

"The Media's Special Role and Responsibility,"

continued from page 95.

- A very *superficial* way of informing people where images and symbols are more important than concepts and ideas. We are reaching the point where a political option may succeed, or fail, because of the skills of the political leader who personifies such an option.
- A very *simplistic*, almost cartoonish, way of debating issues. And referenda being the most elementary form of any political debate—it takes one word, "yes" or "no," to settle it—television is *the* medium par excellence. If there is any referendum this year, it will be interesting to see how both camps adjust. For example, it was one thing in 1980 for Marc Lalonde or Monique Bégin to whisper to a group of seniors that, with a separate Quebec, they may lose their pension. If today's Paul Martin or Lloyd Axworthy were to make that argument in front of a camera, their message would be amplified to the point perhaps of killing their case.
- An *antagonistic* medium. It is impossible to go from Somalia to

Yugoslavia to the crash site of an airplane and then to a civilized debate about the Triple E Senate. We have blood on the set, people shooting and crying; and the more they look outraged, the better show it is. Television works counter to consensus building in any national debate. One might say that in a referendum debate, it is all the better since it is sort of a showdown. It may be. But I suggest that the scars of modern political debates, because of their dramatization by television coverage, will run deeper, much deeper. And it is an issue worth considering when one asks the other question: "Can both Canada and Quebec win in this game?"

There is a last issue about the "role of the media" in this age of telepolitics. It is the "CNN phenomenon"—that is, the creation of the CBC's *Newsworld* and of the French Radio Canada's *RDI*. They can bring—live—any event of interest for political scientists, bureaucrats, and influencers. Just think of the magic of this medium where a press conference in Ottawa provokes immediate reactions in Victoria and St. John's—and all of this is accessible

from living rooms in Montréal and Toronto!

This form of television has become such a point of reference that journalists and politicians keep tuned to those channels. Indeed, because they are news by themselves, political debates can easily spin out of control. Given the very sophisticated nature of modern media—with computers, cellular telephones, and satellite links—people are immediately, and in very great detail, informed on what the governments are doing on their behalf. Just compare the modern debates about the future of Canada and the extreme secrecy that covered the 1864 Charlottetown conference. It may be that referendums are a mere byproduct of modern communications. Put another way, the media may not only have a "special role to play," they may be the ultimate *raison d'être* for those referenda.

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GUNBOAT DIPLOMACY AND THE RULE OF LAW

by Jean-Gabriel Castel

BOARDED AT GUNPOINT

On March 9, 1995, in an area of the high seas adjacent to the Canadian exclusive economic zone (EEZ) off the Grand Banks of Newfoundland, a Canadian government vessel, after firing several rounds of ammunition across the bow of the Spanish vessel the *Estai*, forced her to heave to. She was boarded at gunpoint for the purpose of inspection

and search. Upon allegedly finding numerous violations of the *Coastal Fisheries Protection Act* ("the Act"), the *Estai* and her master were arrested and escorted to St. John's, Newfoundland.

Upon posting a bond, both were released pending court proceedings. This action was taken pursuant to the Act as amended in May 1994, which prohibits classes of foreign

fishing vessels from fishing for straddling stocks in the regulatory area of the high seas beyond the EEZ, an area covered by the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO), in contravention of certain conservation and management measures.

The Act allows the use of force to disable a foreign fishing vessel if the Canadian protection officer is proceeding lawfully to arrest her master and believes, on reasonable grounds, that such force is necessary. In this case, the master of the *Estai* refused to heave to and have

his vessel boarded and searched. The Act also extends the application of Canadian criminal law to the NAFO regulatory area and allows for hot pursuit to begin there.

CONFRONTATION AND ADVENTURISM IN INTERNATIONAL DISPUTE RESOLUTION

In arresting the *Estai* and her master, did Canadian authorities violate international law? The European Union and the Spanish government claimed that this action constituted a flagrant violation of international law, both customary and conventional. A century ago, it would have been considered a *casus belli*. Firing upon the *Estai* in international waters violated Canada's obligation under the United Nations Charter to settle international disputes by peaceful means.

Today, resort to force is limited to self-defence and actions under the authority of the Security Council. Even in the case of hot pursuit, only reasonable force can be used to stop an offending vessel. No hot pursuit was involved here; moreover, the provisions of the 1994 Canadian amending legislation do not comply with the customary or conventional international law on hot pursuit.

