THE TEACHING OF INTERNATIONAL LAW

June 24, 1955 Morning Session

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THE INTRODUCTORY LAW SCHOOL COURSE IN IN INTERNATIONAL LAW

PROF. PHILIP C. JESSUP (Columbia University): I want to say at the outset that, in talking about the introductory courses in international law this morning, I assume we are talking more definitely in terms of international law in its limited sense, not in the broad sense of international legal studies, which we discussed yesterday. It is in the more limited sense that I am dealing with the question of an introductory course in international law.

The second thing I would like to say is that I am not confining myself to a discussion of the particular ways in which we teach an introductory course in international law at Columbia. In one sense, I think it would be irrelevant to dwell too much on the Columbia experience, because our problems are different from those which exist in many other schools. We have a combination of activity of members of the law faculty and the faculty of political science, which does not exist elsewhere. We have one introductory course which is open both to law students and graduate students of political science. We also have one general introductory course in international law in one semester which is offered merely to law students. We have a third introductory course in international law offered exclusively to the students in our professional School of International Affairs. So I think our problem is not comparable with that which is met in most of the schools of the country. Furthermore, I am not at all sure that we have reached perfection in teaching of our introductory courses at Columbia, and I would not hold them up as necessarily the correct procedure.

On the other hand, I do not purport to sketch the content of such a course in the law school of Utopia. I would like rather to raise various questions that come up in my mind as connected with this problem instead of making any attempt to be dogmatic or to suggest that any uniformity is possible in law schools across the country. Essentially, the teaching of this course, as the teaching of any other course, must depend upon the general teaching philosophy and approach of the particular school.

Also, I would like to state I am not dealing here with advanced courses or the special training of graduate students. Much

of the work now given in international legal studies in many of the law schools is designed for the training of graduate students or of advanced students and must be considered in a particular way. Furthermore, I am not particularly concerned here with the problem of the training of foreign students. This is a problem of teaching international legal studies, but it is a very different problem. One here is confronted with the problem of teaching American law as if it were foreign law, because one is dealing with a foreign clientele who must be introduced to the American system. Let me turn, then, to the teaching of international law in a limited sense.

Now, it seems to me the purposes of a general introductory course in international law in a law school are two: first, to expose as many students as possible to an understanding of international legal problems, and, secondly, to make them aware of the points of view, methods, and other considerations which bear upon the introduction and solution of these legal problems, especially where these differ from those with which they become familiar in other courses.[1]

Against that background, I now make two assumptions: first, that this general introductory course will not be a required course, and, secondly, that it will not be taken in the first year. As to when such a course should be given, it seems to me much better that it should be offered in the second year, so that those students who are interested will have an opportunity to continue with advanced courses or seminar work in their third year. I believe it is better that the course should be confined to a one-semester course, unless or until students in a particular school are habituated to including a full-year course in international law in their programs.

At Columbia, as I say, we offer both a full-year course and a one-semester course, and the law students may choose between them. In this connection, a practical point of some importance is

1. I do not exclude as a general philosophy of education in the law schools the point of view illustrated by Donald H. Fleming's William H. Welch and the Rise of American Medicine (Boston, Little, Brown, 1954), because I think his comments on medical education are equally applicable to law. In discussing Dr. Welch's theory of the proper development of medical education, Fleming points out that the University must carry on perpetual warfare against the idea that there ought to be two kinds of medical instruction, one designed for mediocre students to make practitioners, and the other for superior students to make investigators and researchers. He quotes Abraham Flexner to the effect that there has been too much accumulation of ready-made material and not enough emphasis on a method of thinking by which an attitude of mind and a pattern of mental habits are to be formed.

that the schedule-makers must be allergic to conflicts between an international law introductory course and the so-called "must" courses in the ordinary "bread-and-butter" program. Students interested in international law constantly find they cannot take the course because it has been so scheduled as to conflict with another course that they feel they must take. This gets us back to the Dean's office, and I will comment on that again later. It is much better, however, if before taking the international law course your students could have previously taken, especially, the course in Conflicts, and Constitutional Law, and if possible, Comparative Law. This represents an ideal which would rarely be achieved. By and large, it seems to me that the place in which this course fits best is the second semester of the second year in the law school.

