Issues of Concurrent Jurisdiction

As the number of international and regional tribunals has expanded in recent years, the possibility that multiple bodies will have conflicting, competing, or concurrent jurisdiction over the same disputes has also increased. The 2012 institute began with a session in which participants could explore the array of issues emerging from the increased overlap found among international, regional, and domestic courts. The participants acknowledged that such overlap can produce certain benefits, including the development of international norms and enhanced access to justice for individuals, states, and other entities. However, participants showed concern for the potential conflicts that jurisdictional overlap may also create.

An article by Rosalyn Higgins, former Judge and President of the ICJ, served as a springboard for the discussion. In “A Babel of Judicial Voices? Ruminations from the Bench,” Judge Higgins points out that overlapping jurisdiction among courts may result in fundamental questions about whose views should prevail and which norms are applicable. She explores several possible solutions, including creating an institutional hierarchy and establishing a hierarchy of international norms. Judge Higgins is not persuaded that either of these solutions is the answer and suggests that, for now, judges should instead develop a respect for and use of other courts’ judgments to promote consistency.

During their discussion, BIIJ participants focused on the various types of conflict that may emerge in situations of overlapping jurisdiction. One type occurs when more than one court is seized of the same matter, resulting in confusion and sometimes even inaction. Such lack of coordination and collaboration has been evident in the attempts to prosecute former Chadian dictator Hissène Habré. Belgium and Senegal simultaneously asserted jurisdiction over Habré’s case, both finding probable cause to prosecute him for his alleged crimes in Chad between 1982 and 1990. Senegalese courts finally dismissed the case, claiming they lacked jurisdiction for the crimes in question, while Belgian courts asserted universal jurisdiction over the case, claiming that international crimes had been committed abroad. However, Senegal, which has been Habré’s place of residence since 1990, refused to extradite him to Belgium. The African Union became involved at Senegal’s request, and indicated that Senegal should proceed with prosecution. In order to do so, Senegal modified its laws to allow for the prosecution of the alleged crimes and requested millions of dollars from the international community to conduct the investigation and prosecution. Funding negotiations, however, took a considerable amount of time, and in the interim, Belgium brought the case in 2009 to the ICJ, demanding that Senegal either prosecute or extradite (see sidebar, opposite page). Meanwhile, a Chadian national brought a case against Senegal before the African Court on Human and Peoples’ Rights (ACHPR), attempting to suspend that nation’s ongoing proceedings against Habré on the grounds that it had violated the principle of non-retroactivity of criminal law. This case was deemed inadmissible since Senegal had not made any declaration accepting the jurisdiction of the Court to deal with applications.
brought by individuals. Finally, the Court of Justice of the Economic Community of Western African States (ECOWAS) issued a ruling that prevents Senegal from trying Habré in its national courts on the basis of nullum crimen sine lege, but permits a trial within the scope of “an ad hoc special procedure of an international character.” The struggle over jurisdiction of Habré’s case has led to a decade-long stalemate, and ironically has prevented his being prosecuted anywhere, despite the many jurisdictions – two national, two regional, and one international – that have been involved.

The Habré situation has implications reaching beyond the disposal of the case itself. The delay and conflict over jurisdiction have called into question both the legitimacy of the courts involved and the credibility of international and regional justice more generally. Furthermore, the situation has highlighted the threat of a similar jurisdicational “tug-of-war” arising among other courts, as well as the pressing need to determine how such situations might be resolved and by whom. BIIJ participants agreed that, should this type of predicament not have a clear and quick resolution, a dangerous precedent could be established, one that could undermine justice and potentially violate the human rights of both accused parties and victims. One BIIJ participant summed up his view of the Habré situation thus: “It has been almost a complete failure of justice at every level – for victims, accused, and for the international institutions. While I think competition can be a good thing, if you look to the efficacy of what is required and look to the spectacle it has given rise to, it does not create respect for what has resulted... International law and justice begin to fray at the edges with these types of instances.”

Jurisdictional overlap may give rise to a second kind of conflict, when the body of substantive law differs between two international courts, or the law of a country differs from that applicable in a regional or international tribunal to which it is a party. Higgins describes the phenomenon as a “competition of norms,” and recognizes that a choice of one set of

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

ICJ Judgment of 20 July 2012

V. Remedies

The Court recalls that Senegal’s failure to adopt until 2007 the legislative measures necessary to institute proceedings against Mr. Habré on the basis of universal jurisdiction delayed the implementation of its other obligations under the [United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984]. It further states that Senegal was in breach of its obligation under Article 6, paragraph 2, to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution. In failing to comply with its obligations under those provisions, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. The Court concludes, therefore, that Senegal must take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

Excerpt from the ICJ Press Release (see footnote 5).
plausible applicable norms over another could lead to different solutions. A country’s criminal code, for example, may differ from the international criminal law that the country has agreed to enforce by virtue of a treaty agreement, or the case law of one international court may be deemed more favorable to particular doctrines or interests than that of another. Recognizing such inconsistencies, applicants may resort to “forum shopping” in situations of overlapping jurisdiction – taking into consideration factors such as “court access, applicable procedure, court composition, its case-law and even its capacity to issue urgent orders” – in order to find the court most likely to favor them. This kind of forum selection may give undue advantage to certain parties in a case.