The European Union pointed out that the arrest had taken place on the high seas where, according to international law, freedom of fishing is the rule, though with due regard for the interests of other states. A Canadian government vessel that encounters a foreign ship is not justified in boarding it, let alone arresting it, unless there is reasonable ground for suspecting that the ship is engaged in certain activities such as piracy or the slave trade. Violations of fishery conservation and management measures are not justifiable grounds. By acting as it did, the Canadian government threatened the freedom of all states to use

the high seas for legitimate purposes.

Confrontation and adventurism are not proper means of settling disputes between states. Although Canada, as a coastal state, has a special interest in imposing necessary temporary conservation measures beyond its EEZ to protect fish stocks, these measures cannot be enforced without the agreement of interested states, obtained either directly or through appropriate subregional or regional organizations.

The NAFO, a regional organization arrangement governing scientific research and fisheries beyond the EEZ, to which Canada is a party, provides for conservation and management measures including surveillance and inspection under an international scheme of joint enforcement. At the moment, arrest and prosecution of violators are left to the flag state. Inspectors who are Canadian or nationals of other member states may board vessels in the NAFO regulatory area for the purpose of surveillance and inspection. Thus, by arresting the *Estai* and bringing criminal charges against her master, Canada was in breach of both general customary international law and the NAFO.

Canada's assertion that a 200-mile fishing zone was justified by customary international law was adopted as the EEZ by the 1982 Law of the Sea Conference. However, Canada's claim beyond that distance was rejected. Within the EEZ Canada has obligations toward other states, including the proper management of fish stocks. Yet, it is universally acknowledged that Canada's failure to manage fisheries in that zone has been monumental. Equally dismal is her record of enforcement against Canadian vessels violating the *Coastal Fisheries Protection Act*.

Beyond the EEZ, the NAFO has not succeeded in preventing the con-

tinued wholesale harvesting of fish and consequent devastation of fish stocks on the nose and tail of the Grand Banks. This explains why Canada extended the reach of its legislation to cover the NAFO regulatory area and took action against the Spanish vessel.

Although states are free to pass laws that have extraterritorial effect, they cannot enforce them in the territory of other states or on the high seas unless these states agree to such action. There is no such agreement on the 1994 amendment to the *Coastal Fisheries Protection Act*. Instead, the European Union is seeking its repeal on the ground that Canada, by unilaterally exercising its jurisdiction over the NAFO regulatory area, was extending Canada's EEZ beyond 200 miles.

Canada has always stressed the importance of settling disputes by peaceful means and professed its adherence to the rule of law. Here, it is unfortunate that Canada resorted to violent action to focus the world's attention on the necessity to preserve the living resources of the sea for the benefit of Canada and humankind.

NECESSITY: A DOUBTFUL DEFENCE

The defence of necessity allows a state whose national interests are threatened to violate the interests of other states. It is doubtful that Canada can invoke that defence in this case: it is a party to the NAFO, whose object is to safeguard its members' fish stocks beyond the EEZ, but has played a significant role in the depletion of fish stocks in the EEZ, and did not take other steps before seizing the *Estai*.

Canada's modification of the terms under which it will recognize the compulsory jurisdiction of the International Court of Justice does

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Diplomacy" on page 96.*

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not advance the rule of law: it seeks to exclude from review Canadian actions to preserve the living resources of the sea outside the EEZ.

On numerous occasions in the past, Canada has condemned the extraterritorial enforcement of foreign legislation, including U.S. anti-trust laws, trade laws prohibiting Canadian subsidiaries of U.S. parents from doing business with Cuba or with the now defunct Soviet Union, and illegal arrests made in Canada by U.S. enforcement agencies.

**PEACEMAKER AND
CONCILIATOR:
THE PEARSON LEGACY**

Gunboat diplomacy does not contribute to the sustainable management of fish stocks. Negotiation and cooperation, leading to a new agreement on quotas and their effective enforcement, to prevent overfishing of endangered species beyond the EEZ is the only solution. Thus, Canadians should be pleased that cooler heads prevailed and that this dispute was solved amicably by diplomatic means, despite irresponsible inflammatory statements made by both sides. The new agreement governing sustainable management of straddling fish stocks beyond the

EEZ could serve as a model for the preservation of fish stocks around the world and start a practice that could evolve into a new customary rule of international law. Ideally, it could lead to the adoption of a multilateral conservation convention under the auspices of the United Nations.

Lester B. Pearson's legacy, which cast Canada in the role of peacemaker and conciliator, was not sacrificed on the altar of local political ambitions. The costs of confrontation were too high and the benefits too few for all parties concerned.

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