ESIL Interest Group on International Courts and Tribunals
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Agora Proposal
INTERNATIONAL ADJUDICATION AS A GLOBAL PUBLIC GOOD?

Interest Group submitting the proposal: Interest Group on International Courts and Tribunals (IGICT)

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Topic:
The organizers of the 2017 Annual Conference define global public goods as *goods with benefits and/or costs that affect all countries, people, and generations. They include inherently public global goods, such as a healthy climate and the fight against terrorism, and domestic public goods whose global regulation makes every one better off, such as free trade and public health*. The proposed agora explores whether international adjudication fits into this definition, or other possible definitions of 'global public goods', in order to assess what is the inherent 'plus' of international adjudication at the international and domestic level.

Chair:
Serena Forlati (University of Ferrara), Co-convener of the IGICT
Discussing the role of international adjudication as 'global public good' offers the opportunity to reflect on whether the current institutional framework of international adjudication is instrumental to promoting the general interests of the international society. However, the different forms of 'backlash' currently taking place against international courts and tribunals urge a more fundamental reappraisal of the role of international adjudication as such. The proposed discussion will thus help shedding light on the response of International Law to such backlashes.

Speakers:
Joshua Paine (Max Planck Institute Luxembourg), ***Evaluating the distinctive contribution of international adjudication as a global public good***
This paper suggests that international adjudication is not itself a global public good, but international adjudication makes a distinctive contribution to securing goods with broad community benefits, whose absence would have wider costs. Specifically, I suggest that adjudication makes an important contribution by clarifying the content of international norms and incrementally adapting them to changing circumstances; and by pushing disputing parties to resolve their disputes peacefully and consistently with other-regarding procedural norms.
The distinctive contribution of adjudication in clarifying and developing international law reflects the immense semantic authority of international tribunals. While this function can be performed by other actors (eg national courts, the community of scholars), international adjudication resolves the meaning of international norms in a relatively authoritative manner.
Thus international adjudication provides legal certainty, which allows a range of actors to plan their affairs. Adjudicators also perform a crucial function of incrementally adapting existing international norms to changing social demands and material facts. This contribution should be appreciated in light of international law's limited processes for law adjustment. The distinctive contribution of international adjudication to the wider community interest of peacefully resolving disputes lies in the ability of adjudicators to authoritatively resolve contested issues of law and fact, and to enforce obligations of the disputing parties to cooperate and to consider other affected interests. Compared to resolving disputes through negotiation alone, adjudication enables the interests of other treaty parties to be considered (eg through third party submissions in the WTO

and investment contexts). Adjudication only offers limited avenues for the consideration of affected third party non-state interests. More flexible procedures, such as compliance review, may give greater voice to such interests. Nevertheless, the function of international adjudication in resolving international disputes should be characterised as partly serving a broader community interest, beyond the concerns of the disputing parties.

Paula W Almeida (Getulio Vargas Foundation Law School), ***Enhancing ICJ procedures in order to promote global public goods: overcoming the prevailing tension between bilateralism and community interest***

By developing international law, international courts – 'intermediate Global Public Goods ('GPG')' – can also contribute to the protection and promotion of final GPG. In international legal discourse, the term is often linked but not limited to the idea of *erga omnes* norms. Especially due to the recognition and application of *erga omnes* obligations, the ICJ is capable of promoting GPG by adjudicating inter-state claims. In addition to the general challenges GPG face, there are specific obstacles whist their promotion by international adjudication. The aim of this paper is, particularly within the ICJ, to appreciate the relentless demands involving GPG and present a non-traditional response to its challenges.

The main obstacle faced by the ICJ relates to the existing tension between the bilateral nature of its own proceedings and the multilateral nature of the conflicting substantive law. Whereas the rules of substantive law - that protect community interests - are considered as GPG, those guiding international adjudication are of a procedural nature. As procedure may guide and shape the application of substantive law, it should itself be interpreted and developed in a manner to ensure community interests.

Our proposal is that using its power to 'frame rules for carrying out its functions' (Art. 30 of the Statute of the ICJ), independently from consent, the Court should assume expanded procedural powers in order to ensure the effective application of substantive law whenever GPG are at issue. Most procedural rules can be adjusted and tailored for multiparty aspects (enhancing participatory mechanisms) with the aim of protecting community interests and enhancing international court's legitimacy. It is up to the Court to find the balance between State's rights and commonly aspired goals, acknowledging the relationship between the emergence of soft international law-making (procedure) and its role of addressing the provision of GPG (substance).

Ralph Wilde, ***International human rights adjudication as a global public good: the special case of extraterritoriality***

Reflecting a common trope in international dispute settlement generally, the conventional wisdom in human rights law is that domestic judicial remedies are the ideal/norm/default. The public good served by international judicial remedies is the provision of a subsidiary, exceptional corrective of last resort, providing a remedy if the domestic option is absent or deficient. The merits of this general approach are placed into question when the focus is on the situation of the rights of people affected by the actions of foreign, non-sovereign states (for example the people in Crimea subject to Russian occupation). The profoundly different political relationship between people and a foreign state, when compared to people and the state in whose territory they reside, places into question commonplace ideas about the dialectical relationship between the normative character of domestic versus international remedies, and so, in consequence, such ideas about the public good served by international judicial remedies. The legitimacy of domestic human rights review, and its position as the ideal when compared to international human rights review, is rooted in part in the role national courts play within the domestic polity. This creates the potential for tensions to arise when such courts are called up on to adjudicate conformity to human rights standards by the executive branch of their state when it is acting abroad, affecting people who do not form part of the national polity. Equally, the mismatch between the identity of the polity national courts are affiliated to, and the identity of a foreign state acting in the territory of that national state polity, places into question the validity of such courts exercising jurisdiction over the foreign state. The present paper will explore these and other tensions, considering the thesis that in the case of extraterritorial state action, the exact opposite of the commonplace assumption about the dialectic between national and international remedies should prevail: international human rights adjudication should be regarded as serving a different public good, not as a secondary last resort, but as the primary means of ensuring that remedies are provided in a manner that sits above and thereby transcends the irreconcilable political tensions manifest in domestic human rights remedies.

Information on speakers: please see the attachments.