



## Opening Plenary Summary – “International Law: Coherence and Chaos”

Thursday, November 5, 2015

9:15am – 10:45am

### **Chair**

Adrienne Jerabek Marion, President, CCIL

### **Speaker**

Professor Donald McRae, CC, FRSC

Reported by Anthony Rosborough – Halifax, NS

Professor Donald McRae began the conference with a fascinating discussion about the perceived inconsistencies within the creation and application of international law. His primary proposition was that, despite the modern proliferation of specialized international tribunals, globalization and greater involvement of non-state actors has resulted in greater uncertainty as to the status of international law, the goal to achieve coherence nevertheless remains. To this end, Professor McRae proposed that international law’s fragmentation and coherence are two ends of a cycle that is far from unidirectional. Instead, he proposed that sovereignty, as the basis for the international legal system, takes the shape of underlying world events at any given time.

As examples of the ebb and flow of international law’s chaos and coherence, Professor McRae pointed to the great motivation in the 1970s to establish the United Nations Convention on the Law of the Sea (“UNCLOS”), and the sudden reverse in tone beginning in the 1980s. Despite the numerous states that sought to distance themselves from the treaty shortly before its formation, UNCLOS is increasingly referred to as a statement of customary international law. This, Professor McRae proposes, is one example of the difficulty in ascertaining the extent to which consensus is a requirement for establishing rules of international law at any given time. To this end, chaos and coherence are dynamics of how international law is viewed at a given time rather than something intrinsic to the law itself.

Regarding the efficacy of international courts and tribunals, Professor McRae noted that the International Court of Justice was at one time mired in controversy and regarded as a Western-controlled court. International Law generally, he suggested, has had its efficacy called into question before. In recent decades, Professor McRae said, this has changed radically: the ICJ now entertains a full docket, war crimes are being prosecuted in the International Criminal Court, and specialist tribunals are producing numerous decisions and settling disputes. This fragmentation of the forums in which international law is created and decided, McRae suggested, has broadened the role of interpretation in applying international law principles.



Despite his proposition that coherence and chaos are not mutually exclusive, Professor McRae pointed to two consequences of globalization that have posed challenges to the traditional concept of international law as Westphalian state sovereignty. The first of which is that domestic law is no longer wholly domestic. -- it is increasingly becoming influenced by international law standards. The other consequence is the disappearing distinction between public and private international law. Professor McRae suggests that the erosion of this distinction is due to greater reliance on arbitration decisions, regional customs and domestic laws in determining the status of international law.

Bearing the above in mind, Professor McRae included a caveat that international law's status as either coherence or chaos may be overly binary or simplistic. Instead, he suggested, a more accurate view should seek to free itself from the Western tradition of yearning for overarching principles and rules. In this respect, he proposed that the notions of international law as coherence or chaos ought to be viewed as metaphors, and part of a cycle that has been ongoing since its beginnings.