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# From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum

Mathias Reimann\*

The purpose of this essay is to call for a significant change in the international law curriculum. For decades, the introduction to, and the basis of, that curriculum has been the established international law course.<sup>1</sup> Today, we should no longer use it for that objective but teach it at a truly advanced level. We should introduce students to the international curriculum in a course that provides a more comprehensive

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1. My characterization of this course draws on three sources. First, it rests on a survey of a broad range of American casebooks, in particular: CHRISTOPHER BLAKESLEY, ET. AL., *THE INTERNATIONAL LEGAL SYSTEM* (5th ed. 2001); BARRY CARTER, ET. AL., *INTERNATIONAL LAW* (4th ed. 2003); ANTHONY D'AMATO, *INTERNATIONAL LAW COURSEBOOK* (1999); LORI FISLER DAMROSCH, ET. AL., *INTERNATIONAL LAW CASES AND MATERIALS* (4th ed. 2001); JEFFREY DUNOFF, ET. AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* (2002); MARK JANIS & JOHN NOYES, *INTERNATIONAL LAW* (2d ed. 2001); JORDAN J. PAUST, ET. AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* (2000); WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* (2d ed. 1995). Second, it takes into account the scope and contents of the basic books written for students taking this course, especially: DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* (2001); THOMAS BUERGENTHAL, ET. AL., *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* (3d ed. 2002); MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (4th ed. 2003). I have also consulted several more extensive works that are in use in the United States, particularly: IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (5th ed. 1998); ANTONIO CASSESE, *INTERNATIONAL LAW* (2001); OPPENHEIM'S *INTERNATIONAL LAW* (Robert Jennings & Arthur Watts eds., 9th ed. 1992); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* (1991). Third, I have relied on information obtained from colleagues who have taught the course on a regular basis.

I realize that there are considerable variations among the courses offered and I discuss some of them below. See *infra*, Section III. Yet, while there is, strictly speaking, no such thing as *the* international law course, there are sufficient commonalities shared by virtually all such courses to allow a fairly general characterization.

overview of the global legal order. Such a course needs to be developed.<sup>2</sup>

My thesis is developed in four steps that trace an evolution over the last half-century. Part I takes a look at the situation fifty years ago when American law schools began to develop a substantial international law curriculum. At that time, international law was taught in what I will call the classic style, i.e., almost purely as the law of nations. Arguably, this was an acceptable basis for the international curriculum in a world in which public international law faced little serious competition from related areas, presented a fairly orderly picture, and was marked by distinct boundaries. Part II shows that we no longer live in such a world and outlines the changes that have occurred in the meantime. Over the last few decades, we have witnessed the rise to prominence of many other international subjects, a growing complexity of the international scene, as well as an increased blurring of the lines between public international law and other fields. Part III then considers whether, under current conditions, the international law course can still serve as a general introduction. Despite the fact that the basic course today incorporates many of the developments described, the answer should be no. The course still presents too limited, lopsided, and artificially isolated a view of the global legal order to serve as the principal basis of the international curriculum. In conclusion, part IV suggests the creation of a new basic course that adequately reflects the breadth, diversity, and interrelatedness of current international legal issues. The most appropriate title for such a course could be Transnational Law.

I hope that some of those who teach in the international law arena will agree with me. They should then convince their institutions to follow the University of Michigan Law School's example and implement the changes outlined here.<sup>3</sup> I am sure that many others in the field,

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2. There is substantial literature on international law teaching, but as far as I can see, it does not squarely address the issue discussed here. See, e.g., JOHN KING GAMBLE, *THE TEACHING OF INTERNATIONAL LAW IN THE 1990S* (1993); John King Gamble, *Roundtable on the Teaching of International Law*, 85 AM. SOC'Y INT'L L. PROC. 102 (1991); David Kennedy, *International Legal Education*, 26 HARV. INT'L L.J. 361 (1985); Daniel Turp, *Reexamination of the Teaching of International Law*, 78 AM. SOC'Y INT'L L. PROC. 198 (1984) (workshop proceedings).

3. The University of Michigan Law School introduced a new introductory course, entitled Transnational Law, in 2001. It became mandatory beginning with the class of 2004 (entering law school in the fall of 2001), and was described for our alumni in an article I wrote in 2003 for Law Quadrangle Notes. Mathias Reimann, *Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law*, 46 L. QUADRANGLE NOTES 54 (2003) (on file with Penn State International Law Review). A somewhat abbreviated version of the article is reprinted in 82 MICH. B.J. 52 (2003) (on file with Penn State International Law Review). For comments on this innovation, see Jeffrey Atik & Anton Soubbott, *International Legal*

especially many seasoned teachers of public international law, will disagree. Yet, they should not adhere to the status quo by simple force of habit but defend the current position of the traditional course with arguments refuting mine. If this results in a discussion about the need for a new introduction to the international curriculum, this essay has served its purpose.

