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Introduction

The general course in Public International Law has not traditionally been considered a "black letter law" subject along the lines of the legislation and case law based domestic law subjects in most Australian Law School *curricula*. Despite the general acceptance among international law educators that international law is much more than simply a set of rules,[1] teaching methods in the subject, at least in Australia, have rarely focused on the actual practices of international law, particularly the peculiarities of the process of international law making.[2] Indeed, a clinical international legal education program has yet to be developed anywhere in Australia.

This lack of attention to teaching about the making of international law poses a particular problem in the area of multilateral treaty making. Treaties are one of the four major formal sources of international law[3] and, increasingly, are seen as the most significant component of the international legal order. An understanding of the principles of treaty law is fundamental to any analysis of the substantive provisions of an individual treaty and therefore indispensable to any student of international law. Yet, the methods and processes by which treaties *emerge* remains relatively unexplored in the

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1 Clinical legal education is discussed in some detail in Kathy Mack, Clinical Learning for Conventional Classrooms (1992) 3 *Legal Educ Rev* 89. See also the introductory chapter in Rosalyn Higgins, *Problems and Progress: International Law and How We Use it* (Oxford: Clarendon Press, 1993) entitled 'International Law is Not Rules'.

2 "Teaching in university law schools, with a few notable exceptions, is narrow, focusing primarily on exposition of legal doctrine and rather half-hearted in its application". Richard Johnstone, Rethinking the Teaching of Law (1992) 3 *Legal Educ Rev* 17, at 18.

3 Statute of the International Court of Justice, art. 38(1)(a).

discipline. This can be contrasted with scholarly activity in domestic law where "emergence studies" into national legislation is a thriving field.[4]

Accompanying the predominance of treaties in international law is the associated proliferation of international organisations. These organisations vary in scope and subject matter. The UN itself is, of course, the quintessential global, multi-faceted multilateral organisation. Other global organisations, usually in some affiliation with the UN, are issue specific such as the World Trade Organisation, the Organisation for the Prohibition of Chemical Weapons and the International Labour Organisation. Other multilateral organisations have a limited membership based on, for example, geographic location (the European Union), commodity production and export (Organisation of the Petroleum Exporting Countries) or level of economic development (Organisation for Economic Co-operation and Development). Whatever their nature or mandate, every significant organisation created since 1945 has been established after a process of multilateral treaty making. Understandably, international lawyers have focused on the constitutive instrument in order to interpret and evaluate the work of the organisation. Again, however, the teaching of international law has tended to under-emphasise the process by which these organisations come into existence through the negotiation of a multilateral treaty.

In this article we suggest that the use of simulations offers at least one means by which this over-emphasis on doctrine at the expense of practice can be remedied. Through simulations students can understand that process is vital to an adequate comprehension of the political context in which international law operates and the legal forms which international law adopts and utilises. This is, of course, true of all law teaching. To some extent, this article advocates the use of simulations generally and not just in international law[5]

4 P O'Malley, Accomplishing Law: Structure and Negotiation in the Legislative Process (1980) 7 *Brit J of L and Soc'y* 22, at 22-35; W Carson & C Henenberg, The Political Economy of Legislative Change: Making Sense of Victoria's New Occupational Health and Safety Legislation (1988) 6 *L in Context* 1, at 1-19.

5 Johnstone, *supra* note 3. See also Richard Ingleby, Translation and the Divorce Lawyer: Simulating the Law and Society Interface (1989) 1 *Legal Educ Rev* 237. For other examples of simulation see Stacy Caplow, Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law (1989) 19 *N M L Rev* 137; Philip G Schrag, The Serpent Strikes: Simulation in a Large First-Year Course (1989) 39 *J of Legal Educ* 555; Robert G Vaughn, Use of Simulations in a First-Year Civil Procedure Class (1995) 45 *J of Legal Educ* 480.

because in Richard Ingleby's words: "Simulation is a direct way of demonstrating the links between the legal world and the non-legal world".[6]

Simulations have been used extensively in law school teaching for many years. The archetypal law school simulation — the moot — has been an integral part of Australian law school *curricula* since the inception of tertiary studies in law in this country.[7] Since then, academic colleagues have made extensive and creative use of simulation techniques to teach procedural as well as substantive issues and this is as true in international law as it is in other subject areas.[8]

In this Article we intend to describe how we have drawn on these previous efforts to devise a simulation exercise aimed at redressing the lack of emphasis on process and negotiation in the teaching of international law and organisations.[9] We begin by offering some possible explanations for the absence of a drafting/process component in International Law *curricula* and outline the background to our drafting/process module. We then describe in detail the structure, logistics and content of a particular simulation exercise we run involving the drafting of the Statute for an international criminal court. We identify particular problems that have arisen in the course of successive experiences with this particular exercise and offer the solutions we have implemented in response to these problems. Every use of the exercise has been successful and we conclude the essay with an evaluation of the benefits of adopting this form of teaching.