Next, one cannot assume that the students will have much background. I have made some futile efforts to induce my colleagues at Columbia to introduce into the ordinary courses in the curriculum at least passing references to public international law materials. It could be rather simply done. The possibilities would be evident to all of you. In connection with contracts, one can frequently make allusion to the different rules which pertain to the making of agreements among states, in an entirely different framework of legal operation. Quincy Wright mentioned yesterday the possibility of including references as to the effect of war on contracts. In criminal law, one can touch on extradition, on war crimes, and various other matters, which raise entirely different considerations, but within the general field of criminal law. The possibilities in conflicts of law are obvious. So in constitutional law, when one is dealing with, for instance, the Bricker Amendments, and the place of treaties in our domestic law, it is possible to open the minds and eyes of the students to the international problems which are involved. One could go on similarly through the curriculum. I suggest jurisprudence, admiralty, trusts and estates, equity procedure, and taxation, as questions on which the international point of view could be brought to the attention of the students. This, however, depends on an awareness of international law in the minds of all members of the faculty.

It seems to me when one comes to the approach to teaching international law in an introductory course, one might very well keep in mind the recent experience in teaching languages. As I understand it, in the modern way of teaching languages one escapes from the deadly old method by which one was immersed for a year or more in horrible struggles with grammar before one

ever got any appreciation of the language as a tool and as something which was of interest as a means of communication. Under the present methods, largely developed by the Armed Forces during the war, one first acquires an appreciation of the language as a spoken medium, and then goes on into some of the humdrum detail which is eventually necessary. Query: Whether in the teaching of international law one should avoid the traditional method of beginning with the nature and sources of the law, and plunge into some complex problems which will awaken his interest.

Now this leads me to the point which was touched on yesterday, discussed by Mr. Katz and also by Mr. Brewster: Is it necessary to devote much of one's time to developing student interest? Clearly, international law courses are very different from courses, say, on torts and evidence. It makes no difference whether the student is interested in those courses or not, he has to take them, he does not have to take international law.

Now, of the preconceptions with which the law student views a course in international law, I think there are three. First, that it is not law, secondly, that it is not useful, and thirdly, that it is not important. Mr. Katz has answered some of these questions already, but in connection with the point of view that it is not law, I believe there are some advantages in arranging the materials in the international law course as we did at one time through some mimeographed materials at Columbia, under rubrics which are familiar to the students through their studies of private law; that is, you have a section on contractual law, you have a section on torts, where you put your injuries to aliens, for example, you have a section on property, where you deal with territorial problems, you have a section on crimes. On the other hand, you can take the bull by the horns, and like Judge Hutchinson in Ryan, Trustee v. United States, which Mr. Briggs uses as Case #1 of his casebook, say we are entering a new wonderland of law, and try to tell them this is really exciting stuff that they will get into. In any case, you have to show here a body of material that a lawyer can put his teeth into, and something which is of both interest and importance.

Now, we may also say international law is useful to the practitioner. One can, perhaps, partly meet that as Mr. Bishop does in his "Foreword to students," by stating what big fees lawyers collect from international cases. This is an appeal to a baser motive and sometimes successful. The articles by Willard Cowles and Louis Sohn in the 1954 Journal of Legal Education are important in showing that one can make a convincing case in that regard, but I doubt whether one should fight it out on a pure bread-and-butter basis.

Thirdly, when students say it is not important, I think you must turn, as Mr. Katz did yesterday, to the general task of the lawyer and point out the important issues which are constantly brought up before public opinion, and with which they must deal as citizens, such as the Bricker Amendment, the controversy over prisoners of war in Korea, the question of recognition of Red China, and so on, and this task can constantly be illustrated by the erroneous manner in which the daily press deals with these subjects.

