expediency. Occasionally I have observed attempts on the part of some states to make international law subservient to their political aims. I need hardly point out that this is a practice directly contradictory to the customary view, namely, that international law provides the standards at which national policies should be aimed. An incident from my experience at the United Nations may better illustrate what I have in mind.

In 1946, on the occasion of the first session of the United Nations General Assembly in London, I had the honour to be present at a dinner given by the Lord Chancellor. It was attended by most of the lawyers participating in that opening session, representing many countries and a variety of legal systems. And a dis-

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tinguished jurist of the Soviet Union, Mr. Andrei Vyshinsky, made an address on that occasion which I still remember vividly. In the light of the many important statements he has subsequently made on behalf of his country, Mr. Vyshinsky's after-dinner speech in 1946 was of particular interest.

In essence, Mr. Vyshinsky's talk was a fervent plea for the restoration of the primacy of law in international relations. Speaking as a lawyer, he said that the lawyers around the Lord Chancellor's dinner table constituted a group who could appreciate the importance of this plea. As a gathering of lawyers, they all spoke the same language. To them he expressed an unequivocal conviction that the peace and security of the world were inseparable from respect for the principles of international law. There is an unfortunate contrast between Mr. Vyshinsky's professional protestations on this occasion and his subsequent diatribes in the United Nations on practical problems intimately related to the rule of law in international affairs.

Repatriation of Prisoners of War in Korea

One illustration, among many, arose during the discussions of the prisoner of war issue in the Korean armistice negotiations. The question centred around article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12th, 1949,[1] which provides in part:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

Also relevant is article 7 of the convention which states:

> Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by . . . special agreements . . .[2]

In the prolonged armistice negotiations at Panmunjom and during the debates in the General Assembly, different interpretations of these provisions have been advanced.

At the seventh session of the United Nations in 1952 Mr. Vyshinsky, as the representative of the Soviet Union, insisted that

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[1] Concluded by the diplomatic conference held at Geneva in 1949 for the purpose of revising the Convention of July 27th, 1929, Relative to the Treatment of Prisoners of War. The texts of the four Geneva conventions of 1949 were published by the International Committee of the Red Cross in 1950.

[2] These special agreements include agreements on the release and repatriation of prisoners of war. Compare articles 6 and 118 of the convention

the obligation contained in article 118 was unconditional and that all prisoners must be repatriated on the conclusion of active hostilities, regardless of circumstances and of the prisoners' own wishes. Under the Communist interpretation any form of coercion could be used, if necessary, in order to repatriate prisoners. In essence the Communist legal position was that article 118 sets out a "categoric formula" obliging captor states to repatriate all prisoners of war without exception. This right to repatriation was claimed to be made irrevocable by article 7. "In other words, there is a special article which says that war prisoners are not entitled to waive their rights. . . . What right? The right to be repatriated."[3]

Canada, in common with other western countries, took an entirely different view of articles 7 and 118, based on the principle of non-forcible repatriation which is implicit in the Prisoners of War Convention. Under this interpretation there is, under article 118, an obligation to release and repatriate prisoners of war on the conclusion of hostilities, but there is no obligation to do so by force. Speaking on this subject during the seventh session of the General Assembly, I expressed the Canadian position in these words:

> The right of repatriation is admitted without equivocation.
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> The right of repatriation is one thing; the use of force in its implementation is something else. It is inconceivable to admit that such force was contemplated by those who drew up the Geneva Convention; and such an interpretation will certainly not be endorsed by the vast majority of this Assembly.[4]

The validity of the legal case put forward by the non-Communist delegations rests on the accepted principle of treaty interpretation by which a treaty must be interpreted in the light of the purpose which it is to serve.[5] If the relevant words in their natural and ordinary meaning make sense in their context, that is, of course an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an

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[3] Statement of Mr. Vyshinsky to the First Committee of the General Assembly, October 29th, 1952. The Soviet position is analyzed in an article by J. P. Charmatz and H. M. Wit: Repatriation of Prisoners of War and the 1949 Geneva Convention (1953), 62 Yale L. J. 391.

[4] Statement by the acting chairman of the Canadian Delegation to the United Nations General Assembly, Mr. Paul Martin, made in the First Committee on November 27th, 1952.

