CASE COMMENTS AND NOTES

CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION: SYSTEMS-BUILDING AND THE ROLE OF LAW

I. INTRODUCTION

Canadian Perspectives on International Law and Organization[1] is no insignificant work. It is a distinguished contribution to the Canadian literature on international law possessing all the qualities which should be found in a book of its nature: it is as up to date as is possible, stimulating, comprehensive, and, above all, scholarly. As such it has received favourable review and critique elsewhere.[2] Speculation leads to the conclusion that the following remarks will not be the last it will receive. The book has done much and, because of this, leaves the reader with the conclusion that there is still much to be done.

But, in the space of a few brief pages, exactly how does one comment on a book of almost one thousand pages; a book that touches nearly all aspects of Canada's role in international law and organization?[3] The realization of that difficulty leads this writer to diverging roads respecting the purpose which ought to be pursued here. First, an attempt could be made to deal generally with each chapter or to select a few for detailed consideration—the latter path having been characterized by La Forest as "invidious".[4] Second, comment could be made about what this book means today and what it may mean tomorrow. These alternatives are not exhaustive of the possible directions, only the most obvious.

La Forest has travelled well the route of present and future meaning and draws the following conclusion:[5]

> . . . if one can now begin to isolate the areas of weakness in Canadian international legal scholarship and practice, it is because of the tremendous strides that have been taking place in recent years to deepen and broaden our knowledge in the area. This book is at once a monument to this development and a highly significant step towards future attainments.

Professor D. M. McRae, along similar lines has noted, in part, that the success of this book results from the inclusion of essays by scholars and practitioners who have established world-ranking credentials on the topics about which they write[6] and, taken in the context of current attempts to consolidate and extend the endeavours of international lawyers in Canada, the book is a "splendid effort".[7]

In contrast, although the first alternative of description may yield

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[1] Macdonald, Morris, Johnson, *Canadian Perspectives on International Law and Organization.*

[2] *See,* McRae, Book Review (1974) 24 U.T.L.J. 457; Baxter, Book Review (1974) 12 Can. Yearbook of Int. L. 366; La Forest, Book Review (1975) 53 Can. Bar Rev. 442; Claydon, *Canadian Perspectives on International Law and Organization: Toward an Expanding Role in World Order* (1975) 2 Dal. L.J. 533.

[3] Indeed, these are the opening remarks of the review of this book by G. V. LaForest, *id.,* at 442. Also, it is worthwhile to note that the review by Professor Claydon is not a review in the strict sense but a full scale comment, *id.,* at 533-552.

[4] *Supra,* n. 2 at 442.

[5] *Id.* at 445.

[6] *Supra,* n. 2 at 459.

[7] *Id.* at 462.

results for the reader which could not otherwise be obtained, it is doubtful whether such an approach would give the results desired by the authors and editors. Both of the alternatives outlined above, i.e., that of description and that of present and future meaning, must be rejected for a path already marked out by the editors.

In the Introduction the editors state a number of claims and themes which may be characterized as reference points for assessing the contribution of this volume to the *belles lettres* of international law. Stating that this work, ". . . brings together for the first time a comprehensive Canadian conspectus on current issues and developments in international law,"[8] the editors formulate their objective as that of *sketching a modern Canadian world view.* Although the various chapters amphasize issues of special interest in Canada or reveal Canadian assumptions and preferences, the editors state that, ". . . this book may be regarded as a fairly complete reflection of contemporary Canadian approaches to international law."[9]

In addition to recording their hope that this volume, ". . . will stimulate further debate and research on issues relating to international law and organization,"[10] and that it will solicit reactions and suggestions from readers, the editors have asked us to consider the following specific questions:[11]

> . . . readers may wish to consider whether Canada has increasingly turned away from internationalism in the past few years in favour of unilateral pursuit of national goals. Have we, perhaps, long deluded ourselves concerning the extent of our objective altruism? Or are we assuming a growing role as a progressive voice in multilateral consultations on the numerous complex problems facing the world? What attitude is appropriate for a middle power such as Canada?

In setting out their goals in this way and having put forward the above question the editors have cast their gauntlet at the reader. It is incumbent upon the reader to take up the challenge. That challenge is to examine the field of Canada and international law. The editors have formulated one aspect of this study as the consideration of whether Canada has increasingly turned away from internationalism in favour of unilateral pursuit of national goals.

Accordingly, the path taken in the following pages, as an alternative to either speculation on meaning or partial analysis, is a response to the editors' espoused goal of debate and a brief foray at their wide ranging questions, particularly the perceived need for a theoretical Canadian perspective and the relationship of law and foreign policy. However, before proceeding with the analysis at hand it is appropriate to first describe the contents.

II. THE CONTENTS

The subject matter is treated in five parts, being: (1) perspectives; (2) practices; (3) air, communications and weather law; (4) territorial considerations; and, (5) Canadian participation in international organizations.

The first part—*Perspectives*—opens with contrasting pieces by Maxwell Cohen and the late Wolfgang Friedmann, which provide an

[8] *Supra*, n. 1 at xix.

[9] *Id.* at xix.

[10] *Id.* at xx.

[11] *Id.* at xix-xx.

internal and external perspective of Canada's role in the international legal system. These opening chapters are followed by an extensive treatment of the relationship between Canadian federalism, international law, and domestic law; and between public and private international law, in four separate chapters by four different authors: Gerald L. Morris, Andre Dufour, R. St. J. Macdonald, and W. R. Lederman.

The second part—*Practices*—is principally concerned with international law as developed and implemented through various state organs in five chapters: recognition; immunities; claims; the position of informal and interdepartmental arrangements in the Canadian treaty-making process; and immigration, extradition and asylum law and practice, by the following authors: Emilio S. Binavince, Edward G. Lee and Michael J. Vechsler who deal jointly with immunities, M. D. Copithorne, A. E. Gotlieb, and L. C. Green.

The third part—*Air, Communications, and Weather Law*—is the shortest section in the volume containing three chapters as follows: air law by Gerald F. Fitzgerald; telecommunications by C. M. Dalfen; and, weather law by Joseph W. Samuels.

