Session 8B – *Teaching international Law in a Time of Complexity*

November 7, 2015
9:00 – 10:30 a.m.

Chair
Sara Seck, Western University

Speakers
Chios Carmody, Western University
Craig Forcese, University of Ottawa
Betina Kuzmarov, Carleton University
Obiora Chinedu Okafor, York University
Sara Wharton, University of Windsor

Reported by Jenny Poon, Ph.D. Candidate, Faculty of Law, Western University

Seck:

Professor Seck began by explaining why she put together this panel. Seck decided to put this panel together for outreach purposes because the topic of teaching international law is not talked about at CCIL. Seck taught domestic, international environmental law, and corporate social responsibility in? international law.She noted that there is a published article aboutthe fact that Canada has environmental responsibilities that are codified in statutes, but thatwhen lawyers argue the importance of responsibility in international law, judges often do not understand. The main question that was explored in today's panel: To what extent do we talk about the relationship with international law when we teach domestic law? There is also the business or human rights context. For instance, in 2011, the normative "*Guiding Principles of Business and Human Rights*" are not a binding obligation, but something else. Where do business lawyers learn about international law or human rights law? If there is a business responsibility to respect human rights, where do we learn that? The speakers talked about who they are and what they teach and why they're here.

A summary of each speaker's teaching area:

Carmody taught international business transactions, contracts, and international trade law. Forcese teaches advanced international public affairs, national securities law, and public international law ("PIL"). Kuzmarov taught law and legal studies, including international law ("IL"), PIL, and transnational law. Okafor taughtPIL courses, international court and tribunals, international human rights law, North and South relations, and Canadian immigration law. Wharton taught international criminal law ("ICL"), domestic criminal law, and coached the International Criminal Court("ICC") moot.

Carmody:

Overview:

Carmody began by explaining the coherence theme. He asks the question of what do we mean by coherence and chaos when we teach IL. According to Carmody, these two ideas are integral to IL and how it structures, functions and operates. To him, coherence and chaos are the difference between unity and diversity. However, the question is how this relates to, and what does it say about IL? For instance, what is law?What do we mean when we talk about IL? What is IL? To Carmody, IL is a result of different perspectives and is itself interdisciplinary, a "*mot du jour*" ("word of the day") theme. Interdisciplinarityis a popular theme but there is a risk of being controversial in that it is a theme that introduces a lot of ideas and creates a lot of noise.

The teaching of international law:

The teaching of international law is interdisciplinary in some sense because it can yield a lot of confusion, which makes it difficult to assess what is coherence and what is chaos. What we need to start with is a fundamental description of law as rights and obligations that are expressions of normativity and that are binding. There are alternative views of what law is, including law as injustice, oppression, legitimacy, principle, practice, text, soft law. These views all inform us in what we are doing. To begin with, law as rights and obligations helps us to structure the conversation. There is a correspondence between rights and obligations, in that the idea of rights and obligations tends to thrust in the idea of coherence, and coherence between the ideas of rights and obligations. Rights and obligations have to be relatively comprehensive. For instance, how does a legal system contain rights and obligations? We mix everything together with the presumption that everything is equal. For instance, students are taught human rights, but there are other rights and obligations out there. We need to order and fit these concepts together harmoniously. When we talk about bilateral obligations, do we need to consider obligations *erga omnes*? According to Carmody, professors of international law throw everything into one bowl like a salad,but that is not helpful when thinking about coherence and chaos. For instance, how can we order and structure thinking to understand the diversity that we see?

Legal system as a set of rules or norms that work harmoniously:

The idea that the legal system is a set of rules or norms or rights or obligations meansthat we need to work together harmoniously – in a way that is coherent. According to Carmody, we need to emphasize the idea that the law starts with coherence. For example, the World Trade Organization ("WTO") has 161 members, and it is a single undertaking that member states are obliged to follow, which has internal organization, and a system of dispute settlement. According to Carmody, when we talk about the idea of coherence, this idea carries over to decision-making as well. For example, there is the idea that treaty interpretation should be undertaken to give treaty terms harmonious interpretation. Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT") states the idea that treaty interpretation takes place in light of

terms of the treaty, in accordance with the object and purpose of the treaty, and context, all of which are to be interpreted harmoniously. The idea of chaos, however, is also present. For instance, in the WTO, different domains do not fit well together, such as dispute settlement compared to settlement where the disputes go away. There are also regional trade agreements such as the*Trans-Pacific Partnership*. How do you fit the WTO with those involving subject areas such as human rights and the environment?There is chaos in the WTO as well, in that WTO law is not completely correspondent, coherent, or exhaustive. Chaos is pervasive in international law. Carmody believes that it is a false choice when we describe the theme of the CCIL conference as making us having to choose either coherence or chaos, because in international law there is evidently both.