Why Process or Drafting is Not Taught

The doctrinal focus of much international law teaching can be explained partly by the difficulties inherent in any attempt to teach process and negotiation. Communicating information about legal rules and principles is, on the whole, more straightforward than engaging students in the simulated

6 Ingelby, *supra* note 5, at 246.

7 James R Crawford, Teaching and Research in International Law in Australia (1984) 10 *Australian Y B of Int'l L* 176; also Ivan A Shearer, The Teaching of International law in Australian Law Schools (1983) 9 *Adel L Rev* 61.

8 Christine Chinkin & Hilary Astor, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992). For an example of this method, see Paul J Spiegelman, Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web (1988) 38 *J of Legal Educ* 243.

9 Johnstone, *supra* note 2, at 51.

practice of international law. We have identified the following reasons, in particular, for the hesitancy to use this teaching method more readily.

Time-Commitment Involved

A successful simulation exercise on the negotiation of a draft multilateral treaty requires a substantial time commitment on the part of both teachers and students. Teachers need to identify an appropriate subject for negotiation — either from an existing multilateral negotiation process or by creating a hypothetical subject and process. We have always used an actual negotiation process in order to maximise the benefit of existing materials. There is added benefit too in that a current process is usually known by at least some of the students and involvement in the simulation will encourage students to more closely follow the real negotiation process. Even with the adoption of a current negotiation process, however, the advanced planning for the exercise can be administratively burdensome.[10] The sheer logistics of identifying appropriate materials for each student, copying relevant numbers of each document, distributing the correct documents to each student and scheduling time to clarify aspects of a particular country brief for students involves a substantial amount of time and effort.

In addition, the amount of time the actual exercise consumes is a factor for consideration. If the exercise occurs during normal class time, a teacher would need to allocate a substantial proportion of the lecture/seminar time allocated to the subject. The most successful simulation exercises we have been involved in have usually taken one whole day. In the context of an intensive graduate course on the Law of International Organisations, for example, one day of "negotiations" to establish a new organisation in the context of the rest of the course has worked very well. We cannot envisage a successful simulation split over several weeks and this automatically raises problems for undergraduate or graduate teaching where courses are often allocated only a 1-2 hour teaching slot per week. While it might be possible to organise a simulation exercise outside of the normal class time (for example, a whole day on a weekend or during a non-teaching period) this would inevitably exclude some students from the exercise.

10 Jay M Feinman, Simulations: An Introduction (1995) 45 *J of Legal Educ* 469.

Lack of Exposure to Negotiation Processes

A successful simulation will also rely on the experience and knowledge of the teacher(s). Clearly, inside knowledge is invaluable not least because it permits the teacher(s) to devise a simulation that more closely resembles the reality of negotiation and also allows them to compare the simulation to that reality in a debriefing session. We have been fortunate to attend key moments of multilateral institutional design as advisers to the Australian Government. In relation to the International Criminal Court in particular, these opportunities have included successive periods at the Sixth Committee of the UN General Assembly in New York, numerous departmental briefings in Canberra and the Conference of Plenipotentiaries in Rome.[11]

This level of involvement is unusual but not unprecedented in Australia. Many of our Australian international law academic colleagues have close working relationships with the international law offices of relevant government departments (particularly the Department of Foreign Affairs and Trade (DFAT), the Department of Defence and the Attorney General's Department) which are often keen to encourage academic involvement. Indeed, several of the early simulations we developed were partly devised by DFAT legal officers and these individuals have attended several simulations, often adopting roles or acting as advisers to student representatives.

The other obvious benefit of such collaboration is the increased availability of source material. Conversely, the lack of access to such material can act as a disincentive to the use of simulations. Again, the solution to this must lie in ongoing cooperation between academics in order that knowledge and material can be distributed as widely as possible. The current article is an attempt to contribute to this process.

Motivation, Unpredictability and Coverage

Other possible deterrents include the suspicion that students may not be sufficiently motivated to make the simulation work and the sense that such events are rather unpredictable. The question of motivation is one worth raising. In our

11 Our experience in other institutions like the Unrepresented Nations and Peoples Organisation (Simpson) and the Conference on Disarmament, the Organisation for the Prohibition of Chemical Weapons and the Conference of States Parties to the Geneva Conventions (McCormack) have also afforded us a wider context with which to work.

experience, simulations work only when students engage with the activity and take it seriously. If students are already motivated by a course of learning, the simulation is likely to be successful but even where a class has lacked sparkle, simulations can inspire renewed interest in the subject-matter. This is partly attributable to the fact that simulations are invariably entertaining as well as edifying. However, simulations also allow students to speak in a different voice or adopt a fresh *persona*. This can liberate otherwise diffident students to speak more freely that they would otherwise have been inclined to do. We have often observed that student contributions in a course become more regular and fluent after a simulation.

