# Teaching international law in the context of domestic legal systems: Towards a transnational approach[1]

## 1 International law: What to teach and why?

My colleagues on this panel and many in the audience have devoted much time to considering the subject of teaching international law. The focus of the discussion is often on why the general course should be taught and, if possible, be required of every law student. This is an important subject and I am in complete agreement with the position that some knowledge of international law is required of every legal professional today. But how much needs to be taught and why?

Having attended and participated in decades of discussions about the teaching of international law, I feel that we have not adequately addressed the issue of what should be taught and why. In an effort to develop a possible framework for such a discussion and to satisfy my own curiosity, I undertook (with the research assistance of a College of Law Administrative Honours Fellow) to see how much teaching in international law mirrored its practice. This effort was much assisted by the appearance of Dinah Shelton's *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011).[2] I selected seven out of the 27 countries covered in Shelton for a sample covering different legal traditions and parts of the world. I then undertook to collect international law course syllabi and materials from these countries. The results were mixed in the time available and I would welcome the contributions of panel members and others to assist further research in this area. Of the seven countries selected – Australia, Canada, Japan, Netherlands, South Africa, the United Kingdom, and the United States, I could secure teaching materials for only five – Australia, Canada, South Africa, the UK and the US. But for purposes of this ILA discussion, these provide a starting point for consideration.

The volume of international law activity in existence today is impressive with one study accounting for 82 000 publicised international agreements and possibly up to 100 000 additional interstate agreements negotiated since the beginning of diplomatic history.[3] These agreements are supplemented by numerous 'atypical' instruments that include multilateral framework and general declaratory instruments in treaty form; soft law in non-treaty form like

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[1] A Discussion Paper Prepared for the Meeting of the Teaching International Law Interest Group, International Law Association Biennial Meeting, Sofia, Bulgaria, August 2012.

[2] Shelton's volume contains country reports for 27 principally European and Commonwealth countries examining how each country gives effect to international law.

[3] Johnston *Consent and commitment in the world community* (1997) at 8-9.

codes of conduct, guidelines, statements of principles; memoranda of understanding and other informal implementation instruments; political accords; the implementation activities of non-governmental organisations; United Nations General Assembly resolutions of a law-making quality; United Nations Security Council resolutions; resolutions and regulations of international and regional organisations with law-making capacity; and declarations of intergovernmental conferences.[4] The number of international actors has expanded to include not only the 193 member states of the United Nations, but also the few non-UN member states, international and regional organisations, sub-state entities like municipalities, a range of non-governmental organisations, associations, and individuals.

As a result, international law has dramatically increased from its early days in the range of its coverage as well as in the modes of law-making and implementation of its obligations. See, for example, multilateral treaty information collected by John Gamble and his students in the Comprehensive Database of Multilateral Treaties (CDMT). An early version of this database recorded 86 multilateral treaties for the first 100 years of the collection (1648 to 1750) and more than 2 000 multilateral treaties for the 25 year period between 1951 and 1975. There is evidence that the volume of multilateral treaty-making may have plateaued and is decreasing.[5]

This growth in international activity has rightfully focused academic attention on how these myriad obligations are given effect. One central fact remains clear – states remain a key actor in the implementation of international law. As such, domestic actions taken either in the name of international law or in reaction to it can give rise to conflict and confusion. See, for example, the debate sparked in the United States and around the world over the US Supreme Court's decision in *Medellin v Texas* that failed to give effect to the decision of the International Court of Justice to delay the execution of Jose Ernesto Medellin in 2008.[6] This also directly affects *what* we teach and *how* we teach international law.

For most law students, work with international law will likely be part of an area of domestic practice like family law or civil procedure. For these students, gaining a solid foundation in the distinctive elements of international law, their intersection and interaction with a given domestic legal order may prove the

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[4] *Id* at 25.

[5] Comprehensive Database of Multilateral Treaties (CDMT) developed by John King Gamble at The Behrend College, Pennsylvania State University (2000).