Some countries have avoided conflicts in substantive law, one judge pointed out, by meticulously comparing their local laws to the Rome Statute when joining the International Criminal Court, thereby guarding against inconsistencies. Another judge noted that if international criminal law were made part of the domestic legislation of all states, then such conflicts could be largely avoided. Furthermore, resolving conflicts of substantive law would eliminate the issue of which court is best suited to take on a particular case. A participant declared, “What difference does it make which court tries an accused if the substantive law to which he is subjected and the definition of crimes is the same? That issue fades away.”

BIIJ participants discussed another factor that can come into play when there is a conflict between substantive law at the state and international levels – non-compliance with judgments. When the ECHR held in the “prisoners’ voting rights case” that Britain’s blanket ban on prisoner voting was a violation of the European Convention on Human Rights, the United Kingdom threatened to withdraw from the Convention in order to sidestep compliance with the court’s ruling. This threat brought up the question of what such a move would mean for the U.K.’s membership in the European Union (EU), given that that the EU is now itself a party to the Convention. By examining this case, the participants recognized that conflict between national, regional, and international tribunals has a very far-reaching effect, going beyond the court systems and into the very heart of contemporary international relations.

Finally, participants identified a third type of conflict associated with jurisdictional overlap, that arising from differences in the interpretation of the same legal norm. Even where tribunals agree on the substantive law to be used, “the reasons set out in the judgments may … show divergent interpretations of the same legal principle, thus undermining the unity of international law, or even its certainty.” Higgins notes that this kind of conflict is exemplified by the ICTY Tadić case, where the tribunal used an “overall control” test in contrast to an “effective control” test as elaborated by the ICJ in the Nicaragua v USA case. On the other hand, Higgins points out that the ICTY’s overall control test pertained to a different context, and even a different issue, from the effective control test in the Nicaragua case. The ICTY’s test was necessary to determine whether a conflict was an international one for purposes of grave breaches of the Geneva Conventions, while the ICJ’s test was part of an analysis of state responsibility for the actions of irregular forces.

After commenting on the various kinds of conflicts that may emerge through jurisdictional overlap, BIIJ participants pondered possible solutions to the problem. One solution raised was that promoted some time ago by Gilbert Guillaume, former ICJ Judge and President. He suggested the establishment of a hierarchy in the international legal order that would empower certain courts – and in particular the ICJ – to ensure consistency in international jurisprudence. BIIJ participants pointed out that it is unclear which entity could set up such a system. Since international and regional courts are established by different constituencies and instruments, no single body has the authority to give order to these diverse agreements.
Some participants noted that there are international courts whose statutes already mandate certain kinds of hierarchical relationships. The SCSL, for example, has concurrent jurisdiction with the courts of Sierra Leone; however, in cases of conflict, the Special Court takes primacy over its domestic counterparts. Conversely, the ICC’s “complementarity principle” specifies that domestic criminal prosecutions should take precedence over those of the ICC, provided that the domestic judicial system is willing and able to carry them out.17 The specificity of the complementarity principle has not, however, prevented disagreement about which bodies – national or international – are entitled to prosecute in the current ICC cases concerning alleged crimes in Kenya and Libya.18

Overall, however, participants agreed that the political will necessary to set up such a generalized institutional hierarchy does not exist. In fact, it was noted that the notion of political sovereignty was “the elephant in the room” during this discussion. Thus, even if courts were able to develop a hierarchy to solve issues emerging from overlapping jurisdiction and the fragmentation of law it may engender, the politics of sovereign states would inevitably interfere. “When there is serious conflict or competition between judicial and political grounds,” one participant declared, “judges will always lose. Judges don’t like to accept that.”

Participants recognized that while issues of political sovereignty may discourage any attempt to establish a hierarchy of international judicial institutions, the reality of sovereign political interests makes it even more important for international courts to work together to increase their sway, credibility, and legitimacy. One BIIJ participant summarized the unlikelihood of a judicial hierarchy like this: “What it goes to show is we have all these international bodies, some of them existing for a very long time. But the length of existence doesn’t seem to have gelled into any particular order or hierarchy. It’s still a work in progress. In the end, adjudicators on these various bodies should not see multiplicity as a liability, but rather as an asset.” If a formal hierarchy of institutions is not feasible, then international courts and tribunals should at least strive toward recognizing a hierarchy of international legal norms. Many judges commented, however, that such an endeavor is also fraught with difficulties.