[5] See Harvard Research Draft on Treaties (1935) p. 937; Oppenheim, International Law (6th ed., 1947), Vol. I, p. 859: "The whole of the treaty must be taken into consideration, if the meaning of any one of its stipulations is doubtful; and not only the wording of the treaty, but also its purpose, the motives which led to its conclusion, and the conditions prevailing at the time".

unreasonable result, then it is necessary to ascertain what the parties really did mean when they used the words.[6]

Few treaties exist whose purposes are so clear as those of the 1949 Geneva Convention on the Treatment of Prisoners of War. This convention is designed for the protection of prisoners of war and their humane treatment at all times. The categorical language of article 118 was intended to prevent the detention of prisoners long after any military necessity had disappeared.

At the same time the drafters of the Geneva Convention did not wish to place an *obligation* on detaining powers to extend permanent asylum to all prisoners of war unwilling to be repatriated. The reason for this is obvious—traditionally each state grants asylum at its own discretion and its freedom of choice cannot be fettered. The Geneva Conference of 1949 therefore decided that no obligation could be placed on the captor country to grant asylum. It was clearly recognized, however, that states were not meant to be prohibited from granting asylum where it is reasonable to conclude that prisoners of war would suffer persecution if they were returned and if the prisoner himself opposes repatriation so strongly that it can be effected only by using force. An examination of the conference records indicates unmistakably that, although it was not considered wise to tamper with the *general principle* of repatriation, there is nothing to show that it was the intention of the conference that the application of this general principle should involve the forcible repatriation of prisoners of war.[7]

Again, the rights secured to prisoners of war by article 7 are rights to humane and decent treatment provided for the benefit of the prisoners themselves. "Since the Conventions themselves were designed for the protection of the individual, no single article can be interpreted in such a way as to cause hardship for him."[8] In the case of the Prisoners of War Convention, the rights secured are rights which states are intended to exercise for the benefit of the prisoners themselves: they are not rights which have been provided for the direct benefit of those states themselves. Accordingly the meaning of article 7 is that no prisoner of war may renounce a right given by the convention, which was created for his own protection. The right to repatriation is a right provided

[6] Advisory Opinion on Admission to the United Nations, International Court of Justice Reports, 1950, p. 8.

[7] The Records of the Diplomatic Conference of Geneva of 1949 were published by the Swiss Government in two volumes in 1950.

[8] Statement by Mr. Paul Martin to the First Committee of the Seventh Session of the General Assembly, November 3rd, 1952.

for the benefit of prisoners of war since it is normally in the interests of prisoners that they should be returned to their own countries on the cessation of hostilities. It would be an absurdity, however, to interpret this as a right to forcible repatriation. As one writer has pointed out, "To argue, as follows logically from the Communist standpoint, that Article 7 justifies the repatriation of prisoners of war by force is a travesty of the purpose of that Article. It was designed to prevent a situation in which prisoners of war could be forcibly retained at the conclusion of hostilities on the pretext that they had renounced their rights to repatriation; it was not designed to ensure the forcible repatriation of individual prisoners of war who had genuine grounds for fearing political persecution if they were returned to their own countries."[9]

As is well known, the Soviet claim of forcible repatriation was rejected by the United Nations General Assembly, which on December 3rd, 1952, adopted a resolution, introduced by India, calling for the release and repatriation of prisoners of war in Korea and affirming that "force shall not be used against the prisoners of war to prevent or effect their return to their homelands".[10] Thus this resolution embodied the two principles—no detention by force and no repatriation by force—which are basic to the purposes of the 1949 Prisoners of War Convention. These principles were also written into the Armistice Agreement signed at Panmunjom on July 27th, 1953, under which the release and repatriation of prisoners of war in Korea has been successfully carried out.[11]

Now let me turn to a discussion of certain recent developments in international law which are of particular interest to Canada. I propose to deal primarily with the work being done by the United Nations in promoting the progressive development and codification of international law. In doing so, I am mindful of the fact that the International Law Association was originally founded in 1873 to study "the Reform and Codification of the Law of Nations" and still maintains a close interest in this general subject. I should like also to offer a few observations on the Canadian at-

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[9] J. A. C. Gutteridge: The Repatriation of Prisoners of War (1953), 2 International and Comparative Law Quarterly 207, at p. 215.

[10] Resolution 610 (VII), General Assembly, Official Records: Seventh Session Supp. No. 20 (A/2361) p. 3.

[11] Para. 3 of the annex to the Armistice Agreement, providing for the repatriation of prisoners of war who have not exercised "their right to be repatriated", states, "No force or threat of force shall be used against the prisoners of war . . to prevent or effect their repatriation. . . . prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of that Convention."

