

THE TEACHING OF INTERNATIONAL LAW

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Let me say in the beginning that I do not take it as my responsibility in this program to describe the teaching of international law in the United States. I would not dare to give my version with my colleague, Professor Stevens, an ex-colleague, Professor McWhinney, and other friends and associates present in the audience. I do not think, either, that I will attempt to make any comparison between what is done in the United States and what is done in England. I had my first training in England, with Professor Brierly, whom I still regard as one of the great men of all time.

I am reminded by Professor McWhinney's emphasis upon languages of an incident that occurred when I was traveling one Christmas to the Association of American Law Schools meeting with friends, including a professor from a great school near New Haven. I asked this friend what he was teaching, and he replied that he was teaching a course in comparative constitutional law to students from other countries. I happened to know that this man did not know any languages, and so I said, "How in the world do you teach a course in comparative constitutional law?" "Well," he said, "it's like this. I teach them the United States Constitution, and they can damn well compare their own!"

The most that I propose to attempt, without making any pretense of being representative, is to suggest the broad outlines of an emphasis in theory about international law which is shared by several of us participating in this meeting and by a considerable number of people back home. The American Society of International Law has already put out little pamphlets which describe the teaching of international law, both in the law schools and in departments of government. Unhappily, a quick look at these pamphlets demonstrates that much of our teaching, although it has increased in quantity in the last fifty years, is highly conventional, emphasizing relatively unimportant problems.

The inspiration that moves many of us in seeking a new and more comprehensive conceptual map is the same inspiration that was behind the call for our conference here today. As Professor McWhinney suggests, we attempt to build not only upon sociological jurisprudence, with its roots deep in England and the continent and elsewhere, but also upon American legal realism and the theories and findings of the emer-

ging policy sciences. Our emphasis goes beyond most sociological jurisprudence in its insistence upon a conscious, explicit, and deliberate focus on policy. In our conception, though not all policy is law, all law is policy—if reference is made to its impacts upon the shaping and sharing of community values. Our aspiration is to achieve a framework of inquiry which will assist both in the detailed specification of the important transnational problems of our time and in bringing to bear upon these problems all the intellectual skills necessary to the creation of a more appropriate and effective international law.

This is the principal point where I would disagree with Dr. Brownlie. Policy is not relevant merely for the purpose of finding out what are the motivations of these mammoth nation-states. Policy is relevant because it is something we want, something the people in a community demand to have put into effect among them.

In the terms that Professor Falk employed this morning, the peoples of the world are demanding protection from threats of nuclear and other war, the depletion and despoliation of resources, the burdens of overpopulation, epidemics, poverty, deprivations of freedom and human rights, and so on. Policy is relevant because human beings demand it, not simply because inquiry about it can be made to shed some light on the motivations of effective elites.

It is of course as impossible for Dr. Brownlie as for others to escape considerations of policy. The concepts of aggression and self-defense, with which he works in his great book on *International Law and the Use of Force by States*, embody the larger community's most important policy of all, that of the maintenance of a minimum order in which unauthorized coercion is controlled. It can only be a happy accident that Dr. Brownlie, without benefit of a policy orientation, came to much the same conclusions as Dr. Feliciano and myself in our book on *Law and Minimum World Public Order*! An explicit and systematic appraisal of relevant factors in context would still appear to offer a better guarantee of rationality in decision than either undisciplined hunch or subservience to ambiguous and tautologous technical concepts.

The law of the sea problems, to which Dr. Brownlie also refers, are equally infused with inescapable policy choices. In a recent speech Ambassador Pardo, for example, insists that all the distinctions between "territorial sea," "continental shelf," "contiguous zones," "extra-territorial exercises of jurisdiction," and so on—achieved so carefully through the centuries for balancing the inclusive and exclusive interests

of states in the enjoyment of a great sharable resource—are useless because they hamper the coastal state in unilaterally protecting its alleged special interests. It is this kind of theory that is employed to support the Latin-American states in their demands for a single, comprehensive “territorial sea,” or its equivalent in “sovereign jurisdiction,” of 200 nautical miles. The only effective answer to these demands must be in demonstration of their destructiveness of common interests, including their own genuine exclusive interests, and, hence, of important general community policy.

