diritto internazionale
giurisprudenza catania

Rosario Sapienza

International Law, from Apology to Advocacy. The case for Transnational Law

2020-2.3

Fogli di lavoro
per il Diritto Internazionale

Testo chiuso nel mese di giugno 2020

FOGLI DI LAVORO *per il Diritto Internazionale* è *on line*
http://www.lex.unict.it/it/crio/fogli-di-lavoro

ISSN 1973-3585
Cattedra di Diritto Internazionale
Via Crociferi, 81 - 95124 Catania
E-mail: risorseinternazionali@lex.unict.it
Redazione: foglidilavoro@lex.unict.it

In the Spring Term 2020 I held a workshop on methodology in international law intended for English speaking Students attending the course on Transnational Law. In this course the students were given seven papers as a first biblio and were also given a series of seminars on the issue "What is Transnational law?".

They were guided in writing a legal paper on the subject "What is Transnational Law?" They were required to focus on the strategy of advocacy shown by the authors of the papers examined.

Transnational Law is claimed by some to be a completely new and autonomous legal discipline. An idea difficult to argue.

It is commonplace, when speaking of Transnational Law, to start from a famous quote from Jessup seminal Storr Lectures 1956

«Nevertheless, I shall use, instead of "international law," the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories»

The course on Transnational Law was thought as a way to deal with what is to be intended by the words "other rules which to not wholly fit into such standard categories".

As a matter of fact, Transnational Law, as seen by Jessup, has been further elaborated by different schools of thought, each one claiming to be a Transnational Law school, if not the only one. Each one producing a pretty huge amount of papers, articles, books and other documents advocating their idea of TL. Students were guided in detecting and understanding the structure of the arguments put forward by the different authors.

In my methodology seminar, I followed a method developed here in Catania through the years, which moves from the idea that research papers in law disciplines should be evaluated taking into account the fact that they are rhetorical exercises.

The method is commonly referred to as "International Law: from Apology to Advocacy", which of course brings to the mind the famous work by Martti Koskenniemy "From Apology to Utopia". And in fact, our method is based on the idea that every Utopia has to be advocated, because ther is nothing in this world which can be deemed to be self-evident.

We start from the seminal work by Chaïm Perelman (1912-1984) *Traité de l'argumentation – la nouvelle rhétorique* (1958), written with Lucie Olbrechts-Tyteca.

Perelman has offered a pathbreaking theory of legal argumentation, through which several issues of classical rhetoric are given new strength and appeal.

He emphasizes the fact that the aim of arguments pertaining to the realm of law is not to demonstrate a given idea or theory but rather to obtain the adherence of a given audience through non-formal arguments.

Now, this implies that the orator (or the scholar writing a paper) must ensure that the audience adheres to each successive element of an argument.

Therefore, we have developed a framework of analysis that we use to go into the contents of a given paper or other piece of scholarly work and evaluate it both from the point of view of its rhetorical and effectiveness, and also from the point of view of the quality of the scientific research on which the paper is based.

Our method consists of three phases: Context Analysis, Content Analysis and Critical Evaluation.

1. Context Analysis

First of all, our analysis starts by collecting information on the context of the object of our analysis. Elements of this context are:

information about the author: his/her education and background, research interests, main works and so on;

information about the work:

the aim of the paper and its scientific location (review, chapter in a book, encyclopedia entry),

the scope of the analysis (whether a shorter comment or note, or rather an essay or presentation, if it was written as an original work, or as a transcript of a lecture).

All this helps to a better identification of the audience. A short perusal of the sources will also help to better define the context.

2. Content Analysis

Then we move to the second phase of our analysis, i.e. an analysis of the paper itself, through which we shall study first the rhetorical structure of the argument and then the contents of each part of the work.

2.1. Content Analysis A

Legal arguments, like all non formal arguments, always start from one or more starting points which are called locus communis, i.e. a proposition on which a certain amount of consensus is shared by the audience.

These propositions, often called *topoi,* from the Greek word for place (in latin *locus*), are the starting point from which the orator moves, followed by his/her audience through a path that he will show the audience as a guide does when leading a group through a visit.

Single stop-overs of this stroll are offered by what are commonly called *exempla*. An *exemplum* is a rhetorical device that is defined as a short tale, narrative, or anecdote used in pieces and speeches to explain a doctrine, or emphasize a moral point. They are generally in the forms of legends, folktales, and fables, while in legal argumentation they may be instances of application of the argument to single particular cases. Aim of an exemplum is always to clarify and prove a point.

2.2. Content Analysis B

Once completed the technical analysis of our object, proper content analysis of it will follow, consisting of a critical appreciation of the ideas discussed in the paper.

This is what usually scholars do when reading and evaluating other scholars contributions.

What is new in our approach is the fact that we do this only after having situated the contribution in his context, and after having analyzed it as a piece of rhetorical exercise.

3. Critical Evaluation

The third and last phase of our examination will consist of a thorough critical evaluation of the piece of scientific work as a whole, through which a final judgment will be elaborated.

We will then be in the position of establishing what is the right place for the contribution examined in the panorama of legal literature.