The fourth part—*Territorial Considerations*—is composed of nine separate chapters only one of which does not deal with water, being the chapter by S. Josua Langer on international leases, licenses and servitudes. The other eight chapters direct our attention to a number of issues of particular interest to Canadians: maritime claims by L. H. J. Legault; fisheries by J. A. Yogis; the seabed regime by G. W. Alexandrowicz; Arctic waters by Donat Pharand; maritime law by A. J. Stone; international drainage basins by C. B. Bourne; Le Regime juridique des Grands Lacs by Charles Bedard; and the International Joint Commission by F. J. E. Jordan.[12]

The final part—*Canadian Participation in International Organizations*—is composed of fifteen chapters ranging in subject matter from competition policy by D. H. W. Henry to environmental law by Douglas M. Johnston to war and military operations by J. P. Wolfe. In addition to the closing comments of the editors which are contained in the final chapter on Canadian approaches to international law, John Humphrey provides an assessment of Canada's role in the promotion of human rights. The remaining chapters deal with the following topics: peacekeeping by D. Colwyn Williams; arms control and disarmament by George Ignatieff; regulation of trade and customs by Ivan Bernier; intellectual property by Bruce C. McDonald; international trade arbitration by John E. C. Brierley; international civil procedure by J. G.

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[12] It might well be added that there are compelling reasons for devoting this much time, space and effort to a consideration of water related matters. As somebody is reputed to have said at Caracas in a moment of exasperation during the Law of the Sea Conference: "The oceans are not a topic—they're a place where all the other topics come up!" *See, The Wolfgang Friedmann Series in International Law, "Post Caracas: striking a Bargain for Settlement at Geneva"* (1975). 14 Colum. J. Transnat'l L. 3. There is hardly any issue which does not come up within this context: the environment, energy, food, science, national security, and aid to developing countries to name but a few.

Two years ago, the late Wolfgang Friedmann stated that we do not lack the institutional apparatus but the political will. "Certainly," he wrote, "we cannot return to a *laissez-faire* world. The stark alternative is between the partition of at least large portions of the oceanbed—and the superjacent waters—and an international welfare regime." Professor Friedmann went on to state that the tragedy of mankind may prove to be, ". . . the inability to adapt its modes of behavior to the products of its intellect. Twentieth-century man threatens to be a new kind of dinosaur, an animal suffering from a brain ill-adjusted to its environment." *See,* Friedmann, *The Future of the Oceans,* at 120.

If for no other reason than Canada's geographical location, our national and international goals must be, in part, channelled in such a manner so as to ensure that pessimism does not find roots in reality.

Castel; sovereignty and North American defence by Erik B. Wang; economic nationalism by Ivan R. Feltham and William R. Rauenbusch; development by Louis Sabourin; and, the perspective of the legal advisor by J. A. Beesley.

III. THE RETREAT FROM OBJECTIVE ALTRUISM?

a. The Need for a Canadian Theoretical Perspective

In an extensive and lucid comment on this book in the Dalhousie Law Journal,[13] Professor John Claydon notes that it is not possible in a review to undertake definitive analysis of any of the questions raised by the editors, much less to comment on even a few of the individual chapters.[14] Accordingly, Professor Claydon's purpose is, ". . . to consider briefly certain aspects of these broad "perspectives" in the context of the essays contained in this volume."[15]

In his analysis of theory and scholarship Professor Claydon suggests that we might consider whether the essays in the book demonstrate a scholarly world view.[16] He concludes, in part, that the authors have not analyzed their topics on the basis of any consensus about what constitutes a "Canadian perspective", resulting in a considerable variation in the standard of scholarship.[17] "Not everyone," he writes, "has paid sufficient attention to the events which give rise to legal claims, hence to the identification of all the relevant claims or to the viability of solutions, where proposed. Some writers delve into the realm of policy recommendation, while others eschew this penetration."[18]

Professor Claydon vigorously argues that adequate and effective discharge of scholarly responsibility involves the application of the following intellectual operations:[19]

> . . . careful specification of the entire range of issues comprising the problem, including the relevant features of the context which give rise to those problems and which their solution will affect; recommendation of goals or policy outcomes; systematic examination of the current state of the law relating to the problem area, including description of variables . . . that have conditioned the course of decisions; finally, if the course of future decisions is unlikely to move autonomously in the preferred direction, the suggestion of strategies for bridging the gap between reality and preferential outcomes, i.e., for solving the problem.

Professor Maxwell Cohen, in his chapter on the "inside perspective", notes the absence of a theoretical focus in Canadian international legal scholarship as well as the reluctance of lawyers to embrace interdisciplinary approaches.[20] Although Professor Cohen states that, ". . . it cannot be seriously argued that a first-class Canadian theorist (Percy Corbett excepted) has emerged to demonstrate a capacity for model-building and broad analytical thinking that could make a contribution

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[13] *Supra*, n. 2.

[14] *Id.* at 533.

[15] *Id.* Furthermore, Professor Claydon provides a number of provocative questions in addition to those stated by the editors: "What are the issues and developments that are of contemporary significance to Canadians? What are Canadian approaches to international law as reflected in both scholarship and national practice and position? Do these issues, developments and approaches constitute, either separately or in combination, a distinctive world view? What should be Canada's role in the international legal system, and to what extent are current concerns and approaches conducive to the performance of this preferred function?" *See, Id.* at 533-534.

[16] *Id.* at 538.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 538-539.

[20] *Supra*, n. 1 at 26.

not only for international law but for the theory of law in general,"[21] he is not sounding as pessimistic a tone as might first appear, for he observes the following:[22]

> Probably the next stage to be expected or, at least, to be hoped for is that the multiple interests of Canadian scholars deriving from federalism, the varied experiences on three oceans and with the Arctic Basin in particular, the unique bilateral problems in the U.S.-Canadian continental context, the general Canadian multilateral involvement, classically and through the U.N. family, will in due course not only be reflected in the discrete topics analyzed but in some comprehensive view of international law from a Canadian standpoint where the 'accidents' of national interest are converted into insights having some universal validity.

Although it may be readily conceded that a first-class Canadian theorist has not yet emerged, it is also readily conceded, as Professor Claydon points out, that, ". . . Canadian international legal scholars . . . are much more functionalist and sensitive to policy considerations than is readily apparent through quick observation,"[23] and, ". . . it can be stated with confidence that neither Kelsen nor Austin holds much sway over contemporary Canadian legal scholarship."[24] Professor Claydon continues this point as follows:[25]

> By focusing on the global context in which international law functions, . . . (Canadian international legal scholars) . . . have demonstrated in a wide variety of areas the relevance, especially in a decentralized system, of political content for the formulation and implementation of norms . . . thereby undermining unrealistic faith in international institutional processes, especially those of an adjudicatory nature. Through highlighting the inadequacies, ambiguities, or outright non-existence of norms they have demonstrated the significance of the policy-making task, with its tremendous potential for securing the common interest, as an inevitable and invaluable item in the intellectual baggage of both scholar and decision maker.

