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Canadian Perspectives on International Law and Organization. Toward an Expanding Role in World Order

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Canadian Perspectives on International Law and Organization.[1] Toward an Expanding Role in World Order.

In their Introduction to this massive collocation of almost forty essays comprising nearly a thousand pages, the editors advance a series of claims and outline a number of themes which may serve as useful points of departure for considering the contribution of this volume to scholarship in the area of international law and organization. Perceiving the book as providing "for the first time a comprehensive Canadian conspectus on current issues and developments in international law", they state the goal of their endeavour to be "the sketching of a modern Canadian world view." Through emphasis placed by the contributors on issues of particular concern in Canada or which "reveal Canadian assumptions and preferences", the book is characterized as "a fairly complete reflection of contemporary Canadian approaches to international law." General questions are raised about whether the emerging Canadian global role reflects a shift from "internationalism" toward the unilateral pursuit of national goals perhaps incompatible with world community interests. Finally, the editors invite speculation about the preferred nature of Canada's global orientation.[2]

While it is not possible in a review to undertake definitive analysis of any of these points, much less to comment on even a small proportion of the chapters included in this volume, it is proposed to consider briefly certain aspects of these broad "perspectives" in the context of the essays contained in this volume. 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

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1. Canadian Perspectives on International Law and Organization. Edited by R. St. J. Macdonald, Gerald L. Morris and Douglas M. Johnston. Toronto: University of Toronto Press. 1974. Pp. xx, 972. Price: $35.00, Student Price: $27.50.

2. P. xx.

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?

Perspective as Problem: Canadian Concerns and Global Issues

The volume is organized into five broad parts comprising a total of thirty-eight chapters. The first part, entitled "Perspectives", opens with two stimulating essays by Maxwell Cohen and the late Wolfgang Friedmann, which provide general surveys of Canada's evolving posture *vis-à-vis* the international legal order. These are followed by two (one by a Quebec lawyer) on the implications of federalism for Canada's international activities. The concluding chapters explore areas generally neglected in international law scholarship: the relationship between international law and domestic law and between public and private international law. Because of their essential overview orientation, the chapters in this section, together with the last two essays in the book, bear most directly on the large issues raised in the questions indicated above.

The next part — "Practices" — is concerned with the development and implementation of international law through the activities of various state organs. There are chapters on recognition, immunities, claims, as well as an omnibus analysis of immigration, extradition and asylum. An essay by Allan Gotlieb describes the position of informal and interdepartmental arrangements in Canadian treaty-making processes. These developments toward greater flexibility in facilitating the international participation of non-state units are not only important in view of Canada's federal status; they are manifested increasingly in the functional international recognition, with varying degrees of formality, accorded a wide variety of non-state actors, including inchoate state units, corporations, groups and individuals.

The third section is relatively short, comprising chapters on air and telecommunications law, as well as on the emerging problem of weather modification. The fourth part demonstrates graphically the importance of Canada's geographical location between the Atlantic and Pacific, the Arctic and the Great Lakes. Out of nine chapters in this section on "Territorial Considerations", only one does not deal

primarily with water.[3] The remaining essays concern maritime claims, fisheries, the seabed, Arctic waters, international maritime law, international drainage basins, the Great Lakes, and the International Joint Commission.

The final (and most diffuse) part, entitled "Canadian Participation in International Organizations", ranges from international environmental law to intellectual property, from peacekeeping to international civil procedure. It contains a chapter on an area of intensive international organizational activity in which Canada's role has been effective and innovative — international environmental law; it also has a chapter on a problem characterized by the absence of international institutional framework — economic nationalism. Other chapters, in addition to the editors' final remarks and an essay on the role of the legal adviser, include John Humphrey's attestation to Canada's less than adequate role in the international human rights field, as well as analyses of war and military operations, arms control and disarmament, trade and customs, international competition policy, development, commercial arbitration, and North American defense.