## I. The Classic Model: The Law of Nations

Fifty years ago, interest in international affairs was high after the cataclysm of World War II, the Nuremberg and Tokyo trials, and the foundation of the United Nations. When money from the Ford Foundation began lavishly to fund international legal studies programs, American law schools set out to develop a more substantial international law curriculum.<sup>4</sup>

At that time, international law was conceived of, and taught in, what I call the classic model.<sup>5</sup> For present purposes, three features of this approach are particularly important: It dealt only with a limited subset of international legal issues; it presented a fairly simple legal order; and it portrayed a field with well-defined boundaries.<sup>6</sup> Let us look at these three features in turn. The classic approach covered only part of the law beyond national boundaries because it defined the topic in fairly narrow terms. It conceived of international law in a literal, Benthamite, sense: as inter-national law, i.e. the law existing *inter nationes* as sovereigns.<sup>7</sup> Thus, it was primarily concerned with the basic features of the “Westphalian order”<sup>8</sup> as modified over time. Originally, it focused only

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*Education*, 36 INTL. LAWYER 715, at 717-718 (2003); Anne-Marie Slaughter, *Notes from the President*, AM. SOC'Y INT'L L. NEWSL., March/April 2002, at 4; Sandra Day O'Connor, Keynote Address (March 13-16, 2002) in 96 AM. SOC'Y INT'L L. PROC. 348, 352 (2002).

4. See, e.g., ELIZABETH G. BROWN, LEGAL EDUCATION AT MICHIGAN 1859-1959, at 143-46 (1959).

5. This approach is embodied in the literature of that time. See, e.g., WILLIAM BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS (1953); J.L. BRIERLY, THE LAW OF NATIONS (5th ed. 1955); EDWIN DICKINSON, CASES AND MATERIALS ON INTERNATIONAL LAW (1950); MANLEY HUDSON, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW (3d ed. 1951); LESTER ORFIELD & EDWARD D. RE, CASES AND MATERIALS ON INTERNATIONAL LAW (1955).

6. All this was less true in an earlier period, especially in the nineteenth century when international law was still more broadly conceived to encompass both public relationships (among states) and private entitlements (among individuals). See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 4-10, 19-37 (1834).

7. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296 (1970).

8. The system of sovereign nation states created by the Peace of Westphalia (the peace treaties of Münster and Osnabrück in Germany) that ended the Thirty-Years-War in 1648. See CASSESE, *supra* note 1, at 21.

on the world of sovereign and formally co-equal nation states who make, follow or violate international law, and who sometimes arbitrate or litigate in international tribunals. Around the middle of the twentieth century, two important elements were added: permanent international organizations and international human rights. Despite this addition, however, the coverage of the classic model remained strictly limited to *public international law*. Consequently, it excluded private international law, not only in the narrow sense of conflict of laws but also in the broader sense of all rules pertaining to transboundary transactions and disputes between private parties, be they individuals or business organizations. In other words, international law under the classic model was, at its core, *The Law of Nations*<sup>9</sup> as actors on the world stage.

Second, classic international law presented a relatively uncomplicated and internally consistent picture of the international legal order. By restricting itself to the public law elements, it focused on a limited range of actors, sources, principles, and dispute resolution mechanisms. In terms of actors, it dealt primarily with states and eventually with the United Nations as their principal organization; individuals played a marginal role at best and other actors, such as non-governmental entities, received virtually no attention. The sources considered were those listed in article 38(1) of the Statute of the International Court of Justice (treaties, customary international law, general principles, judicial decisions, and the opinions of leading scholars) and perhaps soft-law in the form of UN resolutions or the like. As far as the basic principles are concerned, classic public international law typically addressed state sovereignty and its consequences, international comity, and the major bases for international jurisdiction, as well as the immunity of states and their representatives. Its coverage of dispute resolution mechanisms centered around the procedure before the International Court of Justice though it often included arbitration of disputes between states. While all this amounted to a rather full plate, the whole menu was decisively and intentionally state centered.

Finally, the classic view saw public international law as a subject with well-defined boundaries. This is particularly true in two regards. First, the approach assumed that there is a clear distinction between public and private international law. As mentioned, it concerned itself only with the former and did not address private transactions and disputes across international boundaries. Second, it presumed a

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9. This was indeed the more traditional title. See, e.g., BRIERLY, *supra* note 5. It is still the common title in German (*Völkerrecht*). See, e.g., ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* (3d ed. 1984). The notion persists today, albeit in modified form. See *infra* note 39 and accompanying text.

fundamental difference between international and domestic law. Hence it addressed the basic relationship between the two spheres (monism and dualism) and discussed whether and how international law becomes effective within certain domestic legal systems.

At the time, a good case could be made that a public international law course with such contents and characteristics should serve as the basis for the international curriculum. The most important argument for that proposition is that fifty years ago, the law of nations was probably the single most relevant topic in international legal studies. Most related subjects either had not yet fully developed, as was the case with human rights and international trade, or had yet to come into existence at all, such as European Community law. To be sure, private international law had existed for centuries. Yet, even this area was arguably of lesser importance. Transboundary transactions and disputes among private parties were still relatively rare and most practitioners never faced them. Thus there was no urgent need to train the majority of future attorneys and judges in this regard. It was therefore not unreasonable that international law teaching was aimed at those future lawyers who would have a need for it: lawyers working for governments or international organizations whose primary concern was, of course, not private but public international law.