Simulations are, of course, unpredictable. In this, they are rather like practice itself. This makes them risky, *ad hoc* and experimental. They can also be somewhat emotional affairs. Teachers may have to relinquish their control over a course for a period. This is not always easy but one clear advantage of the simulation is that it is a departure from the centralised model of teaching where the teacher is principally a disseminator of information. In the words of one teacher, "[s]imulations can transform students from passive, detached observers into involved participants in the learning process."[12]

The teacher concerned with getting through a mass of material in a course will find simulations an unappealing way to teach international law. Students teach themselves more slowly than we can teach them. But they teach themselves more effectively. So, while a simulation may take a large proportion of the time allocated to the unit and while the coverage of material will be unpredictable, all of this is offset by the deeper level of self-education engendered by the simulation.[13]

Background to Involvement

Reflecting upon our development of the simulation exercise on the negotiation of a draft statute for an international criminal court, we have identified several shared experiences which have contributed to a "gestation period" fundamental to the

12 Spiegelman, quoted in Mack, *supra* note 1, at 101.

13 See, for example, GR Williams, Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses (1984) 34 *J of Legal Educ* 307; Marlene Le Brun and Richard Johnstone, *The Quiet ()evolution: Improving Student Learning in Law* (Sydney: Law Book Co Ltd 1994), at 304-307.

emergence of this exercise. A brief account of some of these key experiences will help explain both our conception and our development of the exercise:

Earlier Simulations in International Law

When the UN General Assembly declared the 1990s "The Decade of International Law", Member States of the UN were asked to implement measures to promote the teaching of International Law.[14] As part of its response to this request, The Australian Department of Foreign Affairs and Trade helped to organise a number of international law simulation exercises in Australian Law Schools. We participated in two such exercises in 1992 and 1993 in the Law School at the University of Melbourne. Both exercises simulated meetings of the UN Security Council. The first involved a debate in the UN Security Council on the question of whether to impose economic sanctions on Libya for the failure to surrender the two Lockerbie bombing suspects to the governments of the UK and the US. The second involved a hypothetical debate about the admission of Taiwan and Palestine to the UN.

These two UN Security Council simulations were both extremely successful experiences and introduced us to the educational possibilities of simulation exercises in international law. We subsequently attempted a number of simulation exercises in two international law related subjects — Human Rights Law and Current International Legal Problems. These exercises included arguments before the UN Human Rights Committee on the Toonen Case[15] pursuant to Australia's accession to the 1st Optional Protocol to the International Covenant on Civil and Political Rights and a war crimes trial of Lt William Calley[16] charged with offences in relation to the My Lai massacre in Vietnam. Again we observed that students responded enthusiastically to these initiatives and many students have cited the exercises as foremost among their personal highlights from the courses.

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14 GA Res 44/23, U.N. GAOR, 44th sess , U.N. Doc A/RES/44/23 (1989). The General Assembly declared the period 1990-1999 the U.N. Decade of International Law to promote acceptance, respect and progressive development of international law as well as its teaching and dissemination.

15 *Toonen v Australia* UN Hum Rts Comm, UN Doc CCPR/C/50/D/488/1992 (1993).

16 *US v Calley* 46 C M R 1131 (1971), aff'd in 22 USCMA 534, 48 CMR 19 (1973).

Exposure to Multilateral Negotiations

Our participation in various negotiations exposed us to the idiosyncrasies of the multilateral process — the unwritten rules of multilateral diplomatic etiquette, the practical application of the principle of sovereign equality of States, the complexities of delegation flexibility within the parameters of the negotiating brief, the creation of sometimes unexpected coalitions of States to pursue common negotiating positions, the diversity of strategies to encourage particular States to change their positions on specific issues. As a consequence, we recognised the significance of the process of multilateral negotiation to an understanding of the making of international law. Our increasing familiarity with the process emboldened us to attempt to teach aspects of the process through the technique of simulation.

Access to Primary Materials on the International Criminal Court

An additional benefit of participation in "real" multilateral negotiation processes, particularly in the Sixth Committee discussions of the International Law Commission's Draft Statute for an International Criminal Court, was the access to primary materials for the simulation exercise. National delegations making formal statements in the course of Sixth Committee debates invariably provide written copies of their statements. These statements do not become official UN Documents, are not allocated UN Document numbers and are not available commercially through the usual channels for distribution of UN Documents. Copies of the statements are often only made available after a statement has been formally presented in oral form. Consequently, unless an individual, present throughout the entirety of a debate on a particular agenda item, makes a concerted effort to collect a comprehensive set of the statements, it is very difficult to acquire them.

We were able to collect three incomplete sets of delegation statements from the 48th, 49th and 51st sessions of the UN General Assembly's Sixth Committee debates on the question of an international criminal court and these documents have been indispensable to the success of the exercise. The formal documents from the debates on the international criminal court, particularly the text of the draft statute itself, are of course readily available in the public domain. However, the individual delegation statements, which are much harder to acquire, make it possible to assign

specific country roles to participating students and to provide each of them with an indication of their "State's" position on the issues under discussion.