If one desires to plunge into the midst of things in the hope of arousing students' interest, one can, of course, change the order of the materials entirely, and I shall come back to some suggestion on that.

Secondly, as to the approach and method, it seems to me that for a course of this type, there is need for a selection of topics to be studied in depth, as against the possibility of creating a mental attitude on the part of these students, so that there will be at least a flicker in the eye when they hear such words as servitude or state succession or continuity. I would suggest that these points can be covered by outside reading plus occasional talk in class, but the point is that they should go deeply into some of the more fundamental branches of the subjects. I would not omit a consideration of the law of treaties, the law of claims, and the general jurisdictional field including immunities, except as the latter may be covered in the course in Conflicts.

Now, granted the purpose of the course, to which I have referred, I think it is important that one should touch on international organization, even though, as at Columbia and Harvard, other courses on international organization and administration may be available at the same time. This I think can be done, for instance, if one is dealing with the subjects of treaties, claims, and jurisdiction. One can pretty well, through the case material studied here, gain an understanding of the processes of the organizations, for example, in the requesting of advisory opinions, which must introduce them to the relative hierarchy of organs and powers in the General Assembly and Security Council, and in problems of United Nations' membership, problems of pacific settlement, problems of domestic jurisdiction, as in the Tunis-Morocco case, and, perhaps, the general question of immunity of international organizations and their officials, which would come under my general jurisdictional head. I think one can omit in such a course the whole subject of territory, except as it comes under jurisdiction, where one would deal somewhat with the geographical limits of jurisdiction. One can leave out

extration, deportation, and state succession. One might touch briefly prize law, neutrality, and the law of war. I would have some question whether one should not touch upon subjects of international law, recognition, continuity, act of state doctrine.

An alternate approach, it seems to me, to the one I have suggested of taking some of these normal topics and concentrating on them in depth is to plan, let us say, a course on the rights or status of aliens. This might have the advantage pointed to yesterday, of bringing the subject home to the individual in the international scene. It would begin by emphasizing the fact that an American, as soon as he leaves this country, is an alien. One would consider nationality in practically all of its phases. One would take up admission and expulsion, jurisdiction, civil and criminal, and here introduce them to the notion of sovereignty.

Also, it would be necessary to consider maritime and aerial jurisdiction, jurisdiction in occupied territory, international criminal jurisdiction, and so on. Extradition would also come in here. In the whole field one would treat the right to do business, to own property, to practice a profession, etc., which Wilson and others commented on yesterday. This gives an opportunity for a full introduction to the body of treaty law. Then one can go on into the full treatment of the subject of claims.

Similarly, in this general approach of choosing a particular body of subject matter, one could focus it around treaties or international agreements, and in the study of the cases there insist upon the student acquiring some familiarity with the subject matter of a case which may involve an issue of treaty interpretation, for example, before the International Court. It all could be brought in an incidental points in the study of treaty law.

Another alternative, which may be possible in some schools, and which I think is highly desirable—I am sorry we have not completely worked it out at Columbia—is that in which the same man teaches both public international law and conflict of laws, or where he is on friendly terms with his colleague teaching conflict of laws, to provide for some re-examination of the distribution of the materials. The distribution in the traditional courses is purely arbitrary. One could accomplish a great deal by transferring much of the public international law material into the conflict courses which students normally take. But these alternatives, it seems to me, would be something like half-way houses, resort to which would only be inspired by the need to stimulate either student interest or faculty and dean interest. Often in our law schools throughout the country, the great problem is to stimulate not the interest of the students, but the interest of the Dean.

are very practical ones, which must be faced. Some day, I think, we will find that bar examiners will include some problems of international legal studies in bar examinations. And when that day comes, the demand will be supplied for courses in this field, and at that point deans will demand that the course be supplied. Meanwhile, it seems to me that experimental courses of as great a variety as possible are highly desirable, and I hope that in our discussion this morning we may all have the benefit of hearing of other experiments which may be carried on in various schools, to the end that all of these ideas may be fruitfully exchanged and that new developments in the teaching of this introductory course of international law will lead to its securing an established place in the curriculum.