In addition, public international law was a fairly suitable basis for the international curriculum because it was still a rather limited field that could be covered in reasonable depth in a two- or three-credit-hour course. It also presented a relatively self-contained system that could thus be understood with limited reference to other areas, especially private international and domestic law. All this has changed in the last fifty years.

## II. The Winds of Change: The Expansion and Diversification of International Law

It is no longer news that in the last half-century, the global legal order has undergone enormous change.<sup>10</sup> In the present context, three developments are particularly noteworthy. First, numerous fields lying beyond the traditional law of nations have developed, matured, and become important in practice. Second, the world legal order has become more diversified and complex. Third, the boundaries between public international law and other areas have blurred or broken down. Here, we will simply describe these developments and leave for later to what extent current international law teaching takes them into account.

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10. On the changes described below, see also Harald Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-05, 2624-31 (1997).

### 1. *The Rise of Other Areas*

Of the many areas that have risen to prominence in the last couple of decades, some belong in the realm of public international law, some lie completely outside of it, and some straddle its borders. Of course, public international law itself has long comprised a number of particular topics, such as the law of the sea, humanitarian law, and the rules pertaining to foreign diplomatic and consular representatives. In the second half of the twentieth century, several additional new specialties have developed. The most prominent examples are, as already mentioned, the law of international organizations and of human rights. More recently, international criminal, environmental, refugee, and trade law have become standard sub-topics of public international law. To be sure, many of these new areas have matured to the point where a thorough understanding requires studying them in their own right, not simply as an appendix to the general law of nations. Yet, they do cluster closely around the classic core.

This cannot be said for private international law, which has gained enormous importance in the last few decades. Fifty years ago, transboundary transactions and disputes between private parties were probably exceptional enough to treat them as discreet specialties and to leave them in the hands of a few experts. The phenomenon commonly labeled “globalization” has changed that dramatically. The combined effects of the internationalization of markets, the increased mobility of persons and capital, and the age of electronic communication have turned the private side of international law from a backwater into a vast and highly prominent field of enormous practical importance. At the same time, this field has diversified as well. It is now often divided into international business transactions, corporate law, commercial arbitration, litigation, and other subjects. All these topics lie well beyond the territory of public international law.

There is now a panoply of areas that are impossible to assign to either the public or private international law realm because they contain ingredients of, and begin to transcend, both. Probably the most salient example is European Union law, where elements of public international law (international organizations, treaty, supremacy issues, etc.) are inextricably intertwined with the regulation of markets and private relationships as well as administrative and procedural matters.<sup>11</sup> Here, the blending of public and private international law has, in fact, created a new order that is, by now, *sui generis*, especially since it has engendered truly supranational law, i.e., law made and enforced by a body above

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11. See GEORGE A. BERMAN, ET. AL., *EUROPEAN UNION LAW* (2d ed. 2002).

sovereign nation states and binding upon them. Other mixed areas range from the regulation of cyberspace to international investment and intellectual property regimes. At least in terms of their practical relevance, these hybrids no longer linger at the margin of the international law universe but present core transboundary issues:

## 2. *The Growing Complexity of the Global Legal Order*

The rise of these new areas has not only broadened the range of international legal issues, it has also changed the character of the world legal order. In particular, it has rendered this order much more complex than it was even a generation ago. This is most visible in the emergence of new actors, sources, principles, and tribunals.

Legal actors in international law have become more numerous and diverse than ever. To begin with, this is true for the two categories considered by classic public international law: states and international organizations. States have become a much larger and more heterogeneous group as a result of de-colonization and the break-up of former federations such as the Soviet Union and Yugoslavia. Today, Third World countries leave the Western industrial states in the minority and present a challenge to the traditional international law regime originally created by the European powers. Intergovernmental organizations have multiplied as well. Fifty years ago, the United Nations and the Bretton Woods institutions were almost the only major actors of that kind on the world stage. Today we have to include at least the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), and the World Trade Organization (WTO), as well as regional organizations such as the African Union, the Arab League, the European Union (EU), the Council of Europe, the Organization of American States (OAS) and the Association of Southeast Asian Nations (ASEAN).<sup>12</sup>

What is even more significant in the present context is the multiplication and rise of non-state actors. NGOs, especially now, play a significant role in the international legal process, particularly in lobbying and pressuring governments and in influencing international lawmaking.<sup>13</sup> Individuals have become important players as well.

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12. From 1951 to 1999, the number of intergovernmental organizations has roughly doubled (by one count from 123 to 251). See Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INTL. L. 489 (2001). On regional organizations, see JAMES HAWDON, *EMERGING ORGANIZATIONAL FORMS: THE PROLIFERATION OF REGIONAL INTERGOVERNMENTAL ORGANIZATIONS IN THE MODERN WORLD-SYSTEM* (1996).

13. From 1951 through 1999, the number of NGOs is said to have grown from 832 to 5825 or even 43,985. See Stein, *supra* note 12, at 491 (with further references).