Preliminary Steps for the Simulation

We have developed a particular exercise that involves a simulation either of UN General Assembly Sixth Committee debates on, or the Preparatory Commission negotiations for, a permanent international criminal court. Here we identify and explain the specific steps we have undertaken in preparation for the simulation exercise.

Preparation of Materials

One key preparatory step for the simulation exercise is to identify the materials students will use in the exercise and gather those materials for distribution. We have prepared appropriate numbers of copies of the following documents:

- the relevant provisions of the Draft Statute for an International Criminal Court (specifically the provisions on the definitions of the substantive crimes; on the triggering of the court's jurisdiction; and on the relationship between the court and the UN Security Council).[17] We have asked students to use the actual text of the Draft Statute as the basis of "negotiations" in the simulation exercise and so the text itself has been fundamental;
- relevant extracts from various secondary sources commenting upon the aspects of the Draft Statute the subject of the simulation exercise.[18] These materials have helped provide background information for students and to help clarify the contextual basis for the specific positions in their country statements;
- the country statements from the Sixth Committee already referred to above. We only give each student copies of the

17 We have never considered it necessary to provide the Draft Statute in its entirety because so much of the document is not directly relevant to the simulation exercise and copies of the entire document only increase the costs of the exercise and the time involved in preparing for it. However, there is certainly no reason in principle why students could not receive the complete document.

18 We have published joint commentary on the aspects of the Draft Statute also the subject of the simulation exercise and so have tended to use that material with some other authors. Our tendency has been to provide relevant extracts from 2-3 different articles. Again, there is no reason why more could not be provided but we have found that students do not need copious secondary sources to engage in the exercise.

statements delivered by the State they are "representing" in the simulation exercise. We have selected particular States to be represented on the bases of: geography (that is, at least two States from each of the 5 regional groupings in the UN System — Africa, Asia, Eastern Europe, Latin America, and WEOG — Western Europe and Others Group); political significance in the actual negotiations for the international criminal court (for example, all five permanent members of the UN Security Council); availability of statements from the same States in different years (entirely dependent upon our own collection of statements); and availability of statements in English, or a language accessible to one or more students participating in the simulation exercise.[19]

Presentation of Background Lectures

We have found it helpful to provide one or two lectures as background preparation for the simulation exercise. These lectures have concentrated on an introduction to both the concept and the process of multilateral negotiation as well as upon the arguments for and against an international criminal court, a critical evaluation of past unsuccessful attempts to create such a court, a brief overview of the negotiating history of the draft statute and, particularly, the key issues of contention we have made the subject of the simulation exercise. Here we have identified and attempted to explain different national positions in relation to the definition of war crimes, crimes against humanity and genocide; the consent of particular States for the initiation of criminal proceedings; and the relationship between the UN Security Council and the Court.

The lectures have always helped students participating in the simulation exercise gain a greater sense of familiarity and, as a consequence, confidence with the substantive issues the subject of the simulation exercise. We have attempted to present the lectures some days prior to the exercise itself to allow students the opportunity to follow-up the lectures with their own reading of the secondary sources referred to above.

19 Most statements are provided in English including by those States whose representatives speak one of the other official U.N. languages (Arabic, Chinese, French, Russian, Spanish). However, some statements are only provided in French and others only in Spanish. We have always found fluent French speakers and often found fluent Spanish speakers among the students participating in the exercise and have allocated them roles accordingly.

Explanation of Exercise and Allocation of Roles

At some stage prior to the actual day of the simulation exercise, we have held a session to outline the proposed agenda, to explain the way in which we propose to conduct the exercise and to allocate specific country roles to each of the students. In allocating country roles we have regularly assigned one student only to each of the developing States and the smaller developed States and at least two students to each of the five permanent members of the UN Security Council and the larger developing countries (for example, Germany, Japan, Canada). We have regularly allocated more students to the US delegation than to any other State and on occasions have had up to five students "representing" the US with no more than 2 students "representing" any other single country.

These disparities in relative sizes of country delegations are indicative of our attempts to replicate at least some of the realities of multilateral negotiations. The more influential States regularly have much larger delegations than smaller States and the US routinely has delegations which dwarf almost all other States in terms of numbers of personnel. The actual number of States "represented" in the simulation and the number of students allocated to each delegation is ultimately dependent upon the number of students participating in the exercise. We have found that 30 or more students representing 20-25 States is ideal but we have also conducted successful exercises with as few as 14 participating students.

In the explanatory session we also attempt to describe some of how multilateral negotiations work — both in terms of procedure and conventional forms of negotiation as well as in terms of the pursuit of national objectives and priorities. Although this session is necessarily brief and somewhat superficial, it is also important for the overwhelming majority of students uninitiated in the process of multilateral negotiations many of whom may be apprehensive of what is expected of them personally in the simulation exercise.

