

LAW, POLITICS AND THE SEARCH FOR JUSTICE

Government 3610/ES 3963
Spring 2019
TR 1:15-2:40
Hubbard 22

aspringe@bowdoin.edu

Allen L. Springer
302 Hubbard Hall (Tower)
Office Hours: MR 2:45-4:15
Phone: 725-3294
E-mail:

Introduction

This course examines the relationship between international law and politics in two important and rapidly developing areas of international concern: humanitarian rights and environmental protection. We will discuss the challenges facing the international legal system not just to provide “order,” but also to develop patterns of state and individual action that help realize broader collective goals we associate with “justice.” The course puts particular emphasis on the role of courts and the adjudicative process, not because they are necessarily more effective in advancing these objectives, but because the process of dialogue they require helps clarify important legal and political issues faced in each of these policy areas. Among the central questions addressed in this course are whether the creation of centralized institutions evident in the humanitarian arena is sustainable in the future and whether it represents an appropriate model for the future development of international environmental policy.

Readings

Two books provide some of the required reading for the course. Both are available from the Bowdoin College Virtual Bookstore.

- J. Martin Rochester, *Between Peril and Promise: The Politics of International Law* (2nd ed, Washington: CQ Press, 2012)
- Allen L. Springer, *Cases of Conflict: Transboundary Disputes and the Development of International Environmental Law* (Toronto: University of Toronto Press, 2016)

In addition, I will be handing out a Supplement, which contains briefs of a number of the cases we will be analyzing. Additional required readings will found on Blackboard, either through direct links on the syllabus page (BB) or on electronic reserve (ER). Changes may be made in the assignments and additional readings added.

Requirements

Each of you will prepare a major research paper (25-30 pages). Students using this course to fulfill an Environmental Studies requirement must choose a topic with a clear environmental dimension. At the class conference at end of the term, papers will be presented in a series of thematic “panels.” Each of you will read and comment in writing and orally on the papers prepared by other members of your panel.

Class participation is important to the seminar's success. Please do not use computers in class. Reading assignments must be completed before the class in which they will be discussed. Students are expected to attend all classes, to contribute regularly to class discussion, and to participate actively in the litigation exercises. To help you prepare for class discussion and focus on key issues raised by the readings, each of you will be expected to submit one short (1-2 pages) “response paper” each week on a topic assigned by me. These short papers will be graded on a Credit-Fail basis and considered part of the “class participation” portion of your grade. The approximate weighting of these requirements in determining your final grade is:

- 60% - research paper
- 20% - class participation, including response papers
- 20% - group litigation exercises

I plan to contact you often using e-mail. Please check your e-mail on a daily basis; you are responsible for being aware of any messages I send out! Course materials, including a copy of the syllabus, will be found on Blackboard.

Litigation Exercises

Among the more unusual (and actually quite fun) aspects of this course is a series of in-class, simulated adjudicative proceedings in which two groups of students argue their respective sides of a case before a body of judges, made up of myself and the students who are not serving as litigants that week. Each of you will serve as litigants in **two** different exercises; I will do my best to mix you up into different groups each time.

There will be four litigation exercises, two in the area of international humanitarian law and two involving issues of international environmental law. Two of the cases will be heard before real international courts (the International Criminal Court and the International Court of Justice) and two will be heard before hypothetical national courts. Each team of litigants will be led by an alphabetically-determined “lead litigant,” whose role is simply to organize the team and help decide on individual assignments. Each team will be presented with a set of questions to be argued before the court and will prepare a written submission (12-15 pages in length) providing an overview of the team’s argument on each of the questions. These written submissions will be circulated and posted on Blackboard before the actual litigation exercise to allow the parties to prepare rebuttal arguments and to permit the judges to prepare questions for the oral proceedings.

The oral proceedings will be divided into “phases,” focusing on each of the questions asked. Litigants will begin presenting their arguments subject to withering questioning by the judges. After the exercise is over, each of the judges will prepare a written “verdict.” The verdicts will be circulated and placed on Blackboard.