However, given the editors' characterization of the Canadian national philosophy in international law wherein they refer to the crucial emphasis on a 'technological-ideological' continuum,[26] such attainments are not easily achieved:[27]

> At one extreme, the 'technological' pole, international law is identified as a preferred problem-solving technique available to national governments, international organizations, and other major participants in the global process of decision making. At the other extreme, the 'ideological' pole, international law is identified as a system of values applicable to the most threatening issues between the rich and poor areas of the world. The first of these different, though not necessarily conflicting, approaches to international law would be essentially pragmatic and specific in concept, favouring empirical methods of research, often in conjunction with the social sciences and other disciplines. The second approach, the ideological, would be essentially systemic in

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[21] *Id.*

[22] *Id.* Professor Cohen's "inside perspective" has a few historical overtones. In the initial stages he guides the reader through our development from colonial Englishmen and Frenchmen, to our more recently achieved Americanization reminding us of the permanent crisis in Canadian life; namely, our development beside an immense neighbour who would outstrip us in everything perhaps, but the determination to achieve an integrity of our own. *See, Id.* at 4.

One cannot resist the temptation to speculate as to what possible effects this "permanent crisis" may have had, and may continue to have, on the development of a "Canadian perspective". In this context it is interesting to note that the late Professor Friedmann's "outside perspective" commences with the callous questions, "Is there a need for Canada? Would the world be shaken if Canada, as a political and international unit, disappeared from the world scene?" Thankfully, Professor Friedmann reaffirms for us that our national inferiority complex (the demise of which is progressing with rapidity) is not altogether well founded although he leaves us with considerable doubt as to whether our contribution to the progress of international law, as a middle power, is really much better than that of the major powers. *See, Id.* at 33, 47-50, 52.

[23] *Supra*, n. 2 at 540.

[24] *Id.* at 541.

[25] *Id.* at 540.

[26] *Supra*, n. 1 at 948-949. Referred to by Professor Claydon, *supra*, n. 2 at 542-543.

[27] *Id.*

concept and lean more heavily on value commitment in the abstract, favouring the personal involvement of international lawyers in international causes related to social welfare programs which are aggravated by the widening economic and technological disparities in the world community.

The editors anticipate that Canadian international lawyers will continue to write mostly in response to events of direct Canadian significance, ". . . rather than on the basis of long-range expectations or on theoretical questions of general interest."[28] The editors perceive the chief danger of this being the remoteness of Canadian international lawyers from international welfare issues and the neglect of important questions of legal theory.[29] That no Canadian has attempted a systemic view of international law may be attributed, in the opinion of the editors, to a Canadian tendency to avoid or moderate ideological positions, or to a Canadian distaste for interdisciplinary collaboration and systemic perspective,[30] and they predict that as a result government officials will continue to live for tomorrow's crisis, concentrating on the practical rather than the theoretical side of the exercise.[31]

Furthermore, the editors point out that the technological frame of reference is encouraged by government policy favouring government-academic interaction and that this policy, ". . . is regarded as ethically acceptable by many Canadian political scientists, lawyers, and economists."[32]

Professor Claydon has argued that although there is no necessary connection between "technological" problems of interest to Canada and the lack of orientation in the direction of clarifying "long-range expectations" or the overall unconcern with theory-building, ". . . there can be little doubt that scholarly concentration in a few areas which correspond to government concerns risks a number of serious negative consequences."[33]

Professor Claydon then posits two such consequences. First of all, ". . . the resources of a small academic community are finite and susceptible to disproportionate deflection from other areas."[34] Although this has occurred, to some extent the imbalance is a matter of degree, ". . . for there are Canadian scholars who are committed to examining the role of international law in establishing and implementing 'long-range expectations' in non-technological areas."[35] Although the editors express doubts about the interest of Canadians in such fields as human rights, Professor Claydon reminds us that Canadians have long achieved "global prominence" in this area in both operational and scholarly roles. "While it is correct," he writes, "that a wide variety of environmental factors will . . . channel scholarship into certain areas . . . it is debatable whether they are so pervasive . . . that research in other areas will be adversely affected . . ."[36]

The second negative consequence set out by Professor Claydon pertains to the perception by some academic lawyers of their basic role.

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[28] *Id.*
[29] *Id.*
[30] *Id.* at 950.
[31] *Id.* at 949.
[32] *Id.* at 950.
[33] *Supra*, n. 2 at 543.
[34] *Id.* at 543.
[35] *Id.*
[36] *Id.* at 544.

It may also concern the ethical question raised by the editors respecting academic-government collaboration. In speaking to this collaboration, Professor D. M. McRae, another writer who has commented on this volume, suggests that the editors' comments about the role of the international legal advisor, ". . . might tend to shift undesirably the focus of responsibility for ensuring that government policies are weighed in the light of international law considerations."[37] Professor McRae states that through a constant identification of appropriate rules for international conduct, and an evaluation of them in the light of particular problems, ". . . international lawyers can ensure that their government's foreign policies are assessed publicly against relevant international law constraints. In this respect the work of international lawyers in Canada appears deficient. One does not find in the literature a regular practice by Canadian international lawyers of subjecting their government's policies to detailed analysis and criticism. . . ."[38]

Professor McRae outlines one particular example as being the lack of reaction by international lawyers to the recent reservation by the Canadian government to its acceptance of the jurisdiction of the International Court of Justice.