Conduct of the Simulation

Prefatory Sessions

The simulation exercise cannot commence without the appointment of a chairperson. We have usually selected a confident and articulate student for this role but, on occasions,

we have also used a government official experienced in multilateral negotiations and invited to participate in the simulation exercise. The role of the chairperson is critical to the success or otherwise of the exercise because we do not use formal rules of procedure for the conduct of the exercise and this person exercises their own discretion as to the way the meeting will be conducted and take its decisions. The chairperson directs the discussion, calls for statements on particular issues, has the responsibility to move through the agenda concluding discussion on specific items and initiating breaks in the plenary sessions for informal consultations when impasses emerge, and to call for votes on specific issues when required. If a student is chosen for the task they will invariably need some brief instruction on how to perform their responsibilities but it has always been an encouragement to us to see particular individuals rise to the opportunity afforded them in this role.

The formalities of the exercise commence with "representatives" of States taking their seats behind their State namecards (arranged in English alphabetical order as occurs in most multilateral negotiations) with the chairperson calling for 2-minute statements from each of the delegations. This brief statement reflects the particular State's position in relation to the creation of a permanent international criminal court and to some of the substantive issues under discussion. The students base their own statements on the country statements they have already received and it is the responsibility of the chairperson to ensure that "delegates" do not take an excessive amount of time. The length of time for this initial session will obviously depend upon the number of State delegations but these have often occupied up to one hour.

After the initial session of introductory statements, we have often had the chairperson instruct "delegates" to break for informal discussions and caucusing with "like-minded" States. This informal session is the first of several throughout the exercise and we have encouraged delegates to use morning and afternoon tea breaks and the lunch break to continue with informal discussions. We have played a role ourselves as "capitals" for all delegations so that they can approach either of us at any time with requests for advice or clarification as to their national position on any particular issue. Delegates tend to use this resource on a regular basis as a way of confirming their own ideas and initiatives on particular issues. We also take a more active role and approach delegations with suggestions about positions they should

initiate or support to alter the dynamic of a discussion in relation to a particular issue. For example, we regularly approach the larger delegations and suggest that they threaten specific developing States' delegates with cancellation of aid programs or with the imposition of economic sanctions if those States do not change their position to support particular initiatives in the discussions.

In the initial informal discussions after the plenary session on introductory statements, we arrange for the chairperson to indicate that delegations will be asked to nominate cities for the seat of the court and that they should caucus within their State's geographic grouping, and lobby beyond that grouping, for nominations they wish to promote. It is always intriguing, and often humorous, to observe what proposals particular groups of students produce from these discussions. On one particular occasion the "representative" of Slovenia wanted to nominate her own capital for the seat of the Court but then, embarrassingly for her and for her "country", had to check what the name of the capital city actually was! On another occasion separate delegations in the simulation nominated Melbourne and Sydney for the seat of the Court and the debate at Australian Federation about the national capital was replicated all over again. Other more interesting and better conceived proposals have included Nuremberg, Tokyo and several capitals in the Developing World.

After a period of up to 30 minutes, we have the chairperson call the meeting to order and to ask for nominations for the seat of the court. Delegations nominating host cities are asked for a brief statement articulating the rationale for their particular nomination. We leave the nominations of host cities entirely to the creativity of the students themselves. If there is only one nomination, that host city is elected unopposed by decision of the chairperson. We have seen that outcome only once after some sustained and clearly effective lobbying by one delegation in the informal discussions. It is much more common for there to be multiple nominations, all usually supported with creative and thoughtful arguments as to the relative merits of the nomination.

Definitions of Crimes

Once the host city for the Court is appointed we move to the first substantive issue for the exercise — the definitions for the crimes making up the subject matter jurisdiction of the Court. The crimes in the draft statute for the Court were

genocide, war crimes and crimes against humanity. In some exercises we have chosen just one of the three substantive crimes and concentrated on the negotiation of that definition because of time constraints. In other exercises we have dealt with the definitions for each of the three "core crimes". Naturally, the definitional problems are different for each crime. For genocide, for example, the draft statute relied exclusively on the definition incorporated in the 1948 Genocide Convention.[20] Criticisms of the limits of this definition have focused on the high threshold mental element of the requisite specific intent to destroy "in whole or in part" the victim group as well as on the exhaustive and, therefore exclusive, list of target groups the subject of the genocidal activity. In relation to war crimes there were issues about the extension of the Court's jurisdiction beyond international armed conflicts to also cover internal armed conflicts. There was also uncertainty about the scope of the Court's jurisdictional competence in respect of the means and methods of warfare — for example, the use of certain weapons types, the targeting of protected objects and/or persons, perfidious use of protected emblems and the question of proportionality and military necessity.

