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Editorial

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We open this issue of FORUM with an appraisal by Marie-Isabelle Pellan of the achievements – unspectacular, maybe, but real nonetheless – of the recent Johannesburg summit, in reinforcing the commitment to the goals of sustainable development enshrined in the earlier Doha Declaration.

Our main theme is the teaching of international law. In her Introduction, Ellen Hey synthesises the range of comments and short contributions that were offered by the practitioners and academics we approached. We are pleased to publish the considered – sometimes even radical – views of Hans Corell, John King Gamble and Gerard Tanja, whose different professional and national perspectives invite us to challenge some of our long-held assumptions about what forms of teaching are optimal, feasible or even desirable.

Ronald St. John Macdonald is a fine example of someone who has achieved a wide reputation as an inspirational teacher. Craig Scott, in his Profile, tells us why. And, in a Bookshelf characterised by undisguised enthusiasm for his subject, Alain Pellet presents the lessons – not least of them in logic and lucidity of expression – to be learned from the International Law Commission Report of the late Roberto Ago on State Responsibility.

In times of threatened conflict, as we have seen recently, we look to professors of international law to pronounce with authority and objectivity on what international law will or will not allow, and they are listened to. But the teaching of international law should not be regarded as the preserve of academics alone, though they deservedly take pride of place. As Ellen Hey points out in her Introduction, it matters too much. Each of us who is engaged, in whatever capacity, in any kind of international legal practice or function, shares in the responsibility to promote the understanding of, and respect for, international law both public and private. Law is, after all, employed most often and most productively as an instrument for avoiding, as well as resolving, conflict, and this is because it is relevant to, and provides the underpinning for, many of the forms of international interchange that lawyers regularly handle. The greater their awareness of this, the better.

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In the News / Actualité

Le Sommet mondial pour le développement durable: aspects liés au commerce dans le Plan de mise en oeuvre et impact potentiels sur les négociations de Doha

MARIE-ISABELLE PELLAN[1]

Le Sommet mondial pour le développement durable, qui s'est tenu à Johannesburg du 26 août au 4 septembre 2002, a déjà fait l'objet d'un bilan pour le moins mitigé.

Partant d'un constat général d'échec dans la mise en oeuvre du Plan d'action adopté à la Conférence des Nations Unies sur l'Environnement et le Développement à Rio en 1992, le Sommet de Johannesburg avait pour objectif de réengager la communauté internationale sur la voie du développement durable par le biais d'actions concrètes et l'identification de moyens efficaces de mise en oeuvre.

Le processus de négociations dans lequel se sont engagés les gouvernements a toutefois abouti à un nombre relativement restreint d'engagements spécifiques, de critères et de dates cibles pour relancer l'objectif du développement durable.[2] Faut-il accuser un agenda trop ambitieux, un manque de volonté politique, ou simplement un essoufflement de la communauté internationale à suivre les rendez-vous de ce début de millénaire?

Il faut dire que le Sommet de Johannesburg emboîtait le pas à d'importantes conférences internationales tenues depuis 2000, soit le Sommet du Millénaire des Nations Unies[3], la Conférence ministérielle de Doha de l'OMC[4] et la Conférence de Monterrey sur le financement au développement[5]. Des considerations relatives

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[1] L'auteur est Juriste à la Division du Commerce et de l'Environnement du Secrétariat de l'OMC. Les opinions exprimées dans cet article sont strictement personnelles et n'engagent en aucune façon les Membres ou le Secrétariat de l'OMC.

[2] Au terme des négociations, les pays participants ont adopté sont la Déclaration de Johannesburg sur le développement durable et le Plan de mise en oeuvre du Sommet mondial pour le développement durable. Ces documents sont disponibles sur le site du Sommet: http://www.johannesburgsummit.org.

[3] New York, 6-8 septembre 2000.

[4] Doha, Qatar, 9-13 novembre 2001.

[5] Monterrey, Mexico, 18-22 mars 2002.

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à la cohérence entre les résultats de ces différents processus de négociations et à la déférence entre forums où se discutent des questions sous-jacentes au développement durable ont émergé dans le contexte des négociations sur le Plan de mise en oeuvre et ont divisé les pays participants.

Diverses positions ont été exprimées à ce titre dans le cadre des négociations sur le Plan de mise en oeuvre sur le développement durable. D'une part, on estimait que le résultat de ces conférences internationales devait servir de levier, ou de point de départ aux négociations du Plan de mise en oeuvre, de manière à ce que le Sommet de Johannesburg comporte une véritable "valeur ajoutée". Après tout, la notion de développement durable réunit les aspects sociaux, environnementaux et économiques du développement et donc englobe l'ensemble des questions traitées dans ces autres forums.

D'autre part, on estimait qu'il était illusoire de penser que le Sommet de Johannesburg puisse revenir sur des engagements négociés dans d'autres forums. Le Sommet devait plutôt chercher à compléter ces engagements préalables relatifs au commerce et au financement au développement, en se concentrant principalement sur la dimension environnementale, qui n'avait pas été couverte dans le cadre de ces autres conférences internationales.

En particulier, dans le contexte des négociations sur les aspects du Plan de mise en oeuvre liés au commerce, des délégations ont dénoncé des interprétations du mandat de Doha qui semblaient préjuger du résultat des négociations en cours à l'OMC, ou qui tentaient d'extirper de leur contexte certains aspects du mandat de Doha.

Les sections pertinentes du Plan de mise en oeuvre de Johannesburg se limitent finalement en grande partie à une réaffirmation des engagements de Doha et à une invitation adressée aux Membres de l'OMC à se conformer à ces engagements. Mais cela ne devrait pas pour autant minimiser la portée de ce texte, notamment quant à son impact potentiel sur les négociations en cours à l'OMC.

Le mandat de Doha accorde une place importante au développement durable. Et le Sommet de Johannesburg, en plus de réaffirmer au plus haut niveau politique l'importance du développement durable, clarifie et renforce les paramètres de sa mise en oeuvre. Nous mentionnerons ici quatre exemples qui démontrent comment le Plan de mise en oeuvre sur le développement durable pourrait recevoir un écho favorable dans le contexte des négociations de Doha.

Premièrement, les Ministres ont réaffirmé à la Conférence de Doha leur engagement sur la question du développement durable[6]. Cet engagement s'applique

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[6] Cet engagement figure déja dans le préambule de l'Accord de Marrakech instituant l'OMC.

de manière horizontale à l'ensemble des négociations du mandat de Doha. Concrètement, les Ministres ont convenu de mandater deux organes de l'OMC, soit le Comité sur le commerce et le développement, et le Comité sur le commerce et l'environnement, comme enceintes pour identifier et débattre les aspects relatifs au développement et à l'environnement dans le contexte des négociations, afin que le développement durable y soit pris en compte de manière appropriée.[7]

A ce stade préliminaire des négociations, les Membres de l'OMC en sont toujours à considérer la manière de donner forme à ce mandat. Un message politique fort du Sommet de Johannesburg ne peut que raffermir la détermination des membres de l'OMC exprimée à Doha de donner une place importante à la question du développement durable dans le contexte des négociations.

Deuxièmement, le Plan de mise en oeuvre appuie de façon générale l'achèvement du programme de travail de Doha sur les subventions, "afin de promouvoir le développement durable, de protéger l'environnement et d'encourager la réforme des subventions qui ont des effets négatifs considérables sur l'environnement et qui sont incompatibles avec le développement durable."[8] La Déclaration de Doha donne pour sa part instruction aux Membres de "clarifier et améliorer" les disciplines de l'OMC relatives aux subventions, incluant les subventions aux pêcheries[9], et de négocier des réductions de toutes formes de subventions à l'exportation de produits agricoles, en vue de leur retrait progressif.[10]

Bien que le texte de la Déclaration ministérielle de Doha portant sur les subventions ne fasse pas référence explicitement au développement durable ou aux effets néfastes sur l'environnement, le texte de Johannesburg pourrait être utilisé par certains Membres pour orienter les discussions sur les subventions à l'OMC dans une direction qui profite aux objectifs du développement durable.

Troisièmement, sur la question de la relation entre les règles de l'OMC et les Accords environnementaux multilatéraux (AEM), dont certains aspects font aussi l'objet de négociations à l'OMC, le Sommet de Johannesburg a souligné l'importance d'assurer le renforcement mutuel et de maintenir l'intégrité de ces différents instruments internationaux[11].

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[7] Ce mandat est prévu au Paragraphe 51 de la Déclaration de Doha.

[8] Paragraphe 91 b) du Plan de mise en oeuvre.

[9] Paragraphe 28 de la Déclaration de Doha.

[10] Paragraphe 13 de la Déclaration de Doha.

[11] Paragraphe 92 du Plan de mise en oeuvre.

La Déclaration de Doha prévoit des négociations sur la relation entre les règles de l'OMC existantes et les obligations commerciales spécifiques énoncées dans les AEM, "afin de renforcer le soutien mutuel du commerce et de l'environnement."[12] Ces négociations, sont toutefois limitées à l'applicabilité des règles de l'OMC entre les parties à un AEM, et ne doivent pas par ailleurs accroître ou diminuer les droits et obligations des Membres de l'OMC au titre des accords existants, ni n'en modifier l'équilibre.[13] La reconnaissance dans le Plan de mise en oeuvre de l'intégrité et de l'absence de hiérarchie entre les normes du système commercial multilatéral et les normes contenues dans les AEM pourra contribuer à renforcer cette notion de "soutien mutuel du commerce et de l'environnement" dans le mandat de Doha.

Finalement, le Plan de mise en oeuvre sur le développement durable met l'accent sur la nécessité d'accroître la coopération entre les diverses organisations internationales oeuvrant dans les domaines du commerce, de l'environnement et du développement relativement à l'assistance technique fournie aux pays en développement.[14] Cette assistance technique devrait assurer une participation pleine et efficace des pays en développement dans les négociations commerciales multilatérales, en plaçant leurs besoins et leurs intérêts au coeur du programme de travail de Doha.[15]

Cette disposition vient encourager les efforts de coopération entre les secrétariats du PNUE, de l'OMC et de la CNUCED, qui collaborent déjà dans le cadre de leurs activités d'assistance technique et de renforcement des capacités aux pays en développement dans le domaine du commerce et de l'environnement.

Par ailleurs, dans le cadre du mandat de Doha sur l'environnement, l'échange d'informations entre les divers comités de l'OMC et les secrétariats d'AEM fera l'objet de négociations en vue de formaliser, ou éventuellement d'élargir la collaboration existante.

Alors que le Programme d'Action 21 de Rio reconnaissait déjà le rôle d'un système commercial multilatéral ouvert, prévisible et non-discriminatoire pour le développement durable, le Sommet de Johannesburg identifie le commerce comme un véhicule de mise en oeuvre ou "moyen d'exécution" du développement durable.[16]

De la même façon qu'Action 21 rappelait qu'un résultat rapide des négociations commerciales dans le cadre du Cycle d'Uruguay permettrait de poursuivre la

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[12] Paragraphe 31 de la Déclaration de Doha.

[13] Paragraphe 32 de la Déclaration de Doha.

[14] Paragraphe 91 c) du Plan de mise en oeuvre.

[15] Paragraphe 45.*bis* du Plan de mise en oeuvre.

[16] Le commerce figure à la Section IX du Plan de mise en oeuvre intitulée "Means of Implementation."