Plainly irrelevant in the classic law of nations, individuals have advanced from mere objects of protection under humanitarian and human rights law to actors with their own rights (e.g., to petition international human rights bodies) and responsibilities (e.g., for crimes under international law). The latest addition is business corporations. While their status continues to be much disputed,<sup>14</sup> they, too, enjoy rights (e.g., investment protection) and are charged with responsibilities (e.g., for environmental damage or human rights abuses) as actors on the international scene.<sup>15</sup>

The sources that shape international legal issues have multiplied and diversified as well. Again, this is also true for the traditional categories under classic public international law. In particular, the number of treaties, both bilateral and multilateral, has grown exponentially.<sup>16</sup> They cover an ever wider spectrum of subjects, ranging from arms control to international sales, from human rights to service of process, and from the protection of biodiversity to foreign investment.<sup>17</sup> In the meantime, customary international law has also continued to develop.<sup>18</sup> And the number of judicial decisions rendered by international tribunals has skyrocketed, as has the number of publications on international legal issues.

Yet, there are also many sources that lie outside the traditional public international law catalog. There is now a dense network of regulatory law on the international level, issued by international organizations and agencies such as the IMF and the World Bank, as well as by the European Union.<sup>19</sup> Moreover, as countries have become more internationally involved, they have produced more and more (domestic) law dealing with transboundary issues, addressing matters as far-ranging as export and import control, asylum and refugee status, and the domestic effects of foreign commercial activity. In this process, the sources of private international law have become especially important. We now have a multitude of treaties drafted under the auspices of the

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14. See, e.g., Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443 (2001).

15. See, e.g., *John Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002); see also David Weissbrodt, *Principles Relating to the Human Rights Conduct of Companies: Working Paper, Commission of Human Rights, Sub-Commission on the Promotion and Protection of Human Rights*, 52d Sess. ¶ 16 U.N. Doc. E/CN.4/Sub.2/200-WG.2/WP.1 (2000).

16. The United States is currently a member of approximately 14,000 international agreements, PAUST, *supra* note 1, at v.

17. See, e.g., the variety of treaties reprinted in BARRY CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW, SELECTED DOCUMENTS* (2001).

18. For an illustrative (and famous) discussion, see *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), especially pp. 880-885.

19. For the latter, see, for example, the materials collected in GEORGE BERMAN, ET. AL., *EUROPEAN UNION LAW, SELECTED DOCUMENTS* (2002).

Hague Conference of Private International Law, UNCITRAL, and European Communities addressing substantive private law, choice of law, and private international litigation.<sup>20</sup> Additionally, there are the practices and principles governing international business transactions which, as a revived *lex mercatoria*, greatly influence international arbitral proceedings.<sup>21</sup>

The changing nature of international law is also evident in the expansion of jurisdictional claims made by states and their institutions. In addition to the classic paradigms of territoriality and personality, the effects principle has become firmly established and begun to play an enormous role.<sup>22</sup> Today, the main jurisdictional battleground is no longer just the relationship between states as such, i.e., classic public international law territory. Instead, jurisdictional principles are most often invoked (and contested) to justify (or attack) the regulation of transboundary business activities, the exercise of personal jurisdiction in private litigation, and the enforcement of criminal law beyond national borders.

Finally, we have witnessed a tremendous proliferation of international tribunals and dispute resolution mechanisms. Half a century ago, nearly all the emphasis was on the newly created International Court of Justice. Today, this court is just one among a host of others. Again, many of the new institutions can be said to belong to the realm of public international law proper. This is true not only for the various human rights tribunals, i.e., the United Nations Commission of Human Rights and the European, Inter-American, and (incipient) African Courts of Human Rights. It is also the case for the International Criminal Court and the UN Tribunals on Rwanda and the former Yugoslavia as well as for the International Tribunal of the Law of the Sea.

Yet, as with the new actors and sources, there are also numerous

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20. See, e.g., HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, COLLECTION OF CONVENTIONS 1951-1996 (1997); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION, SELECTED TREATIES, STATUTES AND RULES (2d ed. 2001).

21. See Francesco Galgano, *The New Lex Mercatoria*, 2 ANN. SURV. INT'L & COMP. L. 99 (1995); Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133 (2000).

22. Moreover, the universality principle has now moved more into the limelight, mainly as a result of the growing awareness of, and greater enforcement efforts in, the human rights field. See, e.g., Arrest Warrant (Belg. v. Congo), 2002 I.C.J. 1 (Feb. 14 2002) (Belgian arrest warrant against former foreign minister of Congo based on universal jurisdiction violates head-of-state immunity). See also R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 W.L.R. 827 (H.L. 1999) (universal jurisdiction over alleged crimes committed by former Chilean dictator). Even the protective principle, rarely invoked a generation ago, is likely to become a prominent issue in an age when nations are more than ever seeking to forestall terrorist acts planned or prepared abroad.

institutions that lie outside the purview of classic public international law. The most salient examples are the European Court of Justice and the dispute resolution panels of the WTO. In addition, there is a thriving regime of international arbitration, both for disputes between investors and states and among private businesses themselves,<sup>23</sup> not to mention ad hoc institutions like the Iran Claims Tribunal.<sup>24</sup> Finally, we must not forget the enormous practical and theoretical importance of the many international cases adjudicated in domestic tribunals around the world, the United States courts prominent among them.

### 3. *The Blurring of Boundaries*

In this expanding and increasingly complex world of international law, the lines dividing the various areas have blurred more and more. This has occurred in two major regards.