Exercise of the Court's Jurisdiction

Another key issue for discussion has been the various options for the exercise of the Court's jurisdiction — otherwise known as "triggering mechanisms". Here the draft statute envisaged two relatively non-controversial options — a complaint from a State Party alleging a violation of the Statute of the Court or a referral of a situation by the UN Security Council for the investigation of the Prosecutor of the Court. The third proposed trigger, and much more controversial than either of the other two proposed triggers, was that the Prosecutor be authorised to act *proprio motu* — or on her own initiative — to investigate a possible commission of a crime within the subject matter jurisdiction of the Court.

This question of triggering mechanisms is inextricably linked to the question of the consent to the exercise of the Court's jurisdiction. There were issues about whether States Parties ought to automatically cede jurisdiction to the Court over some or all of the crimes in the Court's Statute *ipso facto* as States Parties to the Statute or whether they ought to be

20 Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec 9, 1948, *entered into force* Jan 12, 1951, 78 UNTS 277.

entitled to select the specific crimes they will cede jurisdiction over and which they will not. There was an additional issue about non-States Parties to the Statute of the Court — particularly where one of more of the territorial State, the custodial State and the State of nationality (of the accused) are not party to the Statute of the Court.

Relationship Between the Court and the UN Security Council

One of the final issues the students negotiate is the precise relationship between the UN Security Council and the international criminal court. After the students have broken for informal discussions and negotiations, we have often arranged for the chairperson to call the meeting together and to ask delegations for statements on the wording of the relevant provision of the current version of the draft statute for the court. The earlier versions of the Draft Statute prior to the Rome Diplomatic Conference on the International Criminal Court envisaged the court being precluded from considering any situation currently under consideration by the UN Security Council. Such a provision could have seriously limited the potential jurisdiction of the Court because "under consideration" by the Council could be interpreted to mean any situation listed on the agenda of the Council whether or not the Council was actively considering the situation in debates. Students are invited to accept the status quo or to come up with some alternative proposal which may still allow some capacity for the Council to block the court's consideration of a situation but on the basis of a more onerous formula.

Because this session has usually been the final substantive session in the exercise we have often been in the situation of having to rush our deliberations. However, the issues here are particularly interesting and conducive to creative and intriguing compromises to bridge the gap between apparently polarised positions. Consequently, we have attempted to save at least 30–45 minutes for the negotiations and have offered a 10–15 minute break for informal negotiations where this has seemed appropriate.

Debriefing

We have always concluded the exercise with a "debriefing" discussion. This session enables us to talk through our perceptions of the benefits of the exercise and to give the students the opportunity to express their views about their experiences. We have taken the opportunity to help some

individuals emerge from the national roles they have so enthusiastically embraced and to remind others that any frustrations with delegates from other States encountered in the exercise ought not to spill over into interpersonal relationships outside the limited context of the exercise. It is always encouraging to hear students speak of what they have learned through the exercise and we have often received invaluable feedback with suggested improvements for future exercises.

Problems and Possible Solutions

In this section we identify a series of problems and possible solutions associated with our use of this particular simulation. It should be borne in mind that these problems have often occurred only intermittently or have been revealed to us only through consultation with the students after the simulation is completed.

Inadequate Background and Expertise

It is usually the case that students have relatively little background in either multilateral negotiations or the history and politics of the State they are purporting to represent. This can lead to either a lack of confidence on the part of students or a tendency to enter the realm of the fantastic in adopting debating positions. To avoid this, teachers must provide adequate briefing papers in good time for students to absorb these papers and develop positions. A prior lecture combined with some accessible secondary materials on both substantive and procedural issues is vital if students are to enter the negotiations with sufficient knowledge and skill. Needless to say, no set of briefing papers will ever be complete (this is, after all, the experience of negotiators and diplomats in real life) and students must be encouraged to improvise while remaining faithful to the material before them.

We have found that the general diffidence or shyness of students can be overcome using two techniques. One is to have each representative make an opening statement of about a minute in duration. Students immediately feel part of the debate having had their voices heard. The second technique we have employed is to begin the simulation with a technically straightforward and non-legal issue where students can afford to make ingenious or imaginative suggestions without feeling too constrained by the material. In many cases involving the ICC, we have used a debate about

the location of the Court to help students relax. This exercise also serves a useful intellectual end by revealing to students how few of the UN's primary institutions are situated in the Southern Hemisphere.

An associated difficulty is that students, instead of improvising, become fixed in rigid positions or arid debates. In these cases, the simulation can lose momentum and meander rather fitfully. One possible solution to this lies in providing "instructions from capitals" throughout the day in order to steer the negotiations towards meaningful subjects. This is a role at least one of the lecturers can adopt for much of the day (see above).

