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The Teaching of International Law in the Eighties

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SHORT ARTICLES, COMMENTS AND CASENOTES

The Teaching of International Law in the Eighties†

I. International Law in the Law School Curriculum

Lawyers are trained to be specialists in community decisionmaking. Those charged with their professional education try to equip their acolytes with the conceptions, skills and ethical precepts that will enable them to discharge their functions in a responsible fashion. Given the brevity of the period of formal instruction—usually six 14-week periods distributed over three years—there must be a certain competition for time and, inevitably, a tendency to characterize some courses as core or indispensable and others as essentially optional or cosmetic, "boutique courses" as they are now called.

International law is frequently relegated to the second category, in part because of apparently rational calculations, in part because of the pressures of "consumer" groups such as Bar associations and committees of examiners, in part because of outmoded jurisprudential conceptions which operate at very deep levels of consciousness, and in part because of little more than curricular inertia. That relegation is a mistake whose consequences can be measured in terms of a loss of professional competence and capacity to serve clients and the community. Anyone teaching international law knows that our planet is increasingly interdependent and that most of the social arrangements that we think of as quintessentially domestic in this country are inextricably interwoven with complex processes in other countries and regions of the globe. Consider: our security system; our political-economic system; the search to find and retain external mar-

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kets for our products; our dependence on the natural resources without which an advanced industrial and science-based civilization cannot survive; our health system; our conceptions of fundamental morality and so on.

II. International Law in an Integrated Global System

Integration in a global system means that even "domestic law" courses can no longer be understood adequately—whether for descriptive or practical professional purposes—without an understanding of the organization and dynamics of the international system. Constitutional law and, in particular, the relative powers of the different branches; emergency economic powers as they relate to all the areas of commercial law, environmental law and so on are all deeply influenced by and, in many ways, take account of international events.

An integrated planetary communication system has now created a state of global simultaneity for political and economic matters, to the point that even practitioners in small cities often encounter mundane commercial cases with "foreign" elements. The point bears emphasis. The penetration of international systems into the domestic process has gone so far that international law is no longer the prerogative of a small circle of lawyers practicing in New York and Washington. It is a feature of professional life to be reckoned with throughout the nation. Insofar as law schools recognize a coordinate responsibility to educate future political leaders, many of whom are recruited from the Bar, the need to equip students with conceptions and tools for dealing with global legal processes is even more apparent.

Professional education must take careful account of the problems professionals encounter and the skills they will need. The practice of international law, like the practice of all law, is far more than simply researching and reporting black letter to a client. In the introduction to the casebook Professor McDougal and I prepared,[1] we wrote:

> The scholar as well as the lawyer advising a client can do no more than explain what relevant decisions were made in the past and what relevant decisions are likely, under different conditions, to be made in the future, to aid in the clarification of goals and then devise strategy tooled toward goal realization. We are, thus, concerned with sensitizing the student to the performance of five intellectual tasks which every decision specialist must discharge: the clarification of goals, the review of past decisions, the identification of conditioning factors that accounted for those past decisions, the projection, by a variety of means, of possible future courses of this decision, and finally the invention of

1. M. McDougal & M. Reisman, International Law in Contemporary Perspective (1981).

techniques for intervening in a way to cause future decisions to promote the public order interests of one's community or other clients.[2]

But if the intellectual tasks of international law are the same as those required in all other fields of legal endeavor, the context and structures of the international system are radically different. This is a point that lawyers not trained in international law frequently fail to appreciate.

III. Differences between Domestic and International Law

I have considerable sympathy for the dilemma of deans and chairmen of curriculum committees. Obviously our schools cannot teach students everything they will need in the course of their careers. Demand for time in the six 14-week periods exceeds supply. Choices must be made. And the fact is that some courses can be deleted from the compulsory and even optional curriculum, not because they are unimportant but because a competent lawyer can teach himself their elements in a short period. If you have a case with an intellectual property component and you had not done that course in law school back-when, you can probably teach yourself what you specifically need for your case. After all, lawyers are trained to be students and quick learners. Even in courses we have taken, we are expected constantly to update our knowledge as fields change, information is obsolesced, policies modulate and institutions are transformed. But that process of self-education cannot be accomplished in international law. It is worth exploring why.