In addressing himself to this question, in his chapter in this book—*Canadian Fisheries and International Law*—Professor John Yogis concedes that, ". . . certain aspects of Canada's recent fisheries legislation are regrettable from an international lawyer's point of view."[39] However, he goes on to state that, ". . . this is not to deny that there are some arguments supporting the Canadian position in terms of a traditional international law approach."[40] For example, with regard to exclusive fishing zones, Professor Yogis reminds us that the Canadian position is in conformity with the general tendency, since the Truman Proclamation of 1945, to permit the partitioning of areas of the ocean for purposes of conserving and protecting fisheries. The claims of the coastal state were further strengthened by the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. "While the Canadian assertion differs from previous formulations," Professor Yogis writes, "it may be argued that the juridical basis has now been established for a claim by the coastal state to a special interest in the fisheries of the high seas adjacent to its coasts."[41]

Professor Maxwell Cohen, in his chapter in this volume on the "inside perspective" expresses the view that Canadian reservations with respect to the compulsory jurisdiction of the International Court of Justice in the matters of the Arctic pollution zones legislation, as well as east and west coast fisheries control and pollution regulatory areas, ". . . doubtless have surprised some in the international community and possibly a substantial number of professional international lawyers in Canada itself."[42] However, such a step may be defended says Professor Cohen, ". . . in the face of the ambiguities with respect to present rules, or their absence, touching upon high seas environmental pollution hazards threatening coastal states and the non-existence of inter-

[37] *Supra*, n. 2 at 461.
[38] *Id.* at 462.
[39] *Supra*, n. 1 at 405.
[40] *Id.*
[41] *Id.* at 405-406.
[42] *Id.* at 10.

national machinery to regulate or abate such hazards even if the legal position were clear, which it is not."[43]

The late Professor Wolfgang Friedmann, in his chapter in this volume on the "outside perspective" states that ". . . Canada has undoubtedly joined the general race for an extension of national controls and a further reduction of the already lamentably weak sphere of international legal and administrative controls,"[44] but that there are extenuating circumstances such as pollution dangers from oil tankers, interference with the ecology and effects on the climatic balance. Professor Friedmann notes that even at the time of Canada's action, ". . . jurisdictional claims exceeding twelve miles were still regarded as exceptional, they have now rapidly become the rule. In the absence of effective control measures and authorities, there is some jurisdiction for Canada's unilateral action."[45]

Professor McRae has regarded the views expressed by Professors Friedmann, Cohen and Yogis as exemplifying a "reticent" reaction of international lawyers in Canada.[46] He has furthermore argued that the reservation by the Canadian government to its acceptance of the jurisdiction of the International Court of Justice should have been debated openly with arguments both for and against the action openly expressed and not characterized as merely "regrettable" or as action that may be "vaguely defended."[47]

Professor Claydon notes that such reticence, most noticeable in this one particular instance, ". . . does great disservice to both global and national interests."[48] There is a danger that international lawyers, who are citizens of nation states ". . . will suffer distortion of their scholarly outlook by failing to identify with all the communities in which they hold membership."[49] Furthermore, partiality hinders the performance of a valuable scholarly "adjudicatory" function in a legal system characterized by the absence of authoritative adjudicating institutions and ". . . the risk of subordinating common interests to 'national egoism' is particularly accute in the current national climate, with its identity and independence consciousness and parallel activism in the pursuit of specific national interests."[50]

However, the question must be asked whether the views expressed by Professors Friedmann, Cohen and Yogis exhibit such a clear reticence or whether they exhibit an intention to do something apart from a critical analysis. Professor Yogis does not deny that there are some arguments on this issue supporting the Canadian position. Professor Cohen acknowledges that such a step may be defended in the face of ambiguities with respect to present rules. Professor Friedmann has noted the extenuating circumstances. It would seem, at least in part, that all three have engaged the use of international law principles (or lack thereof) in one of the most useful roles of legal analysis—that of justification. They have argued that the Canadian decision in this instance, albeit "regrettable", is either (1) reconcilable with accepted or

[43] *Id.*
[44] *Id.* at 51.
[45] *Id.* at 51-52.
[46] *Supra*, n. 2 at 462.
[47] *Id.*
[48] *Supra*, n. 2 at 544.
[49] *Id.*
[50] *Id.* at 545.

developing norms, or (2) is not reconcilable with such norms because such norms do not exist, i.e., in the words of Professor Cohen, ". . . in the face of the ambiguities with respect to present rules, or their absence. . . ."[51]

If "justification" is accepted as one of the roles of the principles of international law should it not be within the academic function of each scholar to resort to this function of law in the analysis of any particular issue? If so, then the criticism which ought to be directed at Professors Friedmann, Cohen and Yogis in this instance is not that their views display a "reticence" to engage in the critical but that no evolving justification function of law from a "Canadian perspective" is readily apparent—which is all the more vital in light of the editors' stated goal of achieving a Canadian world view.

The question then which must be asked here is one that does not receive full elaboration form the comments of the editors or Professor Claydon. *Should Canadian academic international lawyers be engaged in systems-building?* What are the problems to which systemic analysis gives rise? Is theoretical narcissism one of the potential drawbacks? What relationship does empiricism have to all this especially in light of the position that legal facts are nebulous?[52]

The above noted comments of the editors indicate that there is a shared view among some Canadian international lawyers that international law can be made to flow (at least conceptually and theoretically) along some systemic channel, not unlike municipal law. What is crucial in this view is the potential for rigorous devotion to procedure as well as theory and a concomitant abbreviation of "free reflection". Systemics, as an aid to understanding, may be utilized as a benefit to ratiocination; but, and this is the real danger, it may become a substitute for it by creating a synthetic sphere of self-consistency unresponsive to utilitarian needs. Only when the function of systemics, as a methodology of knowledge, is clearly understood will significant appreciation of its utility be realized. That this is a problem can be seen from the decade old debate in the field of international relations.[53]

The assumption upon which the editors seem to have proceeded is that since international law is rational in its expression it can accordingly be confined to logico-theoretical processes. Although the modern law of nations exhibits an aspiration for the reduction of international tensions, it does not necessarily follow that this will be an inevitable consequence of problem-solving thought. The systemic grand design is fraught with the danger of driving academic international lawyers into areas of study which will be chosen not because of their intellectual importance but because they fit the grand design, and thereby the pejorative purpose of self-preservation. The role of "free reflection" will be reduced to the function of formulating hypotheses to be tested by the design.

All of which raises the predictive question of whether such problemization can serve as a vehicle for progress. If the field of

[51] *Supra*, n. 1 at 10.

[52] For example *see*, Frank, *Courts on Trial*. Unfortunately, it is not possible to develop an analysis of all the issues arising out of these questions within the few pages of this comment. The author intends to deal with them more fully at a later date when a detailed consideration is more appropriate.