The Canadian claim to assert competence with respect to ultra-hazardous pollution in a specified zone might, in contrast, be found by appropriate contextual analyses and distinction of different interests to be in accord with the policies which underlie historic assertions of contiguous zones and other extraterritorial competences. Relation to common interest depends upon the degree of danger and the proportionality of the competence asserted.

The basic problem to which we address ourselves this evening is, however, whether or not there is any way to make this emphasis upon policy, this policy-oriented approach, more effective in inquiry and decision. My first suggestion is that we need something more than merely interdisciplinary or multidisciplinary work. I once had a colleague, Professor Underhill Moore, who insisted that the best collaboration between the social sciences was in one head. By analogy we need to have our own jurisprudence of international law, our own comprehensive map of the realities and intellectual tasks with which we are concerned, to guide any necessary interdisciplinary or multidisciplinary work. The historic role of the lawyer or legal scholar is that of the synthesizer, and we need our own appropriate theory.

If we are to achieve a more effective policy-oriented approach to international law, certain particular, explicit emphases would appear indispensable. Some of us are attempting to develop these emphases in teaching materials, monographs, and articles on various problems. It is perhaps worth insisting that more than teaching is involved—that inquiry comes first. One cannot be a good teacher without the requisite knowledge or intellectual procedures for securing such knowledge and keeping it up to date. The comprehensive theory we seek is thus primarily a theory for inquiry—though hopefully, it may assist in both teaching and decision.

The major emphases we recommend are five. The first is the establish-

ing of observational standpoint: being clear about who you are and what you are trying to do, and the comprehensiveness of your map of reality. The second requires a selectiveness of the focus: What is it that is peculiarly legal among the events with which we are concerned? What is it that we as lawyers can contribute? The third emphasis is that we make explicit the intellectual tasks we are trying to perform. The emphasis this evening has been on reporting the past. Reporting the past is, however, but the simplest of the tasks required of us. We recommend specifying a number of interrelated intellectual tasks. If, further, policy is to be a center of inquiry, then what policies? We suggest, as a fourth emphasis, that everyone should make his own policies as explicit as possible, that he deliberately postulate the goal values for which he takes responsibility as comprehensively and explicitly as possible. We do not care how logically he derives such values. He can derive them from ideologies, religion, metaphysics, or whatever, if he travels down the ladder of abstraction toward relations between human beings that are compatible with a public order of human dignity. The fifth and final emphasis is upon the organization of continuous, systematic inquiry. How does one establish a comprehensive program which will promote the overriding objectives of inquiry and decision?

For more detailed exposition, we begin with the observational standpoint and the comprehensiveness of the map. This is a point that was not clarified in our earlier discussion today. I think it is indispensable that, for purposes of inquiry, the scholar distinguish himself from the operator—the decision-maker, whether authoritative or merely effective elite. What the scholar is trying to do is, among other things, to describe what the decision-maker is doing and to account for his decisions in terms of the variables that affect them. The technical words that the decision-maker employs, the conventional rules of law which have been so omnipresent in our discussions here today, are part of the data being described and accounted for; if the scholar allows himself to get lost in the complementarities, ambiguities, and incomplete references of these technical terms, he will achieve little enlightenment about either the course of past decision or the factors affecting such course. He will go around and around, as do the people who talk only about sovereignty, domestic jurisdiction, international concerns, aggression, self-defense, freedom of the seas, contiguous zones, and so on without relating these concepts to the larger context in which these terms are used to justify particular shapings and sharings of values.

The scholar cannot of course wholly isolate himself from the community processes of which he is a part. The studies that he makes have an unavoidable impact upon such processes. What we recommend is that the scholar be as conscious as possible of the different communities with which he identifies and that his appropriate indentifications include, at the most comprehensive level, the whole of mankind. The knowledge the scholar should seek is that relevant to clarifying and implementing the common interests of the members of the different communities with which he identifies, and his special role may be that of demonstrating to such members common interests which they themselves have not been able to perceive.