A. Dangers of Transposing Domestic Experiences

Once a student has a basic understanding of our domestic legal system, he or she can move to other areas and learn them quickly because the decision-structure in which they transpire, the methods of making and applying law, and many of the basic policies of the law are the same or, at least, cognate. Legislative sources—statutory or regulatory, federal or state—will be the same. Agencies of application—federal or state courts, administrative agencies at different levels and so on—will be the same. The style of ratiocination will be the same. And most important, the environing system of political power within which our legal system operates, that variable of power which is inevitably part of law but whose salience we are often able to ignore or even deny, will be the same.

None of this applies when the student moves into the international legal arena. Some of the road signs seem to be similar, but, on examination, they prove to be what the French call "false friends." There is something

2. *Id.*, at xviii, xix

called an International Court and there is a General Assembly which might be likened to an international parliament and there is a Secretary General and a Security Council which might be likened to an Executive Branch. But in most ways, these institutional designations are quite misleading. Although the General Assembly produces a great deal of law-like material, it actually makes law rarely. The lawmaking process in the international system is much broader, more varied and for the most part non-institutional. The International Court can be likened to an American court in name only.

In the United States (though in relatively few of the other one hundred sixty some territorial communities of the planet), there has been and is, for the foreseeable future, a fairly stable congruence of power and authority; the formal institutions of government have adequate effective power to sustain their indispensable decisions. Hence lawyers and citizens can rely on statements of what the law is that emerge from legislatures and courts and can count on courts and other agencies, in appropriate circumstances, to enforce that law. In part, this institutional stability, based on a congruence of legal authority and effective power, permits the domestic lawyer to move rather rapidly into areas in which his formal training is thin and to self-educate. But because of the radical differences between the domestic and the international context, that sort of confident lateral move is most perilous when someone without systematic training rushes into international law. At one time or another, all of us have had occasion to gasp at the sincere but truly bizarre efforts of such autodidacts.

The student encountering international law must understand that the relatively tempered character of domestic politics in North America and the western peninsula of Europe is unique and is a key factor accounting for the broad range and remarkably efficient operation of American law. In most other settings, and certainly in the international, politics operates with its full savagery. Even teachers sometimes forget this. If one wants to understand what authoritative decision does and what it can accomplish, it is imperative that student, teacher or any observer ground himself in the global process of effective power. And it is imperative that he appreciate that when power is not coordinated with law, it wreaks havoc with law—and not vice versa.

One of the major problems in understanding international law and teaching it to beginners involves incorporating this discrepancy between formal statements of law, on the one hand, and operative normative codes which are discrepant from the formal code, on the other, into a coherent theory which can enable the student or practitioner to perform the analytical and predictive tasks of legal practice. A good deal of what is international law on the books is not international law in practice and that includes, un-

fortunately, some of the most fundamental norms. Substantial parts of the United Nations Charter were drafted at a time when there was a fundamental consensus between the major powers of the globe. That consensus dissolved and many of the procedures of the Charter which had been designed in contemplation of it were suspended. But the Charter continues to serve as a major symbol and statement of international goals.

B. Coping with Complexity and Contradiction

How does one convey this complexity and contradiction to students? One must equip students with a theory which can account, on the one hand, for the policy of Article 2, paragraph 4 of the Charter and confirm its importance and viability, yet acknowledge that it is neither an accurate description or prediction of behavior nor of authoritative reaction to it. One must encourage the student to proceed to develop a set of criteria for making meaningful judgments about the unilateral use of force. In an earlier study,[3] I used the words "myth system" and "operational code" to try to capture this curious discrepancy:

> A disengaged observer might call the norm system of the official picture the myth system of the group. Parts of it provide the appropriate code of conduct for most group members; for some, most of it is their normative guide. But there are enough discrepancies between this myth system and the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the operational code.[4]

This discrepancy between authority and control and the extraordinary gap between the international myth system and the actual operational code combines with the lack or organizational structure to present the teacher with a major intellectual and pedagogical problem.