COMMENT

DEAN MIRIAM THERESA ROONEY (Seton Hall University Law School): My approach to this problem is three-fold. First, I had long experience with the problems of international law in the Department of State. I learned a great deal there about practical situations as well as theory, and I should like to take this opportunity to express my deep gratitude to the Legal Advisers and their assistants, with whom I worked closely for twenty years, for the wonderful teaching they gave me by example as well as by verbal direction.

Secondly, my approach is that of a teacher of international law who is concerned with the selection of what to teach and how to get that much across to students who have no previous practical knowledge or experience in confronting international law cases.

My third approach to this problem arises from being Dean of a law school and concerns the problem of providing the international law courses that Mr. Jessup has just spoken about. The Dean has a very real problem of how to get any more into the law school curriculum. What can one do in either a two-hour or a four-hour course in providing an intelligible introduction to international law? How can one arouse enough interest in the students for the problems that are not just "bread-and-butter" cases, but that constitute the real substance of the international law field?

What goes on generally in our law schools seems to me to be of the greatest significance to the world. Lawyers are necessarily the principal advisers to all the world's leaders, in economic, social, business, and all kinds of affairs. If the education of lawyers is confined merely to techniques and to the processes of handling only "bread-and-butter' subjects, the aspirations of the human spirit for justice will erupt beyond the controls devised by the law. Law students must in some way be aroused while they are still in school to an awareness of some of the world problems discussed here yesterday. Otherwise they will be unable to give the sort of advice the people expect. And if the law schools fail in the training for leadership in the maintenance and development of order under law, not only their students, not only their country, but the world will suffer from that failure.

How is a law school dean to meet this situation? International law is not a "bread-and-butter" subject. It is not yet required for bar examinations. Its clients are not frequently met with in most

law offices. In an already overcrowded curriculum, international law seems to most students to be a subject which could well be left out of account. Nor will graduate courses in the subject take care of the need, since comparatively few take graduate work after admission to the bar. If the practical problems of international law are to become known in any degree to the legal profession generally, a way must be found to provide at least an introduction to them in the regular law school curriculum. For the law school dean, the decision involves not only the content of the course which should be included, but the value of the other senior courses which it must necessarily displace or shorten.

The course in international law cannot be taught in a vacuum. Its problems and rules must be related to the law of torts and contracts, of insurance and corporations, of agency and conflicts of jurisdiction, with which the student has already become familiar. If it can be taught so as to tie in to the seamless web of the law, to many of the situations which the student has seen arise in other law school courses, its place in the curriculum is justified even if no clients with international problems may be anticipated by the students immediately after admission to practice. It is in the broader viewpoint and the deeper learning involved that international law earns its right to be included in the usual law-school curriculum.

The question of how to arouse a student's interest and how to encourage him to pursue on the graduate level the kind of research and study that the subject requires, remains. Unless the introductory course is taught skillfully, it may result in a mere hodge-podge or smattering of unrelated cases which the student is happily rid of as soon as possible instead of serving as an inviting introduction to a life-long field of study. Mr. Murdock has spoken about the undesirability of chopping up the subject matter into bits. How the introductory course can provide a broad view of the field in the brief time allowed is a pressing question.

My own conviction is that philosophy provides the key. There is, of course, a necessity of teaching facts and for learning what the cases are about, but something else has to be incorporated into the international law course before it will meet the needs of the community. In my own teaching I have used Professor Bishop's casebook, and I have had the privilege of seeing its development through several of its stages. It is very teachable and a most satisfactory casebook for the introductory course, but I cannot help wishing there were a bit more about philosophical foundations in it. I think Professor Bishop set out to include some philosophy in the book, but by the time he whittled and

culled and got the manuscript within the space expected by the publishers, there was not much philosophy left in it, and I think neither he nor the rest of us who have been discussing philosophy over a long period of time are quite satisfied with the result in this respect.