[53] For example *see* the debate sparked by Hedley Bull's article "International Theory: The Case for a Classical Approach" and rebuttal by Morton A. Kaplan "The New Great Debate: Traditionalism vs. Science in International Relations". In, Knorr and Rosneau *Contending Approaches to International Politics*.

pragmatic experience can be reduced by such a diminution of "free reflection" should not anything which potentially routinizes creative thinking, such as systemics, be regarded with the gravest of suspicions? Will talents be expended on the adaptation of previously thought out and exhausted *ideas* to a new language of servitude justified on the grounds that some unique and generally shared Canadian world view is required? Will systemics lead to dogmatics and, if it does, should we not be engaged in a war with systems-building?

Let us return for a moment to one of the views expressed by the editors, i.e., that one of the reasons why no Canadian has attempted a systemic view of international law is due to a Canadian tendency to avoid or moderate ideological positions, or to a Canadian distaste for interdisciplinary collaboration and systemic perspective.[54]

In this regard all international lawyers would probably concede that there are certain perspectives common to all. Uniting modes of perception of the world and its problems are somewhat unavoidable due to the fact that international lawyers are lawyers. Although these "uniting modes of perception" may be unavoidable, they are not final. To narrow the international perspective to specialized views produces a tendency to reduce the variety of the whole to a fixed rigidity; a rigidity which may be partially avoided by extended interdisciplinary collaboration.

Yet, the production of a grand design may become a reason for its own continuity whereby the goals originally perceived are replaced by the goals of systemic survival. That is the first dilemma which must be clearly understood—on the one hand the potential benefits of interdisciplinary collaboration in systems analysis bringing to bear a variety of specialized perspectives which may produce a unifying world view; but, on the other hand, the tendency that systems have for becoming bureaucracies of "free reflection".

(B) Law and Foreign Policy

In their closing comments on Canadian approaches to international law, the editors note that the present Prime Minister tends to rely on the advice and negotiating skill of his advisory staff instead of turning to External Affairs and they are skeptical of his commitment to legal solutions.[55] He appears less interested in law than 'cost-benefit' analysis:[56]

> In respect of both domestic and international issues, the Prime Minister seems often to have emphasized economic agruments, while introducing legal rationales only to the extent that they provide a convenient supplementary argument. In international affairs the Prime Minister has not been markedly law-oriented in his approach. . . .

The editors state that under the present administration there is an absence of concern for the development of international law except in those cases where it would serve Canada's immediate national interests:[57]

> There does not appear to be much interest in the development of a legal regime as such. While international lawyers of the highest calibre are available in the public service, we conclude that they are called on to employ their talents in a somewhat

[54] *Supra*, n. 30.

[55] *Supra*, n. 1 at 944.

[56] *Id.*

[57] *Id.*

narrower range of issues than in past years and are more frequently used as adjunct-technicians after policy has been discussed and settled on non-legal bases.

A similar change, in respect of foreign policy, has been perceived by Allan Gotlieb and Charles Dalfen[58] who have noted a shift in Canada form an internationalist position to an emphasis on Canadian interests.[59] "There has been a de-emphasis," they write, "of Canada's world role, its altruistic mission, and its potential as a contributor to solutions to international problems. There is much less talk, in general, of Canada's world responsibilities and of any special or particular international role. International goals are now regarded as relating primarily to the betterment of Canadians."[60]

Gotlieb and Dalfen conclude, in part, that ". . . under the current approach there is a new stress on national self-interest," but, ". . . there is also recognition of the absence of any fundamental incompatibility between the pursuit of national goals and international objectives, and between self-development and world order."[61] National self-interest not only requires ". . . the betterment of Canada," but also implies a world order ". . . which is favourable to or comparable with such betterment."[62]

One of the most significant examples of the dialectical approach to foreign policy was Canada's decision to adopt a functional approach to matters of coastal jurisdiction.[63] "Because Canada believed that a twelve-mile exclusive fishing zone would be in its own national interest . . . it took the initiative in 1956 to define the concept and waged a remarkable worldwide campaign to get it accepted from 1958 to the early 60's. Failing to obtain an international legal endorsement for such an extension, Canada went ahead on a unilateral basis."[64]

These two issues, (1) the claim that government lawyers are more

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[58] Allan Gotlieb and Charles Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law* (1973) 67 Am. J. Int'l L. 229.

[59] *Id.* at 230. Also referred to by Professor Claydon, *supra*, n. 2 at 546. Indeed, there has been a significant shift from the goals which characterized Canadian foreign policy form 1948 to 1968 during which time Canadian policies were based on the premise, ". . . that the maintenance of international peace and security must be the foremost goal of any country's foreign policy and support for the United Nations, NATO, and NORAD remained at the basis of Canada's quest for collective security." *See, id.* at 230. *See also,* Department of External Affairs, *Foreign Policy for Canadians,* 1970. However, on May 29, 1968, the Prime Minister stated that Canada's paramount interest was "to ensure the political survival of Canada as a federal and bilingual sovereign state." *See, id.* at 230.

[60] *Id.*

[61] *Id.* at 231. The foreign policy review of 1968 outlined six national aims: economic growth; social justice; high quality of life; sovereignty and independence; peace and security; and, a harmonious natural environment.

[62] *Id.* Further, Gotlieb and Dalfen note that these recent trends in Canadian foreign policy have had "significant implications" for Canada's attitude and approach to international law: "First, the new foreign policy created a conceptual framework in which it became logical and necessary for problems relating to the national interest to occupy the center of the stage in the field of foreign policy . . . Secondly, with the shift in Canada's objectives, Canadian attitudes have changed as to the appropriate or most effective instruments for achieving those objectives. International law has come to be seen as an instrument that has a direct, perhaps critical, bearing on national interest. The Canadian role in the development of international law has accordingly become far more active. And this turn has instilled a greater awareness in many Canadians of international law and its relevance. . . . Thirdly, Canadian representatives have begun to work keenly for the adoption of stringent rules of international law in areas of national interest to Canada. There has been a continuation of the earlier emphasis of international solutions but with less reliance on the need to fall back on compromise solutions. . . . Fourthly, at least in cases where the dependence on multilateral action to protect the national interest seems unrealistic, a tendency emerges towards claiming national jurisdiction in order to make Canada less vulnerable to external—or what are perceived to be external—dangers. . . . Fifthly, the Canadian approach to international law, whether in multilateral rulemaking or in taking unilateral action, arising, as it seems to do, in response to the threat or fear of the consequences of activities based on advanced technology, is less in terms of traditional concepts of international law than of concepts that are themselves directly influenced by the technology that is perceived to be the source of the dangers." *See, id.* at 231-233.