Take only one example. One of the features of a decentralized system, lacking institutional articulation, is that there is no formal and organized way to terminate existing norms. You simply cannot repair to a legislature and ask that a statute be terminated or to a court and ask that a precedent be overruled. In decentralized systems, law is terminated, more often than not, by unilateral claims expressed in or supported by behavior. Since a number of actors continue to rely on the norm that is being terminated this way, international law and politics are regularly marked by a conflation of conflicting characterizations: one side will describe its behavior as a good faith innovation, a claim to establish a new norm, while the other side will characterize it as a manifest and intentional violation of law. In

3. M. Reisman, Folded Lies: Bribery, Crusades and Reforms (1979).
4. *Id.* at 16.

a way, both sides are correct, for much depends on how you look at things. Often, much will depend on who prevails. But the net result of this unorganized system of terminating norms is a continuing uncertainty about which norms are operative and an exacerbation of reciprocal suspicion and distrust. Think, in this regard, of United States testing over the Pacific Ocean in the early 1950's or U.S. initiation of aerial surveillance.

Students, whose intellectual provenance is an organized and effective national system, such as our own, must be made aware of the complexity of legal change in a decentralized or ineffectively organized system and the hazards involved in superficial characterizations of certain actions as unlawful without regard to the larger dynamics of power and authority. If something approximating the real picture is not conveyed, the student emerges with a reassuringly rosy but wholly unrealistic conception of what international law is and can do. Any advice he or she may give to a client at a later stage would be inaccurate and highly irresponsible. And that possibility should be a serious concern for us. But if a student slides off, as is quite easy, into the cynical view that there is no international law, that clubs are trumps, to borrow from Hobbes, and that all that counts is power, he or she will be equally ineffective in predicting, advising, and appraising.

At times, it is exceedingly difficult to evade the corrosive effect of cynicism, especially when the issue is consensus on values and political goals. Every community, including the international community, is marked by sufficient homogeneity of demands and of conceptions of past and future to warrant the attribution "community." But there is also enough heterogeneity to require a system of law with effective sanctions to maintain group order. Heterogeneity and the conflict in various forms it imports exist in even relatively stable and organized national communities. Students often lose sight of that fact. But the degree of heterogeneity in the international system is particularly daunting. The world community is composed of peoples scattered over some one hundred sixty territories, with different cultures, classes, castes, language and dialect systems, moralities and beliefs systems, dissimilar levels of economic development, radically different conceptions of what has happened in the past and what will happen in the future and, frequently, intense and often reciprocal hatreds and distrusts rooted deeply in their very identities. In such a "community" it is very difficult to find common symbols of authority and it is frequently difficult to identify common values. There may be precious little common ground between an Islamic fundamentalist in any country from Morocco to Indonesia and the secular urbanized person in Amsterdam, Tokyo, Rome, Paris, London, New York or Chicago. In this dizzying diversity, the international law teacher and practitioner must identify or create institutional practices whose capacities to realize common interest

are sufficiently obvious to recommend them to the peoples who hold such divergent viewpoints.

C. Learning to Clarify Common Interests

For the teacher, the challenge—I believe—is to make the student appreciate the fact that international law, like all law, is no more than a set of artifacts created by human beings to realize perceived common interests. That forces the student to address the problem of identifying common interests in the extremely heterogeneous community in which he operates, for acknowledging that law is a tool requires one to find and make express the purpose for which the tool is to be wielded. The resistance to this type of inquiry may be great, for many students in the United States come to international law with the casual assumption that law presupposes wide and deep political consensus on most issues and hence that the proper province of the lawyer is essentially a technical one.

