

Association of American Law Schools

Conference on Educating Lawyers for Transnational Challenges

Session: "Government Organizations"

Presentation

by

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Dear Colleagues,

The purpose of this Conference is to discuss the role that law schools and law curricula should have in preparing tomorrow's lawyers for a world where countries and jurisdictions are increasingly inter-connected. More specifically, this particular session is to consider the transnational challenges facing lawyers whose practice relates to governmental organizations.

Let me say at the outset that I once belonged to the skeptics who believed that international law was a topic not so central to a lawyer who had decided to devote his or her career to serving at the national level. However, over the years I have come to the conclusion that this is a serious misunderstanding. The explanation appears in my Appeal to the Deans of Law Schools Worldwide that I made in June 2000 in my capacity as Legal Counsel of the United Nations at the time.

My conclusion then was that international law had become an ever more important ingredient in the finely spun web that connects us all both within countries and across borders. New dimensions had evolved, in particular, through cyberspace. Through the Internet people can communicate all around the globe in a matter of seconds. Modern communications make it possible for us to travel long distances in a matter of hours.

In 2001, I participated in a panel organized by the American Society of International Law raising the question whether it should be possible to graduate from law school without having studied international law. I answered the question by asking another four, namely: Why is teaching international law so important? How should international law be taught? What should be the contents of the teaching? And how does the United Nations contribute to the teaching of international law?¹

Today's discussion has a slightly wider scope; it refers to educating lawyers in a more general sense for transnational challenges. I think that this is a good point of departure.

Let us approach the topic from two directions: first, the need for lawyers well versed in international law and, second, how to organize their education in this law.

We need lawyers well versed in international law!

As a point of departure, we can conclude that there is legal work performed at the national, regional, and global levels. At the national level, there is equally work performed by lawyers at the local, regional and central levels.

¹ Both these documents are available on the Internet. I refer to <http://www.un.org/law/counsel/info.htm> The appeal was also published in the ASIL Newsletter of July–August 2000.

Looking at the central national level, we find that lawyers are assisting parliaments, governments and governmental agencies not only in applying the law but to a large extent also in formulating legal solutions based on political considerations. This applies, in particular, to work performed within ministries and standing committees of parliaments.

If we look specifically at legislative activities, these are today more and more dependent on the contents of international agreements. To an increasing extent, the national legislator is bound by international commitments formulated in international agreements after careful and often laborious negotiations in various inter-governmental fora. Over the last few years, the number of such agreements has been considerable.

It is of crucial importance that the legislative branch of a national administration is served by lawyers who are fully familiar with the various topics that must be addressed. Basically, the legislative activities cover every walk of life, and there is a definite tendency towards specialization in this work.

I never fail to stress how important it is that lawyers who assist governments and parliaments are well versed also in international law. It is in these institutions that knowledge of international law is absolutely necessary. International law will play an ever-increasing role in the decision making of national administrations.

Moving now to the national regions, many government activities are by necessity delegated to this level. However, focus will now be more on the application of existing law than on policymaking and legislation. For obvious reasons, the focus would be on national law. But in order to correctly apply this law today, you would need to have an international perspective. In particular, those concerned must understand that national law based on international agreements has to be applied in light of the latter.

What I just said applies also at the local level. It is a mistake to believe that application of national law at the local level is unrelated to international law. On the contrary, it is at this level where the real interface between government and citizens exists, be it in the local administration, the police station, the prosecutor's office or the district court. It is at this

level that the application of the law has a direct impact on the rights and obligations of citizens.

By way of example, I could mention international standards of human rights. It is important that these standards are observed when officials apply national law; in particular, when they exercise authority, i.e. decide about citizens' rights and obligations. And we should not forget that serious crises and armed conflicts almost invariably have their roots in violations of human rights.

In one specific area, the contribution of lawyers is of utmost importance, namely international humanitarian law. It is important that national armed forces are properly advised, and that legal specialists in this area are consulted before operations are undertaken, when such operations are necessary – and legal.

Let us now move to the international arena – and to the regions.

Over the last few years, there has been a tremendous development also here. There is today hardly a region in the world, where states have not organized themselves in various constellations to look after their common interests in fields such as security, economy, commerce, or human rights.

Europe is a case in point. We have there the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe (OSCE), and the North Atlantic Treaty Organization (NATO), to mention but a few. The United States of America and Canada are members of both OSCE and NATO. A significant feature today is the expansion of these organizations towards the east.