[63] *Id.* at 234. *See also,* A. E. Gotlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law* (1964) Can. Yearbook of Int'l L. 55 at 63.

[64] *Id.*

frequently used as adjunct-technicians after policy has been discussed and settled on non-legal bases, and (2) the recent Canadian resort to the "you-might-as-well-agree-because-I'll-do-it-anyway" theory have raised serious questions about the role of law in foreign policy decision making.

Professor Claydon has noted that ". . . legal considerations perform a number of critical functions in the formulation and conduct of foreign policy,"[65] and has outlined the following list of some of these functions:[66]

> . . . law and legal institutions can serve instrumentally to fashion solutions to such continuing and emerging problems as pollution, resource shortages and self-determination before they reach a crisis threshold; a legal perspective can provide a broad range of organizational options and settlement techniques as alternatives to unilateral initiatives; a legal focus enables adequate consideration to be given the costs of law violation, including undermining the stability of the international system, encouraging reciprocal non-compliance, and the loss of national power and prestige; law may perform the function of communicating intentions, thereby facilitating prediction of response and avoiding unnecessary escalation; finally, international law provides a common basis for judging international conduct.

Unfortunately, the role of law in foreign policy decision-making has not received the analysis in Canada that it has elsewhere.[67] Even more unfortunate, Canadian international lawyers are now being called upon to engage in systems-building at a time when our knowledge of the role of law is not only scanty but when law is apparently receiving a paucity of consideration from the policy makers. Instead of engaging our talents in systemics it might well be worthwhile to attempt some comprehensive or particularized view of the role of international law from a Canadian standpoint for, as we are tending to forget, law is one possible explanation of the international system.

As Professor Claydon has noted, ". . . neither Kelsen nor Austin hold much sway over contemporary Canadian legal scholarship,"[68] and it would seem that the theory of law as being "coercive orders backed by threats" has reached its demise with the publication of the views of Professor H. L. A. Hart.[69] Not only is the conception of law as a prohibition misleading but there are areas of the law which are barely, if at all, concerned with prohibitions.[70] If, like the domestic law of contract, international law operates to provide a framework for the self-organizing activities of nations, then the question that ought to be asked here is, as Professor Abram Chayes has put it, ". . . in what sense and upon what evidence can we say that the conduct or behaviour of a corporate aggregate of the scope and dimensions of a state, is constrained?"[71]

In that regard, Professor Chayes notes in his recently published and remarkable work on the Cuban Missile Crisis,[72] that we are not even very clear on how law operates to channel individual behavior:[73]

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[65] *Supra*, n. 2 at 546.

[66] *Id.* at 546-547.

[67] For example *see*, Chayes, Ehrich and Lowenfeld, *International Legal Process: Materials for an Introductory Course.*

[68] *Supra*, n. 2 at 541.

[69] Hart, *The Concept of Law*, at 18-25. But *see also*, Dworkin, "Is Law a System of Rules?" in Summers, *Essays in Legal Philosophy*, at 34-44.

[70] For example, in the domestic law it is barely a concern of the law of contract whether one chooses to enter into a contractual relationship, but if the choice is made then certain consequences may follow. Nevertheless, the choice exists in a way that it does not for activity covered by other areas of domestic law such as the criminal law.

[71] Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law*, at 26.

[72] *Id.*

[73] *Id.*

> For the most part, compliance with law is not felt as a limit upon otherwise desired activity. The process of socialization is, in large part, the process of internalizing legal and other kinds of norms. Moreover, the standards embodied in the legal system of a society are not, on the whole, externally derived and imposed on the members. The law develops in reciprocal interaction with the conduct it is supposed to regulate, so that at any point, the law expresses in marked degree the values and purposes of the society in which it functions. Obedience to law is most often not perceived as response to an external constraint, but as the affirmation of valued and desired objectives.

Secondly, what role does the "regime of self-applying regulation"[74] play in constraining the activities of nations? Even if a legal standard is violated, does it necessarily follow that the action was not affected by law? Professor Chayes has put the question this way: "Do we believe that the behavior of a man travelling 65 miles an hour on a superhighway with a 60-mile speed-limit was not constrained by law?"[75]

Professor Chayes makes a third point, and it is that in most cases the applicable law is not as clear as it is in the speed-limit example for in difficult cases, ". . . it is not possible to say categorically in advance whether a proposed course of action is 'lawful' or not."[76] Legal consequences are, ". . . very sensitive to nuances of the fact-setting and the concrete details of the challenged activity. These do not emerge until the action is taken. The relevant facts are, in a sense, defined by the action."[77]

This raises the adjunct question of what J. Allan Beesley, in his chapter in this volume on the perspective of the legal advisor, calls the "operational function" of government lawyers.[78] However, the legal input into foreign-policy decision-making centers on the "advisory function" of government lawyers.[79] Respecting this advisory function it seems that the role of law as a constraining influence in any foreign policy decision depends not only on the inclinations of those ultimately responsible for making the decision, but to a considerable extent, on the inclinations of those who advise the decision maker.

Graham Allison, another of the many writers on the Cuban missiles, has made this point quite well within the context of that crisis.[80] He has argued that differences among men are inherent in the situation; differences in personality, outlook, background, training, experience and susceptibility to various considerations.[81] He states:[82]

> The 'leaders' who sit on top of organizations are not a monolithic group. Rather, each individual in this group is, in his own right, a player in a central, competitive game. The name of the game is politics: bargaining along regularized circuits among players positioned hierarchically within the government . . . players who focus not on a single strategic issue but on many diverse intra-national problems as well, players who act in terms of no consistent set of strategic objectives but rather according to various conceptions of national, organizational and personal goals; players who make

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[74] The "regime of self-applying regulation" is developed in Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, at 131-134.

[75] *Supra*, n. 71 at 26.

[76] *Id.* at 27.

[77] *Id.*

[78] *Supra*, n. 1 at 925-926. The author draws a distinction between the advisory and operational functions of a foreign ministry legal advisor. The distinction is that ". . . the former is his particular and sole responsibility, in consultation, of course, with appropriate experts within and outside the government service; in the case of the operational function, however, the legal advisor carries out instructions of his government in the same way as do other public servants."