I have an associate who insists that we cannot properly talk of common interests because the Soviet Union and the United States do not have the same demands, do not see their interests in the same way. This is a myopia which illustrates the urgent need of the observational standpoint we recommend. From the point of view of the scholar, the observer, one can see that the Soviet Union, the United States, Communist China, and all the others are scorpions in the same bottle, that they do have interdependencies and interdeterminations, whether they know it or not, not only with respect to security, but with respect to wealth, health, enlightenment, and many other values.

From the standpoint of the observer, of the scholar who is able to achieve a larger map, we do have, many suggest, a global community in this sense of interaction and interdetermination, which is sustained by many explicit and tacit agreements in the disposition of power about the world. In more detail, one can observe a process of effective power that embraces the whole globe and extends even into outer space. Decisions are being taken and enforced, whether the English and Americans like it or not, whether the Russians like it or not, and whether the Communist Chinese like it or not. These are effective decisions that have consequential impact on a global scale. Many of these decisions are of course taken largely from perspectives of naked power or expediency. If, however, one looks at these effective decisions closely, it can be seen that some are taken from perspectives of authority. I mean by this, as suggested earlier today, that these decisions are made by the people who are expected to make them; that they are made in established structures (courts, arbitration tribunals, diplomatic interactions, conferences, legislative bodies, executive or administrative agencies); that they are made in accordance with general community expectation about how they

should be made—in a genuine effort to clarify common interest; that they are made by established procedures rather than by convenience or chance; and that the people who make these decisions have enough effective power to put their choices into practice in a consequential number of controlling instances. The whole process of decision, if it is authoritative in the sense we specify, is one of clarifying and implementing common interest, and I would emphasize that the real sanction in the long run of any law is in this perception of common interest. I think we have a very substantial process of this kind on a global scale—despite all the difficulties about aggression and self-defense and the maintenance of the most basic goal of all, security.

If one looks more closely at this global process of authoritative decision, I think one can see that it, also, is made up of two different kinds of decisions. First, there are the decisions that establish and maintain, or constitute, the whole process. These are the decisions which identify and characterize the different established decision-makers; specify and clarify the broad outlines of basic community policies, with indication of different intensities in degree of demand; establish structure of authority for appropriate performance of different governmental functions; allocate bases of power (in authority and control) among different decision-makers for sanctioning purposes; authorize the procedures for gathering facts or exploring policies necessary to the different kinds of decisions; and secure the continuous performance of all the functions (intelligence, promotion, invocation, etc.) indispensable to the making and application of law. It will be noted that this conception of “constitutive process” is much more ample than the traditional notions of constitutional law as judicial decision within which much Anglo-American thinking is confined.

The second type of decision refers to those establishing the public order emerging from this constitutive process, the decisions which shape and secure the protected features of the community's different value processes; the degree to which security is maintained, the clarity with which conceptions of aggression and defense are achieved and enforced; the modalities by which resources are allocated and protected, the degree to which wealth is produced and shared; how human rights are identified and protected; how enlightenment and health are fostered and protected; and so on through the whole range of relevant values.

For relevant and economic inquiry about international law, if international law is appropriately conceived as a process of authoritative deci-

sion, we need, thus, a comprehensive map of the potential interrelations of community process and legal process. The legal process is a response to claims people make about features of this larger community process. It is changes in the distribution of values within community process with which authoritative decision is concerned. Such decision is affected by many features in past community process as well as by peoples' anticipations of alternative future distributions of values. The decisions taken, in turn, not only directly effect an immediate distribution of values among claimants, but also in aggregate determine the quality of the community's public order. The more comprehensive and realistic an observer's map of the potential interrelations of community process and legal process, the more fruitful his inquiry is likely to be.

The second emphasis suggested was that we be selective in our focus. We, as lawyers, are experts upon authority. Unfortunately, we too often leave the study of control to the political scientists and other social scientists. The most fruitful conception of law, I think, is that of authority conjoined with control. If a prescription reflects authority only, it is just illusion; if it expresses control only, it is naked power and violence. The selective focus we recommend is upon the decisions that are both authoritative and controlling. This focus extends not simply to single isolated decisions, but to the whole flow of authoritative and controlling decisions, including both constitutive and public order decisions as described above. It is this emphasis upon authoritative decision which establishes a center and criteria of relevance for inquiry and facilitates an orderly and economic exploration of the larger community processes for precipitating events, conditioning factors, and value impacts.