In considering the range of issues that are of current concern to Canadians as reflected in this volume, it might be useful to classify major global problems into the two categories of continuing and emerging. Continuing problems are those which have confronted the international legal order for some time, although their form and intensity have not necessarily remained static. They include: the control of force in trans-boundary, civil war and terrorist contexts; human rights; the law of the sea; space law; and the reciprocities (immunities, recognition, etc.) involved in inter-state collaboration. The emerging problems arise from two contemporary, and to some extent paradoxical, trends. On the one hand, while increasing interdependence, underpinned by improvements in transportation and communications, has encouraged centralizing and globalizing identification patterns, and opened the way for various forms of trans-state institutional development on regional and universal levels, it has also engendered serious problems. The multinational corporation has become a powerful new participant in international affairs; the global economy is in need of management; processes of development required merely to maintain the current imbalance between rich and poor nations are accompanied by additional threats

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3. S. Joshua Langer, *International Leases, Licenses, and Servitudes*, ch. 23.

to the global ecosystem, exacerbating a world-wide crisis situation stemming from rampant industrialization; new technologies pose further problems as man extends his control over nature; there are crucial shortages in food, energy and land. It is not yet clear whether the seriousness of these trans-state problems will be matched by the intensity of trans-state identifications, on the part of elites and non-elites everywhere, needed to manage them. On the other hand, and partially in response to the same forces and the failure of states to handle the problems of interdependence, there is a trend toward fragmentation, as people coalesce around the ascriptive identities of ethnicity and locality and look increasingly to smaller institutional units to fulfill their needs. Thus there are general movements toward decentralization and regionalism within states, perhaps manifested most dramatically in the rising claims of ethnic groups to establish their own states or to achieve greater autonomy.[4]

In responding to all of these challenges, both continuing and emerging, the role of the international lawyer is to ". . . clarify common interests shared by all members of the many communities of the globe and to innovate institutional and instrumental procedures for realizing those interests."[5] In the context of these changing conditions, performance of this dynamic and creative role must inevitably include re-evaluation of the "statist paradigm" that has dominated international legal thought and action since the Westphalia inception of the modern international system.[6]

The essays in this volume provide cumulatively fairly complete coverage, from the Canadian viewpoint and in terms of the topics considered, of the continuing problems. Essays outlining integrated approaches to Canada-U.S. relations and the United Nations system, as well as a chapter on the use of force, would have made useful additions. However, notable omissions arise in connection

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4. For a somewhat similar description of emerging trends and global problems, see R. Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals* (1975), 84 Yale L.J. 969. It should be noted that there are illustrations of simultaneous thrusts toward more inclusive and less inclusive patterns of identification aimed at combining the advantages of both larger and smaller political units. For example, some of the sub-national movements for regional autonomy within Europe are also European integrationist in outlook. See W. Feld, *Subnational Regionalism and the European Community* (1975), 18 Orbis, 1176; *Contre les Etats, les Regions d'Europe* (A. Marc and G. Heraud eds. 1973).

5. M. Reisman (1971), *Proc. Am. Soc. of Int'l L.* 55.

6. R. Falk, *supra* note 4.

with treatment of the emerging problem areas, many of which are of vital importance to Canada as a resource-rich, technologically advanced country tied inextricably to a global economy and possessing both a surfeit of land and high susceptibility to ecological damage. Moreover, while the role of Quebec in federalism has been of long-standing significance, increased regionalism within the country and concern with minorities in Quebec and with other ethnic groups throughout the country (notably native peoples) have recently become manifest. Although most of these new problems are mentioned somewhere in the book, only a few receive adequate coverage.[7] There is a need to develop and to articulate in scholarly arenas Canadian perspectives on commodity and resource problems viewed broadly, the management of the global economy, the role of non-state participants in the international system, and the protection of minorities. Similarly, Canadian interests are at stake with respect to movements toward political, economic, and functional trans-state regionalism. For instance, the potential of a regional approach to resource and environmental problems could be profitably explored. All of these are issues of significance for both the general international legal order and Canadian national interests.[8] It is, of course, unrealistic to expect analysis of this plethora of new problems in one volume; moreover, some have been dealt with by Canadian international lawyers elsewhere, and many others were barely discernible as serious and immediate problems when the book was being prepared. Somewhat greater emphasis on the emerging perspectives would, however, have been welcome.[9]

Perspective as Approach: I — Theory and Scholarship

This book serves as a reminder of the prominent place occupied by Canadian lawyers in international legal scholarship in fields both of direct and indirect interest to Canada. No review of the global literature would be complete without reference to the contributions

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7. The essays on environmental problems, telecommunications and weather modification are notable in this regard.
8. Emerging Canadian relations with the Soviet Union, China and the countries of Francophonie need to be explored, as Maxwell Cohen observes in his chapter.
9. In fact, the editors are more sensitive than most international lawyers to the implications for international law of projected radical changes in the international system. See Macdonald, Morris and Johnston, *International Law and Society in the Year 2,000* (1973), 51 *C.B.R.* 316.