[79] *See*, Claydon, *supra*, n. 2 at 547-548.

[80] Allison, *Essence of Decision: Explaining the Cuban Missile Crisis.*

[81] Also noted in Chayes, *supra*, n. 71 at 29-30.

[82] *Supra*, n. 80 at 176.

government decisions not by a single rational choice but by the pulling and hauling that is politics.

Legal considerations, says Professor Chayes, do not operate on decision directly, but mediately, ". . . filtered through the different purposes, perspectives, and susceptibilities of the players in the central game."[83]

As noted above, the editors of this volume have asserted that the present Prime Minister is more interested in "cost-benefit' analysis, though he is willing to rely on law as an agent of rationalization,[84] and only resorting to legal rationales to the extent that they provide a convenient supplementary argument. It is one thing, however, only to resort to international law when "convenient", but it is quite another if the connotation is that the use of international law as "justification' is something illegitimate.

In matters of executive action, justification is not a formal requirement as it is in the case of a judicially pronounced and published decision.[86] Nevertheless, it often (not always) does play the same role in that it reveals whether a particular decision is reconcilable with an accepted normative standard applicable to the case thereby providing a substantive check on the legality of action and the responsibility of the decision-making process.[87] Furthermore, legal justification also functions to assist in the legitimation of the action taken to those at home as well as those abroad.[88]

Professor Chayes has posited that international law justification, within this context, has two particular features. Firstly, the norms of international law comprise a ". . . special set of 'generally accepted principles' to which appeal can usually be made without arguing separately the validity of the principles."[89] Secondly, justification is more than an appeal to some vague understanding of what is meant by "world public opinion".[90] In a system such as the international system, which is almost exclusively horizontal rather than hierarchical, failure to justify in terms of international law ". . . warrants and legitimizes *disapproval* and negative responses from the other governments participating directly in the process."[91]

Lastly, it is worthwhile to briefly raise here, and in the light of the foregoing comments, what Professor Chayes has called the "organization explosion" for it represents the most dramatic development in the international legal system during the post-war period being at once ". . . product and source of international law."[92] Furthermore, issues in

[83] *Supra*, n. 71 at 30.

[84] *Supra*, n. 55.

[85] *Supra*, n. 56.

[86] *Supra*, n. 71 at 41-42.

[87] Professor Chayes notes that the failure to issue a legal opinion at the time of the United States military action in Cambodia in May 1970, ". . . became a significant ground of attack on the propriety of that action." He goes on to state that it was rightly taken ". . . as presumptive evidence that legal considerations had *not* been adequately reviewed and that legal advice had *not* been adequately consulted. Ultimately, this criticism resulted in the preparation and presentation of full-scale legal opinions both by the Legal Advisor and the Assistant Attorney General, Office of Legal Counsel, which could be and were exposed to professional criticism. More important, an internal memorandum in the State Department enjoined fuller and more timely consultation with the office of Legal Advisor on issues of similar import." *See, supra*, n. 71 at 42-43. *See also, Symposium on United States Military Action in Cambodia* (1971) 65 Am. J. Int'l L. 1.

[88] *Supra*, n. 71 at 43.

[89] *Id.*

[90] *Id.* at 44.

[91] *Id.*

[92] *Id.* at 69.

the modern law of nations are arising with greater frequency within the processes of institutions.

International organizations are created by specific agreement between states, and agreement, as provided for in the Statute of the International Court of Justice is the most ". . . widely acknowledged and unchallengeable basis of international law."[93]

Moreover, the International Court of Justice, in its advisory opinion in *Certain Expenses of the United Nations*,[94] respecting whether certain expenditures which were authorized by the General Assembly to cover the costs of the United Nations operations in the Congo and of the operations of the United Nations Emergency Force in the Middle East constituted 'expenses of the Organization' within the meaning of Article 17(2) of the United Nations Charter, characterized questions of Charter interpretation as a judicial task:[95]

> It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, the interpretation of a treaty provision.

Professor Chayes has characterized this as "hyperbole" for the treaties that create international organizations are ". . . essentially constitutive documents" concerned less with defining rules of conduct than with ". . . establishing the jurisdiction of the organization and allocating to its various parts their power and authority to act."[96] Because of their structure, international organizations tend to ". . . generate 'law' and 'legal' issues," which are deflected from the merits and discussed in jurisdictional terms. Resolutions, the main action vehicle, tend to convert issues into ". . . exercises in draftsmanship" and plenary organs tend to be characterized as legislative assemblies.[97]

However, as the International Court of Justice has pointed out, international organizations are not sovereign. In its advisory opinion, *Reparation for Injuries Suffered in the Service of the United Nations*,[98] the Court was asked to consider two questions. One was whether the United Nations, in the event of an agent suffering injury in the performance of duties in circumstances involving the responsibility of a State had the capacity to bring an international claim against the responsibile *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him.[99]

The question related to the capacity to bring an international claim and accordingly the Court proceeded to define what is meant by the capacity and considered the characteristics of the United Nations so as to determine whether these characteristics included for the organization a right to present an international claim. In reaching the conclusion

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[93] *Id. See*, Statute of the International Court of Justice, Art. 38(1)(a).

[94] [1962] I.C.J. 151.

[95] *Id.* at 155.

[96] *Supra*, n. 71 at 69-70.

[97] *Id.* at 70.

[98] [1949] I.C.J. 174.

