The Impact of International Justice

The idea of an international rule of law embodies many lofty principles and goals. It is clear, however, that without their real-world implementation, the notion remains empty. BIIJ participants thus found it helpful to discuss an important and enduring concern for international justice institutions – the impact of their work and how it might be measured. Much like the fairness and accessibility of international courts and tribunals, their impact is one of the elements to consider when gauging the conformity of contemporary international justice to the emerging notion of an international rule of law.

The impact of international courts and tribunals is complicated to describe and difficult to document. The impact may include successfully preventing armed conflict, securing a peaceful settlement of boundaries, deterring serious violations of the law, achieving the overall objectives of an international treaty, and obtaining compliance with specific judgments. Moreover, the impact may be dependent upon action by a national jurisdiction, which, in turn, might be carried out by the executive, legislative, or judicial branch of the government. Additionally, international tribunals may have an anticipatory effect on the actions of nations or individuals that is difficult to record.

Participants chose to approach the topic by examining two issues: 1) rates of compliance with the decisions of their respective courts and tribunals, and 2) other types of impact created through their work.

One of the definitions suggested for “compliance” was that articulated by Aloysius Llamzon: “Compliance connotes many things, but to be meaningful it should consist of acceptance of the judgment as final and reasonable performance in good faith of any binding obligation.” Participants noted, first of all, that courts and tribunals need to establish “climates of compliance” since most do not have formal enforcement mechanisms. This is the case with ITLOS, for example, as the 1982 United Nations Convention on the Law of the Sea does not provide for such a mechanism. Nonetheless, parties to disputes brought before ITLOS are required to comply with its decisions, which are considered final, and, to date, they have consistently done so.

The WTO is also frequently pointed out as an institution that has an excellent compliance record for its various decisions. Some observers believe that this is due to its ability to impose retaliatory sanctions if the losing party does not come into compliance. But others disagree with this interpretation, believing instead that nations comply less out of fear of retaliation but rather because they believe it is in their interest to do so. They benefit from rules, and care about their reputations as well as their relationships with other countries. Nations also may calculate that if they comply with an unfavorable decision now, in the future when they win, the losing party will also be more likely to come into compliance. Despite this positive attitude by parties, there are an increasing number of cases pending at the WTO Dispute Settlement Body that pertain to compliance issues. “One party states that they have complied completely, while the other says there is non-
compliance,” observed a judge. As a result, a separate set of proceedings have arisen where dispute panels and the Appellate Body determined whether or not the steps taken by the losing party constituted full compliance.

With regard to compliance with ICJ judgments, there was some difference of opinion about how to assess it. Some scholars think that compliance rates for ICJ judgments have been poorly studied and thus little is known about what happens after the judgments are issued. Others believe that states bringing cases under the system of compulsory jurisdiction at the Court do not have the same interest in the judicial process as those that voluntarily bring a case for dispute settlement. Their compliance is thus less certain. One BIJ participant contested such views. “The function of the Court is squarely focused on Chapter VI of the United Nations Charter. A judgment of the ICJ is the one strictly judicial means of settling disputes and therefore compliance is important.” Furthermore, compliance is obligatory according to Chapter XIV of the Charter (see text box, right). He added that while the level of compliance with judgments is not inconsiderable, the Court should not be “complacent” in this area. Furthermore, the Court could benefit from more support from the Security Council in ensuring compliance. It was pointed out that a weakness in the UN system is that a permanent member of the Security Council can veto sanctions for non-compliance – an option not open to a less powerful state – thereby undermining the Court’s authority.

The Avena case might serve as an illustration of how a powerful country reacts to an unfavorable decision. In the course of two decisions, LaGrand and Avena, the ICJ found that the United States was in violation of the Vienna Convention on Consular Relations (VCCR) for its failure to notify detained foreign nationals of the right to contact their respective consulates. The ICJ further found that, in order to be in compliance with the treaty, the United States had to “allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the VCCR.” Most observers would agree that US compliance with the Avena judgment has been slow and uneven. Nevertheless, there are some gradual developments towards compliance. In July 2010, the US State Department requested that Texas postpone an execution in a case in which a VCCR violation was claimed. The basis for the request was that a federal legislative proposal was under consideration that would allow for a hearing on

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**From The Charter of the United Nations**

Chapter VI: Pacific Settlement of Disputes, Article 33
1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Chapter XIV: The International Court of Justice, Article 94
1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

* Cf. The Charter of the United Nations, which was opened for signature on 26 June 1945 and entered into force on 24 October 1945.
the violation. Even more recently, in January 2011, the Massachusetts Supreme Judicial Court recognized the importance of the ICJ decisions and held that a review of the effect of VCCR violations could be conducted under their state rules on motions for new trials (see text box, below).

From Massachusetts Supreme Judicial Court, Commonwealth v. Gautreaux

“Although a decision of the ICJ is not binding on this court, it is entitled to respectful consideration ... The ICJ is the judicial organ designated to resolve disputes regarding implementation of the Vienna Convention, and as signatory to the Optional Protocol, the United States agreed to be bound by its decisions. We acknowledge and accept the conclusion of the ICJ regarding the obligation that Art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation.”


An issue that has been raised in relation to international judgments, such as those of the ICJ, is the effect of compliance on the sovereignty of nations. Some believe that WTO decisions may also challenge sovereignty by encouraging “anticipatory compliance,” whereby lawmakers refrain from taking action that would be in accordance with national law because they anticipate that such laws would violate WTO rules. The CCJ has sought to avoid such reactions on the part of member states of the Caribbean Community, even incorporating language into its first judgment explicitly about the relationship between Community membership and sovereignty: “The rule of law brings with it legal certainty and protection of the rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.”