Research Papers

The central course requirement is to prepare and present a substantial (25-30 page) research paper on a topic approved by me as appropriate for the seminar. Abstracts from recent papers can be found on Blackboard.

Students who took the course in previous years have suggested ways to encourage/coerce you to get started on your papers early in the term. The third week of the course is set aside to make it possible for you to do this. You need to understand that the research process must go on even when there are other things happening in the course, like litigation exercises, that may seem more immediate!!!

Research Schedule- Unless otherwise noted, please submit the following to me at asprunge@bowdoin.edu as a Word email attachment by 5 p.m. on the required date. While I will not be giving you actual grades for your proposals, outlines, and drafts, how your paper “progresses” through each of these stages will be taken into account in assigning a final grade for the project.

| | |
|---------------------|---|
| February 1 | Topic- one paragraph overview of research topic along with a working title |
| February 4-7 | Individual meetings to review paper proposals |
| February 10 | Proposal due |
| March 8 | Full outline |
| April 12 | First draft of paper |
| April 26 | Final draft of paper due. Please submit 3 hard copies [Note: This is the Friday of Ivies Weekend. You will not receive (and do not want) an extension!] Also, please submit via email (as a Word document attachment) a 125-200 word “abstract” of the paper to be included in the conference brochure. |
| April 29 | Pick up packet of assigned papers. Prepare written and oral comments |
| May 4 | Class conference, 11 am---5 pm (tentative schedule- this may change) |
| May 11 | Final version of paper due |

Selecting a Topic

The range of possible research topics is very broad. Most of you will likely focus on a problem related to either humanitarian or environmental issues, although it is also possible to develop a topic that involves a comparative analysis of an issue facing both regimes, such as the role of non-governmental organizations in developing or enforcing regime rules. Successful papers in the past have often focused on one or more case studies, which offer an opportunity for in-depth research while still permitting students to relate their research to broader questions about the relationship between international law and politics.

“Humanitarian” law refers to the rules governing individual behavior during a time of armed conflict and is an area of international law that is generally considered either distinct from, or a subset of “human rights” law. These rules are designed to regulate how combatants behave towards each other and towards those identified as non-combatants, people who are normally not lawful targets of attack and must be protected. Since this is an upper-level seminar in international relations, you should avoid topics that lack a clear international dimension. For example, a paper focused simply on the development of the US Clean Air Act would generally not be appropriate, but one analyzing a transboundary air pollution dispute between the United States and Canada, which might include an assessment of how the Clean Air Act might apply, would be fine. This is something we can discuss during our individual meetings

One good place to get ideas of possible research topics is on the website of the American Society of International Law (<http://www.asil.org>). The ASIL *Insights* series (<http://www.asil.org/insights.cfm>) provides short issue briefs on the legal aspects of important international relations issues. Many are relevant to issues posed in the course; indeed, several are assigned as course readings.

Preparing a Proposal

Each proposal should be 4-5 pages in length and must include:

- A working title. This can be changed later if the focus of the paper shifts.
- The research “question.” At this point, you should not try to articulate a “thesis,” but explain what the issue is that you plan to explore in your research.
- An overview of the likely structure of the paper, indicating, for example, what case study(ies) you plan to develop.
- A description of the sources you intend to use.
- A preliminary bibliography of at least 15 sources you have actually seen.

Research Materials

There is a wealth of research material on international law topics available, much of it online. Use primary materials wherever possible. A paper on the application of the Protocol I to the 1949 Geneva Conventions to the war on terror should thus focus directly on the Protocol itself, and cite it in the paper, and not simply rely on how authors you have read have interpreted it. Secondary sources are fine, and will be an important source of insight, but they should be “secondary.”