There was a time when philosophy provided the customary approach to international law treaties. Then a strong reaction set in which succeeded in eliminating philosophy almost completely from the field. It is not necessary or desirable to return to the old a priori treatises to satisfy the need. But something much more than the positivists' rule of the case is required. Mere codification of the rules has proven to be illusory as a practical rationalization. Perhaps the most enheartening statement made at this meeting was Mr. Jessup's allusion yesterday to the prevailing revolt against positivism. I was part of that revolt when it first began to take shape. It is wonderful to find here at this conference so many others in the field who feel and share the same conviction.

Students in our law schools should know a great deal more than they do about the difference between positivism and existentialism, between contemporary theories of natural law and idealism, and between subjectivism and realism. If they did, they might be able to anticipate and avoid the dangers of using the public force to coerce and punish free human beings into conformity with some subjective and slanted view of power and control. They should instead be able to observe and analyze facts and situations, and to ascertain jurisdiction and reach judgments in conformity with the best expressions of the common good, in such a way that persuasion and the appeal to reason, rather than coercion and the use of force, be thought of generally as synonymous with law. This knowledge should come to them less by theoretical treatises than by inductive analyses and evaluations of the philosophical notions latent in judicial and comparable legal opinions, to the end that fallacious premises may be detected before the wrong conclusions are given effect.

Above all, students of international law should know that international law, like all law, is founded on reality, on nature, and in this sense it may be said to be based on natural law. They should learn that natural law is not anybody's subjective notion, that it is not an ideal, but that it is derived from facts. It should be made clear to them that law is already existent in the universe and that it needs to be discovered and formulated, but that in discovering and formulating, it is the human mind that functions, not in vacuo, but as needed. It is in the interna-

tional law sphere particularly, that we all have begun to learn again that to the extent that we misunderstand the natural law, we miss the goals we desire and struggle for, and we have to go back and make a new start. In addition, we lawyers are beginning once more to recognize that the human mind achieves its highest point in reaching a judgment, and that judgment is the basis of law. It is not the case situations alone that are important, but rather, it is the judgment the mind makes with respect to the resolution of the fact situations with which it is confronted that is important. Students are not going to understand much about international law until they know this.

Now, what are we going to do about getting this into the introductory course? It seems to me that there is only one practical suggestion that I can offer here and now, and that is to enlarge a little bit more on the over-all philosophical background, where this fits in as a branch of the universal picture, and give these students some glimpse of the vistas you are opening up here. If they could only be helped to see, for example, that philosophical fallacies in the legal system of Nazi Germany led to its conquest, perhaps the theories implicit in contemporary law would not seem to esoteric. Then, if they were given some practice in analyzing the philosophical theories to be found in the cases about claims, treaties, and the like, through a skillful use of the Socratic-dialogue technique, they could be brought down to earth where human beings live, and not left in the realm of fantasy where no flesh and blood people can be found.

One of the most discouraging aspects of the teaching of the philosophy of law has been the fact that jurisprudence courses have not hitherto devoted the time and effort necessary to show the relationship of ideas to the actual judgments that have been enunciated in common law or in international law cases. A careful study of the history of juridical ideas and their effects would be especially valuable in the international sphere.

I hope some support can be given to research in how best to get the philosophy from the cases, analyze it, try to find out where it is wrong or fallacious, what needs to be added to round it out a bit more, and then bring that knowledge back to the graduate schools and eventually to the introductory course, so that students will come to realize that it does matter what you think, and that it does matter why you say what you do.

If the students are going to get a better understanding of international law when it is most needed, they cannot be allowed to graduate completely illiterate in the history of juridical ideas. It seems to me there are three tasks immediately ahead: first,

the interest of the law students in international law problems must be aroused, second, better teaching of the significance of the problems involved must be encouraged, third, a deeper philosophical knowledge should be expected of the teachers so that they can stimulate keener analysis on the part of the students. A good casebook is a help for the first of these, but is not enough alone to develop the other two. Good teachers are indispensable.

The task is formidable. Perhaps hardly a beginning can be made by way of improving the situation. But that is no reason not to try.