The question of how to monitor compliance with judgments was a topic of interest to all participants. Unlike many international courts and tribunals, the ECHR has a mechanism to follow up on the many judgments it issues every year. Fortunately for the Court, it is not charged with reviewing the “execution of judgments,” as it is termed in the European system. This task falls instead to the Committee of Ministers of the Council of Europe, which meets regularly to examine the measures taken by the states named in judgments.

There are several actions that have to take place in order for a judgment of the ECHR to be deemed fully executed. The state is naturally required to end the violation cited in the judgment and to make reparation to the victim(s). But perhaps the most important step to be carried out is a modification of legislation or activity at the national level in order to prevent a recurrence of the violation in question. It was reported that the first part of the judgment is typically not hard to execute. But when it comes to taking legislative measures, the challenges to full execution are much greater. Some judgments are reviewed repeatedly before the Committee of Ministers is satisfied with their execution.

The execution of IACHR judgments is also followed closely, although it is the Court itself that does the monitoring. Like its European counterpart, the Inter-American Court does not consider a case closed until full compliance is obtained. Ultimately there is a high rate of compliance, but cases often remain “active” for many years before all of the necessary measures are taken.

As for the ACHPR, it has yet to test the efficacy of its monitoring mechanism. Its protocol makes provision, however, for the Executive Council of the
Participants then took the conversation beyond compliance as it pertains strictly to judgments. There are also a number of “compliance issues” faced by criminal courts that have to do with cooperation and assistance by states. One judge commented on the difficulty of forcing powerful states to comply with a court’s request. He recounted that his chamber once called for documents pertaining to a trial from a permanent member of the Security Council and the state only partially satisfied the request. What are the limits of a judicial body, he wondered, in ensuring full compliance in such a situation?

Another criminal judge noted that lack of compliance can begin long before a case comes to trial, with the refusal of states to act on arrest warrants issued by tribunals. “All tribunals have suffered from the lack of cooperation, at least of swift cooperation, by states,” he declared. Often this resistance comes from states that have not ratified the treaty establishing the court or tribunal. In other cases, however, even those states bound to comply are unwilling to do so. “We need to measure compliance with regard to international criminal courts and tribunals in terms of effective criminal cooperation,” suggested a participant. “This is the lifeblood of courts, the air they need to breathe. They can’t function without it.”

While acknowledging the existence of these difficulties, another criminal judge pointed out that states have by and large cooperated with his tribunal. “Typically, the compliance has been quite good. We issue hundreds of decisions, logistical questions, requests for documents, and so on. Most of these orders are complied with quickly and routinely.” When a state does not wish to cooperate, for example by carrying out an arrest warrant or subpoenaing a witness, it usually argues “inability to comply.” This may occur even with states that are highly supportive of the tribunal’s work. He added that the rate of compliance has increased following a move by the international community – including the UN, US, and European Union – to pressure states for cooperation.

Participants next turned their attention to the impact of international justice that is beyond the scope of compliance with judgments or requests for cooperation. It was pointed out that the decisions of international courts and tribunals have had an enormous impact on “the legal awareness of the world.” One example cited was the groundbreaking work of the ad hoc tribunals: “The impact of the ICTY and ICTR cannot be measured in terms of the indictments and cases decided. It’s shortsighted, too narrow if you want to measure the real impact,” said one judge. He added, “How would we think about crimes against humanity if we didn’t have the ICTY clarifying that they can be committed in non-international as well as international armed conflict, and in peacetime!”

Another judge concurred, stating that the international community is now well aware that international prosecutions and trials can be done credibly, and that criminal tribunals have contributed to substantive, procedural, and evidentiary criminal law. Furthermore, it is clear that the message about impunity is being communicated: “There is no question whatsoever that in the most recent practice of armed forces, the possibility of condemnation and prosecution is taken much more seriously.” Clearly, as ICTY Judge Fausto Pocar has written, the so-called “completion strategy” of his tribunal should more properly be viewed as a “continuation strategy.” The temporary criminal tribunals will continue to impact the development of international law as well as the implementation of that law in national jurisdictions long after they formally close down.

An important point was also made about the powerful impact that international courts and tribunals have had on legal education as well as interest by the media and general public in international law. “There is a completely new world that began in 1993 with the creation of the ad
hoc tribunals,” declared a participant. “Go to any bookstore, legal or non-legal, and you will find hundreds of books dealing with this issue.”

The discussion ended by circling back to ideas raised in earlier sessions. The notion that the standing of international justice can be enhanced through opening it up to those it affects was reiterated. “To increase the impact of international law, recipients need to feel that they are participating in its creation. Perhaps then they will be more willing to comply with its mechanisms. We should look at this issue from the recipients’ viewpoint.”

Another judge stressed the importance of looking at the question of impact in a holistic manner. “One should not separate out compliance with judgments from other kinds of impacts,” he said, noting the systemic nature of the international rule of law.

Very importantly, a participant pointed out that the relationship between the rule of law in different spheres should not be forgotten. Compliance with an international decision contributes not only to the resolution of an interstate dispute or the conviction of a war criminal, he offered. “It contributes also to enforcing and strengthening the rule of law altogether, at both the domestic and international levels.”

Notes


3. Supra note 38.

4. Supra note 38.

5. Supra note 28.

6. Cf. The Vienna Convention on Consular Relations, which was adopted on 24 April 1963 and entered into force on 19 March 1967.


11. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, supra note 16, Article 29 “Notification of Judgment”: 1. The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission. 2. The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.


Information for notes with “supra” references can be found in the full text version of this report.