of Macdonald and Humphrey to human rights, Johnston to environmental and fisheries law, Gotlieb to disarmament, Bernier to federalism, and Pharand to Arctic studies, to take only a few examples. If the publication eight years ago of *This "Fire-Proof House"* marked, as Judge Read wrote in his Foreword to that collection of essays, "the coming of age of international legal studies in Canada",[10] since that time the discipline has been moving toward maturity. Before considering whether the chapters in this book reflect an emerging national posture or world view, one might consider whether they demonstrate a scholarly world view.

It is readily observable that the authors have not proceeded to analyze their topics on the basis of a consensus about what constitutes a "Canadian perspective". Partially as a result of a limited conception of this organizational theme in the essays of some contributors, there is considerable variation in the standard of scholarship. Government policy positions and practices are, of course, considered in every essay. Some authors, however, have done little more than describe national claims and attitudes. In some cases national positions are evaluated in the light of the broader flow of transnational decisions in the area. Other authors have sought to consider the Canadian posture in the context of prevailing international norms and/or articulated policy preferences of global import. Not everyone has paid sufficient attention to the events which give rise to legal claims, and 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.

Granted the desirability of providing complete and convenient collections of national attitudes on a wide variety of important legal issues, there exist alternate sources from which this information can be derived.[11] This form of enlightenment is vital to the informed undertaking of the scholarly role, but constitutes *per se* only a shadow of that task. Adequate and effective discharge of the scholarly responsibility involves the application of the following intellectual operations: careful specification of the entire range of issues comprising the problem, including the relevant features of the

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10. *This "Fire-Proof House" — Canadians Speak Out About Law and Order in the International Community* vii (L. Head ed. 1967).

11. The Canadian Practice section of the *Canadian Yearbook of International Law* and the steady stream of material distributed by the Department of External Affairs are useful sources of information on government policy.

context which give rise to those problems and which their solution will affect;[12] recommendation of goals or policy outcomes;[13] systematic examination of the current state of the law relating to the problem area, including description of variables (ranging from idiosyncrasies of particular decision-makers to broad features at the heart of the nature of the international system) 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.[14] It should be noted that many of the subjects dealt with in this volume are so broad that the prospects of transcending cursory and incomplete treatment in one relatively short essay were indeed dim; some compromise on analytical scope and depth in the interest of comprehensive coverage can be appreciated.

An observation made by Maxwell Cohen in his overview essay and echoed by the editors in their concluding remarks is the absence of a theoretical focus in Canadian international legal scholarship and the reluctance of academic lawyers to embrace interdisciplinary approaches. 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 would make a contribution not only for international law but for the theory of law in general."[15] The editors attribute this result in part to Canadian distaste for "interdisciplinary collaboration and systemic perspective",[16] and predict that academics will probably remain aloof from "theoretical questions of general interest."[17]

It is true that Canadian scholars have shown little interest in constructing heuristic devices or theories about international law

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12. For example, the contextual focus constitutes a strong point of the Johnston article *(International Environmental Law: Recent Developments and Canadian Contributions,* ch. 24).

13. In part as a result of their careful goal specification, Feltham and Rauenbusch *(Economic Nationalism,* ch. 36) make a persuasive case against extreme economic nationalism.

14. See generally M. McDougal, H. Lasswell and M. Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence* (1968), 8 Va. J. Int'l L. 188.

15. P. 26.

16. P. 950.

17. P. 949.

comparable to the work of such scholars as Falk, McDougal and Lasswell, and Hoffmann. Moreover, the level of collaboration with scholars from other disciplines is not generally very high. However, it is important to stress that an overly formalistic or ambitious conception of theory can obscure the perception of valuable contributions, and that there are a variety of ways to bring to bear on legal problems the insights derived from other disciplines. Partly as a result of their training and continuing exposure to contemporary trends in European and American legal education, and partly stemming from the types of problems they have chosen to deal with and the intellectual and political environment in which they operate, Canadian international legal scholars (and legal scholars generally) are much more functionalist and sensitive to policy considerations than is readily apparent through quick observation.[18] By focusing on the global context in which international law functions, they have demonstrated in a wide variety of areas the relevance, especially in a decentralized system, of political context for the formulation and implementation of norms (and, incidentally, the interpenetration of law and political science), thereby undermining unrealistic faith in international institutional processes, especially those of an adjudicatory nature.[19] 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. In such areas as law of the sea, communications and federalism, Canadian scholars have managed, either through joint activity with scholars from other disciplines or by integrating into their analyses the insights provided by other disciplines, to identify specific and general contextual factors that serve to advance understanding about the range of problems involved and the potential viable policy responses. Although there is a lack of interest in general theory among Canadian scholars, and

