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The Plight of Academic International Law

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When I entered the academic world almost twenty years ago, one of my objectives was to change the way public international law was taught, and more generally how it was understood by the wider community of academics and practitioners. The subject as presented to me when I was a student had been dominated by stale theoretical questions having to do with the sources, hierarchical status, and binding nature of international law, and by a puzzling reverence for the cases of the International Court of Justice. Even as a student, I sensed that what I was learning had little to do with the real world of government decision-making, politics, and commerce.

Then, in private law practice on Wall Street, I found that my academic training had prepared me poorly to deal with the interconnected issues of domestic and international law, with which I grappled in tax and business planning, foreign government bond offerings, commercial bank loans, and joint ventures abroad, and all the associated human problems involving tax, estate, and immigration law. My next experience—as a lawyer in the Department of State—brought home additional gaps in international law as it had been presented in the academy, notably its neglect of the processes by which law was formed and implemented, how those processes related to the bureaucratic decision-making structures of governments, and the importance of foreign and domestic constitutional law in shaping realistic options available in any given situation. My academic training also lacked much consideration of important things that lawyers actually do in their practices, such as counseling, blending non-legal/policy considerations with legal analysis in the formation of professional judgment and advice, and negotiating (both at the intragovernmental and the intergovernmental levels).

As an academic, I have had the opportunity to reflect on the relevance of my experience to the academic enterprise, and, perhaps more importantly, the leisure to contemplate the role of international law in shaping our thinking about the world and in defining the problems that lawyers are asked to solve. I sought to address the deficiencies in academic international law as I had experienced them by adjusting the content of the courses I offered (deviating from the published teaching materials then available), by eventually authoring a new course book that could correct the problems that I saw, and by focusing my scholarship on presenting international law in a more realistic framework that would better reflect the political world in which it operated.

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I first recast our International Organizations course. The principal casebooks presented abstract rules and procedures of various organizations, without reference to context or to the actual impact of these organizations.[1] The usual approach seemed to privilege the United Nations (which at the time was a politically marginal institution of little actual consequence, even for most international lawyers) as the preeminent example worthy of study. I substituted study of economic institutions—the GATT, the World Bank and the IMF—and I included material showing how these organizations worked in practice. Such a topic seemed to me hardly unimportant to lawyers whose practice could include counseling with respect to their projects or lobbying these organizations on behalf of a client, or to academics who might propose realistic reforms. I also sought to convey a sense of the actual impact of these institutions on the societies in which they operated, for example, examining the effects of IMF structural adjustment programs on the price of food in connection with considering their legal status and legitimacy.

In our Public International Law course, I introduced subject matters that I felt American lawyers needed to know about.[2] These included international law elements potentially relevant to civil litigation (the Hague Service and Evidence Conventions), choice of law and choice of forum, the Foreign Corrupt Practices Act, extraterritorial application of law, tax treaties and self-executing treaties in general, the potential effect of Presidential constitutional power, and individual problems associated with immigration, refugees, and the trans-border movement of persons. Subsequently, I developed a course book proposal incorporating some of this approach, but the publisher reported that my colleagues' reaction was simply that they did not teach that course. Nor did publishers publish such books, so I turned my efforts to working on another quite successful, if conventionally organized, book.[3]

I am sorry to report that several generations of casebooks later the situation is not much better. International law continues to be largely separated from the domestic legal and political context necessary for complete understanding of the subject. Treaties are addressed in separate domestic and international chapters, and the politics at both levels is largely unexamined. Bodies of law and the procedures of organizations are presented without reference to the impact they have on government decision-making or on the politics and societies that are affected by them. For

1. See, for example, Frederic L. Kirgis, Jr., *International Organizations* (West 1977); Louis B. Sohn, *Cases on United Nations Law* (Foundation 2d ed 1967).