Frustration of Participants

Either during or after a simulation, students will come to realise that "[t]hey do not possess the answers"[21] or that the process is highly procedural, frustratingly slow, surprisingly informal and inelegant. These are, of course, insights but it will not always be clear to students that these are valuable conclusions. It is important that teachers engage in a serious debriefing at the conclusion of the simulation. In this period, the teacher must emphasise how realistic an exercise the simulation has been and, in particular, she must ensure that students use their frustrations productively. A simulation is a small move from the controlled environment of a class-room where problems are presented and solutions outlined to a less controlled setting in which problems are very often not solved and issues are left hanging in the air. Simulations represent an advance from the comforts of formalism and should be presented in this light to potentially disenchanted students. De-briefings are important for the usual reason that passions can become highly inflamed when roles are adopted. A period of decompression is vital!

Lack of Time

Simulations are time-consuming exercises both in terms of preparation for the simulation and the simulation itself. While we believe this is time worth spent, it can represent a significant proportion of the time allocated to a particular subject or unit. In an International Organisations course, it means devoting around a fifth of the course to the International Criminal Court. This may appear excessive, especially for an institution not yet functioning. On the other hand,

21 Ingleby, *supra* note 5, at 248.

students do not simply learn about the Court in participating in the simulation. They learn about negotiation, about procedure, about establishing institutions and about drafting processes. So, even in terms of substance, to say nothing of the skills acquired during the simulation, there is enormous scope for deep learning. In the International Criminal Court simulation, we have remained immodest in relation to coverage seeking to explore two or three issues in real depth (jurisdiction, consent of States, relationship of the Court to the UN Security Council) rather than aspiring to what would inevitably be a superficial view of the whole Statute for the International Criminal Court.

In the case of a specific course on International Criminal Law, there is the possibility of the greater luxury of being able to run the simulation across a longer period. We are yet to teach a course in International Criminal Law but at least one, admittedly radical, proposal would be to spend the entire course on simulated negotiation of the whole Draft Statute for an International Criminal Court from establishment to the Final Act. There are, coincidentally, 13 Parts in the Rome Statute. An approach such as this would omit a great deal — for example, the Tribunals in Yugoslavia and Rwanda, the Nuremberg legacy and inter-agency cooperation in fighting transnational crime. However, again, the sacrifice in coverage might be compensated by the unique potential to engage in a single drafting exercise in real depth.

Artificiality of the Exercise

We would not wish to claim too much for simulations. "A simulation resembles something but is not the thing itself."[22] One has to accept from the outset that a simulation cannot entirely replicate actual negotiation and drafting. There are severe time-constraints that do not exist to the same extent in reality; there are no second chances in simulated negotiations; cultural factors are often missing from simulations; inter-state histories do not wield the same influence; and, realpolitik differentials are impossible to reproduce effectively in a simulated context. Again, the important point is to acknowledge the artifice and explain the departures from reality.

The nexus between law and politics is one that can be explored rather usefully in post-simulation briefings. Students

22 Feinman, *supra* note 10, at 469.

tend to believe either that the simulation was artificial because it was "all politics … there was no law … the arguments were too general or too personal" or, conversely, that the arguments were "too technical … too legalistic … unrealistically procedural given the weight of power politics."

It seems to us that these impressions would recur in the context of observing international negotiations at different points and in different situations. In other words, they are likely to be accurate for some negotiations in some cases. There are cases of multilateral treaty making or inter-state negotiation where politics seems dominant and where law tends to fall away, at least prior to the commencement of more technical drafting processes. One might say that the Cuban Missile Crisis is an example of this sort of international negotiation.

However, in the case of the International Criminal Court negotiations legal arguments carried a surprising amount of clout. The negotiators, drafters and diplomats in Rome viewed themselves as both State representatives and lawyers engaged in a collective endeavour. Sometimes, this latter role assumed the primary significance and politics became the absent partner.

One rather acute problem facing us in future is caused by the success of the Rome Diplomatic Conference. The Rome Statute is now open for signature and ratification. There is little left to negotiate on matters of substance. How should we proceed with future simulations? One possibility is to run mock-trials of suspected war criminals but this would be a quite different sort of exercise and would not achieve the aims we have in running the simulation. Another possibility would be to ignore the fact that the Statute has been finalised and run the simulation as if the year was perpetually 1998. This would, we fear, exacerbate the problems of artificiality. It may be that we will have to move to a different substantive area for future simulations.

Alternatively, we may continue to use the Rome Statute for the International Criminal Court but, instead, focus on domestic implementation or the mechanics of institution-building subsequent to agreement on the Statute. This latter approach holds some promise for successful future exercises. Prior to entry into force of the Rome Statute, State Signatories will be engaged in a Preparatory Commission process with a mandate to attempt to define the crime of aggression, negotiate the elements of each of the substantive crimes and agree on the Rules of Procedure for the new

Court. It may well be possible to simulate a negotiating session of the Preparatory Commission. Alternatively, the Rome Statute will be subject to future Review Conferences of the States Parties and a useful simulation exercise could focus on amendments to the definitions of the crimes, additional crimes to be included in the Statute or other aspects of the Court's operation.