18. This conclusion is obviously impressionistic. There is a need for a study of Canadian scholarship that would identify the jurisprudential and environmental factors that have influenced, over time, Canadian orientations to international law, ascertain their current relevance, and especially explore the potential for theory of Canada's dual legal heritage in its separate components and through cross-fertilization. A modest beginning is found in D. McRae, *Innovation in International Law: Canada* (unpublished paper, 1972).

19. See generally R. Falk, *New Approaches to the Study of International Law* (1967), 61 Am. J. Int'l L. 477.

much improvement in the conceptual area is possible, it can be stated with confidence that neither Kelsen nor Austin holds much sway over contemporary Canadian legal scholarship. The basic orientation of most academics is somewhere between the extremes of unwarranted optimism and a pessimism belied by empirical observation of an effectively operating international legal order. The mere fact that the literature is largely bereft of explicit theory-building does not indicate the lack of a viable theoretical basis that would facilitate operation of the intellectual inquiries indispensable for rational analysis. On this performance scale Canadians score relatively highly, although (as alluded to earlier) uncertainty about the meaning of "perspective" has detracted from the integrity of the framework of inquiry employed in some essays in this volume.

It is in the interrelated areas of the law of the sea and international environmental law that both the strengths and the weaknesses of Canadian scholarship are demonstrated. Due in large measure to Canada's international institutional involvement and direct interest in these problems, scholars have formulated policies, described the difficulties inherent in multilateral activity, and generally developed a great deal of sophistication in their approaches to these fields. As a result of the development of expertise, a certain amount of scholarly concentration in these areas, and the obvious strong national interest component, there may well be emerging, in the words of Maxwell Cohen, ". . . some comprehensive view of international law from a Canadian standpoint where the 'accidents' of national interest are converted into insights having some universal validity."[20] For instance, the 1970 government initiatives raised questions about the relationship between global and national interests and the role of unilateral state initiatives in the law-making and law-applying processes of a legal order whose institutional framework is relatively primitive in comparison with national systems.[21]

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20. P. 26.

21. The reciprocal essence of customary law creation must be kept constantly in mind, as McDougal has stressed:

> "From the perspective of realistic description, the law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in

Moreover, in this realm particularly, there exists great potential for developing methodologies specialized to discrete but complex topic areas, thereby permitting the manageable accumulation and accommodation of all relevant data as well as the postulation and testing of hypotheses.[22] If future studies culminate in the development of distinctive foci of inquiry for specific areas, even if not accompanied by "insights having some universal validity", significant Canadian contributions to general theory will be made.

On the other hand, the accomplishments have not taken place without corresponding drawbacks. The editors elucidate this point by depicting a "'technological-ideological' continuum" of approaches to international law.[23] The technological side involves the use of international law as a pragmatic "preferred problem-solving technique" for the use of governments, international organizations, and other participants. The "ideological" approach, primarily "systemic in concept", would ". . . lean more heavily on value commitment in the abstract, favouring the personal involvement of international lawyers in international causes related to social welfare problems which are aggravated by the widening economic and technological disparities in the world community." Their expectation is that because of "historical, cultural, political, social, and

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which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them".

He adds in a footnote: "It is not of course the unilateral claims but rather the reciprocal tolerances of the external decision-makers which create the expectation of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law". McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea* (1955), 49 Am J. Int'l L. 356, at 356-57 and 358, note 7.

The complexity and uniqueness of the international legal order can be obscured by generalizations about its primitiveness. One of the many contributions by McDougal and his associates is description of effective processes of law-making and law applying at the international level. See M. McDougal, H. Lasswell and M. Reisman, *The World Constitutive Process of Authoritative Decision*, ch. 3 in 1 *The Future of the International Legal Order* (R. Falk and C. Black eds. 1969). While many dangers reside in finding easy similarities and contrasts between the two systems, the area of constitutional law in a federal state represents perhaps the closest domestic analogy to international law, for it too is concerned with the regulation of large units. On this point see, for example, J. Fried, *How Efficient is International Law?* in *The Relevance of International Law* 93-132, esp. 102 (K. Deutsch and S. Hoffmann eds. 1968).

