EDWARD McWHINNEY

THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW

The Paul Martin Lectures in International Relations and Law

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Foreword by President R.W. Ianni, University of Windsor: The Paul Martin Professorship

In 1985, the University of Windsor established the Paul Martin Professorship in International Relations and Law in the Department of Political Science, Faculty of Social Sciences, and in the Faculty of Law. Its purpose was to attract outstanding national and international scholars to enrich academic programs within law and political science. Through it the University wishes to develop advanced seminars on specialized topics, collegial interchanges and a variety of interdisciplinary seminars and lectures for both the University and general communities.

In short, the University sought to establish a Chair to be filled by senior scholars who by their presence would enhance the reputation of the University and provide leadership to research and teaching of international relations and law in the University.

The inspiration for this Chair was the career and myriad contributions of Paul Martin, Sr. A member of Parliament between 1935 and 1974, Mr. Martin served as Minister of State including Minister of State for External Affairs. Thereafter he served as Canada's High Commisioner to the United Kingdom.

The University believes Canada's continuing influence on world affairs depends upon the knowledge and skills of those responsible for formulating and implementing its policies. To provide a means to expand the knowledge of those who are in the process of becoming Canada's future leaders and to inform the community is seen as a fitting tribute to a person who has personified such leadership as a concrete example of how constructive change can be made in an ever increasingly complex international environment.

The first holder of the Paul Martin Chair in International

Affairs in Law was Sir Shridath Ramphal, Secretary General of the Commonwealth. Its second holder Professor Edward McWhinney, Q.C. the author of this series of lectures and essays both epitomizes a commitment to scholarship, the energetic pursuit of new ideas and the concern for international well-being.

In these essays, Professor McWhinney squarely faces critical, demanding and challenging issues of international relations of current and ongoing moment. The University of Windsor is proud to have supported this contribution to widening understanding of international affairs in law.

R.W. Ianni.

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Author's introduction: Paul Martin, and the international lawyer as Foreign Minister

It is a special privilege, and an honour, to be named as the second incumbent of the Paul Martin Chair of International Relations and Law, in succession to Secretary-General of the Commonwealth, Sir Sonny Ramphal.

Paul Martin's career as a Parliamentarian, a Cabinet Minister, and a diplomat, spanned four and a half decades of Canadian public life from his first election to the House of Commons in Ottawa in 1935. His career as a federal Minister, with direct involvement in the development and application of foreign policy, fell into the two distinct segments: the period from the end of the 1940s until the defeat of the federal Liberal Government in 1957, when he shared the responsibility with his close friend, Lester Pearson, with Pearson as Foreign Minister and Martin as Health Minister and Chairman of the Canadian Delegation to the United Nations (what, in Europe, might be called Minister of State for Foreign Affairs); and the period from 1963 to 1968 when Martin was Minister of Foreign Affairs in his own right in the two successive, Pearson-led, minority Liberal Governments. With the succession to the Trudeau Liberal Governments, Paul Martin continued in the Cabinet, as a Senator, this time, and Government Leader in the Senate; and his public career was capped, in 1974, with his appointment as Canadian High Commissioner to Great Britain, a post that he held until after the election of the Clark Conservative Government in 1979.

Any recital of the high points of Paul Martin's career would be substantially incomplete, however, without reference to his earlier accomplishments as a student of International Law and Relations – in Toronto in the first instance, and then in post-graduate

work at Cambridge, Geneva, and Harvard. This rich experience gave Martin, in his later public career, a commitment to International Law as a foreign policy value in its own right, and not simply as a means for rationalising or defending policy choices already made on other (non-legal) grounds. For he recognised, in his philosophy and his practice of foreign policy, that, in a liberal democratic society, International Law should be an important element, from the beginning, in the total decision-making process, contributing to the refinement and to the quantification of the social cost of the various policy alternatives, and influential in the actual policy choice among them. This led him to a thoroughly principled approach in which long-range considerations – support for supranational international organisation and, after 1945, for the newly-founded United Nations – could transcend considerations of purely temporary national advantage in the instant case. He had no doubt, in this regard, that the United Nations must continue to grow and to be creatively adapted to rapidly changing societal conditions in the new, vastly more representative, plural World Community emerging under the impact of Decolonisation and Independence and National Self-Determination on a worldwide scale. This made him a key sponsor of the famous 'package deal' of 1955 which, over the intransigent opposition of some leading Western powers, broke the log-jam on admission of new members to the United Nations that had lasted over the preceding decade, and secured the entry of sixteen states representative of all main ideological systems, thereby changing irreversibly the hitherto existing balance of political forces within the U.N. General Assembly.

