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Developing a Realistic International Law Curricula for the New Asia: A Personal View

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I have been teaching international law at the University of Tokyo since 1987. From my own teaching experience, I would like to briefly present my views on designing an international law curricula.[1]

I. The Distinction Between Legal Problem and Policy Problem is Important

AT the beginning of my course, I explain the fundamental distinction between legal and policy problems. A legal problem relates to whether a particular State act is permitted, prohibited or rendered obligatory under international law. To establish whether a particular act comes under one of the above-mentioned three categories is the first and most important task for students of international law. *Lex lata* should be made clear and applied to the reality before discussing *lex ferenda.* Policy problems, on the other hand, relate to whether a State act is desirable or not in terms of making policy choices. What is important is that as a matter of theory, considerations of the legal aspect of a problem should precede policy issues and discussion relating to that same problem. If a particular act is prohibited under international law, that act should not be taken without considering the policy implications of such action. If it is obligatory, it should be taken without considering issues of policy. Therefore, the policy aspects of a problem should only be considered where a particular State act is permitted under international law.[2]

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1 In Japan, law is taught at the undergraduate level as well as graduate level. International law is one of the major subjects offered. At almost every Faculty of Law, lectures and seminars on international law are offered. In some Universities, they are offered at other Faculties like the Faculty of International Relations and Faculty of Education, in particular when the University has no Faculty of Law. At our Faculty of Law and Graduate School of Law and Politics in the University of Tokyo, the courses offered include public international law, law of international organizations, international economic law, private international law and EU law.

2 The present writer has to admit that this explanation is rather rough because it does not deal with the relationship between the non-existence of a prohibitive rule and the permissibility of an act. The equivalence or non-equivalence between the two cannot be discussed here.

In reality, within each government, the policy aspects of a problem are considered first and thereafter, legal advisors consider the legal aspects of the problem. It often appears that the opinions of legal advisors that a particular act is prohibited in international law are neglected by his/her government, even if it a democratic one.[3]

It is very useful for students to know the role of legal advisors in his or her State's legal system, as well as in other States,[4] preferably at the beginning of an international course, to help them understand the realities surrounding the practice of international law.

II. Teachers Should Tell Students that the Reality of Diplomacy is not Like a Textbook of International Law

Students should be taught the practical realities of how international law operates. It is important to explain how a particular treaty is enacted and what the authentic interpretation of each provision should be. But it might be more important to explain how the provision is or is not applied within the setting of diplomatic reality. The following examples illustrate this point.

Firstly, inequality and discretion in the application of international rules, a manifestation of inconsistency and double standards, is commonplace in reality. It often occurs that economic sanctions are imposed against State A which committed an internationally wrongful act, while they are not imposed on State B which committed a similar or more grave wrong. The equality of application of international law, in contrast to the equality in the formation and content of international law has not been fully established in reality.

Secondly, in enacting a treaty, it is often a deliberate and intentional diplomatic technique to craft vague treaty provisions, which lend themselves to a variety of interpretations. A treaty provision is like the greatest common denominator. This causes interpretative difficulties

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3 For example, the legal opinion by Fitzmaurice against the armed intervention in the Suez Crisis was neglected by the Eden administration. See Geoffrey Marston, 'Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advise Tendered to the British Government', (1988) 37 *ICLQ* 773-817.

4 On the role of legal advisors in Japan, see Shotaro Yachi, 'The Role of the Treaties Bureau of the Ministry of Foreign Affairs in Japan's Foreign Policy Decision-Making Process', (1988) 31 *Japanese Annual of International Law,* 82-93. On their role in the US, France, Switzerland and UK context , see 'Symposium: The Impact of International Law on Foreign Policy-Making: The role of Legal Advisors', (1991) 2 *European Journal of International Law,* 131-164.

given that text must be read 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose' (Article 31(1), Vienna Convention on the Law of Treaties).

Thirdly, although every textbook states that an internationally wrongful act gives rise to the obligation of reparation, in reality, the admission of responsibility and reparation is rare. In the US-China Air Collision Dispute in April 2001, the different interpretations of the US Ambassador Prueher's letter of 11 April 2001 addressed to Chinese Foreign Minister Tang contained the somewhat symbolic word 'very sorry' might be a typical example,[5] which is ambiguous at best.