When the requirement of clarification of goals in a modern, secular conception of law is understood, issues like the international protection of human rights or the core disagreement of our era—that of the restructuring of production and distribution as a way of facilitating the economic and social development of the poorer states—can be put in an appropriate and fruitful legal setting. The New International Economic Order (NIEO), that set of claims by a large number of peoples of the world for a fundamental change in patterns of wealth production and distribution, cuts across virtually every area of traditional international law, none of which may henceforth be examined without considering it. All international legal discussions of the resources of the planet must take account of it. But NIEO cannot be meaningfully considered unless its proposals can be tested by some conception of common interest, by which the student can assess which proposed arrangements are likely to yield the greatest benefits for the peoples of the world. Without that, we are confined to sterile ideological argument. There is, for example, no inherent value to a regime over the resources of the deep seabed which is organized along pure free market lines or as a type of TVA. In a particular context, the relative value of one over the other can only be determined by projecting the *aggregate* consequences of each and testing them in terms of the aggregate shared interests of the international community (optimum production, equitable distribution of direct and incidental benefits, rational conservation and so on), and finally seeing which yields more. That exercise presupposes clarifying just what those shared or common interests are.

The sheer range of international law is as daunting as the complexity of its individual parts. International law is usually taught as a general course. This means that the general course must effectively cover the

entire spectrum of contemporary international law and must include the basic constitutional law of the international system; the establishment of states and the perquisites that are associated with it; the allocation of different forms of inclusive and exclusive control over the various resources of the planet and the programs to protect the environment from degrading uses; national elite control over people balanced by the attempt to provide a measure of internationally prescribed and guaranteed human rights for them; state responsibility and notions of tortious liability; the regulation of the military instrument, of economic warfare, of propaganda, of diplomacy and of treaties; the allocation of jurisdiction between competing states over people, events and things with regard to which different states have either simultaneous or sequential control; and the attempt to maintain stability and continuity when there are changes of government, the so-called state or governmental succession problem. Each of these areas is subject to the stresses of change; inherited policies must be examined for their present and future relevance, lest practices that no longer serve common interests or are inimical to them continue because of nothing more than inertia.

Thus the international law teacher confronts a range of subject matter which our colleagues in neighboring vineyards rarely encounter. Some selectivity is necessary but there is little agreement among us as to which matters may be left, as we say euphemistically, "for individual study." The late Richard Baxter once remarked to me that he wanted a teaching book in international law in which substantial sections could simply be assigned to the students for reading and study without discussion. I have often wondered which sections he would have thought sufficiently straightforward to be taught in that economical fashion. In my experience, all of it must somehow be explored if the understanding of basic principles and problems is to be conveyed.

And yet all of this is the smallest part of the problem. The international system we have inherited is in a process of decay, perhaps disintegration. That is no discharge from professional responsibility for, whatever the state of the system, legal tasks must still be performed in the service of public and private clients. But intellectually, practically and emotionally, periods of breakdown are particularly confusing to lawyers who are trained to look to certain authoritative institutions for guidelines of appropriate legal and ethical behavior. Unique intellectual challenges are thus posed to teachers who are willing to address reality and try to equip students with the special perspectives and skills that must be brought to bear in these circumstances.

IV. Conclusion

For students and lawyers who are impatient with uncertainty and ambiguity, international law is an irritating, frustrating, even impossible subject. An anodyne is available to those who retreat to a purely textual and technical conception of the legal mission. For those who view law as a means for enhancing the precarious minimum order our species has attained and accelerating the move toward a public order of human dignity, the structural imperfections and inadequacies of the international legal system present a massive problem and, sometimes, a challenge so great that it can depress and paralyze creative response.

Make no mistake about it. International law is a woefully bad system; it does not work well and when it does work, it produces and distributes values in ways that should offend all but the morally defective. Yet it is the only international legal system we have on a interdependent planet where some system of international law is inescapable. If what we have should fail, the consequences for many human beings on the planet will be calamitous. In the meanwhile, whatever its quality, international law limps along, penetrating national processes more and more. Hence students and practitioners, even those who do not contemplate international practices, must understand and acquire skill in it. The international law teacher must understand it in its imperfect totality and learn ways of conveying it to students, so that they will be equipped to practice and improve it.[5]

5. Those interested in exploring the topic of teaching international law subjects might consult the bibliography, Johnson-Champ, *Selected Readings on Teaching International Law*, 18 INT'L LAW. 197 (1984). [Ed.]