22. R. Falk, *supra* note 19, at 487-88.

23. Pp. 948-49.

geographical" reasons, academics ". . . will continue to write mostly in response to events of direct Canadian significance rather than on the basis of long-range expectations . . . ." and instead of developing sophistication in theory.[24] They note the nexus between the technological approach in the academic and governmental fields, and predict that ". . . government officials will continue to live for tomorrow's crisis, concentrating on the practical rather than the theoretical side of the exercise."[25] After pointing out that the technological frame of reference is encouraged by government policy favouring government-academic interaction, the editors comment, with tantalizing obliqueness, that this policy ". . . is regarded as ethically acceptable by many Canadian political scientists, lawyers, and economists."[26]

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. In the first place, the resources of a small academic community are finite and are susceptible to disproportionate deflection from other areas. This has probably occurred to some extent with respect particularly to emerging global problems. This imbalance is, of course, 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. It is ironic that one field pointed to by the editors as typifying those "long-range expectations" about which they express doubts concerning the interest of Canadians is human rights. Canadians have long achieved global prominence in this area in both operational and scholarly roles, and a number of international lawyers currently have a strong commitment to working on human rights problems. Moreover, Canada's federal status has produced a continuing debate on issues of centralization and decentralization, uniformity and diversity.[27] And there are

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24. P. 949.
25. *Id.*
26. P. 950.
27. André Dufour's essay in this volume (*Fédéralisme canadien et droit international,* ch. 4) raises considerations that are germane to the analysis of contemporary global problems in this field.

indications that the challenges of emerging global problems will be met. For instance, the editors of this volume are currently preparing a collection of essays on international welfare law, and the Canadian Council on International Law has chosen the international law of development as the theme for its 1975 conference. While it is correct that a wide variety of environmental factors will exert continuing pressure to channel scholarship into certain areas which are undeniably of prime importance, it is debatable whether they are so pervasive (or even whether the impact of some of them can be measured with any degree of accuracy) that research in other areas will be adversely affected in consequence. Furthermore, current Canadian academic international lawyers are a heterogeneous group, bringing divergent individual background attitudes and experiences to scholarship; their community is also a dynamic one, continually revitalizing itself with the addition of new members and the departure of others. This latter characteristic is not free from disadvantages, but commonality (and hence perhaps rigidity) of outlook is not one of them. Thus if the editors' conclusions on this issue are overly pessimistic, they are certainly provocative and may well turn out to be catalytic.

The second, and more unfortunate, consequence pertains to the perception by some academic lawyers of their basic role and perhaps concerns the "ethical" question raised by the editors in their allusion to academic-government collaboration. Focusing on the recent reservation by the Canadian government to its acceptance of the compulsory jurisdiction of the International Court of Justice with respect to the 1970 fisheries and pollution claims, one commentator on this volume has characterized the reaction of most Canadian international lawyers as "reticent" and has identified as a general deficiency in the work of Canadian academics their failure to regularly subject "their government's policies to detailed analysis and criticism".[28] Such "reticence", most noticable in this one particular instance (which receives little critical analysis in the pages of this volume) does great disservice to both global and national interests. 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. As Richard Falk has noted, it is not uncommon for scholars to adopt adversarial postures (either pro or con) with