Fourthly, in the context of international society, problems are often interlinked and cannot be considered in isolation. Economic sanctions imposed against a State which committed an internationally wrongful act might be lifted, even if the wrongful act continues, because it is necessary to obtain the cooperation of the Delinquent State in order to deal with another wrong. For example, in order to obtain the release of nationals who are detained in a foreign state, even the admission of responsibility can be negotiated.[6]

Therefore, when we talk about the equality of States, interpretation of treaties, and state responsibility, we should honestly give the precise topology of these subjects as is apparent in the exercise of real diplomacy. Both the functions and limits of international rules should be discussed in lectures and seminars. Otherwise, international legal study might become a kind of jargon, a language shared and spoken only by international lawyers. On this particular point, undertaking a course of study on diplomatic history should be prerequisite for all students of international law. To facilitate a more multi-disciplinary approach, we should seek to attract political scientists and economists to engage in the study of international law.

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5 On the letter, see http://www.whitehouse.gov/news/release/2001/04/20010411-1.html
China insisted that the US make an apology as the US had admitted to committing an internationally wrongful act, while the US contended that the US had committed no wrong and that the letter did not constitute an apology.

6 In the USS Pueblo Incident of 1968, General Woodward signed the document prepared by the North Korea in order to free the crew. The document contained the admission of responsibility for an internationally wrongful act and apology. (1969) 63 *AJIL* 682-685.

III. Teachers Should Tell Students that the Significance of Judicial Settlement of Disputes in International Relations is Limited

Among the innumerable international conflicts, the number of those which are resolved by international courts are very small. Most of the conflicts are solved by direct negotiations or remain pending for long periods. The type of inter-state disputes that the International Court of Justice mainly deals with relate to sea/land delimitation and the status of islands. With respect to inter-State arbitration, it is remarkable that there are as many as five awards relating to bilateral air agreements.[7] Even if barriers on consensual jurisdiction (including the adoption of compromissory clauses, declarations of acceptance of the compulsory jurisdiction and *forum prorogatum*) and admissibility (*locus standi* in particular) are cleared and judgment on the merits is rendered, there is no guarantee that the judgment will be properly implemented. Judgments have been understood as the most highly developed form of peaceful settlement of international disputes. Even if this is right in general terms, care has to be taken to ensure that the delivery of a judgment and its implementation does not become a cause of friction between States concerned.[8]

Nowadays, student moot court competitions represent a kind of boom industry in international law. The Jessup Moot Court run by the American Society of International Law, the Lachs Moot Court of the International Institute of Space Law and the Asia Cup of the Society for Promotion of Japanese Diplomacy are well known among those conducted in the English language. They give students a good impetus to study international law. However, we should tell students repeatedly that the reality of international law is quite different from the moot court experience. Even the written and oral pleadings in the ICJ are

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7 US/France (award of 22 December 1963 and decision interpreting the award, 28 June 1964), Reports of International Arbitral Awards, vol 16, pp 5-74; Italy/US (advisory opinion of 17 July 1965), *ibid*, pp 75-108; US/France (decision of 9 December 1978), *Reports of International Arbitral Awards*, vol 18, pp 417-453; Belgium/Ireland (arbitral award of 17 July 1981), Jacques Naveau, Away from Bermuda? *Air Law*, vol 8 (1983), pp 44-57; US/UK (Heathrow Airport User Charges, Award on First Question of 30 November 1992, Supplementary Decision of 1 November 1993), *International Law Reports*, vol 102, pp 215-582.

8 For example, after the Temple of Prear Vihear Case Judgment of 1962, the Thais violently protested against it and thousands of students demonstrated, with government approval, rejecting the judgment. See LP Singh, 'The Thai-Cambodian Temple Dispute', (1962) 2 *Asian Survey*, No 8, 23-26.

quite different from those in such highly Americanized moot courts.[9] Otherwise students might have a wrong image of international law and even on how the ICJ operates.