The American Society of International Law webpage (<http://www.asil.org>) also has links to its Electronic Resource Guide (<http://www.asil.org/erg/>). As the name implies, the ERG provides useful links to primary and secondary sources in many areas of international law. The two most relevant to our course are the pages on international humanitarian law and international environmental law. Online databases available from the Library webpage, notably Academic Search Complete, JSTOR, and LexisNexis-Academic will also be helpful. You can also arrange to meet with people in the library once you have a clear topic in mind. The liaison to the Government Departments, Ms. Barbara Levergood, will be a valuable contact and has offered to work with you individually to identify useful sources.

Abstracts

Every student must submit by April 14 an abstract of roughly 125-150 words. Your abstract should summarize the key points made in the paper and do so in language that is understandable to someone who has not done research in this area. Please email me a copy of the abstract so that I can add it to the conference program. Abstracts can also be included in the beginning of the paper itself

Paper Guidelines

- Papers should be 25-30 typewritten pages in length.
- Each paper must include both footnotes and a complete bibliography indicating all of the sources used in preparing the paper. You may use parenthetical citations instead of footnotes, if you wish, but students have generally found that a more traditional footnote style provides greater flexibility, particularly if you want to use some of the notes to make comments not easily integrated into the body of your paper.
- Papers should be formatted with a size 12 “Times” font. They should be double-spaced with 1” margins on all sides.
- Each paper must have a separate title page.
- Headings and subheadings can be very useful as a way to help organize your paper and guide your readers through it.

Class Conference

At the end of the course, we will hold a class conference, organized into a series of thematic panels where you will each present your paper and comment on the papers of two other students. I will serve as chair. To keep things moving, I will be ruthless about time constraints.

Each paper presenter will have 8-10 minutes to explain to the class the focus of your research, the question you attempted to answer in the paper, and your conclusions, including any interesting insight you developed as a result of the project. Generally, it is better to work from an outline, rather than reading a prepared statement.

Each of the two discussants will then have 3-5 minutes to critique the paper. You should offer positive comments (what you liked, found interesting, etc.) and mention areas where you think it could have been stronger, or issues you feel it did not fully address. Try to focus generally on the substance of the paper, rather than its style. (Those comments can be made in writing on the paper itself.) Please make sure to give the author the copy of the paper.

There will then be a period of roughly 5-8 minutes for general discussion of each paper. The presenter can use this time to respond to some of the comments made.

Final Paper

When you submit your final paper, please include the drafts on which your readers made their comments. While you may wish to make changes in the paper responding to what the discussants have said, you should not feel it necessary to respond to all of them. The paper ultimately is your own product and the comments are simply intended to help you get a sense of how others are reacting to what you have written.

Syllabus

I. The Search for Justice

A. Course Introduction--- 1/22, 1/24

- Stephen R. Ratner, "International Law: The Trials of Global Norms," *Foreign Policy* (Spring 1998), No. 110, pp. 65-80 (Handout)
- Rochester, *Peril and Promise of International Law*, Chapter 1

B. International Law: Key Concepts--- 1/29

- Rochester, *Peril and Promise of International Law*, Chapter 2-4

C. Evolving Regimes--- 1/31

- Rochester, *Peril and Promise of International Law*, Chapters 5-6, 8-9

D. Developing a Research Proposal- week of 2/5, 2/7 (Schedule individual meetings- No classes on those days)

II. International Humanitarian Law: The Evolving Global Regime

A. Historical Perspectives: From Nuremberg to the Ad Hoc Tribunals---2/12

- Justice Jackson's Report to the President on Atrocities and War Crimes, June 7, 1945
http://avalon.law.yale.edu/imt/imt_jack01.asp (BB)
- Statement by Justice Jackson on War Crimes Trials Agreement, Aug. 12, 1945
http://avalon.law.yale.edu/imt/imt_jack02.asp (BB)
- Judgment of the International Military Tribunal for the Trial of German Major War Criminals
http://avalon.law.yale.edu/subject_menus/judcont.asp (BB)
- "In Re Yamashita," United States Supreme Court, February 4, 1946, 327 U.S., *Justicia*,
<https://supreme.justia.com/cases/federal/us/327/1/case.html> (BB)
- Michael D. Biddiss, "From the Nuremberg Charter to the Rome Statute: A Historical Analysis of the Limits of International Criminal Accountability," in *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, Ramesh Chandra Thakur, ed. (Tokyo: United Nations University Press, 2002), pp. 42-60 (ER)