Regional organizations have been established also in the Americas, in Africa, in Asia and Eastern Europe. The limits of this paper do not allow me to elaborate.

Within all these organizations lawyers are active both in administration and in assisting member states in making decisions or in formulating treaties or other norms based on policy considerations. To some extent, lawyers are also applying the law directly, in

particular when they perform judicial functions. I refer in this context to the many new institutions – including courts – that have been established by these regional organizations.

For obvious reasons, lawyers serving in this area must be well educated in international law and able to communicate on the same wavelength, including with their colleagues at the national level. As a matter of fact, there is a very important interface here.

Moving on to the global level, it is natural first to point to the United Nations, established after the Second World War. Much could be said about this Organization, but for someone who has devoted 10 years to serving in its Secretariat suffice it to say that the conclusion is obvious: the world needs the United Nations.

It is true that the World Organization is often criticized – and rightly so. But often this criticism is due to the performance – or rather lack of performance – by its Member States or some of them.

A prominent feature of the work of the Organization is the contribution by lawyers within the delegations of Member States and in the Secretariat. Many of our most important international treaties have been negotiated under the auspices of the United Nations, and many people do not even think about that their daily activities in many fields are directly dependent on the application of treaties concluded in this manner.

The Secretary-General of the United Nations is presently the depository of over 500 multilateral treaties covering a variety of fields, from the deep sea to outer space. Every day, treaty actions are taken at the United Nations Headquarters, and, at present, the United Nations treaty database has more than one million hits per month.

However, when we talk about the United Nations it is important to recall that the Organization is more than its six main organs. We must also recognize the United Nations system, which consists of several agencies, funds and programmes engaged in more specific areas of international law, as well as in providing legal technical assistance.

One privilege that I had during my 10 years as Legal Counsel of the United Nations was to chair annually a meeting of the legal advisers of all the agencies within the United

Nations system. We numbered almost 30. I always thought what a tremendous expertise there was gathered in the room during these meetings. Colleagues from FAO, UNESCO, IAEA, IMO, ILO, WHO, IMF, and the World Bank, just to mention a few, are engaged in activities of the most varied nature. Needless to say, collaborators well educated in international law assist them all.

In later years, we have also seen the establishment of international courts. Not only do we have the International Court of Justice, one of the six main organs of the United Nations. We now also have regional international courts, specifically in the area of human rights. We have the International Tribunal for the Law of the Sea and the organs established by the WTO. We have the international criminal tribunals established by resolutions of the Security Council (the International Tribunals for the former Yugoslavia and Rwanda), the special Court for Sierra Leone, and the Extraordinary Chambers to be established in the national courts of Cambodia. Most significantly, we have the International Criminal Court, established by the 1998 Rome Statute.

Of special importance is to recognize that international criminal courts are not only courts. As a matter of fact, they perform functions, which at the national level are distributed among several agencies: the police, the prosecution, the judiciary, the prison service, and the Bar. This is also reflected in the requirements of the lawyers who serve the international courts.

This development should be seen against the backdrop of phenomena with which we have to grapple in modern society: violations of international humanitarian law, war crimes, genocide, terrorism, drug trafficking, corruption, piracy, etc. In order to counter or address these problems it is necessary to have international institutions served by lawyers who understand international law and who know how to cooperate at the international level and with their counterparts at the national level.

As a matter of fact, the question of the rule of law has surfaced as one of the most important elements in the work at the international level, including in the United Nations. Traditionally, in the United Nations, treaty law and matters relating to the rule of law were dealt with by the International Law Commission, the Commission on Human Rights, ECOSOC, the Third and Sixth Committees of the General Assembly and the Assembly itself.

However, over the last few years, also the Security Council has realized that one cannot de-link peacekeeping and peace enforcement from the rule of law. Today, these aspects are always discussed when the Council is considering establishing a new peacekeeping mission. As a matter of fact, in September 2003, the Council decided to put the rule of law on its agenda as a distinct item. The Secretary-General will issue a report on the subject matter later this spring.

To sum up on the need for lawyers educated in international law: this brief expose should be evidence enough of the fact that legal work today is more and more related to the situation at the international level. As I have said on other occasions, new phenomena pose challenges to mankind, and those who are set to govern it. Some of this development is positive and contributes to our development and the ability for human beings around the world to lead a dignified life. But, regrettably, it also poses serious threats to our common security and has to be addressed accordingly.