2. Many of my colleagues have commented that my instincts in teaching and scholarship may seem rather nationalistic or parochial. Perhaps that is true, but I believe that my principal mission in teaching is to train lawyers, almost all of whom will practice law in the United States, and that my first obligation is to prepare them to do so. I also feel that presenting international law as the same in all national contexts is profoundly misleading, both as a theoretical and as an empirical matter. See Phillip R. Trimble, Review Essay, *International Law, World Order and Critical Legal Studies*, 42 Stan L Rev 811 (1990). To a lawyer in the world the presentation of international law as an objective, uniform, cosmopolitan enterprise must seem almost childishly naïve.

3. The book, titled *International Law*, is co-edited with Professor Barry E. Carter, and is in its third edition. See Barry E. Carter and Phillip R. Trimble, *International Law* (Aspen 3d ed 1999).

example, flag state jurisdiction and other parts of the law of the sea ignore their effects on passengers, fisheries, and coastal communities, as if these matters were not important to understanding the political assumptions underpinning the rules, the impetus for change, and the general inadequacy of international law-making and enforcement. Human rights law provides another example of rules and process taught without the scrutiny of practical effect. In that context, one of the most noteworthy developments in international relations in the past decade is the increased activity and importance of Non-Governmental Organizations ("NGOs"), a development whose implications are hardly considered in the principal casebooks.

Because I am skeptical that academic international lawyers will actually respond to the training needs of future generations of lawyers, I think that a more realistic remedy for some of the deficiencies of existing teaching materials is simply to introduce international law and practice into the relevant courses across the entire hitherto domestic law curriculum. For example, the U.N. Convention on the Sale of Goods should be presented in Contracts; the Hague Conventions (and the distinctive due process issues in transnational litigation) in Civil Procedure; treaties and Presidential foreign relations power in Constitutional Law; limits on extraterritorial application of law in Antitrust, Securities Regulation, or Bankruptcy. The fundamentals of the subject could be introduced in a mini-course of ten or fifteen hours in the first year of instruction. Of course, a professor will assure you that there is never enough time to teach her particular subject matter adequately in the time allotted. Nevertheless, the basic international law doctrine, underlying political realities and constraints, bureaucratic governmental processes, and issues of accountability could be readily introduced in a one-unit course. Such a mini-course could be offered at the beginning of the year and could serve as a prerequisite for all courses having an international dimension elsewhere in the curriculum. Such a development would be one step toward addressing the problems of academic international law.

The shortcomings of pedagogy turn up again in most international law scholarship, which brings us to the theme of this Symposium. The answer to the question—"What's Wrong with International Law Scholarship?"—of course depends on what purpose you think scholarship serves and who the audience is. When I started reading the academic literature twenty years ago the scholarship was dominated by two styles—positivism and aspirational idealism. The positivist style of writing mostly described rules and procedures, analyzed ambiguities and shortcomings, recounted cases or situations where the law had been applied, and sometimes recommended changes. It assumed that international law existed independently of context and could be objectively determined. Aspirational idealism presented international law as a system of rules and principles whose function was to achieve some valuable objective, such as the elimination of nuclear weapons, environmental equity, human rights, or some other policy preference of the author. This approach also ignored real world contexts and treated law as objectively determinable (provided you have the right values and politics). Neither approach

seemed especially relevant to, or connected with, the real world of politics, government, society, and culture. From my perspective, the most significant shortcoming in the scholarship as I found it twenty years ago was simply that international law was not connected to its obviously important underlying political structure—indeed it ignored politics—and the writing paid insufficient attention to domestic law implications and interconnections.

Now I am pleased to say that the situation has improved substantially. The positivist tradition continues, but it in fact has an important place in the legal universe; and there are many current examples of rich and informative writing that serve significant professional needs. For example, this writing can be quite useful to the practicing bar, international judges and arbitrators, and a whole range of people who simply want to be better informed about a subject. It is, of course, true that a major problem in international law is that there are relatively few such judges and arbitrators and similarly few practicing lawyers who appear before international tribunals or even advise private clients on purely international law question. Nevertheless, there is still an important, if limited, audience of academics, students, government and intergovernmental organization ("IGO") officials and their lawyers, and NGOs who may seek basic information and orientation on a particular subject. They have to start somewhere, and plain descriptive writing serves a purpose in this context. Some recent and quite impressive manifestations of this style include Hurst Hannum's *Guide to International Human Rights Practice*[4] and, in a more traditional and scholarly vein, Cherif Bassiouni's monumental description and analysis of the texts comprising international criminal law, including an exhaustive exposition of their negotiation and background.[5] Similarly, last year Johannes Morsink published a painstakingly researched and richly descriptive account of the origins of the Universal Declaration of Human Rights,[6] and Arthur Eyffinger did the same with respect to the 1898 Hague Peace Conference[7]. These latter three works represent impressive pursuit of knowledge for its own sake; although without immediate utility or a wide academic audience, they can also be seen as esoteric exegeses that reinforce the popular image of international law as a fringe enterprise.