28. D. McRae, *Book Review* (1974), 24 U.T.L.J. 457, 461-62.

respect to foreign policy issues instead of assessing competing adversary positions in the context of the common interest.[29] Moreover, partiality hinders the performance of a valuable scholarly "adjudicatory" function in a legal system characterized by the absence of authoritative adjudicating institutions and their substitution by auto-interpretation of the parties to a dispute.[30] The risk of subordinating common interests to "national egoism" is particularly acute in the current national climate, with its identity and independence consciouness and parallel activism in the pursuit of specific national interests. Myres McDougal has identified clearly the nature of the scholarly role and its transendence of the decision-making function: "The scholarly inquirer assumes an observational standpoint relatively apart from the processes of authoritative decision being observed, attempting to free himself in the highest degree possible from the limiting perspectives of national participants, and seeks effectively to perform certain interrelated intellectual tasks about such processes."[31] It is only through the continuing informed evaluation of government proposals and decisions that enlightened foreign policy can be made. Furthermore, even on the purely national interest level the scholarly role is essential; as Alan Beesley emphasizes in his essay, the conduct of foreign policy in a manner compatible with international law ". . . as the basis for the developing world order, or even the lesser goal of stable relations between states . . . ." is a "valuable form of protection of national interests."[32] Sensitivity to long-term "milieu goals" is especially important for Canadian policy, since the emerging problems stemming from the new conditions of the international system will undoubtedly affect Canadian national interests in a direct way. Hence Canadian policy-makers must act to influence developments if only to avoid undesirable consequences from the Canadian viewpoint; constructive scholarly criticism is an indispensable element in this process.[32a]

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29. *Supra* note 19, at 477.
30. *Id.*, at 478.
31. *Some Basic Theoretical Concepts About International Law: A Policy — Oriented Framework of Inquiry* (1960), 4 J. Confl. Resol. 337.
32. Pp. 924-25.
32a. The legal issues surrounding the 1970 initative are again achieving prominence in a new context, as pressures increase for unilateral Canadian action to extend fisheries jurisdiction to two hundred miles.

Perspective as Approach: II —Law and Foreign Policy

In their analysis of "New Canadian Approaches to International Law", Allan Gotlieb and Charles Dalfen point out that there has been a shift in foreign policy from an "internationalist" posture to a stronger focus on Canadian interests, their pursuit by unilateral means if necessary, and an unwillingness to trust them to international institutions of adjudication.[33] Roughly corresponding to the political transition from Pearson to Trudeau, this change is embodied primarily in the 1970 actions and the foreign policy white paper of the same year.[34] The editors perceive a similiar but more striking metamorphosis, asserting that Prime Minister Trudeau is more interested in economics than law, though willing to rely on law as an agent of rationalization. In addition to expressing reservations about his "essential commitment to legal solutions as a primary frame of reference", they note Trudeau's reliance on his own advisory staff instead of the Department of External Affairs and claim that government lawyers ". . . are called on to employ their talents in a somewhat 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."[35] Although there may be disagreement about the extent of the departure from the Pearson period, the mere perception of change has raised questions about the role of law in national decision-making and Canada's potential future role in the international legal system.

In addition to their status as a component of national interest, legal considerations perform a number of critical functions in the formulation and conduct of foreign policy. The following list of some of these functions is taken from a study of the role of law in the war-peace area, usually chosen by "anti-legalists" to show both the irrelevance of law and the lack of utility of a legal perspective: 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

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33. A. Gotlieb and C. Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law* (1973), 67 Am. J. Int'l L. 229, 258. The authors also stress simultaneously Canada's continuing pursuit of international solutions to problems central to the national interest.
34. *Foreign Policy for Canadians* (1970).
35. P. 944.

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;[36] 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.[37] In order to integrate into the foreign policy process an international legal perspective responsive to this potential, it is necessary to have adequate human resources and a supportive decision-making structure.

One of the significant features of this volume is its demonstration of the generally high quality of government international lawyers and the consequent influence of Canada in a wide variety of transnational arenas. In his foreword, Judge Read observes that this book is "unusual in the matter of authorship", representing a "co-operative venture" between academics and government lawyers drawn mainly from the Department of External Affairs.[38] Not only are there essays contributed by government lawyers, but many of the chapters by academics and practitioners pay tribute to what Alan Beesley terms the "operational" function of government lawyers. This is the role which normally comprises the "co-ordination, preparation, persuasion, and legal diplomacy" required to implement national policy.[39] The expertise developed by Canadian government lawyers at the operational level is likely to be a major factor influencing Canada's future contributions to international legal order.

The legal input into foreign-policy decision-making centres on the other important function of government lawyers — the

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36. A state making a unilateral claim not only establishes a precedent which may be invoked by other states to support similar or dissimilar claims, but also may suffer diminution in its "adjudicative" capability. This stems from Scelle's "dédoublement fonctionnel" insight: "Ce sont les gouvernements nationaux ou étatiques qui, chacun pour son compte en même temps que *pour le compte de la collectivité internationale,* accomplissent, dans la limite de leurs possibilités d'action locale et matérielle, les trois fonctions indispensables: création du Droit; vérification juridictionnelle; exécution." (emphasis in original) G. Scelle, *Droit International Public* 22 (1944). See also McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea, supra* note 21, at 357-58.