Seck:

Professor Seck mentioned how interesting it is that Professor Carmody showed coherence and then chaos in international law. One question she had for the panel was: With the proliferation of treaties, customary international law ("CIL"), and soft law, which are the rules that we should teach about? And who decides what the rules are?

Forcese:

Forcese commented that chaos is when he is trying to pull together the class syllabus, but coherence is when the syllabus is finally put together. It is important to convey to students who know nothing about the law the fundamental concepts, but sometimes he forgets that he is teaching at a high level of abstraction which students may not understand. Forcese started with the presumption that students know that they live in a state called Canada. He does not get into a detailed conversation on what treaties, CIL, or soft law are until in upper year classes, where more abstractions can be discussed but he tries to make classes more practical, such as asking how the students would advise the Department of Foreign Affairs, Trade and Development ("DFATD") on a particular issue.

Kuzmarov:

Kuzmarovtaught law outside of law school. Kuzmarovmentioned that the colleagues she teaches with are not necessarily lawyers, but are psychologists and experts from other disciplines. The main question for Kuzmarovis whether law is an autonomous discipline or a field of study. Kuzmarovquestions what basic understanding of IL is needed if students do not want to practice. Kuzmarovstated that there are strong debates on whether law is a political idea or an independent discipline. In the 19th century, chairs in social science were created, but it was not until the 20th century that law schools left the bar tobecome an autonomous discipline, and became (?) part ofthe modern structure of the university. For the French sociologist, a field of study is an area of socially structured pattern of practice, which isinterdisciplinary and professionally practiced – an activity for the professional world, and which requires one to speak the language and understand the language of that field. For Kuzmarov, law is a field of study, but it draws also from economics and other fields. The key for

Kuzmarovwas to understand international legal language and then students can use it in other fields in which they are operating. There are basic concepts that are needed for first-year students but greater abstractions are not needed until upper year law studies.

Okafor:

To Okafor, the teaching of law required an interdisciplinary approach which has social, political, and economic underpinnings.According Okafor, no matter how tightly we define law, there is still chaos, because how we interpret law is always subjected to social, political, and cultural factorswhich differ depending on the context. The distinction of soft law and hard law is technical, but the uses of soft and hard law are complicated by social, political, and cultural influences. For instance, for state immunity, the African court has a traditional hard law understanding because it serves the political and economic needs who are elite Africans drafting the treaty. National law is what national judges, lawyers, professors make of it. There is an attempt to convey a mixed reality to students – there is both coherence and chaos, but one cannot understand them without one another.

Wharton:

Wharton mentioned some ideas of challenges in helping students to critique the law. For example, for ICL, there is the complexity of proliferation of institutions such as the ICC, but there is internationalized variance. This variance is an opportunity to get something out of the classroom. The complexity in IL is an opportunity for students to explore and critique the state of the present law.

Seck:

Professor Seck emphasized the idea that how one teaches IL will depend on who the students are and where they are likely to go in a sense. Seck asked the panel: How do you interpret law within and between regimes?

Carmody:

There is a lot of international law out there, but we are always looking for coherence and a sort of arrangement and some sort of order. There is a lot of flashpoints in international law – we try to make some sense of what's happening, there is some coming together in the midst of complexity.

Forcese:

According to Forcese, the principle emphasis is on coherence. There are ways of wading into the chaos in the classroom, for example, byexposing one's students to chaos without having a philosophical discussion. However, it is much easier to do this in a practical and experiential context.

Kuzmarov:

Kuzmarovpointed out the fact that there are fundamental principles of international law which ust be taught to students. In spite of underlying principle of coherences, there is an underlying complexity that is unresolved, without underplaying things such as what “general principles of international law” means.

Okafor:

According to Okafor, law students always want to know what the law is, andone does have to teach them what the law is. One has to let the students know what to critique. Okafor states that he always makes a distinction between hard law and soft law. As lawyers, Okafor states that lawyers assume that a court is more effective than a commission, but that is not necessarily true depending on the context. For instance, just because you declare it as hard law or soft law does not lead to compliance.