The boundary between public and private international law has become more uncertain and less meaningful. Fifty years ago, it may have seemed clear that public international law deals with the law applicable among states and intergovernmental organizations, while private international law concerns itself with transboundary relationships between private parties, i.e., individuals and businesses. In theory, this remains true today, but in practice, the distinction is increasingly pointless. As mentioned before, there are many subject matter areas that escape the traditional classification altogether because they combine public and private international law elements, such as European Union law or the regulation of electronic commerce.<sup>25</sup> Perhaps even more important, we now live in a world in which hybrid issues arise in myriad specific contexts: a business sues a foreign governmental entity which promptly invokes sovereign immunity but loses because the action is based on a commercial activity;<sup>26</sup> a firm invests private capital in another country, suffers from adverse government regulation, and resorts to ICSID arbitration;<sup>27</sup> a citizen brings a claim for employment discrimination and wins in the European Court of Justice because the

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23. See TIBOR VARADY, ET. AL., *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2003); W. MICHAEL REISMAN, ET. AL., *INTERNATIONAL COMMERCIAL ARBITRATION* (1997).

24. On the latter, see CHARLES NELSON BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998).

25. See discussion *supra* Section II.1.

26. See, e.g., *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

27. International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force 1966). Regarding ICSID arbitration, see CHRISTOPH H. SCHREUER, *ICSID CONVENTION* (2001); see also JAMES C. BAKER, *FOREIGN DIRECT INVESTMENT IN LESS DEVELOPED COUNTRIES: THE ROLE OF ICSID AND MIGA* (1999).

rejection of her job application violates European Community law;<sup>28</sup> a defendant sued by a foreign plaintiff moves for dismissal on *forum non conveniens* grounds but the court denies the motion, *inter alia*, because of bilateral treaty obligations.<sup>29</sup> The list of examples is nearly endless.

The boundary between international and domestic law has become less clear and rigid as well. The traditional assumption was that international law exists between (public) international actors, i.e., states and intergovernmental organizations, while domestic law applies (only) within a particular jurisdiction. Of course, things were never quite so simple in the real world. Today, however, the two areas intermingle in so many ways that the traditional division is often outright misleading. Which sphere defines the limits on the exercise of jurisdiction over a foreign corporation in a suit based on acts committed abroad?<sup>30</sup> Are bribes offered to foreign officials forbidden by international or domestic law?<sup>31</sup> How do we answer the question whether the conviction of a foreign national for a serious crime committed in the United States must be reversed because the defendant was not informed of his right to contact his consulate for assistance?<sup>32</sup> Does the recognition of an English judgment turn on the municipal rules of the forum or on international law?<sup>33</sup> Again, these are just examples to which others could be added.

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28. See Case 14/83, *Von Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, [1986] 2 C.M.L.R. 430 (1986).

29. See *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1984).

30. The issue turns on both domestic (state or federal and constitutional) law and principles of international jurisdiction as construed by domestic courts. See *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); see also RESTATEMENT (THIRD) OF LAW: FOREIGN RELATIONS LAW OF THE U.S. § 403 (1986).

31. In the United States, the immediate prohibition is contained in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 to -3 (amended 1998), but that federal statute implements the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 ILM 1 (1998).

32. The answer depends on the American (state or federal) law of criminal procedure, constitutional due process provisions, and the Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 596 U.N.T.S. No. 8638, as interpreted by the International Court of Justice. See *Germany v. United States (LaGrand Case)*, 1999 I.C.J. 104.

33. That depends on where recognition is sought. In the United States it depends on the domestic law of the respective state, possibly the UNIF. FOREIGN MONEY JUDGEMENTS RECOGNITION ACT, 13 U.L.A. 149 (1986), and on principles of international comity. See, e.g., *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1972). In Canada, it may be governed by the Convention Between the United Kingdom of Great Britain and Northern Ireland and Canada Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, Apr. 24, 1984, T. S. No. 10 (1988) Cm 306. In other EU member states, it is determined Art. 32-52 of the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 44/2001, 2001 OJ (L 12) 1.

In fact, many cases today straddle both the public–private and the international–domestic boundaries at the same time. If Peruvian citizens sue an American corporation in a US federal court for environmental damage inflicted in their home country, the case involves a (tort) cause of action under private domestic law but it can be brought only if plaintiffs show the violation of public international law required by the Alien Tort Claims Act.<sup>34</sup> Similarly, if a Chinese buyer sues an American seller for breach of contract, we have a private action based on an international treaty, which has the rank and effect of federal law.<sup>35</sup> And if an American plaintiff brings a product liability action against a French corporation in Federal District Court, we have private litigation in domestic courts in which the plaintiff's right to obtain documents under the defendant's control depends on the interpretation of an international convention.<sup>36</sup>

To be sure, none of this means that a grasp of the basic distinction between public and private international law and between the international and the domestic legal order is not helpful. In fact, such a grasp may very well be crucial, e.g., in order to gauge the force of particular rules and to understand who has the power to change them. But we must recognize that, in practice, these spheres cannot be neatly separated and that many issues cannot be resolved unless we consider how pieces taken from all of them fit together and interact.