The historic, selective focus upon technical rules would in contrast appear to be much too limited. These technical rules are merely some of the variables that affect decision; they are not the only variables. They express someone's policy, but often darkly and obscurely. Their attractiveness to the profession has been that they leave it ambiguous both whose policy and what policy they express. An explicit policy-oriented approach must have intellectual procedures for clarifying both who is responsible for policy and what its detailed content is.

This brings me to the third emphasis: what we are trying to do, the intellectual tasks we seek to perform. It is sometimes said that a profession is a group which both possesses a special skill and an enlightened view of the goals and aggregate consequences attending the exercise of its skill. From this perspective, lawyers are specialists upon authority

(and, hopefully, upon control as well) who assume an explicit responsibility for the establishment, maintenance, and management of processes of authoritative decision which can clarify and implement basic community policies. Though the lawyer must serve clients, private and public, one way he serves these clients is by clarifying their goals and relating these to common interests; one mark of the professional man is that he is not a mere artisan, at the beck and call of every Tom, Dick, and Harry with a special interest to grind. A fortiori, the scholar who observes and evaluates processes of authoritative decision must concern himself with clarification of the common interests which constitute community policy. Neither the practicing lawyer nor the scholar can be content with mere description of the past: Both must be concerned with what people demand and with means for affecting the future to secure such demands.

The first task we recommend is, hence, that of the deliberate and explicit clarification of goal values. For the scholar, this means the values for which he is willing to take personal responsibility in recommending to the different communities of which he is a member. To the degree that economy permits, every particular choice recommended should be related to all the interests it affects and its larger community contexts.

The second task recommended is that of description of past trends in decision, in terms of their approximation to basic community policies. The relevance of inquiry where we have been is to find out where we are and what we can learn about how we got there. The most effective comparison of trends through time and across boundaries requires that the events which precipitate recourse to authoritative decision, the detailed claims which are made to such decision, the factors which appear to condition decision, and the immediate and longer term consequences of decisions all be categorized in terms of facts rather than of technical legal doctrines.

The third task is that of identifying the factors affecting decision, which requires careful and systematic exploration of many variables, both predispositional and environmental.

The fourth task is that of projecting future trends in decision. This requires, in lieu of the simple linear or chronological extrapolations of conventional legal theory, the formulation and testing by many different methods of alternative developmental constructs, embodying varying anticipations of the future.

The fifth and final task is that of the invention and evaluation of

alternatives. If what we observe or predict is not in accord with our basic clarified policies, what can we do about it? This task requires examination of every phase of decision process and its context for opportunities in innovation—new policies, new institutions—which may influence decision toward greater conformity to clarified goals.

The next major emphasis in policy-oriented inquiry about international law requires the explicit postulation of a comprehensive set of goal values. It should be obvious that one cannot economically perform any of the intellectual tasks indicated above unless he is quite clear about the values with which he works. We recommend postulation, rather than derivation, since experience has shown that people enjoying many different styles in derivation can cooperate for the same human dignity values. We work with a set of eight value terms, systematically defined by reference to a series of institutional practices; but one could work with two, twenty, or forty major terms if these terms are given a clear reference to detailed relationships between human beings. The important point is to make comprehensive, combined value-institutional reference to events which escapes the exclusive, parochial perspectives of any particular segment of the larger community of mankind. When basic goal values are kept clear, many different institutional practices, from different communities and cultures, may be seen to contribute equally to the shaping and sharing of such values.

Part of the preparation I did for this meeting was to read a little book, edited by Mr. J.A. Jolowicz of Cambridge University, on *The Division and Classification of the Law*. (The late Professor Jolowicz of Oxford was my teacher, and I have a great deference for anyone who bears that name.) This is an interesting book, on a most important problem. Mr. Jolowicz issues an eloquent call for the reclassification of law, for purposes of inquiry, in terms of facts rather than of technical concepts. By this he hopes to achieve a classification of "problems which should be considered together because, in the social context, they are essentially similar types of problems"—that is, a classification in terms of problems which raise comparable policy problems and facilitate the comparisons through time and across boundaries indispensable to effective inquiry. Unhappily, however, Mr. Jolowicz handicapped himself by a conception of law in terms of "rules" rather than in terms of decision process responding to events in social process, and he had no chance to escape from the blinders imposed by the rules to a comprehensive categorization, from the standpoint of an observer, of the facts to which

decision-makers respond. The main headings of his suggested reclassification are both conventional and limited, containing no reference to global power process or international law.