37. J. Moore, *Law and the Indo-China War* 33-39 (1972).

38. P. xvii.

39. P. 925.

advisory.[40] Although the importance accorded considerations of law as a component of any significant foreign policy decision rests to a considerable extent on the inclination of those ultimately responsible for making the decision, it is crucial to ensure that the legal perpsective is not minimized by default, perhaps through structural weakness. The editors make a number of major recommendations to rectify institutional deficiencies: the establishment within the Department of External Affairs of a unit responsible for conducting research in areas involving Canada's long-term interests and staffed by government law officials as well as visiting academics; convening an annual meeting of government lawyers and academics, perhaps under the auspices of the Canadian Council on International Law, to evaluate the work of the research unit; an annual appearance of the Legal Adviser ". . . 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"; surveillance by this Committee of "the government's performance in international law"; requiring the Minister of Justice to monitor proposed domestic laws ". . . to ensure that the internal legal order is kept consistent with current developments in the international legal order"; the establishment of a national committee to advise the Department of External Affairs and to be composed of international lawyers as well as other experts.[41]

The proposal relating to the monitoring task appears sound, those relating to provision of advisory services are viable in principle, but the suggestion of direct measures to improve the legal component of the policy process might deviate too much from effectiveness for the sake of feasibility. In view of the limited number of academics in Canada with a strong interest in international law, one wonders whether their membership on yet more advisory committees would not unduly deflect energy (if not inclination) from the pursuit of scholarly assessment of official policy. Moreover, the Canadian Council on International Law will have to consider carefully the nature of its corporate participation in the work of the research unit. Would and should the Council be placed potentially in the position of criticizing specific government policy postures? If, as the editors suggest, important decisions are being made in the Prime Minister's

40. Pp. 923-25.
41. Pp. 951-53.

office, consideration should be given to institutionalizing a position of adviser to the Prime Minister on international legal affairs. Finally, one must remain skeptical about the prospects of a yearly appearance of the legal adviser before a Cabinet Committee for improving significantly the international law input.[42] A partial solution might be to upgrade the status of Legal Adviser. However, it is worth mentioning that the structural capability of the Canadian foreign policy process to take effective account of international law is high in comparison with many countries.[43]

Perspective as Promise: Canada's World Role and Legal Education

A wide variety of factors combine to signify an attainable distinctive role for Canada in clarifying and implementing the common interest of the world community. First, there are those particular social, political, geographic and economic facts which in the aggregate contribute to forging a direct link between the national interest and such continuing or emerging problems as the law of the sea, environmental law, resources, control of the global economy, and the claims of non-state actors for greater participation in national and transnational value processes. Second, there are those aspects of the national world view which inspire Canadian concern with war-peace issues, human rights and other international questions. In tandem these considerations conjoin with the availability of expertise, Canada's global role in the near past and the largely still-extant prestige deriving from it, and the country's status as a middle power unencumbered with the world role vagaries of a superpower or the preoccupations of a developing nation, to lay the foundation for this creative potential. Thus Wolfgang Friedmann foresaw Canadian leadership ". . . in the development of the functional international co-operation on which the survival of mankind may well depend" and observed that ". . . few other powers are better equipped than Canada to take a lead in this evolution."[44]

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42. Moreover, performance by the Committee of an effective surveillance role would involve the provision of support services by a professional staff and would risk contributing to that "fragmentation of foreign policy" about which the editors "admit to a concern" (p. 951).
43. See generally *Legal Advisers and Foreign Affairs* (H. Merillat ed. 1964). This volume contains a paper by Marcel Cadieux.
44. P. 53.

There is much that can be done in order to achieve realization. Structural changes in the decision-making process or greater scholarly concern with theory will not ensure that the thrust of policy choices will be in the direction of the common interest or even that Canada exploits its potential in areas less central to the direct national interest. The task of raising the national consciouness to appreciate the value of a just and stable international legal order is largely one of education. Ideally it should involve initiatives at a number of levels, from primary and secondary schools through university undergraduate and graduate programs to the law faculties.