### III. The Current Curriculum: The Limits of Adjustment

Under such circumstances, is the public international law course still an appropriate introduction to the international curriculum? With regard to the classic version described above,<sup>37</sup> the answer is an easy no. Most teachers and scholars would agree that in today's world, a pure law-of-nations approach is an anachronism. Yet, with regard to the teaching of international law as it stands today, the answer is not quite so obvious.

The teaching materials, both casebooks and textbooks, offered in the early twenty-first century take many of the changes that have

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34. 28 U.S.C. § 1350 (1789); *see Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

35. Unless the parties excluded its application under Art. 6, the dispute will be governed by the United Nations Convention for the International Sale of Goods of 1980 (CISG), 15 U.S.C. App. § 52 (1997), to which both the United States and China are parties.

36. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 17, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (1970); *see Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522 (1987).

37. *See discussion supra* Section I.

occurred in the last fifty years into account, albeit to varying degrees. In terms of new areas, they mostly include human rights, international criminal, environmental, and economic law. With regard to actors, all books consider individuals, almost all mention NGOs, and a growing number even addresses the role of corporations in international law. The catalog of sources has remained more traditional, although some works pay attention to norms created by NGOs and other actors. When it comes to dispute resolution mechanisms, the existing literature routinely covers at least some elements of international human rights adjudication, often discusses the WTO institutions, and sometimes even mentions the European Court of Justice. In addition, several books consider the increased interrelatedness between public international law and other areas.<sup>38</sup> Taken together, these adjustments have considerably broadened and modernized the teaching of public international law.

Yet, while this modernization has rendered the basic course more acceptable than the classic version, it is still not a suitable general introduction to the international curriculum. The principal reason is that all these amendments and updates have not changed the fundamental character of the course. It remains, at heart, a course on *public* international law, whether that label is used or not.<sup>39</sup> Even if the classic model is no longer all that is being taught, it continues to characterize the core meaning, to determine the bulk of the content, and to shape the basic character of the exercise today. As a result, the current (public) international law course still suffers from three major shortcomings when used for introductory purposes.

First, the compass of the basic course is still too confined. It continues to cover only part of the relevant territory. Most importantly, even a somewhat enlarged (public) international law syllabus normally still omits virtually all of private international law, although there seem to be some (limited) exceptions.<sup>40</sup> As mentioned, this omission may

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38. This is the theme emphasized by: CARTER, *supra* note 1, at xxxv-xxxvii; PAUST, *supra* note 1, at v. It is also implicit in the overall design in DUNOFF, *supra* note 1.

39. The term International Law has become more common. *But see* BUERGENTHAL, *supra* note 1; *see also* PAUST, *supra* note 1, at v (“international law, sometimes referred to as Public International Law”).

40. CARTER, *supra* note 1, covers a fair amount of private international law topics, such as: international (commercial) arbitration, at 339-399; international recognition of civil judgments, at 418-420; international jurisdiction to adjudicate, at 728-733; and choice of law, at 733-742. JANIS, *supra* note 1, at 317-347, 715-779, also address aspects of private international law in the (narrow) sense of conflict of laws. DUNOFF, *supra* note 1, presents a considerable number of public-private hybrid areas in some detail, including for example: foreign direct investment, at 70-100; the role of corporations, at 206-225; and legal aspects of the world economy, at 777-821. PAUST, *supra* note 1, at 713-738 briefly discusses some aspects of cooperation in international (private and other) litigation.

have been acceptable fifty years ago when that area was still of limited importance. Today, when private international law issues have become so routine that few lawyers can avoid them, leaving the private law side out of an introduction to international legal studies borders on educational malpractice. Moreover, even where particular recent developments are reflected in the teaching literature, most current international law materials treat the newer topics and issues as mere addenda to the traditional core and thus very briefly.<sup>41</sup> To be sure, it is not intrinsically wrong for a public international law casebook to devote only a few pages (out of a thousand or more) to matters such as NGOs, corporations or the European Court of Justice, but it strongly suggests that topics lying beyond the more traditional orbit often receive scant attention in the classroom as well, if they are not omitted altogether for lack of time or teacher interest.

Second, using public international law, however amended, as a general introduction conveys a lopsided view of the international system. There may be “good reasons for maintaining the traditional focus on interstate relations and institutions”<sup>42</sup> in an advanced course in public international law but for purposes of an introduction to the global legal order, such a restricted focus is misplaced. Students will easily get the impression that international legal issues typically concern states, are matters merely for international organizations, or arise just in areas such as human rights, the law of the sea or perhaps before the WTO. At least in everyday practice, however, the reality is different. Most practitioners have little to do with any of these areas. Of course, there are numerous public international law elements, which are often relevant even to the non-specialist lawyer, ranging from the force and interpretation of treaties in domestic courts to international jurisdiction principles and sovereign immunity. Yet practitioners are likely to face these elements in conjunction with private international law issues, i.e., in contexts which most public international law courses fail to address: e.g, how to set up a corporate subsidiary abroad or negotiate an international licensing agreement; how to obtain jurisdiction over a foreign defendant or defend a lawsuit brought by a foreign plaintiff; how to choose or avoid international commercial arbitration or to ensure compliance with a bilateral investment treaty.