Conclusion

In any educational activity, the prior determination of goals is one of the keys to success.[23] In the case of the International Criminal Court simulation what should these goals be? The literature on educational objectives reveals a taxonomy of possible goals or skills. These are cognitive, performative and affective.[24] Traditional legal education has focused on cognitive learning (doctrinal, formalistic problem solving and information gathering). The performative and affective objectives concerning "what students can do and how they feel and experience a situation" are insufficiently emphasised. The simulation accomplishes all three if done correctly.

The students clearly absorb the doctrines and rules in a meaningful context (*cognitive* learning). Students who negotiate over a particular rule and who make arguments in support of certain drafting changes are far more likely to retain a sense of the content of this rule than those students who simply learn rules in the abstract. But in the case of successful simulation, students learn how to do international law and by learning how to *do* international law, they "learn by doing."[25] The learning process is converted "from passive listening to action."[26] The *performative* aspect is central. Students immerse themselves in the process as actors (in both senses of that word) and, on leaving the academy, they should find the world a more recognisable place as a result. Equally, students learn skills rarely taught in international law – oral skills, negotiating skills and inter-personal skills.

Finally, there is the *affective* skill – the skill that emphasises self-criticism and experimental elements of a role-play. This requires a period after the simulation in which students de-brief. Here, a combination of feedback [27] and "critical

23 Feinman, *id* at 471.
24 *Id*.
25 Thomas A Robinson, Simulated Legal Education: A Template, (1992) 42 *J of Legal Educ* 296.
26 Mack, *supra* note 1, at 101.
27 *See* Johnstone, *supra* note 2, at 59.

review"[28] is vital, if students are to reflect on their responses during the simulation. In order to facilitate this the teachers can develop a series of questions. These could resemble the sorts of questions asked by Richard Ingleby in his divorce law simulation.[29] However this is accomplished, it is indispensable in securing one of the goals of a simulation: what Amy Zeigler calls (in relation to evaluating clinical legal education) "reflective practice".[30] This reflective practice includes a moral element in which the participants think about their ethical responsibilities as actors within a certain process. In the case of the International Criminal Court simulation this is indispensable in ensuring that students think globally as well as acting as conduits for a specific State interest.

So, the simulation can be a success on these three levels. However, we believe it achieves other more specific goals. First, it permits collaboration on meaningful tasks. One of the unfortunate by-products of our highly individualised mode of assessment in the academy is a tendency to depreciate the benefits of cooperative endeavour and yet much of what we do on leaving university is by necessity done as part of a team (whether in government or private practice). Simulations give students a rare opportunity to develop these very particular group skills.[31]

Second, students can better see the value of their own ideas in a simulation. They are given the time to develop positions and strategies as opposed to responses to teacher questions. The agenda is placed back in the hands of the students who gain both autonomy and responsibility. One of the remarkable aspects of the various simulations we have held over the years is that they often produce ideas or proposals that are later reflected in subsequent inter-state negotiations. The "Singapore Proposal", which was suggested in order to break the impasse over the role of the Security Council in the Rome Statute, closely resembled a similar idea developed by students in one of our early simulations in 1997. It is vitally important that students are made aware of these achievements.

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28 Mack, *supra* note 1, at 92.

29 *See* Ingleby, *supra* note 5, at 239.

30 Amy L Ziegler, Developing a System of Evaluation in Clinical Legal Education, (1992) *42 J of Legal Educ* 575, quoting Donald A Schon, Educating the Reflective Practitioner: Toward a New Design of Teaching and Learning in the Profession (San Francisco: Jossey-Bass, 1987). See also Feinman, *supra* note 10.

31 *See* Mack, *supra* note 1, at 92.

Third, the simulation can be an entertainment, a break from the routines of lectures and tutorials.[32] Certainly students in the simulations we have run over the years have had a great deal of fun dressing up in national costume, adopting national characteristics (assumed or actual) or engaging in heated confrontations. Apart from freeing students of the constraints of classroom dialogue, this aspect of the simulation can have positive consequences. At one simulation on the UN Security Council, the Russian delegate removed his shoe and banged it on the table to underline a point he was making. Many students later said they felt this was an implausible act in the context of such a meeting, a case of over-acting. Yet, the student playing the Russian delegate was merely adverting to the famous incident where Khrushchev did exactly that in moment of anger. So simulations, even at their most picaresque, can provide students with a useful insight into the peculiar realities of inter-state negotiation.

Ultimately, as Richard Johnstone puts it, simulations such as this one, "enable students to understand practical aspects of the operation of the law, to explore their own values and assumptions in relation to the law, or to find out about the "internal logic" of a situation in which a lawyer might be placed".[33]

This article has argued for the use of simulations to enhance the teaching of international law. While, these exercises are time-consuming and unpredictable, they can and do work. They achieve a number of educational goals, provide variety for teacher and student alike and inspire an interest in international law that, for many of the students involved, is ongoing.

32 As Kathy Mack puts it, "students are less bored" *id* at 101.
33 Johnstone, *supra* note 2, at 51.