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

Developing International Law through the United Nations

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

Commencing with the work of the League of Nations Committee of Experts, it has now become generally accepted that the systematic codification and development of international law can only be effectively accomplished by a permanent body of experts, who are furnished with the necessary facilities for research and may call on all governments for comments and assistance in compiling material. In my opinion this development is the result of the urgent need to extend the rule of law as a principal means of avoiding interstate conflicts in a world where national relationships have become increasingly complex. This, of course, does not in any way lessen the need for studies and projects undertaken by private groups, particularly in the field of private international law, where a great deal remains to be done.

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

The International Law Commission

The International Law Commission[12] consists of fifteen members who are chosen for their recognized competence in international law. It has two principal duties: (1) the ascertainment, in a systematic form, of the existing law; and (2) the development of the law in the wider sense by filling gaps, reconciling divergencies and formulating improvements in fields where there has already

[12] The commission was established by Resolution 174 (II) adopted by the General Assembly on November 21st, 1947, to give effect to article 13(1)(a) of the Charter, which stipulates that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification: U.N. Document A/519, Official Records, Second Session of the General Assembly, p. 105.

been extensive state practice. I need not underline the fact that the commission's duties illustrate very precisely the nature of international law itself. It is not a law which can be imposed upon states, but a law they accept either by express agreement or by practical recognition and application in their dealings with one another. Consequently, if we are to be realistic about this, we are bound to agree that any principle of international law which it is sought to invoke should be one actually accepted as binding among nations and must—like any other form of law—be proved by satisfactory evidence. In the sphere of codification, therefore, the function of the International Law Commission is essentially that of a court; it has to find what the international law is and to present it in a precise and systematic form. However, where there is a divergence of practice or views the commission considers itself entitled either to choose among conflicting contentions, or, perhaps more reasonably, to formulate a solution which is in the nature of a compromise. Again, an opportunity frequently occurs to examine existing rules of international law in the light of modern developments and to suggest such improvements as may be required in the interest of justice and increased social progress.

Ultimately the commission's work must be combined with another function—partly political in nature—namely, the transformation of the products of its researches into international conventions for adoption by states. This second function is carried out by consultation with governments and the eventual submission of draft projects for consideration by the Sixth (Legal) Committee of the General Assembly, which recommends the action to be taken by the Assembly sitting in plenary session. It should be noted that, although the Legal Committee is the Sixth Committee of the United Nations General Assembly and the First Committee handles security and political questions, under the League of Nations the situation was reversed. In the League the First Committee dealt with constitutional and legal questions and the sixth with political problems. Under the United Nations one result has been that many items which have had important legal aspects have never come to the Legal Committee. Faulty drafting and ambiguity in the operative words of Assembly resolutions have been inevitable consequences of this change in emphasis.

The list of codification projects on which the International Law Commission has taken recent action includes, among other things, the law of international arbitral procedure and the regime of the high seas.[13]

[13] A detailed examination of the work of the commission since its es-

International arbitral procedure. An obvious and primary purpose of law in international society is to afford a basis for the peaceful settlement of disputes. States have always been able to use international law effectively in this way by setting up a court of arbitration and Canada has employed international arbitration on many occasions, notably in the Trail Smelter Case and the "I'm Alone" controversy.[14]

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

(1) The more important a dispute, the more important it is to have it settled by a fair tribunal. If it is not possible or desirable to bring it before the International Court, an arbitral tribunal is the logical machinery.

(2) Similarly, it is absurd to prevent the settlement of a disagreement between states over their legal rights—which is embittering their relations—because one of the parties to the dispute asserts that it is a political question or one of honour or vital interests and therefore not suitable for arbitration.

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

It should not be forgotten that in the long history of international arbitration there are very few instances in which the award has not been carried out. Part of the reason for this undoubtedly lies in the fact that a court of arbitration is frequently the most flexible and most desirable tribunal for the settlement of international disputes, since the arbitrators may be chosen for their special technical skill and the parties are free to determine the competence of the tribunal and the law which it is to apply.

The purpose of the Draft on Arbitral Procedure prepared by the International Law Commission[15] is not to force states to submit all their disputes to arbitration, but rather to provide a uniform procedure to be followed by all states which agree to have recourse to arbitration. It seeks to fill the gaps in existing practice.

