

Public International Law

organizations; refugee law; legal discourse

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Class 10: March 3, 2011

Legal theory of international organizations

What rights and liabilities does an organization have?

What does functional necessity theory say?

Klabbers' response:

- ▶ Don't ignore the fundamental tension between organization and its members.
- ▶ Don't hide political views about organization within a purported legal rule.

Refugee Convention

Refugee definition:

- ▶ outside country of nationality (or last habitual residence if stateless) AND
- ▶ unable or unwilling to return due to
- ▶ fear (subjective) AND
- ▶ that is well founded (objective) AND
- ▶ of persecution AND
- ▶ on account of
 - ▶ race OR
 - ▶ religion OR
 - ▶ nationality OR
 - ▶ membership of a particular social group OR
 - ▶ political opinion

Refugee Convention

Exceptions if there are serious reasons to believe person committed:

- ▶ crime against peace OR war crime OR crime against humanity OR
- ▶ serious non-political crime prior to entering country of refuge OR
- ▶ acts contrary to purposes and principles of UN

Refugee Convention

States are obligated:

- ▶ not return refugee to a territory where life or freedom would be threatened on account of one of the protected grounds (“non-refoulement”)
- ▶ to accord recognized refugees a set of enumerated social, economic, civil, and political rights

Refugee Convention

To fulfill these obligations, states must create adequate procedures for determining refugee status. This includes:

- ▶ access
- ▶ adjudication
- ▶ review

States must also have adequate reception conditions for asylum seekers awaiting status determination.

The Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR) prohibits states parties from:

- ▶ depriving person of life, except as via lawful execution (Article 2)
- ▶ committing torture (Article 3)

This also includes obligation not to return person to territory in which he or she would face risk of having these rights violated.

EU Law

In addition to obligations under ECHR, EU members are bound to principle of non-refoulement and to guarantee right of asylum in accordance with Refugee Convention.

EU law also contains rules about which state has responsibility for adjudicating an asylum claim. (Why is this important for EU states in particular?)

The first state that the asylum seeker entered generally has responsibility. (Which states do you think this responsibility will fall to in practice?)

BUT this does not mean that other states *must* transfer the asylum seeker back to that state...

M.S.S. v. Belgium

John Young, Senior Policy Officer, UNHCR Europe Bureau

Legal discourse

Prediction versus persuasion

Legal discourse

Who is your audience?

What is your objective?

Legal discourse: Facts

Presenting facts:

- ▶ facts based on empirical evidence
- ▶ difference between what you observe and what you “know”
- ▶ consider source and reliability of each piece of evidence
- ▶ distinguish facts from arguments or legal conclusions
- ▶ demonstrate your own credibility
- ▶ don't omit “bad” facts and don't overstate “good” facts
- ▶ conclusions readers themselves draw are more powerful than those “fed” to them

Legal discourse: Facts

Compare:

- ▶ “Ethnic minorities are under constant attack in this city. Because of the police force’s outrageous neglect of this situation, there is no possibility for minorities to receive any protection from the state.”

with . . .

Legal discourse: Facts

. . .

- ▶ “While the circumstances varied, the ten families we interviewed today all appeared frightened and all requested that the police provide greater security. In one building there are only three minority residents remaining, all elderly women whose families have moved to other cities to avoid being attacked. These women report that they spend the nights together in one apartment, placing a heavy refrigerator in front of the door to try to block intruders. They say that a group of armed men in their twenties or thirties visited the building on 2 January and threatened to kill them. While the police came and chased the men away, it does not appear that there has been any investigation of the incident, and the women fear that the men will come again at any moment.”

Legal discourse: Law

Presenting law:

- ▶ distinguish between settled and unsettled areas of the law (and recognize differing levels of certainty over what a court will rule in each area)
- ▶ cite authority for all statements and make sure you understand the weight given to different types of sources
- ▶ present counter-arguments and explain why you have rejected them
- ▶ don't hide “bad” law and don't overstate “good” law
- ▶ be intellectually honest

Legal discourse: Law

Compare:

- ▶ “Under international law, persecution includes acts by non-state agents.”

with . . .

Legal discourse: Law

. . .

- ▶ “The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status explains that harm caused by non-state agents may constitute persecution under the Refugee Convention if it is ‘knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.’ While the UNHCR’s interpretation is not binding law, it is consistent with the European Court of Human Rights’ interpretation of the state action (or lack thereof) required for an act to constitute torture under Article 3 of the ECHR. That interpretation is binding on Spain, and while it does not definitively resolve the question of persecution under the Refugee Convention, it provides a useful guidepost.”

Legal discourse: Applying law to facts

Applying law to facts:

- ▶ explain clearly and succinctly why the facts lead to your legal conclusion based on the rules you have just described
- ▶ be as specific as possible in comparing your facts to those at issue in the legal authorities from which you have drawn
- ▶ be clear about how good the match is—to what extent a given authority is “on point”
- ▶ present counter-arguments and explain why you have rejected them

Legal discourse: Applying law to facts

Compare:

- ▶ “The asylum-seeker in the present case faces persecution under UNHCR’s interpretation of international law.”

with . . .

Legal discourse: Applying law to facts

. . . .

- ▶ “In the present case, while the authorities responded to the reported threats, they have not further investigated the incident. This suggests that they may be unable to offer effective protection against the feared harm, or that they may even knowingly tolerate it. In either case, this would meet the state action requirement for persecution under UNHCR’s interpretation.”

Legal discourse: General writing tips

Your audience usually has very little time, so: (1) be succinct, and (2) lead with conclusions.

Provide roadmaps.

Provide summary or topic sentences where appropriate.

Avoid passive voice.

Avoid jargon and make things as simple as possible. Do not assume readers are familiar with this area of the law.

IRAC (issue, rule, application, conclusion) can be very helpful, but don't be constrained by it.

Legal discourse: Structuring your memo

I. Issue

- ▶ e.g., “The issue is whether Spain violated international law by expelling Mr. X to Kosovo.”

II. Brief Answer

- ▶ e.g., “It appears that Spain’s action here violated the Refugee Convention because Mr. X was at risk of serious physical harm by non-state agents and the authorities in Kosovo were unable to offer effective protection. ...”

. . . .

Legal discourse: Structuring your memo

. . . .

III. Facts and Background

- ▶ if you chose a hypothetical topic, you may make up some or all of the facts
- ▶ if you are writing about a real topic, you should also highlight which facts are not known

IV. Analysis

- ▶ including statements of law and application of law to fact
- ▶ use subsections to address multiple issues, as needed depending on your topic

V. Conclusion

- ▶ keep it short

Written project: Due date, format etc.

Due April 11 at noon.

15-20 pages, typed, double-spaced, Times New Roman 12 point, 1 inch margins.

Citations may be done in any format, just be consistent. Whatever your format, it is very important that *cite all sources* on which you rely.

Written project: presentation

New plan for presentations: They will be done prior to April 11, so that you can then incorporate feedback. Choice of:

Tuesday, April 5 or Thursday, April 7

Which do you prefer?

Final exam

In class on Thursday, April 14.