[17] Action 21, Chapitre 2, "Coopération internationale visant à accélérer un développement durable pour les pays en développement et politiques nationales connexes."

libéralisation et l'expansion du commerce mondial, de renforcer les perspectives en matière de commerce et de développement des pays en développement et d'accroître la sécurité et la prévisibilité du système commercial international[17], le Plan de mise en oeuvre de Johannesburg encourage les Membres de l'OMC à respecter les engagements conclus à Doha, de manière à assurer que ce nouveau cycle de négociations bénéficie de manière concrète aux pays en développement.

Le Plan de mise en oeuvre de Johannesburg sur le développement durable ne pouvait pas, de manière réaliste, outrepasser les engagements conclus à Doha. Toutefois, ce plan d'action se devait, au minimum, de formuler des conclusions visant à ce que le système commercial multilatéral continue de supporter les objectifs du développement durable. Les dispositions portant sur le commerce dans le Plan de mise en oeuvre adopté à Johannesburg atteignent à plusieurs égards cet objectif, et constitueront sans nul doute un point d'ancrage important dans les négociations lancées à la Conférence ministérielle de Doha. L'objectif de développement durable figure déjà dans le mandat de négociations de Doha; reste aux Membres de l'OMC, dans la foulée du Sommet de Johannesburg, d'en assurer concretement la mise en oeuvre.

Recurring Themes / Thèmes récurrents

The Teaching of International Law / L'enseignement du droit international

Introduction, Teaching International Law Matters

How and what to teach law students about international law is a question that continues to occupy the minds of the members of the editorial board, both in our roles as teachers of international law as well as more in general as practitioners in various areas of international law. The issue that concerns us, it hardly needs emphasis, we thought, is not *if* international law, in the broadest sense of the term, should be part of the law school curriculum. However, as John King Gamble illustrates in his contribution, that remains a question in the United States, as well as in several other countries. A worrying phenomenon given, especially, the single super-power role that the United States plays in the present day world – although of course it may be precisely due to that role that the 'if-question' has not been answered with a straightforward 'yes'.

What concerned us in particular when preparing this issue was the manner in which future lawyers should be prepared for their work in an increasingly transnational environment; an environment in which various legal systems are likely to be relevant to any one given situation and in which various cultural perceptions are likely to play a role. To put it in other words: an environment in which there is no escaping from legal pluralism. Gerhard Tanja's plea for the inclusion of a large component of comparative law in the curriculum of those students wishing to pursue a career with global law firms, underscores this point.

In preparing this issue, we approached a number of potential authors from various walks of legal life. For their inspiration we developed an introduction and a list of questions (see Annex to this introduction), but left them free to develop their own thoughts on the topic. We were lucky to find three authors willing to share their thoughts with us on the topic: Hans Corell, Legal Advisor of the United Nations, John King Gamble, Professor of Political Science and International Law at the Pennsylvania State University, and Gerard Tanja, from Clifford Chance. Sir Lawrence Collins, Judge in the High Court, Chancery Division, also shared his thoughts with us. His remarks have been included in this introduction. Moreover, we found Craig Scott, Associate Professor at Osgood Hall Law School, willing to contribute the profile of Ronald St. John Macdonald, who ever-energetically promotes the teaching of international law both in his own country and abroad. In

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this column we thus benefit from the insights of practitioners and teachers of international law, most if not all of whom have functioned in both roles.

While all authors agree that *teaching international law matters*, and all agree that this should involve private international law, public international law and comparative law, as might have been expected, when becoming more precise, they differ as to the 'how and what'.

Hans Corell maintains that international law, including public international law, should be part of every law school's curriculum. John King Gamble, for his part, argues for the development of what he calls a 'bare-bones course in international law' as a basic minimum. Gerard Tanja makes the point that from the perspective of global law firms 'a rather basic knowledge of the main concepts of public international at an undergraduate level is sufficient' because, he adds, '[i]n their future career/practice public international law plays virtually no role. And when it does play a role, one of the very few specialists from within the network will provide the answers or an outside expert will be instructed.' This assessment, if correct, by Tanja raises the question whether it might be problematic that public international law plays virtually no role in the work of lawyers employed by global law firms. Take the prominent calls for partnerships between the pubic and private sectors in the attainment of sustainable development, for example at the recent Johannesburg Summit. If these and similar calls are to be properly implemented, should public law in general and public international law more in particular not play a more prominent role in the work of those employed by global law firms and thus in their education? With the private sector increasingly being regarded as a partner in attaining proper governance, should those employed in that sector not be aware of the relevant law? What responsibility do universities and the private sector have in this regard? Given recent corporate scandals, what role should ethics play in educating international corporate lawyers? Rhetorical questions? Apparently not, given Tanja's assessment.

A point on which all authors agree is that teaching international law is not about teaching rules and regulations. Hans Corell states that 'teaching international law is not simply a matter of conferring factual information,' it should instead take a liberal approach 'and not approach the learning of law as if it were simply some kind of technical vocational training.' John King Gamble advocates the greater use of information technology (IT) in teaching international law. Gerard Tanja proposes a 'dual-learning system,' that includes training in various areas of law as well as in management and inter-personal skills and learning on the job, facilitated by partnerships between law firms and universities, while Sir Lawrence Collins advocated that international litigation courses be made available to students.

There is much to explore and implement in this respect and the traditional lecture indeed is too one-sided a fare for our students. The introduction of the Bachelors-Masters structure in Europe, as Gerard Tanja suggests, offers opportunities for developing Masters curricula in which partnering and on-the-job training can play a role. That is, provided, as I believe Hans Corell suggests with his reference to liberal versus vocational training, we do not forget that one of our more important roles as university law school teachers is to enable our students to appreciate the value and importance of independent legal thinking. The possibilities offered by IT are particularly relevant in teaching international law. In addition to the advantages of interactive learning, which apply generally irrespective of the subject matter, IT enables us to bring together students and teachers from various places around the world in a virtual classroom, thereby making that classroom a more accurate reflection of the multicultural and otherwise diverse world in which our students will be working. Direct contact between student and teacher, however, remains irreplaceable, even if it is challenging to realize given increasing student numbers and decreasing finances, which is the case at least in the Netherlands. Provided we are willing and given the opportunity to make the initial investment in developing teaching materials, IT can also help us in this respect, in the sense that it can enable us more efficiently to conduct some teaching tasks and thus retain at least some quality time with our students.

I add one more point about the content of what we teach. It is my impression that much of our teaching, be it in international law or in law more in general, implicitly focuses on the courtroom. While that is not an unimportant situation in which a lawyer may find herself, it is not the only situation in which those educated in law – be they public servants or corporate lawyers – find themselves. Most lawyers, including attorneys, spend a considerable amount of time at the negotiating table, avoiding disputes and implementing existing rules or designing rules for future conduct. That situation – law as an instrument for avoiding conflict – I suggest, should gain a more prominent and explicit place in our classrooms, in addition to specific optional courses on international litigation, as suggested by Sir Lawrence Collins.

A point that Sir Lawrence Collins also raised with us is the increased prominence of the interface between public and private international law. He pointed to, among others, the International Tin Council case. Sir Lawrence also mentioned that in his view public and private international law courses should be made available to students, although he does not believe that they can be combined in a single course. John King Gamble voices a more North American attitude to the topic when he quotes Peter Trooboff, who suggested that it may not be practicable to have a course in both public international law and international business trans-

actions and that the two topics can be combined to at least introduce students to the essential issues in the field. I suggest that, while two separate courses indeed should be available, teachers of private and public international law should be more aware of developments in the other field, as important lessons can be learned. I refer, for example, to the long-standing debate, particularly in private international law, on the topic of *lex mercatoria*, and whether this normative development qualifies as law and how it seeks legitimacy by establishing links with the 'official state-made legal system'. That debate, for example, offers interesting insights for those public international lawyers who are considering the position of non-state actors and the development of so-called 'soft law' – insights that enable us to convey to students the systemic challenges that the position of non-state actors and the development 'soft-law' are presently giving rise to in public international law. It is also interesting to note in this context that, in France, legal pluralism is accepted in international business relations following the decision of the Cour de Cassation in the Norsolor case, that *lex mercatoria* are legal rules and thus may be applied by arbitrators even though they do not have *amiable compositeur* powers. This decision has had a major impact on the teaching of international business transactions law where *lex mercatoria* has been incorporated into these courses.

The contributions to this Recurring Themes column clearly illustrate, as does the work of Ronald St John Macdonald, that *teaching international law matters*. We of course, as always, welcome your thoughts on the topic.

Annex

Teaching International Law

International and national aspects of law increasingly are intertwined and indivisible. As a result it is every day becoming more true that each and every lawyer is confronted with the international, irrespective of whether she is in private practice, works in the public sector, as a corporate lawyer or as an academic. In addition, it is not only international legal aspects that the lawyer is confronted with, but also inter-cultural aspects of transboundary human relationships. While the negotiations in which the so-called international lawyer participates are the example par excellence of the latter, we often forget about, for example, the lawyers who deal with the countless transboundary legal issues that face those living outside their country of origin – be they emigrants, refugees or ex-patriots.

The above-mentioned developments raise questions about how we should be educating lawyers in the 21st Century. It is this topic that the Editors of the *International Law FORUM du Droit International* propose to treat in the recurring themes column of the upcoming number 4 of volume 4 of *FORUM*. We have approached academics and practitioners in the field to each address how they think

we should be educating future generations of lawyers. It goes without saying that we are of the opinion that every legal curriculum should devote attention to international law. What we propose to address thus refers to the *how* and *what*, not to *if* international law should be part of the legal curriculum. We note that when we speak of international law, we are referring to both private and public international law. Below we have included a list of questions for your inspiration, but we are not asking you to systematically answer each and everyone of the questions.

Questions that you may wish to consider in your contribution

- What attitude towards and knowledge of international aspects of law do you expect a recently graduated lawyer who works in your field or who was your student to have? Does your answer reflect a wish or is it reality?
- What position should international law have in the curriculum? Should international aspects of law be integrated into courses primarily devoted to national law, be presented as separate courses, or should a curriculum include both courses devoted to international law as such and integrate international aspects of law in other courses, primarily devoted to national law?
- Should the curriculum contain a compulsory course in public international law and a compulsory course in private international law or should these aspects be combined in a single course?
- What topics should an introductory course in international law cover?
- Besides an introductory course in international law, what areas of international law require further in-depth coverage in separate courses? Should any of these courses be compulsory?
- What role should comparative law play in the curriculum?
- What position should legal philosophy and legal history have in (international) legal education?
- What position should interdisciplinary aspects have in (international) legal education? Moreover, what aspects should the interdisciplinary focus on (economic, sociological, psychological, anthropological or other aspects)?
- What role should language education play in the (international) legal curriculum?
- What role should an internship with a relevant institution play in the (international) legal curriculum?
- What are the advantages and disadvantages of offering legal education at the graduate level or at the undergraduate level?

- What advantages does contemporary communication technology offer for legal education and what use should those who teach international law make of it?
- What are the advantages and disadvantages for legal education of the ongoing effort in Europe to introduce a uniform bachelors-masters system? I.e. what are the advantages and disadvantages of diversity and uniformity in legal education?

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International Law and the Law School Curriculum

HANS CORELL

Introduction

As I stated in my *Appeal to the Deans of Law Schools Worldwide*, "international law has become an ever more important ingredient in the finely spun web that connects us all both within countries and across borders."[1] Any recently graduated lawyer would thus have to have an open mind towards international aspects of law. International treaties or other international standards today govern major fields of national law. Furthermore, irrespective of the field in which a lawyer works, he or she will increasingly be faced with international aspects in their daily work.