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tablishment in 1947 has been made by B. Cheng in an article entitled "The International Law Commission", published in Current Legal Problems 1952, pp. 251-273. The report of the commission covering the work of its fifth session in 1953 is printed as U.N. Document A/2456 (1953).

[14] Reports of International Arbitral Awards, Vol. III, pp. 1609 and 1906 (U.N. Publication, 1949, V. 2).

[15] See Report of the International Law Commission, Fifth Session, Ch. II, pp. 2-11.

Two provisions of the draft illustrate this aim: the first on the determination of disputes and the second on the validity of awards. Occasionally a deadlock may occur before an arbitral tribunal has been set up, simply because the parties disagree over the existence of a dispute or over whether it comes within the scope of the obligation to arbitrate. The commission's draft provides for the determination of these questions by the International Court of Justice, where no arbitral tribunal is yet in existence. Again, it may be that, after an arbitral award has been given, one of the parties alleges that the tribunal exceeded the powers conferred upon it and that the award is therefore a nullity. In such a case, present international law does not provide any effective means of determining whether the allegation is or is not well founded. In this case the Draft on Arbitral Procedure would empower the International Court to determine the validity of the award.

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

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

Of these, the continental-shelf concept is perhaps the most interesting in view of the great variety of national claims which have been made in recent years asserting jurisdiction and control over the seabed and subsoil of submarine areas contiguous to the coast. A documentation of these various laws and regulations would now fill a large volume, but there is as yet no international regulation or firm agreement on the subject. The commission's Draft Articles on the Continental Shelf are intended to provide a basis for the general acceptance of the continental-shelf concept in international law.[16]

With regard to the extent of the shelf, the commission believes

[16] *Ibid.*, Ch III, pp. 12-17. Generally on this subject see M. W. Mouton: The Continental Shelf (1952); Lauterpacht: Sovereignty over Submarine Areas, (1950), 27 Brit. Y.B. Int'l L. 376; R. Young: The Legal Status of Submarine Areas Beneath the High Seas (1951), 45 Am J Int'l L. 225.

that it should be limited to submarine areas adjacent to the coast where the depth of water does not exceed 200 metres. This represents the present limit of practical exploration and exploitation and also the depth at which the shelf generally begins to slope to the ocean floor. It should be remembered, however, that a fixed arbitrary limit may work to the disadvantage of many states and a more flexible formula, based on the criterion of exploitability, may eventually have to be considered. With the advance of scientific and technical knowledge, what is not exploitable today may well be exploitable in the near future.

Of prime importance is the nature of the rights which the coastal state should be permitted to exercise over the seabed and subsoil of the shelf. The commission suggests that these rights should be recognized as sovereign rights, comprising full control and jurisdiction and the right to reserve exploitation and exploration for the coastal state or its nationals. Such rights include jurisdiction for the suppression of crime.[17] The exercise of the rights is not intended to affect either the status of the waters over the shelf or the airspace above. Moreover, the development of the natural resources of the shelf must not result in any unjustifiable interference with navigation or fishing.[18] Although the commission does not favour the internationalization of the submarine areas covered in the concept of the continental shelf, it has not abandoned the possibility of creating an international agency "charged with scientific research and guidance with the view to promoting, in the general interest, the most efficient use of submarine areas. It is possible that some such body may be set up within the framework of an existing international organization."[19]

Canada is particularly interested in the question of sedentary fisheries over the continental shelf. The commission has recommended that sedentary fisheries, to the extent that they are natural resources permanently attached to the bed of the sea, should be included in the sovereign rights of the coastal state over its continental shelf. At the same time the commission has expressed the opinion that the "exclusive rights" of the coastal state cannot be exercised in a manner inconsistent with the existing rights of other states over sedentary fisheries. This attempt to reconcile the shelf concept with established rights in sedentary fisheries requires greater study and may justify separate consideration of the whole problem of sedentary fisheries.[20]

[17] Report, International Law Commission, Fifth Session, Ch. III, art. 2, and commentary, p. 14.

[18] *Ibid*, arts. 3, 4 and 6. [19] *Ibid.*, p. 14.

[20] See the statement made on November 24th, 1953, before the Sixth

Fisheries of the high seas. The question of fisheries, under the title of "Resources of the Sea", has also been under study by the International Law Commission as part of the general topic of the regime of the high seas.[21] Three draft articles have now been adopted by the commission covering the basic aspects of the international regulation of fisheries. The most important provision would impose upon states the duty to accept as binding upon their nationals regulations enacted by an international authority to be created by the United Nations. Here the commission is to a large extent aiming at the creation of new law, which would have far reaching consequences for Canada, one of the principal fishing countries in the world.