B. Building Global Institutions: The International Criminal Court---

1) The Initial Battle: The Creation and Design of the ICC--- 2/14

- "Rome Statute of the International Criminal Court." Rome, July 17, 1998, (in force, July 1, 2002) <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> (BB). See especially, Articles 5-8, 11-16, 22-25, 27-29, 33-34, 42, 77, 86-87, 98 [Supplement]
- David Wippman, "The International Criminal Court," in *Politics of International Law*, Christian Reus-Smith, ed. (West Nyack, NY: Cambridge University Press, 2004), pp. 151-188 (ER)
- David Kaye, "Who's Afraid of the International Criminal Court?" *Foreign Affairs*, Vol. 90, No. 3 (May/June 2011), pp. 118-129 (ER)
- Keith Pesto, "The International Criminal Court: An Opposing View," *Juniata Voices*, Vol. 12, (2012), Apr. 27, 2012, Vol. 12, pp. 135-140.
http://www.juniata.edu/services/jcpress/voices/pdf/2012/jv_2012_135-140.pdf (BB)

2) Political Challenges---2/19

- United Nations, Security Council, Resolution 1593 (March 31, 2005) Doc. S/RES/1592 (2005) Online: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1593%282005%29 (BB)
- International Criminal Court, Pre-Trial Chamber I, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir,” March 4, 2009, Doc. ICC-02/05-01/09, Online: <https://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (BB)
- David Hoile, “ICC: The Failure that Keeps on Failing,” *New African* (March 2105), pp. 56-57, Online: <http://newafricanmagazine.com/icc-failure-keeps-failing/> (BB)
- “The International Criminal Court on Trial: A Conversation with Fatou Bensouda,” *Foreign Affairs*, Vol. 96, No. 1 (January/February 2017), pp. 48-53 (ER).
- Jean-Baptiste Jeangene Vilmer, “The African Union and the International Criminal Court: Counteracting the Crisis,” *International Affairs*, Vol. 92, No. 6 (2016), pp. 1319-1342 (ER)
- John Bolton, “We Will Not Cooperate with the International Criminal Court,” *Vital Speeches of the Day* (November 2018), pp. 302-305 (BB)

C. National Courts and the Enforcement of International Humanitarian Law--- 2/21

- Henry A. Kissinger, “The Pitfalls of Universal Jurisdiction,” *Foreign Affairs* Vol. 80, No. 4 (July/August 2001), pp. 86-96 (ER)
- Kenneth Roth, “The Case for Universal Jurisdiction,” *Foreign Affairs*, Vol. 80, No. 5 (September/October 2001), pp. 150-154 (ER)
- United Kingdom, House of Lords, “Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex parte Pinochet,” March 24, 1998, in *International Legal Materials*, Vol. 38 (1999), p. 581. [Supplement]
- International Court of Justice, “Democratic Republic of Congo v. Belgium: Case Concerning the Arrest Warrant of 11 April 2000, ICJ Reports, Vol. 2002 (Judgment of February 14, 2002) Online: <http://www.icj-cij.or3/docket/files/121/8126.pdf> [Supplement]