The position of international law in the curriculum

What position international law should have in the curriculum is mainly a question to be answered by the academics and depends on how the law school is organized. At least as far as public international law is concerned, certain aspects of international law could very well be integrated into courses on national law – human rights law into a course on civil liberties, for example, or international economic law and the law of the sea into a course on the law of natural resources. However, it is necessary to focus in a sustained manner on certain other aspects of public international law that are specific to that field – the sources of international law, for example, and its main institutions. The natural connecting link between public international law and national law would be constitutional law.

As far as private international law is concerned, though, I find it much more difficult to envisage integration of any of its elements into courses primarily devoted to national law.

The question of whether international law should be a compulsory part of the curriculum is one that I have on many occasions debated with colleagues from academia. I would certainly not favour granting law degrees without the graduate having some understanding of international law. It is against this background that I have made an appeal to the Deans of Law Schools worldwide to include international law in their university curricula.[2]

While I am aware of the fact that there are those who maintain that one should not include compulsory elements in legal education, but rather allow the students to put together a curriculum that would suit their needs and aspirations,

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[1] Available at www.un.org/law/counsel/info.htm.

[2] *Ibid.*

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one could very well argue that teachers and lawyers with experience from the public and private sectors have a responsibility to explain to students that international law is an element that one simply cannot leave aside in today's society.

The content of public international law subjects

I limit myself to commenting on courses in public international law. First, I would focus on the development of the international community and on States as the primary subjects of international law. I would then focus on relations between States and, in particular, treaty making and customary international law. I would also include State responsibility, the law of jurisdiction and the clearly emerging responsibility of individuals for violations of international (criminal) law. Another element would be the United Nations and other international inter-governmental organizations. Special emphasis should be placed on the system of collective security established by the UN Charter. The next step would be to focus on particular areas of international law, and here I would put human rights at the forefront, either taught as a course in its own right, or as part of a general course on public international law or as an element of a larger course in civil liberties or constitutional law. Humanitarian law, which we see violated almost on a daily basis on our TV screens, is also essential.

Furthermore, it is important to stress that teaching public international law is not simply a matter of conferring factual information. The main focus should be on the philosophy of this law – its conceptual framework and its manner of reasoning – its relationship to national law, in particular, constitutional law, and the realization that in a globalized world it is simply no longer possible for governments to establish their own systems behind closed borders. In order to harmonize the law in the many areas where human beings are now interacting, it is simply a necessity to make use of international law as the umbrella under which national laws and procedures can be harmonized.

The extent to which comparative law should be part of the curriculum depends, to a large extent, on which field of law is in focus. At least as far as commercial law and the law of international trade are concerned, it is difficult nowadays to avoid introducing techniques of comparative law into their study.

Moreover, for those who find themselves studying within countries members of the European Union, it is difficult to avoid the study of comparative law. Whether under the influence of EU law or otherwise, the legal systems of all of the Member States find themselves increasingly penetrated by, or borrowing, ideas and legal concepts from the others. Even in criminal law and procedure, such borrowings are increasingly taking place. I would add that study of comparative law requires

that the student has a good knowledge of his or her own legal system in the field in question.

The wider context

I refer first of all to a point I made in the previous paragraph, i.e., that the main focus in teaching public international law should be on the philosophy of this law. Furthermore, history is always important. If we do not know our history, we are doomed to repeat the mistakes of the past. This goes also for legal history. As for legal philosophy, there is an obvious need to have a deeper understanding of the rule of law in our societies and of the necessity of founding future international relations firmly on the rule of law.

In studying law, it is inevitable that students make comparisons and draw conclusions related to other disciplines. Whether this should be done in an organized form within a curriculum or not, I leave to colleagues from academia to discuss. My general advice would be that being a student is not merely to plough through books and watch computer screens. It also means participating in the life on campus, interacting with students of different disciplines, being member of various associations and maybe also gaining working experience from different professions, perhaps during vacations. It may sometimes be a good idea to practise as an intern in a completely different vocation from the one the student is aiming for. Internships are always useful, and certainly with relevant institutions. But experience from other walks of life is also important.

As to knowledge of languages, it is always useful (and extremely enriching for the person). However, serious language education would probably have to be separate from a legal curriculum.

Communications technology offers tremendous advantages. I do not think that in the future students will think much about it. They will simply use this technology since they are familiar with it from their early years, just as my generation used the telephone and the typewriter.

One further observation that I would make in this context is that communications technology is beginning to break down the legal ethno-centricity that once used to characterize the teaching of international law – when the materials to which students had access and the perspectives to which they were exposed were mostly drawn from their own national jurisdictions (with the obvious exceptions of treaties and the decisions of the International Court of Justice). Hopefully, students, wherever they study, will soon enjoy a truly international education in international law.

Finally

Offering legal education can never be a disadvantage, irrespective of the level at which it is offered. The earlier this education is offered, the better, provided always that the education concerned is a liberal one and does not approach the learning of law as if it were simply some kind of technical vocational training. A pre-condition is, however, that the student has a sound general education (languages, history, philosophy, geography, natural sciences, etc.) as a basis; or, if that basis is not yet fully established, that the curriculum is so designed that he or she will continue to work towards acquiring it, at the same time as studying law.

The Teaching of "International Law": the Need for Curriculum Change

GERARD J. TANJA[1]

1. Introduction

Despite fundamental changes in international society and new developments at the international business and political level, the teaching of international law (in its broadest sense) and the approach to such teaching in continental Europe is still based on a rather static educational model that was introduced some 50-60 years ago. As a consequence, the teaching of public or private international law seems not to meet the educational requirements posed by current international relations and the demands of an increasingly complex and integrated globalised political, cultural, business and financial system.

This contribution will focus on some of the more pertinent developments in the European geography and will be limited to an identification of the most pressing issues, questions and problems with which the international legal practitioner in continental law firms is confronted.

Some initial conclusions and recommendations are formulated at the end of the analysis. It is not the intention to (attempt to) formulate definitive and final answers, but rather to stimulate innovative, creative and out-of-the-box educational thinking and discussion on how we can address the future challenges – both at an operational and at a more conceptual level – on the European continent.

Part 2 will address the main educational and career developmental issues facing law firms active at the global level and law firms operating in local markets. This paragraph also focuses on some educational consequences relevant to their market sectors. Although the two types of law firms are confronted with fundamentally different recruiting problems, there are also some interesting similarities that can be traced back to shortcomings in the current educational system (NB career developmental issues relating to lateral and more senior hiring is excluded from the scope of this contribution).

Whereas part 2 focuses on educational problems encountered by private and commercial practice, part 3 will address some of the consequences of such problems for the design and development of (new) international legal curricula.

Part 3 also contains suggestions and ideas to overcome some of the major stumbling blocks to arriving at a more efficient, effective and "tailored" academic

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[1] World Wirm Management, Clifford Chance LLP.

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educational system delivering "products and services" that are aligned to the needs and requirements of the main target groups or "clients" of such services.

Part 4 contains some concluding observations.

2. Global and Local Law Firms

2.1. Global law firms: requirements

The major challenge for European law firms operating at a global level is to attract (and retain) top talent: young recruits that possess the right "mix" of legal and non-legal competencies and skills necessary to advise demanding international clients in and across the different jurisdictions of the world. Whereas with the stalling economic circumstances the "War for Talent" may no longer be as prominent as it was a few years ago in some business sectors (primarily IT, strategic consultancy and investment banking), the continental European legal sector is still confronted with a limited and restricted pool of graduate recruits that have the required skills and abilities.

At the same time client satisfaction research undertaken by major law firms indicate that Fortune 500 companies and other international clients expect and request (and want to pay for!) the delivery of legal services that:

a) Are of a consistent high *legal* quality;

b) Can, at the service and quality level, be compared to what they expect (and generally receive) from strategic management, IT consultancies and accountancy firms;

c) Go beyond the delivery of *mere* legal knowledge in a *technical* sense. Increasingly, clients require the ability to deliver integrated legal "services" and "products" that can be used as a basis for sound *business* decision-making (*"Do not tell me what the legal problems are and why I cannot do it; tell me how we can pragmatically circumvent the problems and make it happen!"*); and,

d) Are, at the *operational* level, well "managed" and consist of "integrated" pieces of advice in case of complex multi-jurisdictional and multi-faceted projects.

In other words: international clients are not only expecting correct technical legal advice capabilities (national and multi-jurisdictional; this is presupposed), but are expecting a lawyer who can operate as a sound *legal business consultant* as well.

Despite the enormous growth of all kinds of international LLM-programs (showing a spirit of local academic *intra*preneurship but are in essence "more of the same") and recognizing that on-the-job-learning is far more important and efficient than traditional *classroom* teaching, none of the continental European law faculties

seem to provide programs that meet the above-mentioned requirements (an exception is perhaps the recent – private – Bucerius-initiative in Germany).

So what do law faculties need to do in order to address a problem that is affecting a (potential) labour market for some 25-30% of our current European law graduates and that has forced (international) law firms (and national bar associations) to invest millions of Euro's in the professional and career development of young lawyers? (NB international financial institutions, the investment banking sectors and professional services firms active in the mergers and acquisition sectors are facing similar problems).

4.1. Global Law Firms: Challenges for Academic Institutions

Academic institutions involved in the teaching of international law (in its broadest sense) face some interesting challenges. Fundamental is the recognition of the need to change current patterns and approaches to the teaching of "international" law. In addition, it requires addressing some academic and institutional "barriers" that are impeding the delivery of more suitable international programs for the above-mentioned target groups. Perhaps the introduction of the bachelor-master structure, in combination with a more outward looking approach, offers the necessary incentive for overcoming the institutional lethargy present in so many universities/ law faculties.

To service globally operating law firms, continental law faculties may want to consider some of the more important recommendations for changes at the legal/ technical level:

a) The recognition, at a graduate/masters level, of the need to introduce a further specialization "international legal practice" with an emphasis on international business and trade law, international company law, competition law (both national and European), international finance and project finance law (including capital markets) and conflict of laws studies;

b) The introduction of a strong *comparative* legal component covering the major continental European legal systems;

c) A *mandatory* introduction to Anglo-American law/common law (this last recommendation can perhaps be combined with the one under b), and

d) A strong focus on legal issues arising in multi-jurisdictional transactions, mergers and acquisitions, international finance practice, etc.

A more fundamental change is, perhaps, the recognition that a (re)focus on such technical/legal issues at a graduate/masters level is not sufficient. At this level, law faculties need to include programs that also focus on the basics of legal *consulting* skills.

Examples could be effective business communication and presentation skills and other MBA-type of program components like project management skills. It also includes programs addressing the knowledge of basic (international) accounting principles, valuation techniques and a general understanding of the major international financial and economic markets.

It is shocking to see that most graduates from continental European law faculties who decide to pursue a career in international legal practice can barely read or understand a P&L account of a multinational and most of them have no understanding of the international business environment in which their future clients (and employers!) operate. Some familiarity of graduates with the underlying economic motives or rationales for companies to merge with or to acquire another company or a decision to postpone, or speed-up, an IPO is essential to be able to give value-added legal advice.

Law faculties barely stimulate "out-of-the-*legal*-box thinking" which is essential for their graduates in their new roles as international lawyers.