In fact, none of the discussants in Mr. Jolowicz' book seemed to have much notion of the relevance of the larger community process to their inquiry or of how to organize in terms of fact. Professor Twining of Belfast, a gifted and sophisticated scholar who has had opportunity to learn better, (along with certain associates) takes Mr. Jolowicz to task for his calls for facts. What are "facts?" Professor Twining asks. He doesn't know what "facts" are; they can be described at many different levels of abstraction, and Mr. Jolowicz' descriptions are mixed up with the references of legal rules. In the course of his exposition Professor Twining makes reference to Professor Lasswell and myself and notes an odd suggestion from across the waters that a law school curriculum might be organized about "values." While conceding that inquiry might be organized about "values" or "human rights," Professor Twining is as uncertain about "values" as he is about "facts" and wonders what purpose might be served by such a reclassification or any new classification.

There is of course no insuperable intellectual difficulty in scholars' specifying the references they make in terms of "values" or "facts" and in proffering a set of categories for describing social process and legal process, while both distinguishing such processes and noting their interrelations. By such "value" terms as "power," "wealth," "respect," "enlightenment," and so on, and such "institutional" terms as "participation," "perspectives," "situations," "strategies," and so on, one can make comprehensive, explicit, and detailed reference both to the empirical relations between human beings to which legal process is a response, and in turn affects, and to the various relevant features of such legal process itself. These value and institutional terms may be economically employed to facilitate performance of all the intellectual tasks incumbent upon either the scholar or decision-maker: to state the preferences about decision of the observer or others; to describe the degree in which past decisions approximate stipulated preferences; to categorize the predispositional and environmental factors affecting decision; to project probable developments in future decision; and to evaluate possible new alternatives in legal and social process. It is only by some such categories that scholars and others can escape the complementarities, ambiguities, and incomplete references of conventional, technical rules.

In passing, let me say that it was heartening to hear Professor Simmond's reference to law as communication. Certainly, what is called the making of law—the creation in community members of expectations about the content of policy, and about its authority and control—as well as most other phases of legal process, involves communication. What I would emphasize is that more than communication (the shaping and reshaping of rules) is involved. Legal process includes not merely communications, but also operations, acts of collaboration—active choices or decisions and their implementation in controlling practice to effect a distribution of values. The notion of a process of communication may, however, be effectively employed to facilitate understanding of many problems, such as in the interpretation or application of prescriptions.

When we turn to our fifth and final, major emphasis—that upon the systematic, continuous inquiry—we recommend aspiration toward a comprehensive, conceptual map of the interrelations of world community process and processes of authoritative decision which both facilitates contextual inquiry about particular problems and spotlights the more important problems. So comprehensive a map can of course be made manageable only by the establishing of priorities in importance, determined in accordance with postulated overriding goal values.

The map we recommend begins with inquiry about constitutive process. What are the decisions that establish this process, that determine how international law is made and applied? Who participates in the making of these decisions? Nation-state officials, international governmental organizations, political parties, pressure groups, private associations, individual human beings? What characteristics of these participants predominantly affect their decisions? From what perspectives do the effective elites who maintain this process move? What are their demands for values, their identifications with different territorial communities and functional groups, and their expectations about the conditions under which they can achieve their demands? In what degree are they able to perceive, and act upon perceptions of common interest? What structures of authority—diplomatic, diplomatic-parliamentary, parliamentary, adjudicative, and executive—are established in what geographic and temporal distribution for the making of decisions? How open and compulsory is access by participants to such structures? How is authority distributed among participants with respect to different types of decisions, and what bases of effective control are allocated to different participants? What employment by whom is authorized of the