[6] See McGuinness '*Medellin v Texas*: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings' (17 April 2008) 12/6 *ASIL Insights* available at http://www.asil.org /insights080418.cfm.

most effective approach. This transnational orientation may be chosen in order to establish relevance for students, but the approach is also practical – to relate international law to things that are familiar to students and because more and more of international law will be practiced as part of domestic law. See, for example, the course description for the Transnational Law course required at the University of Michigan Law School:

> This required course provides an introduction to the international dimensions of law. In today's world, it is essential that every lawyer understand the making and application of law beyond the domestic (American) orbit. Even though most graduates will practice law in the United States, virtually every area of law is affected by international aspects, whether through treaties regulating transnational economic relations, interactions with foreign law, and oversight by international organizations. Each area of the curriculum, from antitrust to intellectual property to civil rights to tax, is enmeshed within a complex web of international and foreign rules that the lawyer must understand. Because the field of law outside US domestic law is vast 'public and private, international and foreign' the course seeks to provide students with the basic concepts and tools they can use to understand, take further courses in, and practice many specialized areas of law. Because the world lacks one authoritative legislature, executive, or judiciary, our understanding of law must consider a different range of methods for making, interpreting, and enforcing the law.[7]

## 2 The promise and challenge of teaching in a globalised international legal order

International law today functions in a less hierarchical law-making and implementation environment. Law-making and regulated behaviour can now take place through networks and social movements rather than institutions or government. Movements come and go, even if their normative legacies are important, as was the case with the movement to end the use of landmines. Globalised international law functions in an environment that is shaped by ongoing interactions rather than abrupt system-wide changes.[8] These interactions create denser and denser political and normative connections between the local and non-local, the individual and the institutional, and the national and transnational. This reality, together with the nature of international law, require students to understand the interaction of their own legal system with the international legal order and its different modes of 'making, interpreting, and enforcing the law', as noted in the Transnational Law course outline above.

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[7]University of Michigan Law School Course Descriptions: Transnational Law available at https://www.law.umich.edu/currentstudents/registration/ClassSchedule/Pages/AboutCourse.aspx?crseId=038594.

[8]See Keck and Sikkink *Activists beyond borders: Advocacy networks in international politics* (1998) at 213.

The multi-dimensional, multi-sector, and multi-level character of the issues international law is now called upon to address - like sustainable development, environmental protection, and the well-being of individuals - has required a specialisation and focus that have raised questions about the ongoing coherence of international law as a legal order. The International Law Commission, for example, saw the problem as follows:

> The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledges as 'investment law' or 'international refugee law,' etc – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[9]

This potential for normative fragmentation may now be compounded by the varied modes of and jurisdictions involved in implementing international legal obligations. This threat of fragmentation, however, can be ameliorated if domestic legal orders can take adequate account of the distinctive features and properties of the international legal order. The relationship between legal orders – national, sub-national, transnational, international, and global – therefore may be less one of hierarchy than of partnership whereby governing units connect with each other to give life to legal obligations. Global activity will deepen these connections and relationships and will more frequently enter into domestic political discourse and norm development. See, for example, Brazil's involvement with the 2012 US Farm Bill because of a 2004 WTO ruling against the US cotton subsidy programme.[10]

From the teaching materials gathered, it seems that international law teaching is already leaning in the direction of a transnational approach. Was there a

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[9]United Nations Document A/CN 4/L/682 13 April 2006, International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi at 10.

[10]McClanahan 'US pushed to reform cotton subsidies in farm bill as Brazil watches' (19 July 2012) *The Guardian* available at http://www.guardian.co.uk/global-development/2012/jul/19/us-cotton-subsidies-farm-bill-brazil.

common set of basic international law concepts that were taught? Was consideration given to the political and historical circumstances that might have bearing on a country's attitude towards international and foreign law? Was there an effort to demonstrate how international law entered the domestic legal order? Did materials mentioned in either course syllabi or teaching materials track with important developments and cases mentioned in the country reports in Shelton? The summary tables that follow show a close relationship between what was reported in Shelton and what was taught. They also show that there is a core set of international law elements that are covered.