[99] *Id.*

that the United Nations is an international person the Court stated that this is not the same as saying that it is a sovereign entity:[100]

> That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

Although international organizations are neither sovereign nor characterized by all the accoutrements of states, they do act and they do so independently of individual member governments even if their powers are recommendatory. Recommendations are a fact with which any state must deal in its foreign policy decision-making, because they represent a political consensus which finds its way into concrete formulation. Although it may not be binding in the strict sense, and although compliance may escape it, it is there, ". . . a fact of political life that must be taken into the calculus by a state even in the very process of violating its provisions."[101]

If we are principally concerned with economic analysis and not legal analysis it is particularly difficult not just to explain but to expand (or contract where necessary?) the role of law and the legal advisor in decision-making. In confronting what might appear to be a dilemma there are four factors which emerge from the study by Professor Chayes—factors which are not necessarily inherent in the structure of Canadian decision-making and which need much more study within the Canadian perspective:[102]

> *First,* law is not self-activating. On the whole, it does not project itself into the deliberations on its own motion. Someone must call the lawyers in. . . .
>
> *Second,* if legal precepts are not exogenous data, dividing the universe of choices into the permissible and impermissible, if legal analysis is always indeterminate, then at best legal reasoning and analysis will impact on alternatives in terms of more or less, not yes or no. Law cannot determine decision . . . we should not expect it to. It takes its place as one of a complex of factors for sorting out available choices. . . .
>
> *Third,* the significance of legal justification for decision-making is greater and more complex than is customarily supposed. . . . [Although] public justification is not always based on the 'real' reasons for decision . . . it is wrong to conclude on this basis that the decision and its announced rationale are essentially independent and self-contained phenomena.
>
> *Fourth,* decision must take account of the international organizational setting . . . a product of international law . . . a focused and intensified arena of public justification . . . peculiarly sensitive to the legal elements of the position, because the organizations themselves are dominated by legalistic modes of procedure. Most important of all, the international organizations are themselves actors, with some power to create legal relations and alter the legal setting.

In their closing comments to *Canadian Perspectives on International Law and Organization* the editors have recorded a number of suggestions and recommendations together with their conviction that Canada can best prosper within an orderly international community.[103] "At the government level," they state, "there is a need for a more

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[100] *Id.* at 179.

[101] *Supra,* n. 71 at 71.

[102] *Id.* at 102-104.

[103] *Supra,* n. 1 at 950.

sustained, systematic, long-range planning in the area of international law and organization," and it is necessary for government policy-planners. ". . . to get beyond immediate issues and conference deadlines to a more generalized conception of basic disorders in the international community."[104]

The editors have recommended ". . . the establishment within the Bureau of Legal Affairs of the Department of Legal Affairs, or perhaps within the Policy Analysis group of the same department, a special research unit with wide-ranging responsibilities for identification, classification, and analysis of problems of long-range interest to Canada . . . staffed by a small number of career officials who have had experience either in foreign service or in technological functions," together with academic visitors, the report of which might be annexed to the annual statement to the House of Commons by the Minister for External Affairs; the convening of, ". . . an annual meeting of government and academic lawyers to review and assess the work that is being carried out by the research unit, perhaps under the auspices of the Canadian Council on International Law"; that the legal advisor and director general of the Bureau of United Nations Affairs ". . . be requested to appear at least once a year before the Cabinet Committee on External Affairs and Defence in order to review the major issues in international law and organization pertinent to the formulation and execution of Canadian foreign policy"; that the cabinet committee, or subcommittee thereof, might assume responsibility for surveillance of the government's performance in international law; and, to ensure that the internal legal order is kept consistent with current developments in the international legal order, ". . . a monitoring procedure might be established on the model of that in the Canadian Bill of Rights whereby the minister of justice is obligated to examine every proposed regulation . . . as well as every bill . . . in order to ascertain any inconsistency. . . ."[105]

These proposals, however, respecting monitoring, the provision of advisory services, and the implementation of measures to improve the legal input into the policy formulation process raise additional questions. In the words of Professor Chayes:[106]

> It makes a difference whether there is systematic provision within the principal responsible departments for consultation of lawyers in advance of decision and how far in advance; whether such consultation is treated as a routine bureaucratic function or as an occasion for policy influence; whether the lawyers themselves, particularly the chief legal officers, conceive their role as including active participation in political decision . . . It makes a difference what attitude and policy the government adopts towards international organizations as a matter of course in quieter times . . . and how far a government duty of public justification is acknowledged and enforced.

IV. SUMMARY REMARKS

The foregoing was an attempt to develop two points: (1) that although systemic analysis of the international legal system contains much to commend it, a healthy skepticism of model-building is also required lest we become enslaved by an intellectual cage; and, (2) that the role of law and the legal advisor is more than a concern with ". . . wrap-

[104] *Id.* at 950.

[105] *Id.* at 951-952.

[106] *Supra*, n. 71 at 105-106.

ping . . . policies in the mantle of legal rectitude."[107] If, as the editors say, crucial decisions are being made in the office of the Prime Minister, then the second and not the first point ought to be of prime concern to us, for the impact of law on foreign-policy decision-making will depend on factors not unlike those which condition both public and private lawyer-client relations.

To say that this volume is at once a tremendous stride in the development of the Canadian perspective would be an understatement. The editors have set a tremendous task for themselves and they have performed it well. Not only is it a much needed contribution to Canadian scholarship but it is useful as a supplementary teaching tool.

Although the editors may not have altogether succeeded in sketching a comprehensive Canadian world view (for they have given us a variety of perspectives), which may be a result of the sheer breadth of the thing, they have certainly brought together for the first time a comprehensive Canadian conspectus on current issues and developments in international law.[108] As well, they have set the stage for the ensuing debate on these questions and the true measure of the book's contribution will be the debate which it generates.

There is no better way to end than in the words of Judge John E. Read, with which the book begins: "One hesitates to suggest that a book is unique; but this one is certainly unusual. It is unusual in the vast scope of the subject matter of the papers . . . in the matter of authorship. . . . Thirty years ago, it would not have been possible to assemble in Canada a comparable group of contributors."[109]

A. CLAYTON RICE*

[107] Gerberding, "International Law and the Cuban Missile Crisis," in, Scheinmar and Wilkinson, *International Law and Political Crisis*, at 176. In the development of such separate themes a distinction must be made between theories *of* international law and theories *about* international law. *See*, McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry* (1960) 4 J. of Conflict Resolution 337. Richard A. Falk has noted that international law is both a comtemplative academic subject and an active ingredient of diplomatic process in world affairs and that the failure to maintain the clarity of this distinction accounts for considerable confusion about the nature and function of international law. *See*, Falk, *New Approaches to the Study of International Law* (1967) 61 Am. J. Int'l L. 477.

[108] *Supra*, n. 7 at xix.

[109] *Id.* at xvii-xviii.

* LL.B. (Dalhousie), LL.M. (New York), Assistant Professor, Faculty of Law, The University of Alberta. I would like to acknowledge here that Mr. W. Laird Hunter, B.A., LL.B. (Alberta), M.A. candidate, Carleton University, read over an earlier version of this comment. Although we do not agree on everything the content has benefited from discussions with him.