There is yet another fundamental change to be considered: academic and practice *partnering* models need to be developed and *dual*-learning systems to be introduced. In other words: law faculties need to rethink the way in which they deliver "learning".

Unfortunately, at a graduate level for the majority of the continental European law faculties the learning *delivery vehicle* is still the traditional (and rather ineffective) classroom style of learning with a primary focus on the delivery of theoretical, technical legal knowledge. While this may have been the only valid model due to the sheer numbers of students involved, such an approach is not sustainable in the future and seems an outdated learning delivery model at the masters level as it is not aligned to what the graduates will experience in real life.

Secondly, if combined with some sort of managed internship of a certain duration, the introduction of a mandatory *dual*-learning delivery component will probably have a higher ROI and effectiveness compared to "just" classroom teaching: the graduate student personally *experiences* what it takes to put together a deal or transaction (and not only in the technical legal meaning) and why project management and cultural awareness is so important (and why they have to read the Harvard Business Review or The Economist!)

Partnering between law faculties and academic institutions can offer various advantages and opportunities and is beneficial for both partners. It combines theoretical and practical experience, knowledge and know-how of both the academic and the legal practitioner, creating added value for both partners.

2.3. Local Law Firms with International/Regional Services

In the near future, the position and business requirements of locally operating law firms in continental Europe will change. As a consequence, the educational requirements for their graduate recruits will change. Such changes will also demand a reorientation/adjustment of the international law curriculum offered by law schools on the continent.

The developments in the legal sector, as described above, will mean that within the national legal sector, basically five "types" of local law firms will emerge/are (already) emerging in the major European jurisdictions:

- Small law firms focussing solely on national/local clients (either specialised or general practice);
- Small law firms focussing on niche markets serving basically national clients;
- Mid-sized law firms (niche or more general practice, or both) serving mainly national clients, some of which have international/regional interests;
- Mid-sized law fims (niche or more general practice or both) serving national and international clients and which belong to an international "network" of law firms (applying a "referral system", but not providing integrated and seamless legal services); and,
- Mid-sized law firms closely working with one of the big accountancy firms which will mainly concentrate on national and international in-house legal advice, tax advice and legal advice that is related to the finance and capital markets, mergers and acquisitions and corporate sector of the clients of their "accountancy/consultancy mother firms".

Recent market research and estimates of professional recruitment agencies indicate that out of approximately 50% of the law graduates that opt for a career in a law firm, some 50% of this group will be employed in one of the categories of law firms belonging to this sector. Hence, it is obvious that this is an important target group for the law schools. Given the different market requirements of the various national market segments in which those firms operate, the international legal curriculum that can be offered must be tailored as far as possible. Current international legal curricula have to recognise these developments and some generic recommendations will be formulated for those local firms that service international clients.

3. Consequences for Internationational Law Curricula

3.1. How Should Law Schools "Service" the Future International/Global Lawyer?

For graduates aiming to work in this type of law firm/legal business sector (including those who will opt for the strategic management sector/consultancy, international financial institutions sector and investment banking) a rather basic knowledge of the main concepts of public international law at an undergraduate level is sufficient. In their future career/practice, public international law plays virtually no role. And when it does play a role, one of the very few specialists from within the network will provide the answers or an outside expert will be instructed.

On the other hand, it is necessary to pay much more attention at an undergraduate/bachelor level to private international law (not the family-law type of issues, as these are totally irrelevant in this sector) and conflict of laws issues. Basic courses must become mandatory, with further voluntary courses at a graduate level.

As was already mentioned above, international business/corporate law, international finance, capital markets, international banking law and European law are extremely important and must be addressed mandatorily both at an undergraduate and graduate level. Voluntary courses on international commercial arbitration (UNCITRAL, ICSID, various ICCs and national arbitration law) need to be introduced at an undergraduate level, with further (voluntary) specialised programmes at the graduate/masters level (like, for example, courses for litigators on the investigation of witnesses, experts, etc. similar to those which are are being offered by the Law Society in the United Kingdom).

WTO-law and courses on international trade dispute settlement procedures would be a valuable asset as well, and can be offered at a graduate/masters level (voluntary). Such programmes lend themselves extremely well for the implementation of the "partnering" and dual-learning recommendation mentioned earlier. This can then be combined with practice-oriented programs at a graduate level focussing on the preparation and implementation of international transactions, multi-jurisdictional deals, deals management and/or legal project management (including issues like "Legal writing in English" and cultural awareness!). Partnering (in whatever format suits the partners best) probably offers the preferred approach as most academic lecturers at law schools lack the practical experience and qualifications adequately to explain the processes/procedures and flows of documentation involved.

At the bachelor's level basic courses in comparative law need to be introduced. These course programmes should be mandatory and should set out the basic concepts of the major jurisdictions in continental Europe in a comparative framework. For various reasons it is recommended to add a mandatory program on

Anglo-American and/or common law at the bachelor level. The growing importance of these disciplines for the internationally oriented legal practice in continental Europe is underestimated in academic circles. Without a sound knowledge of the basics of common law concepts and Anglo-American law, it is extremely difficult for graduates to service (global and national) clients and to communicate professionally with their future American and UK collegues (and be able to really understand what the legal problems/issues are under a common law system and how this can be solved in a civil law system; and vice-versa of course).

It has been made clear that most graduates from continental law schools coming to international law firms lack, in general, so-called "professional consulting skills" and, most of the time, the ability to think "out-of-the legal box," whereas at the same time such "client focus" skills are extremely important to be successful and credible as an all-round legal adviser. Therefore, it is recommended to introduce at a graduate level voluntary, multidisciplinary, MBA-type programs, where the focus should be on issues like (legal) project management, cultural awareness, general consulting skills (communication, presentation and teamwork etc.), and client relationship management skills. The program should also include some modules on international business(es), business awareness (including how the legal business is being organised and fits together), international economics, economic drivers that determine the valuation of companies (finance and accounting is, of course, core and must be addressed at a bachelor level), the functioning of capital markets, derivatives, etc. This, or a similar set of modules, could be part of a graduate program in international practice, together with the above-mentioned elements. An internship would be a mandatory part of the program.

At the graduate level we need to ensure that there is sufficient space for truly academic "learning" achievements and projects. If this means that future graduates who want to work in international legal practice have to work long(er) hours, so be it. Law schools should not be too afraid to challenge and innovate. A more outward focus of university staff and more knowledge of and experience with this legal sector when designing and implementing a new international legal curriculum would reveal immediately that, once outside the safe boundaries of their university or law school, the graduates are expected to invest (much) more than the average 30 weekly hours they currently invest in their legal studies. The suggested "partnering" and "dual-learning system" could alleviate some of the perceived worries about the consequences for the development and introduction of such programs.

3.2. Consequences for Local Firms/Local Practitioner

For the small law firm operating within one jurisdiction and servicing primarily national clients, no major changes in the curiculum are necessary. Also, graduates who envisage a career with small to medium sized firms operating mainly within a national environment and/or focusing primarily on niche practices (specialised practices in human rights law, immigration law, asylum cases or international criminal law), will find the current international legal curriculum sufficiently developed.

For the graduate interested in mid-sized firms that are part of an international network of national law firms or who foresees a career within a law firm that is closely liaised with an international accountancy firm, the situation is comparable to the situation described in part 3.1.

4. Concluding observations

This contribution focused on the required changes in current international legal curricula of continental European law schools with respect to two identified graduate target groups (or law school "clients"): those who envisage a career in an integrated international law firm with global clients and those who prefer a career in a local law firm where the main focus is on national clients with international interests. Several shortcomings in existing curricula were identified and some recommendations were made: at the contents level, the "proces" level and the conceptual level. A plea was made for the introduction of a revised international curriculum and an innovative approach to introducing it. At the conceptual, delivery and didactical level, it was argued that current classroom-based programs are, in particular, unsuitable for implementing the new international curriculum for the above-identified graduate target groups: dual learning systems and partnering arrangements need to be worked out.

The academic community is, unfortunately, a rather "self-contained" regime. Discussions on the design, introduction (and implementation) of innovative major changes and/or necessary adjustments to existing curricula will, quite often, be dominated by more inward-oriented interests. Hence, it is normal that the focus of such discussions is quite often more on *intra*-preneurial considerations and procedures than that it is driven by academic *entre*-preneurial considerations with the aim to optimise the law school's services to its "clients" and the legal recruitment market. Vested interests, time-consuming decision-making procedures and the absence of practical experience and knowledge about the international legal labour market make it extremely difficult to realise a new curriculum for legal practitioners favouring an international working environment. Partnering and dual-learning

arrangements, in whatever format or framework, may be a way to get around such barriers.

Within the editorial constraints it is impossible to deal with all the consequences of the changes in the legal world and to focus on all "graduate target groups" that need to be serviced by law schools. For this reason the article has not focused on the role and place of public international law in international legal studies, although it was observed that public international law is of only marginal importance for the above-described target groups. This is different of course for those who opt for an international academic or political-diplomatic career or for those who prefer to work for an international organisation. In general, for those target groups it seems that a more multidisciplinary approach in the legal curriculum could be followed, with sufficient room to study international politics and international economic and financial affairs.

For the same reasons, the role of technology, e-learning imstruments, *blended* learning methods, etc. have not been dealt with, although, within the concepts of partnering and dual-learning systems, such methods can easily be introduced and certainly need further investigation by qualified university staff involved in the development and introduction of new international legal curricula. In international practice such methods and concepts, quite often with advanced know-how management, IT-tools and learning management systems, have already been used and are widely applied. It is essential and indispensable for "learning" purposes to familiarise the student with such tools. The main intention of the article was to provide some ideas and food-for-thought when discussing the future of international legal studies/international legal curricula in continental Europe, while at the same time acknowledging that a further and more in-depth analysis is required. Hopefully, it will contribute to stimulate new "curriculum design" thinking.

An Introductory Course: Clear/er Solutions – The Case for a Bare-Bones Course in International Law (BBCiIL)

JOHN KING GAMBLE*

The teaching of international law often is neglected. Although interest tends to be very high, finding positive ways to direct that interest can be problematic. Why? Teaching is one of those cross-cutting subjects where focus and direction are hard to achieve. Most of those reading this have experienced international law teaching at least as students, many also as teachers. These experiences can be a valuable source of insights. But the experiences of a single individual, regardless of how eminent he or she might be, cannot be assumed to be broadly applicable. Much scholarship about the teaching of international law begins with a senior governmental official describing an international law course taken 30 or 40 or 50 years ago. These experiences must be aggregated and placed into context to be valuable.

Everyone writing about the teaching of international law necessarily is influenced by her/his personal experiences. I am no exception. I wish to make my experiences explicit and not relegate them to a footnote. I am a political scientist whose principal research interest is international law. Most of my teaching experience with international law has been the introductory course to undergraduates in the U.S. along with occasional seminars on treaties offered for honors students. I also have taught law students and have taught in Canada.

Three experiences beyond formal classroom teaching have changed and broadened my perspective on the teaching of international law:

1) From 1989-91, I directed the American Society of International Law's Survey of Academic International Law (SAIL) project. The core of that project was developing and sending questionnaires to thousands of teachers, academic administrators, and students inquiring about their experiences with international law. The resulting book, *Teaching International Law in the 1990s*,[1] explains what I found.

2) In 1996, along with Professor Christopher Joyner, I put together a brief book *Teaching International Law: Approaches and Perspectives*.[2]

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[1] J. Gamble, *Teaching International Law in the 1990s* (1993).

