

Justice Beyond the State: Old and New Rights

Spring 2024

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Days: March 18, 2024, 11:00-13:00, Aula 2
March 25, 2024, 11:00-13:00, Aula 2
April 8, 2024, 11:00-13:00, Aula 2
April 15, 2024, 11:00-13:00, Aula 2
April 22, 2024, 11:00-13:00, Aula 2
April 29, 2024, 11:00-13:00, Aula 2
+ two meetings to discuss response papers, either in May or June (dates TBD)

I. Introduction

This course introduces students to the legal institutions and processes that characterize globalization, with an emphasis on public law. The focus is on justice beyond the State.

It can be helpful to say at the outset, for the sake of clarity, that:

- philosophically, justice will be considered as an element of every polity by a strand of thought that is associated with Aristotle and Smith; its violation is injury;
- justice will be regarded as a conflict between interests, of either individual or collective nature;
- finally, it will be examined in light of both ‘regional’ and global institutions and processes, such as the European Court of Human Rights and the International Court of Justice, respectively.

The course employs a variety of legal sources, including treaties, quasi-legislative rules, and judicial decisions. It also includes both legal academic writing and social science literature that illuminate legal issues and disputes. Methodologically, the course intends to provide all participants with

opportunities to apply their critical skills to the analysis of old and new issues concerning globalization. Each session will thus be based on various texts and materials previously circulated. There will be also some indications for further reading. Finally, after the six sessions (between March and April) illustrated here, there will two sessions for the discussion of the papers elaborated by participants, in May or June.

II. Course assessment

Classroom participation is an important part of the assessment. Most of the assessment (70%) is based on the papers that each participant is expected to elaborate on a topic chosen together with the teacher. There is a set of guidelines for this purpose.

III. General resources

General resources on public law and globalization include:

- JB Auby, *Globalization, Law and the State* (Hart, 2019, 2nd edn)
- S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (The Global Polity, 2012), accessible at <http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>
- P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (OUP, 2015)
- G. della Cananea, *Due Process of Law Beyond the State* (OUP, 2016)
- A. Stone Sweet & C. Ryan, *A Cosmopolitan Legal Order. Kant, Constitutional Justice, and the European Convention on Human Rights* (OUP, 2018)

IV. Structure of the course

1. From Arbitration to Jurisdiction: the International Court of Justice
2. A Europe of Rights: the European Court of Human Rights
3. No Justice, no State? The *Begum* case
4. When Legal Orders Collide: the UN, the EU, and the ECHR
5. A Separate Justice for Foreign Investors
6. Environmental Justice

1. From Arbitration to Jurisdiction: the International Court of Justice

March 18, 2024, 11:00-13:00, Aula 2

International judicialization – the creation and use of international courts and tribunals – has been a significant component of liberal approaches to the international order. For our purposes, it can be helpful to put things in perspective. There will be a discussion concerning the remedies available to individuals at the beginning of the 20th century, after 1945, and in more recent decades. The focus will be on the jurisdiction of the International Court of Justice.

Materials:

- the Statute of the ICJ (1948)
- ICJ (Arbitral Chamber), the ELSI case (US v Italy, 1989)

Readings:

- F.A. Mann, Comment to ELSI, 86 Am. J. Int'l. L. 1992

Further reading (optional):

- J.S. Martinez, *Towards an International Judicial System*, 56 Stanford L. Rev. 2003

2. A Europe of Rights: the European Court of Human Rights

March 25, 2024, 11:00-13:00, Aula 2

No regional judicial body organization has attracted as much scholarly attention as the European Court of Human Rights. Its mission is to impose the respect of certain values and rights. It has an original and well-functioning judicial system for the protection of individual rights and liberties, with effects that transcend the regional dimension. For some, this realizes the Kantian conception of justice.