Paul Martin was also, throughout his public life, a champion of the principle of neutral, third-party settlement or arbitrament of international disputes, most admirably expressed, in his view, in international adjudication and acceptance, at the national level, of the compulsory jurisdiction of the World Court – the 'old', Permanent Court of the between-the-two-World-Wars era, and, after 1945, the 'new', International Court of Justice. A major intellectual debt was no doubt owed, here, to the constitutional teachings of the venerable Professor A.V. Dicey, whose lapidarian propositions on the Rule of Law were obligatory reading for law students of Martin's generation; and the institutionalisation

of that concept, at the international level, in an international tribunal was surely reinforced, for Martin, by his exposure to dominant American constitutional ideas on the policy-making, legislative *rôle* inherent in a body like the United States Supreme Court. From the outset of his public career, in any case, Martin was a vigorous champion of the World Court, and this became a *leitmotif* of Canadian foreign policy throughout the Pearson and Martin tenures of the Foreign Ministry. It was therefore a matter of great personal regret to Martin when the Trudeau Liberal Government decided, in 1970, to withdraw and limit the hitherto essentially unqualified Canadian acceptance of the World Court's jurisdiction, so as to exclude, henceforward, any questions concerning the Government's own recently enacted Arctic Waters pollution control legislation. The Trudeau Government's action was apparently taken on the basis of at least questionable fact-finding and advice to the Cabinet as to the policy preferences of the then World Court judges on the emerging new International Law of Environmental Protection. The problem, as Martin saw it, created by the Canadian Government's decision to cut back on the World Court's jurisdiction for reasons of conceived narrow national self-interest in the particular case, was that it could serve as a precedent or example, in the future, to other states far less committed than Canada had always publicly professed to be, to the Rule of Law in international relations and to the legal settlement of international disputes. (In the autumn of 1985, Foreign Minister Joe Clark in the new Conservative Government, quietly negated that particular negation by formally withdrawing the Trudeau Government's 1970 Reservation to the World Court's jurisdiction and restoring Canada's original, essentially unqualified acceptance.)

We shall have occasion to return to both these examples, in some greater detail, in the course of the present study. Suffice it to say, for the present, that they represent case studies, at the international level, of the continuing antinomy between the 'old' and the 'new' in law: the conflict between the traditional, essentially static conception of law as reducing to the logical exegesis of past authoritative community decisions, judicial and other, without regard to the particular societal conditions under which those decisions originally evolved, and newer, more dynamic theories

that see law as existing in symbiotic relation with society, and necessarily having to be adapted and changed with it. This commitment to Law and Social Change as part of a larger, and comprehensive, international law-making process, is central to Paul Martin's approach to foreign policy, and to the necessary rôle of International Law in its formulation and practical application; and it will be an underlying theme throughout the succeeding discussion.

I acknowledge, with gratitude, the warm welcome and gracious hospitality extended to me, during my tenure of the Paul Martin Chair, by the Administration and Faculty, and students and graduates and friends, of the University of Windsor. Among these, I would like to cite, in particular, President Ron Ianni, an International Lawyer of quality, in his own right; Dean Neil Gold of the Faculty of Law; Associate Dean Brian M. Mazer and Law Librarian Paul T. Murphy, of the same Faculty; Professors Richard Price and Bruce Burton of the Department of Political Science; President Emeritus Francis Leddy; Chancellor Richard Rohmer; and last, and not least, Paul Martin, Sr., who is now busily engaged in a further, intellectually productive career, as author and publicist, in the ninth decade of an already distinguished life.

The detailed researches, on which the present study is based, were facilitated by a grant from the Social Sciences and Humanities Research Council of Canada, whose support is appreciated. Opinions expressed in the study remain those of the author and not of any of the persons or institutions already cited.

E. McW.

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I. The Challenge to 'Classical' International Law

The political events attending the two year long process launched in the World Court by the state of Nicaragua against the United States, and seeking an end to the U.S. Government-sponsored military and paramilitary activities directed against the legal government of Nicaragua in aid of the so-called 'contra' rebel forces[1], are symptoms of a larger general *malaise* in International Law. The U.S. Government's actions in regard to the Nicaragua process are, however, startling enough in themselves. For the U.S. Government, over the years, had been the prime sponsor of the idea of independent, third party, Court-based adjudication of international disputes; and after World War II, major U.S. professional-legal, private associations had campaigned publicly in support of a 'World Rule of Law', in which the principal element was postulated as the acceptance by all states of the Compulsory Jurisdiction of the International Court of Justice under Article 36 (2) of the Court Statute – the so-called 'Optional Clause'. It was therefore a series of surprises when the U.S. Government, in April, 1984, announced that it was temporarily modifying its acceptance of the Court's Compulsory Jurisdiction in order to exclude any cases involving Central America, and this for a period of two years; when the U.S. Government, further, in January, 1985, withdrew from any future participation in the then ongoing *Nicaragua* v. *United States* process, with the result that the U.S. was neither represented nor offered any oral or written argument at the crucial, *Merits* stage of that proceeding; and when the U.S. Government, finally, in October, 1985, formally terminated its acceptance of the Compulsory Jurisdiction of the Court, originally made in August, 1946. When the Court's judgment on the