The conclusion is that borders no longer have the same meaning as in the past. Many are now acting as if they hardly existed. But unfortunately there are also those who are engaged in criminal activities that have become a threat to organized society. This means that countermeasures will have to be taken in an organized manner. The role of the lawyer in this work is obvious.

How do we organize their education?

Let us now move to my second main point, namely how to organize the teaching of international law. It is in this context that we must conclude that, unfortunately, many law schools do not have international law in their curricula.

When I first realized that this was the case, I thought that the remedy would be simply to introduce international law in law school curricula. However, the question is more complex than that.

First, it is a question of resources. In countries where some years ago there were only a few law schools we find that, today, there are many, many more. Since the main focus of

lawyers' work will be on national law, it is obvious that the curricula will have to take this into consideration. But at the same time it is important not to forget that the legal profession in any country must be conversant with international law.

In discussing the problem with deans of law schools, I realized that there are problems that are not so easy to resolve. This is one of the most important topics for our discussion at this Conference. In my view, the solution lies in the way in which the teaching of international law is organized.

The first question is what means and what tools can be used for this education. If we take as a point of departure that every law school may not be able to establish a chair in international law, our conclusion must be that we have to figure out how teaching of international law can be offered to the students by other means.

Over the years, I have tried to encourage colleagues in academia to develop new teaching methods. One can use electronic means, be it the Internet or video or audio material for the teaching. Basically, the same material could be used all over the world, provided that it is translated. In my view, this would take us a long way.

But another very serious problem must be resolved, namely how the students are to be credited for taking a course in international law. If there is no local competence to supervise and examine their tests, it will be difficult to rate the students properly. And, surely, if students cannot show credits for participating in courses in international law, they would hesitate taking such courses.

There is also the overriding question on how teaching of international law should be addressed by the law faculty as a collective. In the past, the topic was probably seen as distinct and of very limited interest to lawyers in general. As should be clear, such a view is outdated today.

In my presentation of the lawyer's work, both at the national and international level, I have tried to highlight the fact that international law is now part and parcel of almost every topic in the legal field. A few weeks ago, I had the privilege of discussing with the faculty in an American law school the issue of teaching international law. It struck me when the

professors addressed the issue from their particular points of departure that, obviously, all of them were specialists in different fields. However, a common denominator was that in each and every specific field there was an international connection.

Must we therefore not come to the conclusion that it might be artificial to try to separate the international elements in a specific topic from the national elements? If you take transport or commerce, it would be meaningless to try to separate national and international elements from each other precisely because so much of the national law is based on international considerations or agreements. In my view, therefore, international law should to the extent possible be an element in each topic taught at law schools. This would also make it easier for smaller law schools to introduce international elements in their teaching.

However, one distinct area remains, namely the basic elements of international law – those that would be considered as constitutional law at the national level. In my practical work at the international level it has often struck me how close the relations are between public international law and constitutional law.

While certain aspects of international law could very well be integrated into courses on national law – human rights law into a course of civil liberties, for example, or international economic law and the law of the sea into a course on the law of natural resources – it would be 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 the main international institutions, treaty law, etc. The natural connecting link between this area of public international law and national law would be constitutional law.

I take it for granted that constitutional law is generally taught at law schools at the national level. What we should discuss at this Conference is how one can distribute the teaching of international law between courses on specific topics in the whole legal field and the topic of constitutional law in which one can include the specific elements of international law that I just referred to. This is, of course, in case public international law is not taught as a distinct topic at the law school.

May I suggest that, today, it is not possible to understand constitutional law without some basic knowledge of public international law. The reason for this is that the national

institutions, in particular parliaments and governments, are today heavily dependent on the realities of present-day international interaction and the commitments that they have made in international agreements.

May I also suggest that in our discussion at this Conference we try to work out practical solutions to the dilemma for wider dissemination and further discussion among colleagues in academia.

I congratulate the Association of American Law Schools for organizing this Conference and for inviting participants from so many countries. Let us hope that the outcome of our deliberations will serve the purpose for which we have come, namely to explore changes that at least some law schools will wish to consider in equipping their students for the future.

In this context I would point specifically to the need of finding ways of forming networks of cooperation. Such networks exist between legal practitioners at the international level and in capitals, in particular among the legal advisers of the Foreign Ministries around the world and the legal advisers of the international organizations.

Maybe this kind of networking could serve as an inspiration for the law schools. And why not develop a closer interaction between those existing networks and networks established by academia?