BIIJ participants next reflected on the feasibility of establishing doctrines of deference among international courts. Rather than a strict institutional hierarchy, a more helpful and cautious approach would be for courts to defer to other institutions when appropriate. In such a scenario, courts could elect not to exercise, or to defer, jurisdiction until another entity seized of the matter has made a decision.

Some participants suggested that courts with general jurisdiction should defer to those with specific jurisdiction. This suggestion was met by concern from others. An inter-state dispute judge noted, “There are courts with competence in certain areas, like the WTO, created to handle certain instances. On the other hand, the ICJ was created to have universal, general jurisdiction that covers all types of matters. If we were to say that there is a specific court with special knowledge about a type of matter, and that general jurisdiction courts must defer, it would create a very confusing state of affairs.” A human rights judge observed that while jurisdictional deference might be good in theory, its practice is another matter. The public would not necessarily understand a court’s reason “for saying no,” and perhaps perceive the decision to defer jurisdiction as an abdication of responsibility. Finally, a criminal judge expressed concern about what a court’s decision to defer jurisdiction would mean for victims of alleged crimes and their access to justice. Participants also observed that the larger an area within which institutional deference was attempted, the harder it would be to apply. While regulating the courts within the European Union might be possible, implementing a deference policy among all of the world’s international and regional tribunals would prove as impossible as establishing an institutional hierarchy.
As the BIIJ participants worked through the challenges of institutional hierarchy and doctrines of deference, it became apparent that Rosalyn Higgins was perhaps accurate in her conclusion that awareness of and mutual respect for each other’s courts and judgments are the best hedge against systemic fragmentation. But, participants added, this review and respect should be more than just surface acknowledgment. One judge declared, “Discrepancies between international courts are very dangerous for the state of law – international law – so not only do we need to read each others’ judgments as much as possible, we need to follow or explain why we distinguish our judgments.” Furthermore, decisions from other courts that are not applicable should be filed away for future reference, and disagreement with judgments coming out of other tribunals should not be dismissed but rationally discussed. “Don’t just throw a judgment out because it didn’t come from your jurisdiction,” said a judge. “Look at it for what it is worth!” Participants also suggested that counsel might contribute to knowledge of other courts’ decisions by citing them in their briefs and thereby bringing them to the attention of judges.

Participants supporting the idea of awareness and mutual respect concluded that if they were reading each other’s judgments, then the substantive law of different courts and tribunals would eventually become aligned. So even if not perfect, many participants decided that “review and respect” was the best approach. “I’d like to see a magic solution allowing us to have completely harmonious courts, but things don’t work that way. The best we can hope for is collegiality among international judges – respecting each others’ decisions, taking them into account,” said one judge.

This strategy was, however, met with some skepticism by other participants. One judge described the approach as “wishy-washy” and questioned whether judges could actually be expected to review and respect each other’s judgments in practice. “I think there are very big and difficult questions that pragmatism [as suggested by Higgins] does not answer.” These skeptics felt that while Higgins’ suggestion was good, it is in need of added structure. Rather than merely hoping that judges will consider other judgments, courts should implement an organized approach to ensure that they are reviewing the judgments of other courts relevant to their own cases in a reasoned manner.

It was noted that at least one court is proactive in this regard. The ECHR has an internal body whose role is to make sure that the decisions produced by the court’s various sections are consistent both with one another and with the norms of international law. If a decision differs from these norms, “at least the judges made their decision with this knowledge.” It was suggested that other courts establish a similar procedure for reviewing their own and other courts’ judgments, thereby ensuring that there is consistency both within their institutions and across the array of international courts. “These issues arise through accidental inconsistencies, not deliberate ones. Judges everywhere try to apply consistent law; that is the very essence of justice.”

Participants’ discussion of the conflicts emerging from overlapping jurisdiction ended inconclusively. It was acknowledged, however, that competition among courts does not always engender negative outcomes. Likewise, criticism by politicians was recognized as positive in some respects. To be criticized means that a court is doing important work, one judge noted. Another added, “Both political counterforces and competition between courts with concurrent jurisdiction can lead to better efficiency and procedure. Otherwise, international law and court practice run the danger of becoming esoteric.”

This first session of BIIJ 2012 addressed a number of challenges that arise in the context of a varied and multi-faceted global justice system. It thereby set the stage for the sessions to follow, which examined a variety of topics relevant to contemporary law and legal practice.
Notes


2. Id.


4. Id.


   The reasoning was that since the crimes allegedly committed by Habré — crimes against humanity, war crimes, and torture — were not crimes under Senegalese law at the time they were committed, he could not be tried thereunder retroactively. They were, however, crimes under international law at that time and could thus be addressed by an international body.

8. Higgins, supra note 1, at 792-93.


13. Id.

14. Guillaume, supra note 9, at 302.

15. Higgins, supra note 1, at 794.

16. Id. at 798.


19. Higgins, supra note 1, at 804.