Canada is already a party to six international conventions for the regulation of high-seas fisheries, including the International Convention for the North-West Atlantic Fisheries and the International Convention for the High Seas Fisheries of the North Pacific Ocean. International commissions have been established under four of these conventions with certain regulatory powers. These commissions are relatively new ventures in the field of joint international co-operation for the use and control of fisheries. Canada considers that their creation is a first step towards the universal regulation of fisheries which the commission has in mind. We also think that the draft articles prepared by the commission should be studied in the light of the experience gained from the existing conventional regimes of regulation.[22]

In the case of Pacific Ocean fisheries, for example, Canada and the United States have set up two international commissions for the joint regulation of halibut and sockeye salmon. The commission in each case regulates the catch of only one species, fished by Canadian and United States nationals. The problem would be immensely more complex for an international authority which attempts to regulate not one but many species of fish in all parts of the world for the many nations involved or affected. It seems likely that a considerable amount of study and experience in joint co-operation between two or more countries is needed, therefore,

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Committee of the United Nations General Assembly by the Canadian Representative, Mr Alan Macnaughton, Q.C., M.P., External Affairs Supplementary Paper No. 53/63 (1953).

[21] Report, International Law Commission, Fifth Session, ch. III, pp. 17-19. And see S. A. Riesenfeld: Protection of Coastal Fisheries Under International Law (1942); L. L. Leonard: International Regulation of Fisheries (1944).

[22] See statement before the Sixth Committee by Mr Alan Macnaughton, Q.C., M.P., *supra*, footnote 20

before any attempt is made to establish an international body to regulate all high-seas fisheries.

On the borderline between codification and progressive development of international law are the various special assignments given to the commission by the General Assembly. Here the commission has completed a Draft Declaration of Rights and Duties of States, formulated a Draft Code of Offences against the Peace and Security of Mankind and studied the question of reservations to multilateral conventions.

Draft Code of Offences against the Peace and Security of Mankind. The preparation of a Draft Code of Offences against the Peace and Security of Mankind was begun by the commission in 1949 and was completed at its third session in 1951.[23] The commission has limited the scope of these offences to those which endanger the maintenance of international peace and security and contain a political element. It also decided to deal with the criminal responsibility of individuals, recalling in this connection the judgment of the Nurnberg Tribunal, which declared that crimes against international law were "committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".

An International Criminal Court. Correlative with this project for a substantive international criminal law is the proposal to establish a court which would have international criminal jurisdiction for both war and peace. The effective realization of both these ideas—the creation of an international criminal law and a court to assure the punishment of individuals who violate this law—appears to be a long way in the future. Although the Canadian government is not yet convinced of the wisdom of establishing an international criminal court under the existing world conditions, Canada is in favour of giving the project further study and the General Assembly will again consider the question at its ninth session this year.

Definition of aggression. A central problem in this connection is whether any attempt should be made to define the notion of "aggression". The Charter uses the term but deliberately avoids a definition, leaving it to the Security Council to decide in each case whether a particular act constitutes a threat to the peace or a violation of the peace.

In 1951 the Soviet Union proposed that the concept of ag-

[23] Report, International Law Commission, Third Session, U.N. Document A/CN.4/48, Ch. 4.

gression should be defined as accurately as possible. The question was referred to the International Law Commission, which concluded that a legal definition could never hope to be comprehensive enough to cover all imaginable cases. The Sixth Committee of the General Assembly also gave the question a searching analysis in 1952 and equally failed.

One approach to the problem is to endeavour to enumerate specifically those acts which are to be regarded as constituting aggression. Another is to attempt a general definition with or without a list of acts as criteria. In either case it does not appear to be possible to establish aggression except in the particular circumstances in which the act concerned takes place because, first, the act itself may assume innumerable forms and, secondly, the element of intention is an essential factor. For the same reasons no municipal system of law attempts to specify what particular acts constitute the crime of murder: one and the same act may be murder or may be excusable or justifiable homicide according to the circumstances. The Canadian view has been that a definition of aggression along the lines considered thus far would serve no useful purpose in furthering the aims of the Charter.