One of the most dramatic changes—and for my taste the most important[8]—is the increased emphasis in some recent scholarship on relationships between international and domestic law, the processes of law formation and implementation, and the underlying interconnections of international law and political culture. In

4. Hurst Hannum, ed, *Guide to International Human Rights Practice* (Transnational 3d ed 1999).

5. M. Cherif Bassiouni, *Crimes Against Humanity in International Law* (Kluwer 2d ed 1999); M. Cherif Bassiouni, ed, *International Criminal Law* Vols 1-3 (Transnational 2d ed 1999).

6. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Penn 1999).

7. Arthur Eyffinger, *The 1898 Hague Peace Conference* (Kluwer 1999).

8. See Trimble, 42 Stan L Rev 811 (cited in note 2); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L Rev 665 (1986); Phillip R. Trimble, Book Review, *Legal Scholarship and the ILO*, 6 Comp Labor L J 212 (1984).

addition to general work at a formal and doctrinal level,[9] several scholars have emphasized the importance of domestic law and politics, examined the actual processes of law-making (including studying the roles of non-state actors), and looked carefully at how international law is actually implemented and obeyed. For example, in Hannum's *Guide*, Richard Bilder stressed the critical importance of domestic law in the actual realization of human rights[10] and Hannum detailed the importance of NGOs and the importance of developing techniques for influencing governments.[11] In a more sophisticated and theoretical way, Curtis Bradley and Jack Goldsmith examined domestic law and political culture, and challenged much of the accepted wisdom surrounding United States human rights law practice and the role of international law in American courts generally.[12] In another human rights work Martha Minow critically examined the knee jerk (from a traditional international law perspective) "optimal" response to major atrocities, notably the criminal trial of the oppressors, in light of specific contexts in different societies.[13] The author paid close attention to the local political, social, cultural, and psychological impacts of a broad range of possible responses (other than trials) to major atrocities. She thereby developed a much more realistic picture of the dilemmas involved and the choices that a society must make. A volume of recent feminist human rights scholarship similarly examined local social situations, demonstrated the role that law can play in educating and mobilizing domestic forces for change, and suggested the importance of local reform.[14] In the field of international environmental law, a recently edited volume looked at the implementation of, and compliance with, treaty norms in nine countries in an impressively sharp and detailed way.[15] In a different approach, J.S. Watson challenged human rights orthodoxy by calling attention to the significant disparity between law and practice. He looked at the realities of implementation at the domestic political level, an altogether positive move from my point of view, although he failed to see the enormous impact that human rights doctrine has had on shaping domestic political agendas in helping to marshal domestic political movements (especially associated with the increased importance of NGOs), and changing the way

9. See, for example, John Rogers, *International Law and United States Law* (Ashgate 1999); Jordan Paust, *International Law as Law of the United States* (Carolina Acd 1996); Louis Henkin, *International Law as Law in the United States*, 82 Mich L Rev 1555 (1984).

10. Richard B. Bilder, *An Overview of International Human Rights Law*, in Hurst Hannum, ed, *Guide to International Human Rights Practice* 3 (Transnational 3d ed 1999).

11. Hurst Hannum, *Implementing Human Rights: An Overview of NGO Strategies and Available Procedures*, in Hurst Hannum, ed, *Guide to International Human Rights Practice* 19 (Transnational 3d ed 1999).

12. Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L Rev 319 (1997); *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815, 853 (1997).

