Complementarity and Cooperation in the International Legal Order

The international justice system consists of numerous courts, tribunals, trade agreement bodies, and arbitration panels. Some of these institutions are worldwide in jurisdiction, while others are regional. A small number of courts have been temporarily established to examine a particular set of events. An issue of concern for judges and other international legal professionals is how this vast system might be coordinated, if at all, so that it functions most efficiently and consistently. On this topic, BIIJ participants addressed three questions: 1) How can international courts and tribunals cooperate among themselves; 2) How can international courts and national courts cooperate and establish complementarity; and 3) How might jurisprudence from other courts be effectively used?

There is currently no established hierarchy among international courts, although many in the field of international justice recognize that the International Court of Justice (ICJ) enjoys the highest status. It was noted that international courts sometimes deliberate simultaneously on similar issues. For example, the ICJ and the Inter-American Court of Human Rights (IACHR) each deliberated in 1999-2001 on the rights of foreign nationals in capital cases in the United States under the Vienna Convention on Consular Relations. Although the two courts ultimately rendered similar judgments, there was a real possibility of conflicting results. BIIJ participants expressed concern that the consequences of producing differing opinions on high-profile questions, such as the definition of genocide, could be disastrous to the legitimacy of international law.

It was suggested by several participants that an online clearinghouse of decisions by international courts be established. It would allow international courts to keep abreast of and cite each other’s opinions, thereby allowing for the more systematic development of international law. The problem of overlapping jurisdictions, which might lead to “forum shopping” by plaintiffs, was also raised. It was suggested that these problems might be solved through undertaking an official coordination process for international courts and tribunals. There would be many obstacles to such a process, it was observed. Some judges also feared that coordinating the system might lead to the elimination of specialized tribunals and regional courts, all of which carry out crucial work.

Other participants felt that coordination of the international legal order is not a priority. They noted that there has been no harm up to now in having a non-unified system, one that has, for example, a number of different human rights courts. Indeed, it was suggested, law develops more robustly that way. It is not necessary to establish a hierarchy among courts or eliminate overlapping jurisdictions in order to combat impunity. Ideally, law is unified. But it might still be advantageous to have many bodies engaged in the development of this law rather than just a few.

The question of coordinating the international judicial system with national systems raises another host of issues. Should international courts or their domestic counterparts have primacy in trying particular parties? Can extradition of indicted individuals be required by international courts?
can complementarity between national courts and the ICC be ensured?

The ad-hoc criminal tribunals and the ICC relate to domestic judiciaries in very different ways. National courts in the affected regions must defer to the Yugoslav and Rwandan tribunals, turning over criminals to The Hague and Arusha and generally facilitating their work. This has created frustration and some resentment on the part of both governments and populations in the Balkans and Rwanda. Several judges noted that it will be interesting to see how well the transfer of lower level prosecutions back to national courts in these regions will proceed, a process that will begin as the end date of the tribunals approaches.

The ICC, unlike the ad-hoc tribunals, can only take on cases when national courts are unwilling or unable to handle them. BIIJ participants identified several advantages of this “complementarity” approach. For example, many states parties to the Rome Statute have adopted international law so as to facilitate cooperation with the ICC, and this law has consequently been applied at home. One judge noted, “International law must be dealt with at the domestic level. To apply it only at the international level is to use it incorrectly.” Participants recalled the oft-cited statement of the ICC Chief Prosecutor who noted that if he did his work correctly, ensuring that all cases were first dealt with thoroughly by domestic systems, the ICC would have no cases to try. While this would be ideal, few expect it to become a reality. Regional human rights courts also foster resolution of issues with potential international import in national courts by requiring that parties exhaust domestic remedies before bringing their cases to the regional bodies. This relationship may have benefits for national law as well. States within the jurisdiction of the ECHR, for example, have begun to create their own bodies of domestic human rights law, which the regional court can then reciprocally draw upon.

Judges then turned to a discussion of how courts should regard each other’s decisions. Creating a website of international court decisions would certainly aid in unifying international law. It would allow courts in the international system to cite other opinions even if they do not follow them. However, it was noted that this website would not include decisions made by national courts, many of which might be instructive for cases before international courts. There is also the issue of how national courts use decisions by international courts. The United States has, in particular, been criticized for rejecting both foreign and international decisions as references in its own courts. One participant remarked, “This displays an abysmal ignorance of the use of foreign law. It need not be binding, nor even persuasive, but only illustrative.” The U.S. stance was contrasted with that of South Africa, whose constitution invites its courts to look at foreign law and requires them to have regard for international law.

One participant pointed out, however, that it is more likely that judges will cite foreign or international decisions that support their thinking rather than challenge it. The other problem with comparative law is that judges are limited by the languages that they read. One judge noted that he recently wished to consult a German decision relevant to a case before his court, but he was only comfortable reading legal decisions in English. It was suggested that the International Bar Association could encourage the use of comparative law by translating important decisions. For the moment, however, it would appear that the use of decisions from other courts will remain, at best, haphazard and, at worst, opportunistic. But once again, information technology holds out the hope that this exercise could become simpler and more systematic in the future.