Reservations to multilateral conventions. One of the most valuable contributions of the commission in its five years of existence is its study of the general question of reservations to multilateral conventions. The essential problem is whether a state which ratifies a convention with a reservation can properly be regarded as a party unless it has obtained the unanimous consent of all the other parties to the reservation. Underlying this problem is the general question whether it is better to have a treaty widely accepted, though not absolutely uniform in its application to all parties, than a treaty which creates uniform obligations but is effective among only relatively few states.

The International Court of Justice decided in 1951 that the criterion to be applied to the Genocide Convention was the compatibility of a reservation with the object and purpose of the convention.[24] The International Law Commission considers that the rule as stated by the court is not suitable for multilateral conventions in general.[25] In its opinion a reserving state, in order to become a party to a multilateral convention, must have the unanimous

[24] Advisory Opinion of May 28th, 1951, on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice Reports, 1951, p. 15.

[25] Report, International Law Commission, Third Session, U.N. Document A/CN.4/48, para. 24

consent of all other parties.[26] This view appears to be a sound one. In the case of a law-making convention a reserving state merely evades an obligation while giving no corresponding benefit. Moreover, if states are given an unlimited right to make reservations, the number of reservations would undoubtedly increase and the integrity of the text would be seriously affected. This question is one which will undoubtedly arise again and, in order to avoid undue difficulties in the interpretation of obligations, some firm agreement on the subject is essential.

Canadian Attitude Towards Legal Problems in the U.N.

At this point I should like to outline briefly the Canadian attitude towards a problem with legal implications which has frequently been discussed at the United Nations. It is one with which I am familiar as a Canadian representative during the period when the question was under consideration in the Assembly. I refer to the question of domestic jurisdiction, which was well illustrated by the agenda items on Morocco and Tunisia and the problems of racial discrimination and treatment of persons of Indian origin in South Africa. These issues pointed up the basic difficulty of reconciling article 2, paragraph 7—the domestic jurisdiction clause[27]—with other articles in the Charter—notably article 10, which empowers the Assembly to discuss any questions or matters within the scope of the Charter and, subject to article 12, to make recommendations.[28]

Article 2(7) has been held to embody one of the fundamental concepts of the Charter. As originally proposed, the article excluded "situations or disputes arising out of matters which *by*

[26] *Ibid.*, para 29. "The tender of a reservation constitutes, in substance, insofar as relations with the reserving State are concerned, a proposal of a new agreement, the terms of which would differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned."

[27] Article 2(7) reads: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII". Generally, on this article, see Goodrich and Hambro: Charter of the United Nations (2nd. ed., 1949) pp. 110-121; L. Preuss: Article 2, paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction, Academie de droit international, Recueil des Cours 1949, Vol I, pp 553-650; C. B H Fincham. Domestic Jurisdiction (1948).

[28] Article 12 specifies that the General Assembly shall not make any recommendation on a dispute or situation while the Security Council is exercising the functions assigned to it by the Charter in respect of the matter, unless the Security Council so requests

international law are *solely* within the domestic jurisdiction of the State concerned" At San Francisco the word "solely" was changed to "essentially" and the phrase "by international law" was deleted. The United States delegate, Mr. John Foster Dulles, emphasized that the provision was not intended to be a "technical and legalistic formula" but rather a general principle subject to evolution. Accordingly, although it seems to have been clearly intended that the question of domestic jurisdiction under article 2(7) should not be decided exclusively by legal standards of interpretation,[29] there is no justification for arguing that the interpretation of the article is solely a political function to be performed by the organ directly concerned with the subject matter. The United Nations, it is true, is a political organization but its Charter, being an international agreement, should be interpreted by reference to international law.[30] The political discretion conferred on the General Assembly and the Security Council "is operative only within the sphere of competence conferred upon them by the Charter".[31]

The obvious body to give an authoritative legal opinion on article 2(7) is the International Court of Justice. Thus far, however, every proposal to refer the question to the court has been defeated in the United Nations. Consequently, in seeking the meaning of article 2(7) a balance must be struck between a legal interpretation of the text and the practice followed in the various organs of the United Nations.

In support of a liberal interpretation of the United Nations' competence under article 2(7) it can reasonably be contended that, by adhering to the Charter, the member states must be deemed to have surrendered sufficient sovereignty to permit the organization to operate effectively. The question of what is a matter "essentially" within the domestic jurisdiction of any state is a relative concept, dependent upon the development of international law at any given time. Thus, although the treatment of the inhabitants of non-self governing territories was "essentially" within the domestic jurisdiction of the state concerned fifty years ago, today, in the light of the Universal Declaration of Human Rights and

[29] Goodrich and Hambro, *op. cit.*, pp. 113-114.