13. Martha Minnow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon 1998).

14. Kelly D. Askin and Dorean M. Koenig, eds, *Women and International Human Rights Law* (Transnational 1999).

15. Edith Brown Weiss and Harold K. Jacobson, eds, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT 1998).

elites think about the political and social world. These works show a healthy respect for the political, social, and economic impact of international norms and thereby help establish a sense of reality about the discourse.

In the academy, and especially in the faculty appointments process, there is often considerable emphasis on scholarship that embodies a broad, theoretical perspective. This perspective can be important because fresh theoretical writing can elucidate understanding, challenge assumptions, and change the way the reader thinks about an issue or even a whole field. Here too, significant progress has been made in the past two decades. Feminist scholars exposed assumptions and consequences of international law not much noticed previously.[16] Critical scholars demolished the positivist basis of the discipline.[17] Others critically evaluated the enterprise in light of perspectives drawing on moral philosophy.[18] And, addressing the perennial question of why international law seems to be applied even in the absence of police and military coercion, Harold Koh articulated an approach that paid close attention to domestic politics and law and to the realities of how international law operates in the world.[19] Following an interdisciplinary approach, he examined (and critiqued) several strands of international relations theory, and developed a theory of transnational legal process that appreciably enriches our thinking.

The Holy Grail of politically-oriented international law scholars has been to reconnect our discipline with the study of political science and international relations, a connection lost since at least the 1950s.[20] Some prominent international relations scholars flatly rejected law as anything worth considering,[21] while political scientists generally became mired in methodological thickets as irrelevant as the old positivist scholarship.[22] In the past decade, however, the disciplines have been fruitfully reunited. Anne-Marie Slaughter and Ken Abbott proposed agendas,[23] and several scholars have used the two disciplines to elucidate particular areas of law.[24] Most impressively,

16. See Hilary Charlesworth, Christine Chinkin, and Shelley Wright, *Feminist Approaches to International Law*, 85 Am J Intl L 613 (1991).

17. David Kennedy, *International Legal Structures* (Nomos Verlagsgesellschaft 1987).

18. Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford 1995); Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford 1990); Fernando R. Teson, *The Kantian Theory of International Law*, 92 Colum L Rev 53 (1992); Fernando R. Teson, *International Obligation and the Theory of Hypothetical Consent*, 15 Yale J Intl L 84 (1990).

19. Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 Yale L J 2599 (1997).

20. See Hans J. Morganthau, *Politics Among Nations* (Knopf 2d ed 1954); George F. Kennan, *American Diplomacy 1900-50* (Chicago 1951);

21. Kenneth N. Waltz, *Theory of International Politics* (Addison-Wesley 1979).

22. Jonathan Cohn, *Irrational Exuberance*, New Republic 25 (Oct 25, 1999).

23. Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 Am J Intl L 205 (1993); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 Yale J Intl L 335 (1989). See also Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 Am J Intl L 367 (1998).

24. Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional*

Michael Byers has studied power and customary international law using a sophisticated understanding of realism, regime theory, and traditional international law scholarship to show ways in which law makes a difference in state behavior.[25]

In conclusion, international law scholarship actually seems to be much improved. The trajectory shows a healthy regard for what international law means (or does not mean) to real people in real (domestic) societies. Some writing reflects a necessary understanding of the importance of local political and social culture, not only for comprehending the realities surrounding compliance, but also for fashioning strategies for reform. And finally, we seem to be genuinely assimilating the perspectives of associated academic disciplines.

The question—"What's Wrong with International Law Scholarship?"—should be recast. The issue actually is: "What's Wrong with International Law?" The answer is that, as a subject of academic study, it is still too isolated from domestic law and politics, the dynamic processes (not limited to formal government actions) that produce its contours and changes, and the social and cultural contexts in which it must ultimately find its meaning.

Trajectories of Rule Development, 91 Am J Intl L 231 (1997); John Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 Harv Intl L J 139 (1996); Kenneth W. Abbott, *"Trust But Verify:" The Production of Information in Arms Control Treaties and Other International Agreements*, 26 Cornell Intl L J 1 (1993).

25. Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge 1999).

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