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41. See, e.g., BEDERMAN, *supra* note 1, at 62-63 (dealing with NGOs in barely one page); BUERGENTHAL, *supra* note 1, at 59-65, 218-220 (addressing the European Union in five pages, NGOs in barely one page, and international in personam jurisdiction in two pages); CARTER, *supra* note 1, at 137-142, 322-328, 728-742 (devoting but a few pages to the role of corporations, the European Court of Justice, and international conflict of laws. DAMROSCH, *supra* note 1, at 421-425 (discussing corporations in five pages).

42. DAMROSCH, *supra* note 1, at xix.

In short, there is a considerable disjunction between a pure public international law introduction and the professional needs of the majority of our graduates. This disjunction has two deleterious effects. The more obvious harm is that such an introduction poorly prepares our students for most of the work they will actually have to do. The more subtle impact, however, is that it discourages students from pursuing international legal studies altogether. If a basic course creates the (false) impression that such studies are mainly about principles of state responsibility, the UN Convention on the Law of Treaties or the voting structure in the UN Security Council, the whole field begins to look rather exotic: full of interesting global issues but quite irrelevant to most lawyers' professional lives. Thus, an initial exposure to public international law alone, meant to draw students into the field, becomes counterproductive and discourages them from undertaking studies that can actually be highly relevant for their future work.

Third, an introduction through public international law presents legal issues too much in isolation from each other. To be sure, some of the current casebooks try to avoid such isolationism.<sup>43</sup> Many others, however, make little effort in that direction. Thus they are bound to create, or at least to reinforce, the impression that public international law can be neatly separated from private international law on the one hand, and from the domestic legal order on the other.<sup>44</sup> Yet, in a world where hybrid areas have gained enormous importance and hybrid issues are becoming routine, it is important, particularly for an introductory course, to pervasively emphasize the blurring of lines between the traditional subjects as well as the constant need to draw on public and private as well as international and domestic law at the same time.

Despite all its changes, the standard international law course has remained too narrow, lopsided, and isolated to serve as a general basis for the international law curriculum. Its "Law-of-Nations Plus" approach<sup>45</sup> cannot adequately introduce students to a world in which public and private international law are equally important and in which

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43. CARTER, *supra* note 1, at xxxvii.

44. See, e.g., DAMROSCH, at xix-xx ("International law is a conceptually distinct and self-contained system of law" and "International law is a discrete, comprehensive, legal system").

45. This is not a polemical phrase I invented for present purposes but the way many leading public international law scholars conceive of their subject, and correctly so. See, e.g., BUERGENTHAL, *supra* note 1, at 2 (international law today is "still considered to be principally the law governing the relations between states"); BEDERMAN, *supra* note 1, at v ("International law is the law of nations" but can also be applied in other contexts); BLAKESLEY, *supra* note 1, at v ("public international law is still principally the study of the law concerning the relations among sovereign nation states"); see also DAMROSCH, *supra* note 1, at xix; SLOMANSON, *supra* note 1, at 3.



both mix and mingle, often to the point where the whole distinction becomes dysfunctional.

Still, couldn't the international law course become a proper introduction if it were just further broadened and updated? Wouldn't including private international law, putting equal emphasis on non-traditional topics, and taking greater account of the needs in legal practice today suffice? The main problem with such a strategy is that it would make the international law course impossibly bulky. By adding many of the recent developments to the traditional menu, the quantity of materials currently included has already grown enormously.<sup>46</sup> Adding an equal amount of private international law, giving hybrid topics room equivalent to their practical relevance, and fully emphasizing the interplay between the various areas would lead beyond all reasonable limits. It is simply not possible adequately to cover traditional public international law *plus* private international law *plus* all the hybrid areas and their complex interrelationship in a basic course. To be sure, one might broaden the coverage and at the same time reduce the material addressed in each field to a manageable amount. The result, however, would no longer be the traditional course in amended form but something quite different. Yet, if we really need something different in order to lay sufficiently broad foundations, we might as well stop messing with the public international law course, take the plunge, and design an entirely new introduction.

#### IV. The Need for a New Foundation: A Course on Transnational Law

We should create a new basic course that is not skewed in favor of a particular side of the global legal order but provides a general overview of the whole terrain. Today, this is particularly important. In an age in which most lawyers sooner or later face transboundary issues, students need a realistic chance to learn the indispensable minimum with reasonable effort. The majority, who may have no desire to specialize in international law, will take, at best, one course in this area; this should be a course that provides them with a broad introduction to the variety of international legal issues that shape the world in which they live and that arise in practice today. The minority who do wish to specialize in international legal matters ought to get a sense of the general picture and learn the basics first; they can then choose more wisely among the bewildering variety of advanced topics offered.<sup>47</sup> In fact, these

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46. Most of the casebooks listed, *supra* note 1, run from about 1000 to 1600 pages.