• Litigation Exercise #1- Tuesday, February 26: The ICC Trial of Omar al-Bashir

D. Protecting Non-Combatants: The Syrian Civil War and the Rights of Migrants--- 2/28, 3/5

- UN High Commissioner for Refugees, “Convention and Protocol Relating to the Status of Refugees,” Convention signed in Geneva, July 28, 1951, and the Protocol signed in New York, January 31, 1967 <http://www.unhcr.org/3b66c2aa10.html> (BB)
- European Court of Human Rights, “Khalaf and Others v. Italy (Judgment),” Application No. 16483/12, December 16, 2016, Online: <http://hudoc.echr.coe.int/eng?i=001-170054>. [Note: Link for informational purposes only. This is a very long case discussed in Nanaji-Nogales below.]
- Jaya Nanaji-Nogales, “Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights,” *ASIL Insights*, Vol. 20, No. 1 (January 4, 2016) <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights>. (BB)
- Richard Lewis, “International Law Buckles Under Weight of Refugee Crisis, IPI Global Observatory (March 4, 2016) Online: <https://theglobalobservatory.org/2016/03/international-law-buckles-under-weight-of-refugee-crisis/>. (BB)
- Alexander Betts and Paul Collier, “Help Refugees Help Themselves: Let Displaced Syrians Join the Labor Market,” *Foreign Affairs*, Vol. 94, No. 6 (November/December 2015), pp. 84-92 (ER)

• Litigation Exercise #2- Thursday, March 7: The Belugan Trial of Bashar al-Assad

III. International Environmental Law: Global Ad Hockery?

A. A Customary Law Foundation? Trail Smelter----Pulp Mills Dispute

1) Traditional Perspectives: The Trail Smelter Legacy---3/26

- Springer, *Cases of Conflict*, pp. 1-83 (Indonesian haze)
- “Trail Smelter Arbitration: United States, Canada (Final Decision, April 16, 1938, and March 11, 1941),” *Reports of International Arbitral Awards* 3(1949), 1905-1982. Online: http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf. [Supplement]
- ICJ. “Corfu Channel Case (United Kingdom v. Albania) (Merits),” April 9, 1949, *ICJ Reports* (1949): 4, General List No. 1, Online: <http://www.icj-cij.org/docket/files/1/1645.pdf>. [Supplement]
- “Lake Lanoux Arbitration (Spain v. France),” November 11, 1957, *Reports of International Arbitral Awards* 12(1957): 281, Online: <http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143747E.pdf>. [Supplement]

2) Emerging Norms--- 3/28

- ICJ, “Nuclear Tests (New Zealand v. France),” December 20, 1974, *ICJ Reports* (1974): 457, General List No. 59 Online: <http://www.icj-cij.org/docket/files/59/6159.pdf>. [Supplement]
- ICJ, “Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Judgment), September 25, 1997,” *ICJ Reports* (1997): 7 Online: <http://www.icj-cij.org/docket/files/92/7375.pdf>. [Supplement]
- ICJ, “Case Concerning Pulp Mills on the River Uruguay: Argentina v. Uruguay (Judgment of April 20, 2010),” Online <http://www.icj-cij.org/docket/files/135/15877.pdf>. [Supplement]
- Springer, *Cases of Conflict*, 197-221 (Uruguayan pulp mills)

B. A Role for National Courts? Bhopal---Kiobel and the Future of the Alien Tort Claims Act--- 4/2, 4/4

- Springer, *Cases of Conflict*, pp. 84-111 (Baia Mare cyanide spill)
- “The Bhopal Case,” U.S., Court of Appeals, Second Circuit, 809 F2d 195 (Judgment of January 14, 1987) <http://openjurist.org/809/f2d/195/united-states-court-of-appeals-second-circuit> [Supplement]
- Cameron Barr, “Carbide’s Escape: Why India’s Awkward Strategy Forced The Settlement,” *The American Lawyer* (May 1989), pp. 99-105 http://amlawdaily.typepad.com/files/bhopal_pdf.pdf. (BB)
- “Kiobel v. Royal Dutch Petroleum,” United States Supreme Court, April 17, 2013, 569 U.S. 10.1491, Online: http://www.supremecourt.gov/opinions/12pdf/10-1491_16gn.pdf (BB)
- Pierre N. Laval, “The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court, *Foreign Affairs*, Vol. 92, No. 2 (March/April 2013), pp. 16-21 (ER)
- José A. Cabranes, “Withholding Judgment: Why U.S. Courts Shouldn’t Make Foreign Policy,” *Foreign Affairs*, Vol. 94, No. 5 (September/October 2015), pp. 125-133 (ER)