[2] J. Gamble, C. Joyner, *Teaching International Law: Approaches and Perspectives* (1997).

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The main purpose of the book was to enable professors teaching international law for the first time to get up to speed more easily by showing them examples of syllabi, effective teaching strategies, and even examination questions.

3) For the last 5 years, I have been rapporteur of the ILA's Committee on the Teaching of International Law. This has heightened my awareness of successes and frustration occurring in many different countries when it comes to the teaching of international law. Although I am writing this in my personal capacity, I have benefited enormously from this work with ASIL and ILA.

I should like to focus on the introductory course in international law and offer some suggestions about how these courses might be made more effective. First I shall deal with an issue that has been at the core of many discussions of introductory courses, i.e., whether they should be required. With very few exceptions, international law is not a required course in law schools in anglophonic North America.[3]

International law is required in Quebec and in Puerto Rico although these represent fewer than 5% of the law schools in the U.S. and Canada.[4]

International law usually is required in continental Europe but generally not in Britain. It seems that common law systems are less disposed to requiring international law than are civil law systems. Unfortunately, comprehensive data do not yet exist on how many countries require an international law course. Relatively more complete data are available for Asia due to a recent conference held there.[5]

Sixteen states responded to a questionnaire with these results:[6]

International Law compulsory:

Bangladesh, China, Indonesia, Japan, Malaysia, Nepal, Pakistan, Philippines, Korea (RoK), Sri Lanka, Thailand, Vietnam

International Law *not* compulsory:

Hong Kong, India, Iran, Singapore

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[3] Gamble, 90s, *supra* note 1, at 22.

[4] *Id.*

[5] The results of the conference are reported as "Special Feature: Teaching International Law in Asia," in 5 *Singapore Journal of International and Comparative Law* 277-484 (2001).

[6] Kevin YL Tan, "The SILS-DILA Conference on 'Teaching and Researching International in Asia': Report and Reflections," in Singapore Journal *supra* note 5 at 453.

Recently, there have been two dramatic reversals with very distinguished law schools in common law countries beginning to require international law. The University of Michigan has created a course entitled "Transnational Law."[7]

This is a two credit course, i.e., two meetings per week for one semester compared with three meetings for most courses. Major subdivisions are:

- actors, sources, and principles
- international dispute resolution
- international transactions
- specific areas: human rights, international trade, the European Union.[8]

The course does not limit itself to public international law and includes professors with extensive experience as practitioners. When Dean Jeffrey Lehman described the process that led to the requirement, he said a major factor was advocacy on the part of alumni.[9]

The Australian National University's compulsory course, entitled "International Law," is more elaborate and similar to most professors' perception of public international law.[10]

Major components are:

- introduction, system, and sources
- law of treaties;
- Australia and the international legal order
- the use of force.[11]

There are many similarities between these two courses. Both have dealt effectively with that perennial issue: there simply is too much material to cover in a one semester course.

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[7] Final Report from the Committee on the Teaching of International Law for the New Delhi Conference (2002), Part II (A).

[8] *Id.*

[9] Remarks make at a panel, "International Law and the Legal Curriculum," 96th Annual Meeting of the American Society of International Law, Washington, DC, March 13-16, 2002, panel occurred March 14th.

[10] ILA Report, *supra.* note 7 at II(B).

[11] *Id.*

I hope that other law schools will follow suit and implement compulsory courses. However, at least in the case of the United States, requiring international law in law schools and the complementary issue of international law questions on bar exams have been discussed since the early 20th century with minimal progress.[12]

Of course, the argument can be made that, if better introductory courses in international law were offered, more students will take them. This involves the issue of what constitutes a better introductory course as well as, unfortunately, a justification of the basic need to study international law. Professor Michael Reisman wrote "(i)ntegration in a global system means that even 'domestic law' courses can no longer be understood adequately … without an understanding of the international system."[13]

Reisman points out that some subjects can be self taught but international law is so different that one risks "a wholly unrealistic conception of what international law is and can do."[14] Suffice to say that with so many schools still not requiring the survey course, we need to make the argument anew each year.

Turning to the content of a basic course, one can find guidance from the experiences of the University of Michigan and the Australian National University. Perhaps the most valuable lesson is that less may be better; do not try to do everything. Such a temptation is almost unavoidable. Many important topics in international law today hardly existed 40 or 50 years ago, e.g., much of environmental law. How can there possibly be room for everything essential to a survey course in 2002? One approach is to expand the introductory course to an entire-year course or longer. This is fraught with problems; most law schools feel enormous pressure to accommodate more subjects within a fixed number of curricular slots; if there is doubt about room for a one semester course, how will a request for a longer course be received? On an even more basic level, the hallmark of excellent pedagogy is difficult, reasoned judgments about exclusion: what materials, even though important, must be excluded. Professors in virtually all fields must deal with this dilemma. When I teach Introduction to Comparative Politics in a one-semester course, it would be utterly foolish to try cover all 189 states in the world devoting 12 minutes of class time to each. How do I select which nine states to cover? I endeavor to illustrate important principles of comparative politics while providing variety among the nine that reflects the real world.

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[12] Gamble, 90s, *supra.* note 1, at 136.

[13] W. Michael Reisman, "The Teaching of International Law in the Eighties," 20 *The International Lawyer* 988 (1986).

[14] *Id.* at 992.

I believe an important responsibility of teachers is designing a bare-bones course in international law (BBCiIL). Would such a course deal both with public and private international law? Europeans seem to accept a sharp distinction between public and private international law. American teachers, as seen in the Michigan course, are more likely to blur the distinction. Noted practitioner and former American Society President Peter Trooboff has this view of a BBCiIL:

> It may not be practical to separate public international law and international business transactions into separate introductory courses. I suggest schools could design a course to encourage the best students to study in one semester some of the essential issues in the field. I would urge that a course include enough comparative material to provide an understanding of how different legal systems think about the same legal issues, both in private and public international law.[15]

This is not the place for me to outline all of the content of a bare-bones course in international law, especially since the Michigan course provides a very good example. Instead, I shall comment more generally about qualities such a course should have. First on the list is compactness. The organizing principle should be what is the *minimum* amount of information the students need to be introduced to the field of international law with a view to subsequent practice of law and to in more advanced courses. A very powerful argument in favor of a mandatory BBCiIL is that it is important preparation for more advanced coursework. Many law schools in the U.S. and Canada offer a broad array of courses in areas such as human rights law, law of the sea, trade law, environmental law, etc. Almost none of those schools require a BBCiIL as prerequisite to their advanced course. At a minimum, this can be grossly inefficient pedagogy. Universities do not let students take calculus without a thorough grounding in algebra. Neither should we permit students to take environmental law without a BBCiIL or something like it. Under these circumstances, the instructor must either waste time teaching material that should already have been mastered or run the risk of confusing those who lack the essential background.

I view this BBCiIL as a dynamic evolving entity that can play many different roles. Of course, it could be modified to fit a particular context. An obvious example is applying international law to a particular country. The Australian National University course has a section entitled "Australia and the International Legal Order"[16]

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[15] Peter D. Trooboff, "The Profession, the Public, and International Law," 1 *Chicago Journal of International Law* 129 (2000).

[16] ILA Report, *supra.* note 7 at Section II (B).

which seems like a natural appendage to a BBCiIL. A conference held last year in Singapore was equivocal as to whether there is or should be an Asian perspective on international law.[17]

A frequent criticism of international law courses taught in the U.S. is that they amount to U.S. practice in international law. A BBCiIL should be broadly applicable, essentially region and country neutral, yet customizeable to many country contexts.

So far I have said nothing about the effect of new information technologies on a BBCiIL. The potential is great. There is no reason why such a course could not be available on the Internet with tens of thousands of professors and students using it, leading to continuous evolution and improvement. For example, customary international law certainly would be one of the topics. Professors might contribute teaching strategies that are particularly effective to explain the nature of customary law. Students might achieve consensus that a particular case is especially opaque and not worth the space it occupies. Were BBCiIL available on the WWW, it would address a serious problem with international law teaching: teaching often occurs in isolation, missing the substantial benefits that would come from active collaboration.

A course like this would have many advantages beyond the primary reason for its creation. International law is taught in many departments of political science. There is evidence that many of these courses are quite rigorous;[18] it should be possible to assess whether such courses cover the material in BBCiIL; if they do, law students should be permitted to skip the course and move to more advanced course work. Some of the most profound thinkers in the field of international law have been strong advocates for educating the general public about international law. Judge Manfred Lachs wrote "(t)he citizen of today is much better informed, in general, but he also should know more of international law."[19] The first article published in the *American Journal of International Law*, by U.S. Secretary of State Elihu Root, was entitled "The Need for Popular Understanding of International Law."[20]

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[17] See MIYOSHI Masahiro, "Curricula for Teaching International Law in Asia – Any Asian Perspective?," *supra.* note 5 at 355-67.

[18] Gamble, Joyner, *supra.* note 2 especially 11-68.

[19] Manfred Lachs, *The Teacher in International Law* 207 (1982).

[20] Elihu Root, 1 *American Journal of International Law* 1 (1907).

For almost a century, many have accepted the desirability of educating a broader audience, but how to do it? BBCiIL could provide an opportunity to test the limits of popular education. Scholars could work together to develop a version of BBCiIL aimed at a mass audience including high school students. The critical test of such an endeavor is to simplify, but within clear limits defined by fidelity to the subject.

The improvement of international law teaching can seem enigmatic. The need is clear, but implementation can be difficult. Some solutions seem to be at the cutting edge of information technology, e.g., placing a BBCiIL on the Internet. But a conference on international law teaching held in 1914 offered disquietingly similar prescriptions to those we hear today.[21]

Teaching should be a higher priority given that that many of us devote a sizeable portion of our professional lives to it and it is the principal means through which we procreate the new generation of international law scholars. If further motivation is needed, perhaps it can come from the words of von Humboldt who described "an organic link between the creation of knowledge and its transference."[22]

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[21] Conference of American Teachers of International Law (Washington, DC, April 23-25, 1914), Report of the First Subcommittee, at 22.

[22] See S. Kwiatkowski, "The Organizational Problems of Combining Teaching and Research," 15 *European Journal of Education* 355 (1980).

Profile / Profil

Ronald St. John Macdonald and International Legal Education

CRAIG SCOTT[1]

Ronald St. John Macdonald has been a unique figure in the world of public international law. Beginning in the early 1960s, he achieved a high stature in Canada through a combination of his writings, influence on Trudeau-era foreign policy, and tireless efforts to internationalize legal education in Canadian law faculties, including as Dean in not one but two respected law schools (University of Toronto, 1967-72, and Dalhousie University in Nova Scotia, 1972-79).[2] But Macdonald has also been the quintessential cosmopolitan, whose global network of academic, professional and friendship relations over the past four decades has been matched by few others. In addition to the tireless energy involved in staying in contact with colleagues and former students on a one-on-one basis, his role as something of a "grand convenor" of people of diverse backgrounds is legendary. This capacity and role is almost certainly what made possible the pulling together of what is widely – if not universally – regarded in the international legal community as the leading anthology of original contributions to the theory and fundamental doctrines of international law: *The Structure and Process of International Law*.[3] Apart from his academic cosmopolitanism, Macdonald is most known out-

[1] Associate Professor and Associate Dean (Research and Graduate Studies), Osgoode Hall Law School, Toronto. The author is preparing, with Graham Boswell, a volume of collected works entitled *Towards a Constitutional International Law: Selections from the Work of Ronald St. John Macdonald* (expected publication in 2003).