Efforts should be made in primary and especially secondary schools to stress global interdependence, common humanity, and the concept of world citizenship overlapping with membership in a national community. As the basies of the law in areas such as consumer protection begin to be integrated into high school curricula which are also achieving greater sophistication in the social sciences, there exists fertile ground for establishing and improving programs in the area of international law and organization.

In universities without law schools efforts can be made to encourage political scientists to work with international law.[45] Academic international lawyers can provide a practical incentive by designing course outlines appropriate for use at the undergraduate level either as a basis for a separate course or as a component of a course on international politics or foreign policy. On a fundamental level, there is room for much improvement in communication between lawyers and political scientists, not only with respect to interdisciplinary work but even in providing basic information about what each is concerned with. Just as the political scientist often fails to appreciate that the contemporary lawyer cannot operate without taking political context into account, the lawyer often refuses to acknowledge the political scientist's focus on authority.[46]

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45. In universities with faculties of law, undergraduate and graduate students in other disciplines should be permitted relatively free entry into at least the introductory international law course where no international law course is offered in another faculty. An international lawyer could also teach a course in a political science department in the absence of a qualified instructor within the department.

46. Membership of political scientists in the Canadian Council on International law and the establishment of institutes for international studies in Canadian universities may help to foster closer relationships between the two disciplines.

The editors express concern about a number of aspects of teaching and research in international law in Canadian law schools, including a levelling-off of full-time teachers in the area and especially "the decline in the number of able students in the field".[47] One recommended solution is the creation of "a number of chairs in international law at universities across Canada".[48] In view of the practice in most Canadian law schools of not establishing chairs either generally or in specific subjects, this solution can be justified only as a last resort to obtain financial resources that are not otherwise available. Any action that would place international law on an elitist pedestal should be avoided.

Indeed, it can be argued persuasively that the basic thrust of reform should be in the direction of closer integration of international law with other areas of law, and for both practical and pedagogical reasons. On the practical level, the editors are correct in their observation that most practicing lawyers know little international law. This state of affairs constitutes a professional handicap, for an international law perspective can often open up facets of a legal dispute that might otherwise go unnoticed, or provide useful supportive arguments. Thus the argument that the human rights standards in the Universal Declaration of Human Rights constitute customary international law and hence part of Canadian law might be resorted to in a domestic human rights or conflicts case.[49] Increasing transnational interdependence has resulted in proliferation of international participants and the deepening penetration of international norms into national systems. This, coupled with a more pervasive role of government in all sectors of life, has blurred dividing lines between public and private, domestic and international.[50] Area studies encompassing a combination of these levels are beginning to emerge, as in the case of the coastal zone orientation and its shipping, environmental, fisheries, energy and scientific research elements. Encouragement should be given to the establishment of courses on such functional

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47. P. 954.
48. *Id.*
49. Dean Macdonald demonstrates persuasively in his detailed analysis of *The Relationship between International and Domestic Law in Canada* (ch. 5) that customary international law is part of Canadian law even though there may not exist total clarity in the cases about the doctrinal basis of incorporation.
50. A fascinating illustration is found in the Aramco arbitration. *Saudi Arabia v. Arabian American Oil Company (Aramco)* 1958 (1963) 27 I.L.R. 117.

lines.[51] Finally, for international legal studies to remain within the mainstream of legal education, promising avenues of general reform should be explored; for instance, consideration might be given in appropriate circumstances to the development of clinical programs in the area, and perhaps eventually to internship programs in co-operation with government and international institutions.

If the scope of this review has transcended the usual ambit, the exercise has been undertaken because of the particular importance of the volume as a contribution to Canadian international law literature. The book far exceeds in both ambition and accomplishment any previous endeavour. Whatever defects may be perceived in either general coverage or the treatment of specific topics must be considered from the viewpoint of the magnitude of the task which the editors set for themselves. To a considerable extent they have succeeded in achieving their goals, and in raising broad questions about Canadian scholarship and the role of law in foreign policy they have outlined the parameters of a necessary intellectual debate on these issues. It is now the responsibility of others to expend the energy required to advance the discourse. The book also provides a useful set of supplementary teaching materials, and for this reason will undoubtedly become an important component of international law courses throughout the country. *Canadian Perspectives* is required reading for every international lawyer in Canada and belongs in the personal library of each; publication in a form that would make it more readily available to law students is eagerly awaited.

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51. The trade and human rights areas might also prove fruitful for experimentation.