- **Litigation Exercise #3- Tuesday, April 9: The ICJ Dispute Between Durango and Crimona**

C. Developing Environmental Regimes--- 4/11

- James Gustave Speth, *Red Sky at Morning: America and the Crisis of the Global Environment* (New Haven, CT: Yale University Press, 2004), pp. 78-116 (ER)
- Springer, *Cases of Conflict*, pp. 112-143 (Sellafield MOX plant)

D. Institutional Ad Hockery and the Challenge of Ship-Breaking---4/16

- William Langewiesche, "The Shipbreakers," *Atlantic Monthly*, Vol. 286 (August 2000), No. 2; pp. 31-49, Online: <http://www.wesjones.com/shipbreakers.htm> (BB)
- Springer, *Cases of Conflict*, pp. 169-196 (Clemenceau voyage)
- IMO, "Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships," May 19, 2009, IMO Doc. SR/CONF/45
Online: <http://ec.europa.eu/environment/waste/ships/pdf/Convention.pdf>. (BB)

E. A More Comprehensive Approach: The 1982 Law of the Sea Convention--- 4/18

- Springer, *Cases of Conflict*, pp. 144-168 (Turbot war), 221-234
- Permanent Court of Justice (PCA), "South China Sea Arbitration (Award)" (Philippines v. Peoples Republic of China) *PCA Case No. 2013-19*, July 12, 2016, Online: <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>. [Note: Link for informational purposes only. This is a very long case discussed in McDorman below.]
- Tom L McDorman, "South China Sea Arbitration," *ASIL Insights*, Vol. 20, No. 17 (November 18, 2016) Online: <https://www.asil.org/insights/volume/20/issue/17/south-china-sea-arbitration> (BB)
- Mira Rapp-Hooper, "Parting the South China Sea: How to Uphold the Rule of Law," *Foreign Affairs*, Vol. 95, No. 5 (September/October 2016), pp. 76-82 (ER)
- Ely Ratner, "Course Correction: How to Stop China's Maritime Advance," *Foreign Affairs*, Vol. 96, No. 4 (July/August 2017): 64-72 (ER)

F. Climate Change: Assessing the Paris Agreement--- 4/23

- United Nations, Framework Convention on Climate Change, Conference of the Parties, 21st Session, "Adoption of the Paris Agreement," December 12, 2015, Doc. FCCC/CP/201/L.9/Rev.1. Online: <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>. (BB)
- Elizabeth Burleson, "Paris Agreement and Consensus to Address Climate Challenge," *ASIL Insights*, Vol. 20, No. 8 (March 29, 2016)
Online: <https://www.asil.org/insights/volume/20/issue/8/paris-agreement-and-consensus-address-climate-challenge> (BB)
- Veerabhadran Ramanathan, Jessica Seddon and David G. Victor, "The Next Front on Climate Change: Now to Avoid a Dimmer, Drier World," *Foreign Affairs*, Vol. 95, No. 2 (March/April 2016), pp. 135-142 (ER)
- Joshua Busby, "Warming World: Why Climate Change Matters More Than Anything Else," *Foreign Affairs*, Vol. 97, No. 4 (July/August 2018): 49-55 (ER)

• **Litigation Exercise #4- Thursday, April 25, Imperian Court: The Bizengan Cyanide Spill**

IV. Preparation and Presentation of Research Papers

- A. **Review and critique assigned papers-** week of April 29 [No class- 4/30, 5/2]
- B. **Class Conference---** Saturday, May 4, 11:00 a.m.---5:00 p.m (tentative date)