[2] As one measure of Macdonald's influence in Canada, two recent events are worth noting: a special plenary session at the annual conference of the Canadian Council of International Law in October 2001 that revisited the ideas in Ronald St. John Macdonald and Douglas M Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983); and a special day-long symposium on the influence of Macdonald's work in several fields, which was held at Dalhousie University in Halifax, Nova Scotia, in May 2002 and which attracted scholars of all generations from across Canada.

[3] *Structure and Process*, *ibid*. Note the academic partnership and close friendship of Macdonald and Johnston in the 1970s and into the 1980s; many, including myself, would consider Johnston to have been Canada's leading theorist of international law for a period of several decades. In terms of the *FORUM* theme, the pedagogical role of this book bears

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side the academy for the singular accomplishment of being the only non-European (he does not have any dual nationality) ever to be elected to the European Court of Human Rights, having been summoned out of the blue by the Crown Prince of Liechtenstein to be asked whether he would stand as that country's first-ranked nominee to the Court.[4] Travelling monthly to Strasbourg from Halifax for the Court's sessions, Macdonald served on the Court for 18 years before his retirement in 1998.[5]

At the height of the Cold War, Macdonald was a noted interlocutor with the international legal academy in the Soviet Union, his contact having begun in the 1960s when he was head of Canada's delegation to the UN General Assembly's Third Committee. He began to foster visits to the University of Toronto of Soviet scholars and to seek out articles for the *Canadian Yearbook of International Law*, a good example of Macdonald's ability to meld multiple roles and work in overlap-

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mentioning. It is not only that many consider it a first point of reference when delving into a core concept, fundamental principle or school of international law. It is also that copies of it were at one point sent to countries in the South – to foreign ministries and law libraries – as part of an aid program funded by a Western government's development agency. As for the reference to Macdonald as a "grand convenor", I first used this description when writing a piece that described the papers and discussions at the first-ever annual conference of the Canadian Council of International Law in 1972, at which Macdonald, as founding President of the Council, had assembled, along with the who's who of Canadian international law of the day, an impressive international supporting cast that included Myres McDougal, Percy Corbett, and Suzanne Bastide. See Craig Scott, "1972: New Approaches to International Law" in Yves Le Bouthillier, Donald McRae, and Donat Pharand (for the Canadian Council on International Law), eds., *Compendium: The First Twenty Years / Les Premiers Vingt-Cinq Ans* (Ottawa: CCIL, 1998) 128-142.

[4] See the chapter on Macdonald in Jack Batten, *Judges* (Toronto: Macmillan, 1986) for a story of this episode as well as other interesting dimensions of Macdonald and his life.

[5] Macdonald used the time on the Court mostly to build a body of writing on the doctrinal principles underlying the Court's jurisprudence, playing a collegial role on the Court itself and not tending to dissents or separate opinions. His trilogy of synthetic pieces on derogations, reservations and the margin of appreciation are amongst the leading pieces in the field: see "Derogations under Article 15 of the European Convention on Human Rights" (1997) 36 *Columbia Journal of Transnational Law* 225-267, "Reservations Under the European Convention on Human Rights" (1988) 21 *Revue Belge du Droit International* 429-450, and "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in (1990) Vol. 1, Book 2 *Collected Courses of the Academy of European Law* 95-161. A version of the latter piece also appeared in the leading anthology on the European Convention that Macdonald co-edited: Ronald St. John Macdonald, Franz Matscher and Herbert Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) 83-124.

ping communities. However, it is probably the role he played in providing external support for the opening of legal education in China that is his single most impressive and long-lasting contribution as citizen-diplomat. At the dawn of the 1980s, letter of introduction from Prime Minister Trudeau in hand, Macdonald traveled to China, where he was received by Wang Tieya, one of the century's most respected international law scholars in China and someone who had greatly suffered during the Cultural Revolution. A lasting bond was formed, both with Wang and with Beijing University (known locally as Beida).[6] Macdonald was appointed the first non-Chinese Honourary Professor in the Social Sciences at Beida. Apart from these beginnings and the demonstration of solidarity, external links developed that included a steady outflow of Chinese students to do graduate work with Macdonald and colleagues at Dalhousie and then to the University of Toronto after he had returned there as Professor Emeritus in the early 1990s. From my conversations with scholars in Beijing, I am certain that it is no stretch to say that Macdonald is revered in the international law university community in China, certainly at Beida.[7] During my own visit to Beida campus several years ago, I was struck by the very first wall decoration that one encounters when entering the hallway of the law faculty: a large framed photograph of Macdonald. A picture is indeed worth a thousand words.

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[6] As evidenced by Macdonald's article "Legal Education in China Today" (1980) 6 *Dalhousie Law Journal* 313-339 and by an excellent *Festschrift* for Wang Tieya in which Macdonald's lead essay bears witness to Wang's struggles: see "Wang Tieya: Persevering in adversity and shaping the future of public international law in China" in Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht: Nijhoff, 1994) 1-29. See also the articles in honour of Wang in (2002) 4 *Journal of the History of International Law* at 139-246. Macdonald is the founding editor and now editor-in-chief of this journal.

[7] One Chinese scholar and former student of Macdonald told me that, in this particular community, people sometimes go so far as to speak of Macdonald as the Norman Bethune of international law in China. (Bethune was a Canadian doctor who distinguished himself serving the Republican side during the Spanish Civil War before joining Mao's revolutionary forces. When Bethune died of blood poisoning from a cut received while operating, Mao composed an ode to Bethune that for many years, and perhaps even to this day, is still studied in schools in China. The doctoral student who told me about the Bethune-Macdonald comparison was able to recite Mao's poem to Bethune, two or three decades after having learnt it. I provide this background to convey a sense of Bethune's place in the Chinese imagination and thus to convey the meaningfulness of speaking of Macdonald metaphorically in this way.)

It is fitting that Ronald St. John Macdonald be featured in the current issue's Profile column given that this issue of the *FORUM* is dedicated to the theme of teaching international law. In the course of preparing the forthcoming edited collection of his key work, I have had occasion to review Macdonald's entire body of writing. From that *oeuvre* emerge two dominant passions: the pursuit of a "rule of law" ethos in international life, analogous to the role of constitutional law in domestic legal orders; and the profound importance of international law for legal education.

Macdonald has been a ceaseless advocate for the inclusion of international law as a central feature of legal education. On this front, two engagements stand out in particular: his central role in encouraging the adoption of, and subsequent progress of, a UN Decade of International Law; and his key role as a member of the Institut de Droit International in placing international legal education on their agenda. With respect to the Decade, Macdonald criss-crossed Canada in an effort to promote a higher consciousness of the need for cosmopolitan legal education in what was then, and still by and large remains, a highly parochial legal education system in Canada. He organized symposia and less formal get-togethers, and drew in a range of students, law school alumni and academics from across the country in a series of such meetings – in the process demonstrating his basic instinct for inclusiveness. As for the Institut's study, Macdonald drafted the resolution on the teaching of international law that was adopted by the Institut as a whole.[8] While cause and effect cannot easily be disentangled from complementary parallel efforts, I personally have little doubt that Macdonald's work over the Decade and within the Institut have been important elements in fostering a variety of initiatives in the realm of internationalized legal education that have blossomed in the last few years – from the involvement of the UN in pushing for an information and experience-sharing curriculum database through an emergent worldwide network of law schools, to various gatherings of leading internationalist educators from law faculties around the globe seeking to establish some kind of organization to promote a shift in legal education, to a myriad of bilateral and multilateral partnerships of law faculties that have emerged in recent years or that are in the planning stages.

Macdonald has also been a disciplined chronicler of the evolution of international law university teaching in Canada.[9] He began with a short note published in

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[8] See (1997) 69/1 *Annuaire de l'Institut de Droit International*, Session de Strasbourg, 123-217.

[9] And legal education more generally. See Macdonald, ed., *Dalhousie Law School, 1965-1990: An Oral History* (Toronto: University of Toronto Press, 1996).

1964 that drew attention to a gathering of international law teachers, before then publishing four articles from 1974 to 1983 in the *Canadian Yearbook of International Law*.[10] The four-part "An Historical Introduction to the Teaching of International Law in Canada" combines his interest in international legal education with a long-standing fascination with history generally and with the history of international law and organization in particular.[11]

It is here that another aspect of his work on international legal education deserves emphasis, and that is his devotion to the intellectual biography as a way not only to chart the development of an area of international law but also, implicitly, to make a point that is not always in vogue with professional historians: human agency matters, and matters profoundly, in the direction "history" takes. After the inaugural biography of Maximillien Bibaud, "the pioneer teacher of international law in Canada",[12] all four subsequent biographies concern international law academics who have made an impact both as teachers and as contributors to the "real world" development of international law.[13] In the process of interweaving teaching, scholarship and extra-University career paths, Macdonald's narratives serve as testimony to the institutional interchange between theory and practice that characterizes the field of international law to a greater extent than many other areas of the law.

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[10] See "Meeting Teachers of International Law" (1964) 1 *Canadian Legal Studies* 103-108; and the four installments of "An Historical Introduction to the Teaching of International Law in Canada" in (1974) 12 *Canadian Yearbook of International Law* 67-111, (1975) 13 *CYIL* 255-281, (1976) 14 *CYIL* 224-257; (1983) 21 *CYIL* 235-265.

[11] Which interest resulted in his founding and now editing one of the more exciting international journals to have emerged in the past few years, the *Journal of the History of International Law*; see *supra* note 6. Macdonald was also founding editor of the *Osgoode Hall Law Journal*, the *Dalhousie Law Journal*, and the *University of Western Ontario Law Journal*, while he was general editor of the *University of Toronto Law Journal* for over a decade (1961-1972). Corresponding to each journal, Macdonald was on faculty at Osgoode Hall Law School (before it separated from the profession and attached itself to York University) 1955-1959, University of Western Ontario 1959-1961, University of Toronto 1961-1972, and Dalhousie University 1972-1990.

[12] "Maximillien Bibaud, 1823-1887: The Pioneer Teacher of International Law in Canada" (1988) 11 *Dalhousie Law Journal* 721-743.

[13] "Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge" (1989) 27 *CYIL* 3-56, "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights" (1991) 29 *CYIL* 3-91, "Charles B. Bourne: Scholar, Teacher, and Editor – Innovator in the Development of the International Law of Water Resources" (1996) 34 *CYIL* 3-88, and "Wang Tieya: Persevering in Adversity", *supra* note 6.

Allow me at this point to make the shift in form of address. When I think of Ron, I sometimes think of Georges Scelle's useful notion of *dédoublement fonctionnel*, for Ron has always been both a citizen of Canada and a citizen of the world. The two identities always have the potential to create tensions, especially for Canadians who seek to engage the United States while protecting our right to be distinct (and distinctive in the world), but Ron has negotiated his identities almost seamlessly in the course of belonging to multiple professional circles within the notional (but still highly segmented and fragmented) community of international lawyers. Fiercely proud as a Canadian and idealistically committed to making cosmopolitanism a reality, Macdonald possesses a particular character trait that seems to me to be most responsible for his capacity to be one with many worlds, namely his own thirst to learn and his own willingness to learn by listening to others.