diplomatic, ideological, economic, and military instruments of policy, and what detailed procedures are established for particular exercises of these instruments? In what different types of decisions does the whole process culminate? How is the intelligence necessary to rational decision gathered, processed, and disseminated? Who takes the initiative in the active advocacy of policy alternatives, propagating demands and mobilizing resources? By what sequences in the exploration of potential facts and policies, in the detailed clarification of particular policies, and in the communication of expectation about authority and control is general community policy made authoritative and controlling? Who invokes, how, in what structures of authority the application of authoritative policies in particular instances? By what detailed processes do the exploration and characterization of facts and policies, the projection of decision, and enforcement measures go forward? How are prescriptions, and arrangements made under them, terminated when they no longer serve common interest? How does the general community maintain a continuing appraisal of the adequacy of past decisions to secure postulated goals? And so on. Two colleagues, Professors Lasswell and Reisman, and I have under way what will amount to a two-volume study in answer to these and other relevant questions.

With the basic features of global constitutive process outlined, the map we recommend proceeds to inquire about the "public order" decisions—the decisions about the shaping and sharing of particular values—which emerge from this constitutive process. The most economic and relevant mode of inquiry would of course be to proceed value by value. Thus, in relation to wealth, how and in what degree is a global economy established and maintained: How are resources allocated, planned, and developed and how are the production, conservation, distribution, and enjoyment of goods and services managed? With respect to enlightenment, what are the decisions about the gathering, dissemination, and enjoyment of knowledge: How are individuals and groups protected in their claims for the basic enlightenment necessary to the achievement of their potentialities, for additional enlightenment on the basis of merit, and in freedom from discrimination for reasons irrelevant to merit? And so on, with respect to such other representative values as well-being, respect, skill, rectitude, and affection. It is obvious that inquiry of this kind would make irrelevant many of the traditional distinctions between public international law, private international law, and comparative constitutional law. Unfortunately, there has been too little

scholarly inquiry from these perspectives to permit the detailed completion of such a map.

The more traditional approach to public order decisions has been in terms of the protection that different participants in world social process secure from constitutive process. Thus, most of the conventional case-books in public international law published about the world deal almost exclusively with the protection accorded the nation-state. After a few pages devoted to the "nature" and "sources" of international law, most of these books move immediately into certain limited inquiries: How is a territorial community "recognized" as a state? What resources can it acquire, and how does it establish control? Whom can it regard as its "nationals?" What are the principles for allocating "jurisdiction" over events between states? How are agreements and coercive relations regulated?

These limited inquiries are important, but are far from exhausting important inquiry even in comparable vein. Exactly the same questions could be asked about international governmental organizations and transnational private associations. How does the entity get established with a distinct legal personality? What are its permissible objectives and structures of authority? How does it acquire and control bases? What are its authorized procedures? How does it formulate and apply its own policies? How are its interactions with other participants, of all different types, regulated? Comparable, and no less important, questions could be asked about the protection of other groups and of the individual human being.

Still another way of organizing inquiry about public order decisions is in terms of the protected enjoyment of resources. This is the way in which colleagues and I have made studies of the "public order" of the oceans, outer space, air space, and international rivers. With respect to any major resource or domain, one may ask how access is obtained, how particular resources are allocated for inclusive or exclusive enjoyment, how law is made and applied for particular interactions in enjoyment, how minimum order is maintained, and how potentially conflicting enjoyments are accommodated.

The important point I would make, in conclusion, is that there are many ways, potentially more fruitful than the conventional focus upon technical rules and concepts, of organizing inquiry about the world process of authoritative decision and its interrelations with world social process. Whatever modes different scholars may employ, it is urgent, as

Professor Falk emphasized this morning, that we acquire as quickly as possible a better understanding of world constitutive process—of how international law is in fact made and applied—and that we promptly bring this new understanding to bear upon all the more threatening public order problems now confronting us. Upon the most urgent problem of all, that of maintaining minimum order, of controlling unauthorized coercion, we have made hardly a beginning. It may be that, given our present spoliative practices, the oceans of the world will not shortly become dead cesspools, but we cannot afford to take the chance. It may be that a badly wounded world society and economy can accommodate seven billion inhabitants of the globe by the turn of the century without tremendous loss in the quality of life for individuals, but the eventuality of many more people is one for which we should be making the most comprehensive and rational plans. When confronted by all these problems, and others of comparable magnitude, it would appear frivolous for scholars to make nice discriminations in priorities of urgency.