Wharton:

The ICL intersects with domestic criminal law, where, for example, individuals have to have some sort of notice in order to be responsible for the crimes. But one needs to pull? apart the intersection between law and politics because one does not devote too much time to it in international law.

Seck:

Professor Seck asked the following question: Any thoughts on experiential aspects on teaching international law?

Carmody:

Carmody believed that exercises – in particular negotiation exercises – provide an opportunity for students to experiment and apply international law, especially for international trade law, such as the need to have the right materials and trade-offs. Negotiation simulations allow students to identify where compromises can be reached. The Globe & Mail had an editorial about the deprivation experienced by Aboriginal peoples.

Forcese:

Forcese believed in the use of giant role-play exercises. Forcese ran such exercises as a large-scale moot. The moot allowed students to have a problem solving methodology which passive teaching will not equip them for.

Kuzmarov:

Kuzmarovused the technique of memo writing, developing negotiation skills, and role-playing. For her, it was a matter of trial and error for each topic area in terms of which experimental method to use.

Okafor:

For Okafor, the course which he teaches is International Law of South and North Relations, which involves controversial issues on the North and South. He presented two papers that take different views on the same topic to students, and his students have to give a one-page summary at the end for him. Okafor also used in-class engagement on articles from authors to help students understand concepts.

Wharton:

According to Wharton, not all learning has to be done in the classroom. In fact, moots are very important to gain experiential skills.

Seck:

Professor Seck turned the panel's attention to the *United Nations Declaration on the Rights of Indigenous Peoples*. Seck mentioned that mining law at Western Law was taught by practitioners and involved negotiations stimulation with students. She has guest lectured for the class, including teaching business social responsibility in international law. Seck asked the panel: How should one teach about non-state actors in international law?Where should we be teaching international law in the realm of domestic law?

Wharton:

According to Wharton, Windsor Law does not have any mandatory international law courses in the curriculum for law students. This is probably due to the growing number of required courses in the domestic context which crowds out international law courses for students. Wharton asked the panel: Is there curricular space for students to build up international law abstractions from first year to upper years?

Okafor:

Okafor gave the example of NAFTA and GATT as the place where domestic and international law teaching intersect. Okafor also gave an example of Supreme Court of Canada cases on immigration, and explained that its decisions are almost always premised on international law.

Kuzmarov:

To Kuzmarov**,** every problem comes from some jurisdiction. She asked the panel: What does that look like froma problem solving perspective?

Forcese:

Forcese stated that one can segment the course according to expertise, but it's a matter ofallocating human resources.

Carmody:

International law relates to how we make decisions, and coming from the Western world, that decision comes from a court or a single source. However, one should not forget about alternative methods of decision-making, such as decision-making in the WTO appellate body, where 3 members of the appellate body will make decisions.

Notes from Questions& Answers

1. I take students outside during the first class, outdoor legal education – law of jurisdiction, sacking of Windsor in 1812 – students remember the most from the first outdoor class.

2. Using different resources – didn't ask for NGO representatives to talk – why don't we incorporate it?
   Seck: Courts and lawyers are missing these arguments from NGOs
   Forcese: Depends on where you are, such as U of Ottawa it's easier to bring in guest speakers, but sometimes it disrupts the theme you're trying to accomplish, scheduling issues, etc – I go out and interview people and convert that into a podcast and discuss it in class, the person can then come in at the end of the year to interact with the class – skype in people, etc.

3. I've been teaching advanced international law classes, joint teaching was great, how do you incorporate the moot?
   Forcese: Intend to be dynamic in the moot but unlike Jessup, engage torture issues and incorporate it with international law – the moot will be narrower unlike the podcasts – try to incorporate different real world issues

4. Blended learning works fantastically – blackboard to podcasts – law schools are heavily case based – teaching in a non-law graduate school now I cannot use cases – I feel incredibly liberated – can you comment on it?
   Kuzmarov: Cases were the first things I need to let go – we assume at grad level of Carleton University, that students read full cases, but student understanding is not dependent on knowledge of case law

Wharton: Start with cases and bring in critique – it's more blended learning – hybrid

5. I have not tried taking them to ICTR and ICTY – I have a supportive dean – suspicion on international law that it's irrelevant – the fight is not with the students but with the faculty
   Forcese: Big discussion now is indigenization of law – do we build modules? It's not the classic curriculum
   Wharton: A lot more can be done
   Kuzmarov: Already teaching in interdisciplinary environment – facing curricular challenges for indigenization of the curriculum – but it's a process