Discussion of the interaction between these legal orders often start with the statement that domestic legal obstacles to giving effect to international obligations do not absolve the state concerned of those obligations. The course would end with either a country's track-record in incorporating international law or noting controversies without consideration of the implications of these circumstances for either the international or domestic legal orders. In other words, for now, treatment of international law once it enters the domestic legal system ends there without much consideration of the interactions that are part of the 'different range of methods for making, interpreting, and enforcing the law' that is international law. Discussion of domestic interactions further do not take into account similar interactions that take place within the nearly 200 domestic legal orders now in existence around the world and whose conflicts or inconsistencies will require assessment and modification at the international level. This seems an opportunity lost to note areas ripe for additional transnational activity as the international and domestic legal orders continue to intersect. It further provides an incomplete picture of the scale and scope of interaction between international and domestic legal orders.

Teaching transnationally widens the pool of possible teaching staff as research develops in the interaction of the legal orders and overcomes the distinctions previously made in international law between private and public law. Key points can be established by drawing on a range of subject areas of primary research or practice concern to the faculty. See, for example, the statements of course coverage provided by the several University of Michigan Law School faculty who teach this class. Each instructor's version of transnational law draws on different subject matter to support the core ranging from human rights to the use of force to dispute settlement and drafting joint venture documents.[11] This approach further has the virtue of establishing the salience and relevance of the material to law practice no matter the area of practice. It

[11] See instructor statements on course coverage at https://www.law.umich.edu/currentstudents/registration/ClassSchedule/Pages/AboutCourse.aspx?crseId=038594.

also allows drawing on the growing body of research touching on the density of legal relations outside a single domestic jurisdiction. This way of approaching the subject, however, may require more focus on domestic interactions and less on the development within international law. For the more interested student, a course focused more exclusively on international law may then be appropriate.

Thinking about international law in a global or transnational context may also help to advance research on trends that may affect international law-making in the future. For example, in a number of established democracies, there is evidence that legislatures are becoming more involved in areas that had previously been the almost exclusive domain of the executive such as committing the use of armed forces even for UN mandated operations.[12] See also the example of the British Constitutional Reform and Governance Act (2010) that allows parliament now to prevent the government from ratifying an agreement negotiated by it.[13] Another potential area for advances in research is that of 'interstitial norms' where norms – international, domestic, transnational, public, and private might clash in operation.[14] On the international level, we can think of concepts like sustainable development or humanitarian intervention as such norms where steps are taken to channel interactions in ways that do not conflict. As international activity reaches more deeply into domestic political and legal orders, we can anticipate an increase in these kinds of normative conflict that will have to be managed and resolved. These cross-sector and multi-level areas are the ones where young lawyers will likely find themselves struggling both with international and domestic law.

The goal of this exercise is not to persuade colleagues to abandon teaching international law as we have known it. It is merely to note a possible supplement or complement that a transnational approach may provide to reach more students in ways that might assist their professional as well as intellectual development; to broaden the pool of available teaching staff; and to signal the emergence of trends or issues in need of deeper cross-border and/or interdisciplinary research.

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[12] See Damrosch 'The interface of national constitutional systems with international law and institutions on using military forces: Changing trends in executive and legislative powers' in Ku and Jacobson (eds) *Democratic accountability and the use of force in international law* (2002) at 39-60.

[13] Neff 'United Kingdom' in Shelton (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011) at 621.

[14] Lowe 'The politics of law-making' in Byers (ed) *The role of law in international politics* (2000) at 212-221.

## Table 1: Core international law subjects taught[15]

| **Core international law subjects** | **As taught in** Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| Sources: treaties, custom | √ | √ | √ | √ | √ | √ | √ |
| Jurisdiction: conflicts, legal personality, immunities | √ | √ | √ | √ | √ | √ | √ |
| Dispute settlement: responsibility | √ | √ | √ | √ | √ | √ | √ |

[15]From syllabi collected by or discussions conducted by author.

**Table 2 Relevant domestic legal order considérations**[15]

| **Key domestic legal order considerations** | Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| Constitution | (1900)<br><br>Sec 51 gives High Court power to hear cases relating to treaties | (1867 and 1982)<br><br>Will carry out treaty obligations applicable to it as part of the British Empire | (1947)<br><br>Executive power is vested in the Cabinet | (1815 and 1956)<br><br>Kingdom in Europe and other territo-ries; States General just approve all treaties | (1997)<br><br>International law to play a role in the domestic legal order and particularly in human rights | Unwritten | (1789)<br><br>Congress punish offi against the of nations; treaties are supreme la the land |
| Separation of powers | Foreign affairs presumed to be an executive function; constituent states can change implementing legislation | Minister of Foreign Affairs conducts foreign policy; judiciary does not defer to executive in interpreting treaties | Cabinet concludes treaties with approval of the Diet | Constitution art 120: constitutionality of Acts of Parliament and treaties shall not be reviewed by Courts; political branches are principally responsible for | Executive has treaty-making power | Crown prerogative | Executive |