In this respect, I think it worth mentioning that relatively few would say that it has been in the traditional classroom lecture setting where Macdonald has made his mark as a teacher and educator. Rather, it has been through the web of individual relationships he has formed, with students, former students and colleagues. His role as mentor for countless younger-generation scholars – both those students with whom he worked at Dalhousie or the University of Toronto and those, like myself, who simply benefited from the support he demonstrated for their work – has been made possible by the sincere interest he always showed, and continues to show, in what people are doing and thinking about, by his great personal warmth, and by the infectious enthusiasm that sometimes causes him to resemble nothing so much as a bubbling font of ideas and proposals.

Forever drawing people to each other's attention, Ron is an intellectual matchmaker, a human semi-conductor. He is also always concerned to encourage individuals in their careers, and in the process to turn international law into a flesh-and-blood existence for those drawn to it in their legal studies. I would be remiss, in this context, if I did not recognize something that is commonly known and celebrated amongst those who know Ron, and that is his longstanding practice of encouraging women to enter the international legal world, either as scholars or professionals. Well before anything resembling a strong feminist critique had emerged in international legal scholarship, Ron could often be heard forcefully arguing that international law was an unacceptably male preserve that had to become more diverse.

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To end with a beginning, I hope readers will indulge me with a personal anecdote. My first encounter with Ron occurred in late 1979 or early 1980 when I was 17 and at a junior college in western Canada that was organized around principles of

"international understanding" in education. As one of only two Nova Scotians at the college, I was pulled forward by the principal to meet Ron who was visiting the campus on the way to or from Halifax. Standard fare would have been a polite acknowledgement and some formulaic words of encouragement from someone in Ron's position. But Ron was Ron.

As he made his way down the path towards a waiting car with various dignitaries in tow, he ushered me along with him, managing to ask and find out not only about my background but also about my vague hope to someday be an international something or other (having no real idea what that might entail, readers will understand, beyond someone who might find a job with Amnesty International). I still recall the ease and heartfelt sincerity with which he made this aspiration sound both worthy and eminently doable, and the words with which he encouraged me to hold onto this hope and make it a reality. I cannot now say with certainty that I would not have found my way to this profession, and more particularly the academy, had I not met Ron for those fleeting three or four minutes. What I can say is that our brief conversation often popped up from my memory over the next decade when various decisions had to be made about what university and then what career path I would take, and that this memory did encourage me to pursue my ever-clarifying goals. For this I will always be grateful, a sentiment I suspect is shared by hundreds of others whose education and careers have been influenced by Ronald St. John Macdonald.

The Bookshelf / La bibliothèque

Les Rapports de Roberto Ago à la C.D.I. sur la Responsabilité des États

ALAIN PELLET*

Dans le premier "*bookshelf*" paru dans le *Forum du droit international*, Sir Robert Jennings affirmait: "*no one can become a good laywer, least of all a good international lawyer, by reading law books*". Sans doute; mais il n'est pas interdit de lire quand même parfois du droit … Au risque de paraître "polar", ce sont des études doctrinales passablement techniques, que j'ai retenues: les rapports que Roberto Ago a présentés à la Commission du Droit international sur "La responsabilité des États".

Ces huit rapports, qui s'étalent de 1969 à 1980, constituent une somme, à mes yeux inégalée (dans le genre) d'érudition, de raffinement de la pensée et d'intelligence juridique tendue vers le progrès du droit international. On peut les lire dans les *Annuaires* de la C.D.I.[1]; en outre, à l'exception du deuxième (dont l'essentiel est repris dans le suivant), ils ont été, très opportunément, reproduits par la Faculté de Droit de Camerino, dans un ensemble de trois volumes présentant tous les travaux d'Ago sur la responsabilité internationale[2], ce qui présente l'immense avantage de permettre une lecture continue et la mise en perspective d'une pensée mûrie par plus de trois décennies de réflexion[3].

Ces textes denses et subtils sont, à certains égards, une œuvre de commande: élus par la C.D.I., les Rapporteurs spéciaux sont au service de la Commission et

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[1] *Annuaire*, vol. II, 1969, pp. 129-146; 1970, vol. II, pp. 189-211; 1971, vol. II, 1ère partie, pp. 209-289; 1972, vol. II, pp. 77-174; 1976, vol. II, 1ère partie, pp. 3-57; 1977, vol. II, 1ère partie, pp. 3-47; 1978, vol. II, 1ère partie, pp. 29-57; et 1979, vol. II, 1ère partie, pp. 3-69; l'additif au 8ème rapport a été publié en 1980, vol. II, 1ère partie, pp. 13-???.

[2] Roberto Ago, *Scritti sulla responsabiltà internazionale degli Stati*, Jovene editore, 1986, vol. II-1, pp. 303-899 et vol. II-2, pp. 901-1402; précieux index (en italien) (vol. II-2, pp. 1403-1484).

[3] V. les études reproduites *in Scritti …*, préc., et, en particulier, le cours professé en 1939 à l'Académie de Droit international, "Le délit international", *R.C.A.D.I.* 1939, vol. 68, pp. 415-554 (*Scritti …*, vol. 1, pp. 141-269).

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doivent tenir compte des réactions de ses Membres. Mais la forte personnalité d'Ago, son adresse aussi, lui ont permis d'imprimer, à travers ses huit rapports, sa marque sur un chapitre central du droit international car la responsabilité est l'institution la plus nécessaire au droit des gens et, à vrai dire, au droit "tout court": sans responsabilité, pas de droit.

S'agissant de la responsabilité des sujets souverains que sont les États, un problème particulier se pose: comment concilier le concept de souveraineté, l'*imperium*, avec celui de responsabilité? comment une entité qui ne se reconnaît aucune autorité supérieure pourrait-elle être responsable, comptable de ses actes? et envers qui? et devant qui? Adroitement, Ago a toujours soigneusement évité de poser le problème en ces termes. Tout au plus fait-il allusion aux positions doctrinales, d'Anzilotti ou de Charles de Visscher (des auteurs que tout sépare) notamment, qui se sont employées à expliquer cet apparent mystère[4]; mais il se garde de reprendre l'une quelconque de ces thèses: peu importe explique-t-il en substance, la responsabilité est un fait d'observation. Ceci ne veut pas dire qu'il se défie des constructions théoriques: il est lui-même un théoricien; tout son art a consisté à "imposer" sa propre théorie de la responsabilité internationale mais il la défend en se fondant sur l'observation des faits et non en partant d'*a priori* doctrinaux à la manière d'un Kelsen, pour les thèses duquel il manifeste peu de goût et dont il critique le "manque d'adhérence à la réalité"[5].

D'emblée, le Rapporteur spécial manifeste "sa préférence pour l'application d'une méthode essentiellement inductive plutôt que pour la déduction de prémisses théoriques, chaque fois que la prise en considération de la pratique des États et de la jurisprudence permet de suivre une telle méthode"[6]. D'où la construction, presque immuable, de ses rapports: conformément à l'usage, ils justifient des projets d'articles soumis à la critique de la Commission; chaque projet est introduit par de longues études présentant, dans cet ordre, la jurisprudence internationale, la pratique des États et les opinions doctrinales pertinentes, quitte à écarter "[l]es complications dues à des prises de position théoriques et aprioristes" en découlant[7].

Il arrive pourtant que l'éminent juriste ruse avec les règles qu'il s'est lui-même fixées. L'un des exemples les plus frappants de telles dérives est constitué par les

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[4] 3ème rapport, par. 31.

[5] *Ibid*. par. 27; v. aussi, par exemple, par. 59; 8ème rapport, par. 50 ou l'additif au 8ème rapport, note 263.

[6] 3ème rapport, par. 13.

[7] 5ème rapport, par. 7.

longs développements qu'il consacre, dans son sixième rapport, à la règle de l'épuisement des recours internes[8]. Ici, par exception à son attachement proclamé à la méthode inductive, il pose d'abord des principes théoriques qu'il défend ensuite en critiquant les pratiques et les thèses contraires (dont il prétend, contre toute raison, qu'elles "n'apportent pas un démenti formel" à la sienne[9]). À cette occasion, Ago s'en prend avec une certaine vigueur, à l'arrêt de la C.P.J.I. de 1938 dans l'affaire relative aux *Phosphates du Maroc* dont il donne une interprétation "pro-italienne" fort contestable[10]. Très jeune, il avait été conseil et avocat de l'Italie dans cette affaire; petitesses des grands esprits …

Grand esprit, Ago n'est pas un pur esprit: tout son travail est tendu vers un but: servir les "véritables intérêts de la communauté internationale"[11]. D'où ce mélange de hauteur de vues et de roublardise qui caractérise toute son œuvre de Rapporteur spécial: il s'agit d'ancrer dans le droit les avancées et les tendances qu'il dégage tout en faisant preuve de réalisme de façon à emporter l'adhésion. Et de mettre en œuvre à cette fin toute une panoplie de "tactiques de communication", dont les "ficelles" peuvent paraître, parfois, un peu "grosses" avec le recul du temps mais auxquelles ses contemporains, dont on peut difficilement penser qu'ils s'en laissaient compter – la Commission était composée de Lachs, Jimenez de Arechaga et autres Reuter … –, ont eu l'élégance de se laisser prendre. Et d'abord celle-ci, qui consiste à donner à penser que lui, Ago, n'a rien inventé et que les points les plus délicats de ses positions viennent du tréfonds de la Commission unanime[12]. Mais il

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[8] Pars. 47-113.

[9] Par. 54.

[10] Pars. 66-69; v. aussi les critiques assez vives qu'il adresse au même arrêt à propos de la difficile question du *tempus commissi delicti*, 7ème rapport, pars. 26-32; pour les mêmes positions, assez "revanchardes", v. "La regola del previo esaurimento dei recorsi interni in tema di responsibilità internazionale" publié dès 1938 *in Archivio droit international diritto pubblico*, pp. 178-249, reproduit *in Scritti* …, préc., vol. I, pp. 61-130; dans le même esprit, il est significatif qu'Ago porte aux nues l'opinion *dissidente* de Morelli contre la position de la majorité de la Cour dans l'affaire de la *Barcelona Traction*, 6ème rapport, pars. 75-76.

[11] 5ème rapport, par. 31.

[12] Cf. l'extraordinaire exercice auquel Ago se livre à propos du crime international de l'État dans son 5ème rapport dans lequel il enferme ses collègues dans leurs prises de position antérieures – qu'il sollicite passablement (pars. 144-145). Sept ans se sont écoulés entre la nomination d'Ago comme Président de la Sous-Commission sur la responsabilité des États (en 1962 – il n'a été formellement nommé Rapporteur spécial que l'année suivante) et son premier rapport; il a, à l'évidence, utilisé cette longue période pour "préparer ses collègues" à l'approche, très nouvelle, qu'il préconisait, même si la véritable raison de ce délai tient sans doute à ses multiples occupations (de Conseil notamment) par ailleurs.

est d'autres techniques, plus subtiles, auxquelles le Rapporteur spécial recourt abondamment:

– l'"évitement" des "sujets qui fâchent" lorsqu'ils ne sont pas strictement indispensables à l'avancée du projet; ainsi de l'abus de droit, auquel, dans son troisième rapport, il annonce son intention de s'intéresser plus tard[13], mais qu'il se gardera bien d'aborder ultérieurement;

– la présentation, d'abord prudente – ce qui "rassure" les opposants potentiels –, d'évolutions incertaines pour conclure fermement en faveur du développement progressif dans le sens lui paraissant souhaitable[14];

– la progression implacable des raisonnements; Ago part souvent "en douceur", avançant avec prudence des thèses hardies, présentées d'abord au conditionnel, pour enfermer le lecteur dans un syllogisme dont il ne peut s'échapper – et l'on comprend, à la lecture des longs développements du cinquième rapport sur le crime international de l'État[15] que l'unanimité des Membres de la Commission se soit faite, en 1976, sur cette notion pourtant si controversée; ou

– la rupture avec l'approche de son prédécesseur, Frederico García Amador, dont il souligne abondamment (et non sans raison) qu'elle a mené la C.D.I. à une impasse: en limitant le sujet à la "responsabilité de l'État à raison des dommages causés à la personne ou au bien des étrangers", celui-ci a compliqué plutôt que simplifié l'approche du sujet; "la codification de ce secteur spécial finit par être plus ardue que celle des règles générales concernant la responsabilité tout court"[16].