[30] "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment" — Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, I.C.J. Reports 1947-48, at p. 64. Previously the court had noted that "to determine the meaning of a treaty provision . . . is a problem of interpretation and consequently a legal question" *ibid.*, p. 61.

[31] Preuss, *op. cit*, p. 648.

the human rights clauses in the Charter, it may have assumed an international character. Again, there are numerous examples in the text of the Charter indicating that wide jurisdictional powers were intended for the various organs of the United Nations[32] and, in order to avoid an interpretation of article 2(7) which would lead to unreasonable or absurd results, or which would render the Charter ineffective, the clause should be interpreted liberally. Finally, practice since 1945 indicates that the General Assembly has not shown much disposition to accept the contention that article 2(7) denies it the right to place on its agenda and to discuss any given matter, and even to make recommendations.

In opposition to this interpretation, it has been argued that "intervention" is not confined to dictatorial interference in the affairs of another state and that the adoption of resolutions by the Assembly criticizing a state's conduct of its domestic affairs may, depending on the circumstances, constitute an intervention in that reserved domain. Going still further, it can be contended that because discussion of an agenda item is usually intended to influence the matters in question, it may also amount to intervention. The evidence of practice in the United Nations, including discussion and recommendations, is met with the assertion that an organization such as the United Nations cannot add anything to its powers by exceeding its competency, no matter how often the action may be repeated.[33] Textually, the advocates of a narrow interpretation of the United Nations' competence under article 2(7) say that article 10, which permits the Assembly to discuss any matters "within the scope" of the Charter, must be read subject to article 2(7) and was not intended to override the article, so that if a matter is in fact essentially within domestic jurisdiction it ceases to be a matter which the Assembly may discuss and on which it is entitled to make recommendations.

The Canadian position was defined by the Hon. Louis St. Laurent, then Secretary of State for External Affairs, before the First Committee in 1946 in the following terms:

> The right of this Assembly to discuss and make recommendations for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations is of the utmost importance. This right, among many

[32] *E.g.*, articles 10, 11, 13, 14, 16, 35 and 55.

[33] The Permanent Court of International Justice pointed out, however, in its advisory opinion on the International Labour Organization, that subsequent practice may be used to throw light on the meaning of an *ambiguous* provision in a treaty, P.C.I.J Reports Series B, Nos. 2 and 3, p. 41.

> others, would be seriously impaired if too great an effect were given to paragraph 7 of Article 2.

Canada has consistently adopted a liberal attitude towards the competence of the General Assembly to consider certain matters. We maintained, for instance, during the seventh session of the General Assembly in 1952, that the Assembly had authority to discuss any question provided it had been placed on the agenda of the Assembly. Nevertheless we indicated our respect for the sovereign rights of individual members by clearly distinguishing between the propriety of discussion of a problem in the Assembly and interference by the United Nations in the purely domestic affairs of a member state As acting chairman of the Canadian Delegation, I explained our position in this way:

> . we feel that a distinction must necessarily be drawn between the right of the Assembly to *discuss* any matters within the scope of the Charter and its competence to *intervene*.
>
> . . . As I see it, once the General Assembly has decided to place an item on its agenda, it has decided, in effect, that it *has* competence to discuss it . . We do not believe . . . that the provisions of the Charter are to be interpreted in such a way as to exclude *discussion* of an item once it has been placed on our agenda [34]

In concluding this brief examination of the domestic-jurisdiction clause of the Charter and the Canadian attitude towards it, I suggest that there is no reason for believing that the article will unduly restrict the future development of the United Nations. Already specifically excepted from its application are the enforcement measures the Security Council may take under chapter VII. The practice of the United Nations supports the Canadian view that a distinction can validly be drawn between the Assembly's right to discuss an item, once it has been placed on its agenda, and its competence to intervene. There is also ground for believing that matters covered by treaties binding on states are excepted from the article.[35]

The problem remains unsolved largely because the demands of state sovereignty still conflict with the interests of an organized international society. Whether a state's jurisdiction is subject to international limitations can only be determined on the facts of the case and in light of the existing development of international

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[34] Statement by Mr Paul Martin in the Ad Hoc Political Committee on November 19th, 1952

[35] The General Assembly discussed, for example, during its third session in 1949, the question of the observance by Bulgaria and Hungary of human rights provisions in the peace treaties with both countries.

law. This law is not static but in a process of continuous development. As one writer has pointed out:

> . . . the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural or fundamental It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law but are those which are left by international law for regulation by states.[36]

A matter which is susceptible of international legal regulation and which becomes the subject of new rules of customary law or of treaty obligations ceases to be a matter of purely domestic concern. It is in this line of development that the solution to the problem of domestic jurisdiction will likely be found.