| **Key domestic legal order considerations** | Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| | | | | the regulations and measures to implement international law obligations | | | |
| History | Greatest concern in Constitution was in defining relations among the several states of Australia; assumption that Britain would take care of Australia's foreign affairs so little said | As part of the British Empire, assumed that foreign relations would be in the hands of the UK | Separation of powers and bill of rights in Constitution modeled after US practice after World War II | | Post-apartheid attention to human rights and international law as part of re- entry into the international community | International law was part of the civil rather than common law practice in Britain's early days | Self- execu Direct appl |

[15]Information compiled from country reports in Shelton *International law and domestic legal systems: Incorporation, transformation, and pers* (2011).

## Table 3 Modes of incorporation[16]

| Modes of incorporation | Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| Adherence: legislative action | Local enactment required to make treaty enforceable, implementing legislation can change with no notice | Can legislate by reference to a treaty incorporating sections; implementation may require action by federal or provincial enactment depending on subject matter | | | International agreements bind following approval in the National Assembly and the National Council of Provinces | Acts of Parliament are required to make treaties enforceable in UK courts | 'Later in ti rule applic there is an inconsiste between s and treatie |
| Automatic incorporation | Custom is regarded as a source of Australian law | Custom is a source of Canadian Law (*R v Hape*, 2007) | Art 98 of the Constitution provides for the automatic incorporation of customary international law into domestic | Netherlands constitution is silent on customary law, but practice indicates that it will not prevail over Acts of Parliament, the | Custom is law unless it is inconsistent with the Constitution or an Act of Parliament | Custom is a source of British law (*Trendtex Trading Corp v Central Bank of Nigeria*, 1977 and *R v Jones*, | Custom is regarded a source of f common la (*Paquete Habana*, 1900, *Fila PenaIrala*, *Sosa v Alv* |

| **Modes of incorporation** | Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| | | | law | Constitution or the Charter for the Kingdom; courts do recognize *jus cogens* norms and international human rights law | | 2006) | *Machain*, |
| Interpretation | Courts will interpret Australian statutes as consistent with Australia's international obligations | Enacting legislation may explicitly say that an international convention prevails, international human rights is a persuasive source when interpreting the Canadian Charter of Rights and | Courts will apply rules of treaty interpretation following the Vienna Convention on the Law of Treaties; courts use international law to bolster their interpretation of domestic law; courts | | Courts will interpret legislation in a manner consistent with South Africa's international obligations | Courts will interpret acts of Parliament as consistent with British international law obligations | Federal co construe U statutes to consistent international (*Murray v Schooner Charming* 1804) |

| **Modes of incorporation** | Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| | | Freedoms | have declined to use international law to interpret the Constitution | | | | |
| Self- execution or direct application | | | Ratified treaties are automatically accepted into domestic law once promulgated in the official gazette; whether treaties are directly applicable is up to the courts to determine | Constitution Art 93: treaties and resolutions binding on all persons by virtue of their contents shall be binding after they have been published; art 94: statutes will not be applicable if in conflict with treaties and resolutions; immediate | Self- executing provisions are law unless inconsistent with the Constitution or Acts of Parliament | The Human Rights Act provides for an expedited parliamentary process for laws that may be inconsistent with the European Convention on Human Rights | If the politi branches m clear that a should hav without implementi legislation, become law immediatel *Foster v Ni* 1829; ICJ decisions c be given ef with action Congress, *Medellin v* 2008 |

| **Modes of incorporation** | Australia | Canada | Japan | The Netherlands | South Africa | United Kingdom | United States |
|---|---|---|---|---|---|---|---|
| | | | | effect is given to decisions of international courts and tribunals | | | |

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[16]Information compiled from country reports in Shelton *International law and domestic legal systems: Incorporation, transformation, and persu* (2011).

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