47. There is a long and growing list of specialized courses offered in many law schools that deal with a panoply of special topics. The existing casebooks alone cover not only (public) international law as such but also international arbitration, business

considerations strongly suggest that all students should be required to take such an introductory course although that is an issue in its own right beyond the scope of this essay.<sup>48</sup>

The ultimate goal of such an introduction should thus be to convey the minimum knowledge about, and understanding of, transboundary legal issues that every lawyer should command and that every advanced international course may fairly presuppose. In order to accomplish these tasks, the course must be broad enough to expose students to the basics of both public and private international law as well as to the major hybrid forms we face today. It must present a balanced and realistic overall picture of the complexities of the global legal order. And it must emphasize the overlap and interconnection of elements drawn from various areas. To create such a course is a serious challenge. It takes teamwork, experimentation, and time. The challenge is not so much scholarly, but didactic. The main problem is that in order to accomplish its mission, the discourse must remain on the introductory level, yet not create a misleading picture. It needs to be broad without turning shallow, digestible without becoming simplistic, and selective without omitting essentials.

Given its broad scope, such a course can only be a primer. This requires that we be highly selective in the choice of materials. We must not only eschew most special problems and details, leaving them to more advanced courses; we must also be ready to omit all the subtopics that we do not consider crucial at the introductory level. This does not mean that the course should be purely practice oriented. Instead, it ought to go beyond what is professionally indispensable and also include themes of general educational value and broad geopolitical importance, such as the current world trade regime, salient issues in the human rights field, or a discussion of the use of force in the fight against terrorism.

What should such a course look like more concretely? At a minimum, it needs to deal with the major actors (state and non-state), the most salient sources (of public and private international law) and their effect in the domestic legal order, the leading principles (especially of international jurisdiction and cooperation), and the most important dispute resolution mechanisms (again, both public and private) on the current international scene. Students should eventually see these elements interacting with each other, e.g., within select concrete contexts

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transactions, criminal law, environmental law, human rights, intellectual property, litigation, sales, tax, trade, as well as European Union law, and other topics. This embarrassment of riches already proffers more than any student can ever hope to learn, and it keeps growing.

48. For the reasons that persuaded the University of Michigan Law School faculty to make such a course mandatory, see the references listed *supra* note 2.

such as a tort suit for human rights violations, a criminal prosecution for genocide, or a transboundary business transaction.

Since such a course would be a very broadly conceived *introduction to international law* one could simply call it that. Yet, since the term *international law* has long come to mean public international law, it may be better to give a new course another name. The most appropriate title may very well be the one suggested by Philip Jessup in his Storr's lectures delivered at Yale half a century ago. Already then, Jessup wanted international legal studies "to include all law which regulates actions or events that transcend national frontiers" and thus proposed to call the subject "Transnational Law."<sup>49</sup>

If such a Transnational Law course serves as the general introduction to the international curriculum, what happens to the public international law course? It is certainly not rendered obsolete. It simply no longer tries to perform the introductory function it cannot adequately perform anymore. Instead, it becomes one of the specialized courses in the international curriculum. Thus it certainly retains its significance as *the* course on the law of nations, international institutions, and related matters, as an ever more important element of a well-rounded legal education, and probably also as a particular intellectual challenge. In fact, the course will probably benefit from such a change of role because it would no longer have to serve two poorly compatible functions at the same time: to introduce to basics and to analyze in-depth. Being freed of the former task, it can become a truly advanced enterprise. Teachers can then build on the foundations of the introductory course and thus gain time for the more profound treatment that public international law deserves in light of its importance both in the curriculum and in the world.

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49. PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956). Very much like the course suggested here, Jessup called for broad coverage: "Both public and private international law are included, as are other rules which do not wholly fit such standard categories." *Id.* His view of international studies encompassed state as well as non-state actors, business as well as administrative and political affairs, negotiation as well as litigation.

It is no coincidence that the casebook by HENRY STEINER, ET. AL., *TRANSNATIONAL LEGAL PROBLEMS* (4th ed. 1994) pursues roughly the same idea: it was inspired by Jessup's approach. *See id.* at iii. Whether it is well-suited for the purpose advocated here, i.e., for a general introduction to the international curriculum, is another question that would require a full-fledged discussion in its own right. Suffice it to say that despite its age, it appears to fit such an introductory course better than most (public) international law casebooks.

The term "transnationalism" was also used by Koh, *supra* note 10, at 2624, to describe international law from the 1970s onward. An integrated approach to the specific area of international business transactions is presented in DETLEV VAGTS, ET. AL., *TRANSNATIONAL BUSINESS PROBLEMS* (3d ed. 2003).

## Conclusion

In an age of ubiquitously increasing specialization, any generalist agenda requires some courage—to stick to basics, to keep things simple, even to risk superficiality. Yet, at a time when transboundary issues of all sorts lurk behind every corner, it is imperative that our students understand the general shape and nature of the international forest as a whole, not only of a part or of individual trees. If a truly introductory Transnational Law course provides students with an overall sense of orientation and with a grasp of the basic building blocks, they can then learn the specifics in more advanced courses (including public international law) and perhaps even on their own when the need arises.<sup>50</sup> Without such a sense and grasp, however, our students as future lawyers must remain confused by the growing complexity of the global legal order and prone to commit the kind of blunders that malpractice insurance is all about.

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50. This is, after all, the idea underlying the first-year courses with regard to the whole law school curriculum. It should be the idea underlying an introduction to the international curriculum as well.