Materials:

- European Convention on Human Rights (1950)
- European Court of Human Rights, *Jabari v. Turkey* (2000)

Readings:

A. Stone Sweet and C. Ryan, *A Cosmopolitan Legal Order* (CUP, 2018), chapter 3.

Further readings (optional):

- I. Kant, *Perpetual Peace: A Philosophical Sketch* (1795, reprinted Project Gutenberg, 2016)
- E. Stein & G. Vining, *Citizen Access to Judicial review of Administrative Action in Federal and Transnational Context*, 70 Am. J. Int'l. L. 1976

3. No Justice, no State? The Begum case

April 8, 2024, 11:00-13:00, Aula 2

The European system for the protection of rights applies to all persons, regardless of their nationality. Can it be used also to ensure that no injury is made from the viewpoint of the loss of nationality? The *Begum* case, which thus far has been litigated before UK courts, provides an interesting example.

Materials:

- ECHR

- UK Supreme Court, *R (on the application of Begum) v Secretary of State for the Home Department* (2020)

Readings:

- M. Masters & S.S. Regilme, *Human Rights and British Citizenship: the Case of Shamima Begum as Homo Sacer*, 12 *J. of Human Rights Practice* 2000

Further readings:

Seneca, *Medea*, §§ 202-210

4. When Legal Orders Collide: the UN, the EU, and the ECHR

April 29, 2024, 11:00-13:00, Aula 2

There are several connections between international and supranational authorities, both institutional and functional. But there are also some important differences, concerning their values. The latter have become evident, for example, in the context of the ‘fight against terrorism’. In this respect, there is a complex interplay between collective and individual interests, including global security and the protection of property and reputation, as well as a different interpretation of the rule of law. The *Kadi* saga, which involved national, EU and UN law, is a good example of this.

Materials:

- United Nations Security Council Resolution 1373 (2001)
- Advocate-general Maduro, Opinion issued in case C-402/05, *Kadi*
- European Court of Justice, Judgment in case C-402/05, *Kadi*

Readings:

- E. Cannizzaro, *A Machiavellian Moment - The UN Security Council and the Rule of Law*, 3 *International Organizations Law Review* 189 (2006)
- G. della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union*, 15 *Columbia Journal of European Law* 511 (2009)

Further readings:

- G. de Burça, *The European Court of Justice and the International Legal Order after Kadi*, 51 *Harvard Journal of International Law* 1 (2010)

5. A Separate Justice for Foreign Investors

April 22, 2024, 11:00-13:00, Aula 2

Another terrain of collision between national and international rules concerns direct foreign investment. In this field, disputes between investors and States are not adjudicated by national courts, but by arbitral bodies, in a variety of ways. Their awards are often based on general standards, such as the ‘fair and equitable treatment’ and the ‘full protection and security’, that is, broad standards, which are filled in with contents concerning procedural requirements and transparency. This increases the possibility to render justice, but only to a particular class or category of subjects.

Materials:

- US – Argentina BIT (1994)
- Netherlands – Slovakia BIT (1991)

- ICSID Case ARB/97/1, *Metalclad v. Mexico* (2000)
- UNCITRAL, *Saluka v. Czech Republic*, partial award (2006)

Readings:

- C. Schreuer, *Fair and Equitable Treatment: Interaction with Other Standards*, TDM (2007)

Further reading

- A. Stone Sweet & F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP, 2017)

6. Environmental Protection

April 29, 2024, 11:00-13:00

This session addresses a currently controversial issue; that is, environmental litigation. There will be discussion concerning judicial and quasi-judicial mechanisms, including the ‘*Shrimp and turtles*’ case before WTO dispute resolution bodies. But there will be also discussion concerning non-judicial mechanisms, such as those established by the Aarhus Convention.

Materials:

- GATT 1994, Article XX
- WTO, Appellate Body, *Import prohibition of certain shrimp and shrimp products* (AB-1998-4) (excerpts)
- Aarhus Convention (1998)

Readings:

- B.S. Chimni, *WTO and Environment: Legitimation of Unilateral Trade Sanctions*, in *Economics and Political Weekly* (2002)
- D. Weaver, *The Aarhus Convention and Process Cosmopolitanism*, 18 *International Environmental Agreements: Politics, Law and Economics* 199 (2018)

Further readings:

M. Lee and C. Abbot, *The usual suspects – public participation under the Aarhus Convention*, 66 *Modern Law Review* 80 (2003)