Merits of the Nicaraguan complaint against the United States was finally handed down, in June, 1986[2], it was immediately apparent, in the actual Court holding and also in the sweeping, 12-to-3, judicial majority by which it was rendered, that the case would be a watershed decision in the evolution of the Court's jurisprudence. It was, indeed, the first major verdict rendered by the World Court – both the present International Court of Justice, and also its predecessor Permanent Court of International Justice of the between-the-two-World-Wars era, – against a major state – in fact, against a superpower. The World Court, in that sense, marched in the footsteps of the early 17th century Chief Justice of the English Court of Common Pleas, the celebrated Sir Edward Coke, who, in the *Case of Prohibitions*[3], quoted Bracton to affirm that even a King is under God and the Law; and perhaps that early judicial admonition to overweening executive (Prerogative) power was felt to be in special need of repeating today. The World Court decision on the *Merits,* however, brought angry political reactions in the United States, within the U.S. Administration, and also in some responsible private, professional-legal associations and groups. One former ranking State Department official in an earlier U.S. Administration was heard to say that the World Court decision on the *Merits* was worse than the *Dred Scott* decision.[4] The reference was to the U.S. Supreme Court decision, rendered at the end of the 1850s and upholding the extension of the institution of slavery into the then free territories, that decision being castigated by constitutional historians as having hastened the onset of the American Civil War and being characterised, much later, by the great 20th century Chief Justice, Charles Evans Hughes, as one of the U.S. Supreme Court's 'great-self-inflicted wounds'.[5]

The evident disillusionment of President Reagan and the U.S. Administration with the World Court is, however, only one element in the current *malaise* of International Law. Other voices, outside the United States, have also been raised against the World Court, and against International Law in general, at least as it has been defined and applied in the main international arenas in the post-World War II years. We will return, in some detail, to the particular, *Nicaragua* v. *United States* controversy and the special legal attitudes of the Reagan Administration, at a later stage. It is

necessary, first, to canvass the larger and more long-range objections that have been advanced against the historical corpus of International Law inherited at War's end in 1945 – 'classical' International Law, as it is now called – and refined and extended, thereafter, variously by judicial interpretation, state practice, treaties, and other modes of law-making.

(a) THE OBJECTION OF EUROCENTRISM

The term Eurocentrism evolved, first, in the literature of the social sciences other than law, when it was used to characterise the tendency of scholars, (both Western, and also non-Western but Western-trained) to examine the empirical data of governmental institutions and processes in non-Western societies through wholly Western eyes, and to employ wholly Western concepts and categories in the scientific classification of that data. The implication was that it all resulted in a no doubt unconscious distortion of the process of analysis and evaluation of the governmental practices of non-Western societies, with a downgrading or deriding of local, indigenous sources and the attempt artificially to constrain organic developments in those non-Western societies so as to conform to Western and Western-derived constitutional-governmental stereotypes and preferences. The most notable, or notorious, examples of Eurocentrism too literally and too unimaginatively applied are the 'received' European (Westminster-style, or Paris-style) constitutional charters with which the former Imperial powers had endowed their colonies at the moment of their independence, usually as a political pre-condition to their exercise of self-determination. Such 'European' constitutional creations may have seemed attractive as idealtypes or models for the emerging post-colonial *élites* to whom state sovereignty and independence were now being entrusted, since such local, indigenous *élites* had often themselves been formed in the Universities and professional institutions of the original European metropolitan power. But those constitutional charters had, as European ideal-types, too little relation to the post-decolonisation political, social, and economic reality, and so, too often, they operated at the level of law-in-books only, and never law-in-ac-

tion. The former Imperial powers had not sufficiently studied what Ehrlich identified as the 'living law', – the indigenous social customs and preferences of their subject colonial peoples which would necessarily condition and control the application, after decolonisation, of those 'made-in-Europe' charters and also effectively determine their political survival.

The term Eurocentrism, as such, does not appear to have been used in an International Law context until the beginning of the 1980s; and then it is invoked by a Continental European jurist, but in no sense defensively or apologetically in regard to past Imperial actions in the European territorial possessions overseas.[6] In strict, social scientific terms, Eurocentrism as applied to the analysis of International Law doctrine draws attention to an undoubted historical fact: that the corpus of International Law institutions, principles, and rules 'received' and continued in the World Community at War's end in 1945 was European, indeed Western European, in its character and content and in the social interests which it had been designed to serve. That in itself was hardly surprising. The great bulk of the International Law doctrine concerned, and also the special international institutions, arenas, and processes designed to serve it and to assist in its further elaboration, had emerged only after the Treaty of Westphalia of 1648 which ushered in the 'modern' era of International Relations based upon the new Western European nation-state, itself founded upon the rise of commerce and upon the political expansion of those new nation-states overseas in the quest and mutual competition for new economic resources and new markets and new commercial and trading relations in the non-European territories overseas., Almost all the Customary International Law 'received' as at 1945, and the still extant international treaties, emerged in the post-Westphalia era and are unmistakeably European in their origins and in their core. It could hardly have been otherwise. The main actors involved in International Law-Making in that era were all Western European, whether professional diplomats and Foreign Ministers, commercial envoys and traders, the explorers and later military governors, or the learned jurists and scholarly interpreters; the languages of legal communication were all Western European. Political power, and the military sciences and technology that served and enforced it, also resided

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