Cette rupture est probablement le premier trait de génie de Roberto Ago: comme lors de la préparation de la Conférence de codification de la S.d.N. de 1930, la limitation de l'étude à ce sujet particulier par le premier Rapporteur spécial de la C.D.I. sur la responsabilité des États, avivait des controverses, idéologiques et politiques, trop vives pour être surmontées et l'on s'engageait dans la tache impossible

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[13] Par. 69.

[14] Pour des plaidoyers en faveur d'un développement progressif décidé en ce qui concerne surtout le "contenu" de la responsabilité, v. par exemple 1er rapport, par. 16 ou 5ème rapport, par. 11.

[15] Pars. 72 à 155. Dans le même rapport, la démonstration portant sur la "vigueur de l'obligation internationale" (pars. 37-71) est également un chef d'œuvre de raisonnement juridique.

[16] 1er rapport, par. 56.

de "codification du droit international tout entier"[17]. "Le maintien d'une confusion avec des sujets différents était certainement l'une des raisons qui empêchaient cette matière de devenir mûre pour une codification. C'est notre conviction ferme que, aux fins d'une codification, la responsabilité internationale des États doit être prise en considération en tant que situation découlant du manquement par un État à une obligation juridique internationale, quelles que soient la nature de cette obligation et la matière à laquelle elle se réfère"[18].

Cette "épuration" de la notion de responsabilité débouche sur une autre intuition géniale: en conséquence, Ago appelle la Commission à s'en tenir à la codification des règles "secondaires", par opposition aux normes "primaires" traditionnellement envisagées. Cette distinction fait inévitablement penser à celle de Hart[19]; mais elle est beaucoup plus simple puisque, pour le Rapporteur spécial, les règles secondaires sont tout simplement celles qui s'attachent à déterminer les conséquences d'un manquement aux obligations établies par" les règles primaires, qui, "dans un secteur ou un autre des relations interétatiques, imposent aux États des obligations déterminées"[20].

En même temps, Ago "débarrasse" le sujet dont il a la charge de l'une de ses ambiguïtés majeures: il ne traiterait que de la responsabilité pour faits internationalement illicites[21] à l'exclusion de celle pouvant découler d'activités compatibles avec le droit international: "Le fait d'être tenu d'assumer les risques éventuels de l'exercice d'une activité légitime et celui de devoir faire face aux conséquences – pas nécessairement limitées à un dédommagement – qu'entraîne la violation d'une obligation juridique ne sont pas des situations comparables"[22].

La définition du sujet, ainsi épuré de toutes les scories qui l'encombraient traditionnellement, n'en est pas étroite pour autant: le Rapporteur spécial désigne par l'expression "responsabilité internationale" "*toutes les formes de relations juridiques nouvelles qui peuvent naître en droit international du fait illicite d'un État*"[23]. "Toutes

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[17] 5ème rapport, par. 7.

[18] 1er rapport, par. 6.

[19] V. H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1984, pp. 77 et s.

[20] 3ème rapport, par. 15; v. aussi par. 143 ou 2ème rapport, par. 7.

[21] Titre qu'il proposait de retenir pour son étude (3ème rapport, par. 20) et qui a été finalement adopté par la Commission … en 2001, sur la suggestion du dernier Rapporteur spécial sur le sujet, James Crawford.

[22] 3ème rapport, par. 20; v. aussi par. 5.

[23] *Ibid.*, par. 43 – italiques dans le texte; v. aussi les pars. 16, 32 ou 40.

les formes", ceci inclut ce qu'il appelle les "sanctions" et que le projet final désigne par l'expression "contre-mesures"[24], ce qui n'a pas simplifié la vie de ses successeurs mais était dans la droite ligne de son approche générale.

Plus profondément encore, une autre grande novation due à Ago tient à cette définition de la responsabilité internationale de l'État, ramenée ainsi à un fait générateur unique: le fait internationalement illicite, ce que traduit le projet d'article 1[er] proposé dès 1971, et demeuré inchangé à travers tous les avatars du projet, jusqu'à son adoption finale en 2001:

> "Tout fait internationalement illicite d'un État engage sa responsabilité internationale"[25].

Ceci peu sembler anodin; c'est extrêmement lourd de conséquences: le dommage, traditionnellement considéré comme l'un des éléments constitutifs de la responsabilité, au même titre que le fait illicite ou l'attribution, se trouve exclu de cette définition: "Commettre un fait internationalement illicite veut dire, pour un État, commettre, par une action ou une omission qui lui est attribuée, un manquement au respect d'une obligation de droit international envers un autre État, et non pas causer un dommage à cet État"[26]. Et les conséquences de cette exclusion sont énormes. À deux points de vue surtout:

– en premier lieu, d'"inter-subjective" qu'elle était, la responsabilité internationale devient "objective" en ce sens que c'est la violation du droit international par elle-même qui se trouve "sanctionnée" par l'engagement de la responsabilité; ceci ne signifie pas que le dommage ne joue aucun rôle dans les mécanismes de sa mise en œuvre; il demeure, dans la majorité des cas, une condition nécessaire à la réparation; mais dans la majorité des cas seulement car,

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[24] V. les articles 49 à 53 du projet d'articles de 2001, annexé à la résolution 56/83 de l'Assemblée générale du 12 décembre 2001. Bien qu'il n'eût pas été à l'origine de cette partie du projet d'articles, adopté sur les rapports de G. Arangio-Ruiz et de James Crawford, Ago avait, sur les contre-mesures, des vues prémonitoires (cf. son 3ème rapport, par. 39).

[25] 3ème rapport, par. 48; v. aussi le projet d'article 2 ("Conditions de l'existence d'un fait internationalement illicite"): "Il y a fait internationalement illicite lorsque: *a)* un comportement consistant en une action ou une omission est attribuée à l'État en vertu du droit international; *b)* ce comportement constitue un manquement à une obligation internationale de l'État" (*ibid.*, par. 75).

[26] 4ème rapport, par. 69. Autre preuve de son extraordinaire adresse, Ago "passe" assez rapidement sur ce qui constitue pourtant une révolution par rapport à la conception traditionnelle de la responsabilité internationale (v. 3ème rapport, pars. 73-74).

– en second lieu, la définition retenue ouvre la voie à une nouvelle notion extrêmement féconde et "moderne", dont Ago a été le concepteur, le promoteur et le défenseur convaincu[27], celle de "crime international de l'État" longuement explorée et défendue dans son cinquième rapport[28].

Le présent *bookshelf* n'est pas le lieu d'évoquer les controverses passionnées que la notion de crime de l'État a suscitées[29]. Il suffit de dire qu'une fois Ago élu à la Cour internationale de Justice, ses successeurs comme Rapporteurs spéciaux sur la responsabilité internationale de l'État ne l'ont pas défendue avec toute l'ardeur qu'elle méritait même si les professeurs Arangio-Ruiz (nettement) et James Crawford (moins clairement) ont fini par en apercevoir les mérites – mais trop tardivement pour en tirer toutes les conséquences qu'il eût fallu. Toutefois, si le mot "crime" a disparu du projet finalement adopté par la C.D.I. en 2001, l'idée que tous les faits internationalement illicites ne produisent pas les mêmes conséquences et que certains d'entre eux appellent des réactions de la part de tous les membres de la communauté internationale a été "sauvée"[30].

Au-delà du "crime" (maintenant dénommé "violation grave par l'État d'une obligation découlant d'une norme impérative du droit international général"), ce projet porte la marque puissante de la pensée rigoureuse et novatrice de l'immense internationaliste que fut Ago. Sans doute n'a-t-il pas mené jusqu'au bout la tache

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[27] Même s'il est loin d'être exclu que, en la promouvant, Ago, ait voulu donner des "gages" aux "progressistes" (de l'époque) et, notamment, à la doctrine soviétique: il avait publié, en 1960, dans la revue qu'il dirigeait, *Communicazione e Studi*, un article de G. Tunkin sur le concept de crime qui l'avait beaucoup marqué.

[28] Pars. 72-155. La distinction entre crimes et délits internationaux est déjà en germe dans le cours précité d'Ago à l'Académie de La Haye.

[29] V. notamment trois articles que je lui ai consacrés: "Vive le crime! Remarques sur les degrés de l'illicite en droit international", *in* C.D.I., *Le droit international à l'aube du XXIème siècle – Réflexions de codificateurs*, Nations Unies, New York, 1997, pp. 287-315; "Can a State Commit a Crime? Definitely, Yes!", *E.J.I.L.* 1999, vol. 10, no. 2, pp. 425-434; "Le nouveau projet de la C.D.I. sur la responsabilité de l'État pour fait internationalement illicite – *Requiem* pour le crime?", à paraître *in Mélanges Antonio Cassese*, Kluwer, La Haye, 2002; pour des considérations plus générales sur le projet de la C.D.I. (et l'apport de Roberto Ago), v. notamment: "Remarques sur une révolution inachevée – Le projet de la C.D.I. sur la responsabilité des États", *Annuaire français de droit international* 1996, pp. 7-32; "La codification du droit de la responsabilité internationale: Tâtonnements et affrontements", *in* Boisson de Chazournes et V. Gowlland-Debbas dirs., *L'ordre juridique international, un système en quête d'équité et d'universalité,* Liber Amicorum *Georges Abi-Saab*, Kluwer, La Haye, 2001, pp. 285-304.

[30] V. notamment les articles 40, 41, 49 et 54 du projet.

entreprise puisque ses rapports ne portent que sur la première partie du projet adopté en première lecture, consacrée à l'"origine de la responsabilité"; sans doute, certaines de ses intuitions sont-elles moins heureuses que d'autres (outre son aveuglement en ce qui concerne l'épuisement des recours internes, je pense, par exemple à sa conception, fort contestable, de l'opposition entre obligations de comportement et de résultat ou à sa position, sans nuance, sur les "circonstances excluant l'illicéité"); sans doute, ses successeurs n'ont-ils pas toujours été fidèles à sa pensée. Il reste que, globalement, il est sans doute peu d'auteurs qui aient contribué à ancrer dans le droit positif des évolutions d'aussi grande portée. L'opiniatreté, l'adresse, la force de conviction dont il a su faire preuve, l'énorme somme de travail qu'il a fournie, la limpidité de son expression, lui ont permis d'utiliser la tribune de la C.D.I. comme un puissant levier pour faire évoluer le droit et le mettre plus en harmonie avec les besoins de la société internationale contemporaine.

Après Ago, le droit international n'est plus tout à fait ce qu'il était avant lui; ses huit rapports ont été le véhicule efficace d'une pensée rigoureuse et attachante. Ils demeurent des modèles du genre, à ce jour inégalés, et probablement insurpassables.

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