Legal Implications of Collective Security

Finally, I should like to refer to some problems which have arisen out of the conflict in Korea and our participation in NATO. The Korean conflict is the first example of effective police action taken under the control and authority of an international organization in order to restore peace to an area where aggression had occurred. For the United Nations this action has been conducted by an international field force designated as the United Nations Command and the armistice agreement was signed by the commander in chief of this unified force.[37]

International unified commands of the forces of several countries are not new. There were, for example, unified Allied commands in the principal theatres of the Second World War and NATO has a unified command structure. NATO troops are still national troops, however, raised, supplied and administered on a national basis. They preserve their political and military identity and seem to possess no more legal homogeneity than did similar troops in World War II, despite their integration in the supreme command. The treaty constituting the European Defense Community[38] envisages what would seem to be the first truly international force, wearing the same uniform, subject to a common code of discipline and owing allegiance to the defense community.

The laws of war, however, have developed in the context of

[36] Preuss, *op. cit* , p 568.

[37] See generally R R. Baxter: Constitutional Forms and Some Legal Problems of International Military Command (1952), 29 Brit. Y.B. Int'l. L. 325; W J. Bivens. Restatement of the Laws of War as Applied to the Armed Forces of Collective Security Arrangements (1954), 48 Am. J. Int'l. L. 140

[38] Signed at Paris on May 27th, 1952, and not yet in force.

wars between states. The Geneva Conventions of 1949, as an example, were signed by states and do not envisage the conduct of hostilities by forces acting under a unified international command. Under the provisions of the Prisoners of War Convention, prisoners may only be punished for acts forbidden by the law of the detaining power, or by international law, and must be tried by the same courts and according to the same procedure as are members of the armed forces of the detaining power.

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

For the future it may be necessary to consider the desirability of permitting an international military command itself to become a party to conventions on the conduct of hostilities. This possibility is already recognized by a special protocol annexed to the European Defense Community Treaty, which binds the member governments to facilitate the adherence of "the Community as such" to international conventions on the laws of war.[39] The alternative would seem to be special provisions to take account of situations where a number of states act through the agency of an international command.

Different legal problems arise in time of peace over the status of military forces abroad. Canada, for instance, is a party to the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces signed in London on June 19th, 1951, which came into force last year. This agreement governs the legal status of Canadian military forces stationed in Europe in fulfilment of our North Atlantic Treaty obligations and contains detailed provisions governing such matters as jurisdiction over offences committed by members of a visiting force, the settlement of claims for damage to property and fiscal immunities.

Peace through Law

It has been possible for me to indicate in this address only a few

[39] In addition, article 80 of the treaty provides that "the Community shall respect the rules embodied in conventions concerning the laws of war which bind one or more of its member States"

of the many recent developments in international law which are of concern to Canada. In doing so I should not wish you to forget the wider significance of these questions. In the words of St. Augustine, "Peace is the tranquility which comes of order". Lasting peace can only be achieved in the context of law and its realization must therefore depend to a great extent on the increased willingness of states to accept and to apply the principles of international law in their dealings with one another.

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

Perhaps the best evidence that international law can function effectively is the work already accomplished by the Permanent Court of International Justice and its successor, the present International Court of Justice. As Canadians we can be proud that a countryman of ours now sits on the court in the person of Mr. Justice John Read.

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

Devoir de surveillance

Il me semble que le rôle propre aux juristes dans la création du droit par le législateur doit être un rôle de surveillance et de censure Nous prenons l'habitude d'accueillir chaque loi avec la même indifférence dans une soumission résignée. Il y eut pourtant autrefois de beaux combats contre les lois injustes, et ils ne furent pas sans succès. La condamnation d'une loi par des juristes qualifiés finit par convaincre l'opinion de son inutilité ou de sa nocivité. La réclamation persistante d'une réforme au nom de la justice n'est jamais inutile; il y faut seulement de la persévérance et de la patience. (Georges Ripert, Permanence ou régression de la règle morale dans le droit. Cahiers du droit, 1953, no 28)