Legal Reasoning and Public International Law Teaching

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1. *Domestic law and public international law: two universes for legal reasoning*. On teaching public international law teaching, some differences arise with regard to the teaching of domestic law. Legal reasoning is one field where these differentiated aspects are put to test, and this paper shall contribute some ideas on the subject stemming from teaching experience.

Domestic law offers a wide range of different branches and consequently of different approaches, between private and public law, between common law and continental law systems. Public International Law, on its part, emerges from diverse origins, bringing about substantial differences; this being said this without disregarding the "private international law" or "the conflict of laws" branch of law, which is private law in an international setting, with an increasing public international law content gradually permeating each other.[1] It is also said without disregarding the fact that public international law is massively applied as internalized rules of national law.

2. *Technique and content*. The differentiated elements of public international law are inherent both in the creation process and in the content of its rules. They distil their differences in each legal level, when creating, construing and applying public international law rules.

The essential difference between domestic and international law is the hierarchical structure of the former and the homogenic structure of the latter. Another core difference between domestic and international law is the existence of jurisdictional organs, whether administrative or judicial, vested with the capacity of applying and enforcing law. While in the domestic legal order there is such almost indispensable judicial structure, in the international law community, quite differently, only previously agreed jurisdictions are able to apply international law, with limited enforcement capacity.

When students attend an international law class, what they learn about law differs from what they have studied in courses addressing domestic law. The content differs enough to make students wonder if it is really law, or another category of norms.[2] The challenge for teachers is to demonstrate why it is law, even if its creation process is not the same and its implementation and enforcement pattern is widely dissimilar.[3] The differences become visible regarding the process of creation in the absence of a parliamentary process, the lack of an executive branch and the absence of a mandatory jurisdiction. And, no doubt, it is still law, because the concept of law –Kelsen and Hart providing for this definition, is broader than that of domestic institutions. Law is a profuse universe comprising different spheres.

[1] On this regard, Alex Mills, *The Confluence of Public and Private International Law. Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law,* Cambridge University Press, 2009, especially at 211-217.
[2] An example of critical approach in Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law,* Oxford University Press, 2006.
[3] Advocating the relevant role of international law in international relations, Mónica Pinto, *El derecho internacional Vigencia y desafíos en un escenario globalizado,* Fondo de Cultura Económica, Buenos Aires, 2004; Mary Ellen O'Connell, *The Power and Purpose of International Law. Insights from the Theory and Practice of Enforcement,* Oxford University Press, 2008.

3. *The concept of representation and the universe of legal persons*. It seems appropriate, to help to understand this process, to focus on the concept of representation, a significant legal evolution. It is through this institution that corporation and organizations could develop, and the concept of State as a juridical person could be generated. The institute of representation is so strong that it made possible the notion of juridical personality, which in turn led to the modern concept of States, their organs, and their political divisions and subdivisions. States, governed by international law, make up the international community, and possess enough legal capacity as to establish new subjects of their exclusive creation in the international community, *i.e.,* international organizations.

4. *Application of international law*. The application of law is an exercise of adaptation of real situations to the abstract formulation of the law, from the more specific to the more general, from one legal layer to the next. This is the mechanism of applying law, this is the way of studying law, and this is the way in which we generally teach law, by means of doctrine and case law, statutes and constitutions. When shifting to the application of international law, doctrine and case law remain unchanged, but statutes and constitutions are substituted by treaties, customary law and general principles of law. It is a legal order with sources of equal level, which might and do overlap. When they come from the general to the particular, the rules and their application become deductive, in the usual careful reasoning of international courts. When some rules derive from practice, the rules and their application become inductive. In the absence of a constitutional umbrella embracing the international legal order, customary rules and general principles of law are able to perform as the international law summit. This is a differentiating feature of international law bringing about a particular legal reasoning in which, contrary to domestic legal order, uncertainty plays a larger part.[4]

5. *General principles embedded in international law*. There are other differences that make international law a particular branch of law, or a particular self-sufficient universe. One of them relates to the influence of general principles of law, which are not only one category of international law rules but also an intrinsic part of their content and a binding rule of interpretation.

General principles of law are a distinctive component of international law upon which the rules of equity, good faith and justice impinge. These principles are positive rules in international law, and address its content. In this way, international law nurtures national law, and is nurtured by it. It is a two-way road.

General principles of law are linked to the essential duties of persons as members of the human society, building the common habitat of mankind. International law holds these principles not as an abstract philosophical formulation, but as binding legal rules. It is precisely for that reason that it is in the sphere of international law that human rights flourish to protect the even rights of persons everywhere, and that environmental law is striving to protect the environment where life could prosper.

6. *Looking back to the classics*. To illustrate the concept of those essential principles, classics are the perfect source. Cicero (Marco Tullio Cicerone) stands out among classic authors because he devoted his life to being a publicist, and as a philosopher, to applying human duties to political affairs. When he compared himself with the most important Greek philosophers, Plato and Aristotle, he said they would have been brilliant publicists, had they been interested in, and not totally absorbed by their philosophical work.

[4] René Urueña, 'Risk and Randomness in International Legal Argumentation', 21*Leiden Journal of International Law,*December 2008, Cambridge University Press*,* 787-822.

In his essential book *De officiis* (*On Duties*) Cicero, an author analyzing in depth the roots of *ius gentium*,[5] explains that justice is the most important value for human society, because it is through justice that all other duties work. And he goes on to say that the first element of justice is not to injure others, if not first injured by them, and to use common goods as common, and private goods as one's own. But Cicero clarifies further, relating justice to an essential principle of international law, good faith. Good faith is embedded in the *pacta sunt servanda* rule ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith," Article 26, Vienna Conventions on the Law of Treaties (1969)), and in the general rule for the interpretation of treaties. He states that the foundation or source of justice is *fides* or good faith, that is to say, the observance and sincerity of commitments and agreements, adding that on searching for the etymology of the word *fides,* or good faith, he found that it was called that way because it means that what is done is what has been stated would be done. Cicero insists that even if abiding by equity may be difficult, it is all the more valuable, because there is no circumstance in which one should not behave according to justice. [6]

7. *The building of legal reasoning*. Legal reasoning is not a spontaneous process of literary interpretation; it requires knowledge, logic, goals and values. In sum, it requires a legal way of thinking, a legal mind. One of the targets of law teaching is the building of such a legal mind, and the unstructured regime of public international law enriches and broadens such task.

[5]Marco Tullio Cicerone, *I doveri,* introduzione e note di Emmanuele Narducci, traduzione di Anna Resta Barrile, Testo Latino a Fronte, BUR, Milano, 2007, or Cicero, *On Duties,* ed. M.T. Griffin and E.M.Atkins, Cambridge University Press, 1991, at I.23, I .35, III.23,III.46,III. 69.

[6]'Sed quo difficilius, hoc præclarius; nullum enim est tempus, quod iustitia vacare debeat,' Cicero, *op.cit.,* I.64,65.