IV. Teaching International Law with Asian State Practices is Important to Attract Students

We Asian teachers should place much emphasis on state practice in Asia. We have to admit that even in publications by Asian writers, reference to Asian state practice is rather neglected when compared with those in Europe and North America. This is not good even within the educational context as students might have the wrong impression that international law is something far and remote from them. State practices can be found in some national yearbooks or journals of international law.[10] The Asian Yearbook and the Asian Manual on International Law, when published, is and will be very helpful. The development of websites will make it easier for us to collect state practice. Among the textbooks already published, I consider remarkable Tunku Sofiah Jewa's *International Law: A Malaysian Perspective* (1996), because it is very rich in Malaysian State practice.

V. Studying Regional Organizations in Asia is Important Both in Theory and in Practice

The new curricula should include a study on how Asian States are organised in international and regional bodies. A few years ago, I had an opportunity to write a short chapter on ASEAN and APEC in a Japanese textbook on law of international organizations.[11] I found that there are few, if any, writings by international lawyers on these crucially important entities. This is in contrast with the huge number of publications on the European Union. I do not consider that the EU presents the only model for regional integration. ASEAN and APEC are alternative models and they can influence the study and development of the law of international organizations.

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9 For example, in the ICJ as distinct from such Moot Courts, judges rarely ask questions in a manner which interrupts oral presentations.

10 In Japan, the Japanese Digest of international Law is included in the *Japanese Annual of International Law.*

11 Kazuhiro Nakatani, Regional Economic Organizations and Law (2) – ASEAN and APEC, in Yozo Yokota (ed), *Law of International Organizations* (in Japanese, 1999), pp 186-199.

I am also interested in energy security. As far as this subject is concerned, the study on the possibility of the establishment of the so-called Asian Energy Agency (something like the Asian version of the International Energy Agency) is crucially important, considering that we are going to face another oil crisis sooner or later.[12]

VI. Teachers Should Tell Students that International Law is Relevant to Even Routine Activities by Private Companies at this Time of Globalization

The new curricula should include transnational legal problems as far as possible. I had an opportunity to study on ISO (International Organization for Standardization)[13] and codes of conduct enacted by private companies. Again I found that there are very few related articles by international lawyers in spite of the fact that the subject of so-called global standards, *de jure or de facto,* like ISO, is of vital importance to governments as well as private companies in this age of globalization. Codes of conduct sometimes refer to Human Rights Treaties, Labour Treaties and Environmental Treaties.[14] Today, stakeholders for private companies are not only shareholders but also consumers, employees and the carriers of international public opinion. When we consider, at least in Japan, that most international law students enter the private sector after graduation, we should touch on these problems.

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12 On 24 June 1986, ASEAN Petroleum Security Agreement was adopted. However, the ASEAN Emergency Petroleum Sharing Scheme established by the Agreement will not work properly in the oil supply crisis because Indonesia, which was considered to be the oil exporting member in the meaning of Art 3 of the Agreement, is no more so and other members cannot expect Indonesia to supply plenty of oil in the supply crisis.

13 ISO is a world wide federation of national standards bodies. Its mission is to promote the development of standardization in the world with a view to facilitating the international exchange of goods and services, and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity. On ISO, see its homepage http://www.iso.ch

14 For example, Social Accountability 8000 (SA8000), a voluntary international standard, mentions the Universal Declaration on Human Rights, the Convention on the Rights of the Child and 13 ILO Conventions requirements and requires a company to respect them. SA8000 has the backing of major companies such as Reebok and Toys 'R' Us. It aims to be the ethical version of ISO. On SA 8000, see http://www.ellipson.com/sa8000, http://www.cepaa.org/sa8000.htm

VII. Linkage with Other Academic Curricula is Important for the True Understanding of International Studies

To link international legal studies with other academic fields is very important when we address a particular subject. For example, when we teach international environmental law, some knowledge of natural sciences including biology, chemistry, meteorology, forestry and oceanography is indispensable. As it is impossible for one international lawyer to cover all these fields, it would be desirable to hold a joint lecture or seminar with natural scientists, at least once during a term.