The influence of precedent in international law

If decision making by judges of a particular court is largely invulnerable to the influence of its parent institution, what is the impact of the work of judges of other international courts on this critical function? What is, or should be, the relevance of jurisprudence from courts deciding similar issues? BIIJ participants explored this subject by considering the use of precedence in international courts.

The so-called “proliferation” of international courts and tribunals over the last decade has been much discussed in legal circles, with many questioning its impact on the international legal regime. Institute participants seemed already in agreement, however, that the increasing number of international judicial institutions is more desirable than undesirable, as it will lead to a more robust development of law and provide more diversified venues for the adjudication of issues. Participants did acknowledge that international law risks becoming fragmented through the multiplication of international courts and pointed out some of the techniques that have traditionally been used by judges to avoid conflicts of jurisprudence in their decisions. These include distinguishing cases that are factually different and the exercise of judicial restraint.

Some participants questioned whether these techniques could work indefinitely, however. Might international courts reach a point where they make unwarranted distinctions or restrain themselves excessively in their decisions, simply to avoid conflicts? In this case, should there be another tool at the disposal of international judges to resolve conflicts? There was no general agreement on this issue, although most participants did not believe that the creation of a formal hierarchy among international courts was either advisable or possible.

The discussion of this subject was particularly timely, given the ICJ’s 2007 judgment in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. The bench of the ICJ was faced with many precedents on the issues that they had to consider in their decision, primarily from the ICTY but also from the ICTR, in regard to the definition of and liability for genocide. The ICJ avoided a potential conflict by agreeing with the ICTY that genocide had occurred in Srebrenica, a point that further relied heavily on the factual and legal findings of the tribunal. However, the ICJ found that Serbia held no state liability in the direct commission of genocide (although it was responsible for failure to prevent and punish genocide) because Serbia did not have “effective control” over the Bosnian Serb perpetrators of the atrocities. The use of the “effective control” test put the ICJ at odds with a decision from the ICTY Appeals Chamber that had used an “overall control” test. For the most part, the ICJ distinguished the ICTY decision as deciding a different legal issue. The ICJ noted that the issue in the case before them was one of state responsibility while the issue before the ICTY was whether a conflict was international. They also distinguished the ICTY decision on the basis of the nature of the cases. The case before the ICJ involved state parties while the case before the ICTY was a prosecution of an individual. However, to the extent that the ICTY decision had concluded that the “overall control” test was applicable to the determination of state responsibility, the ICJ indicated its disagreement with that finding. In an exercise of judicial restraint, the ICJ refrained from deciding whether the effective control test or the overall control test should be used to determine the international character of a conflict as that issue was not directly before the court.
Participants discussed some of the implications of the recent ICJ decision. In general, participants thought that the ICJ was wise to distinguish issues, applying the effective control test with respect only to state responsibility and leaving open the issue of the appropriate test for the determination of whether a conflict is international or non-international. This distinction was viewed as a way in which the two decisions could be reconciled. One participant commended the ICJ for its perspective on the jurisprudence of the ICTY: “In the Bosnian case, it is the first time that the ICJ took the bull by the horns and referred largely to the decision of another tribunal. It also took judicial notice of some of its findings. For the first time, the ICJ showed that it is aware of other courts!” It was noted, however, that the ICJ failed to refer to an important decision by the ICTR on genocide and the involvement of a head of state.\(^5\)

Other conflicts in legal thinking have, of course, occurred in the international judicial system. There was a potential conflict, for example, in the “Bosphorus Airways” v. Ireland case between decisions of the ECJ and the ECHR regarding human rights restrictions imposed by an EC regulation and its conformity with human rights obligations in the ECHR system.\(^6\) The question of “forum-shopping” was also raised in relation to the potential it creates for conflicting jurisprudence. A human rights judge spoke of being disturbed when the UN Human Rights Committee decides differently from his court in a particular case, believing that judicial restraint should be exercised more generally when different outcomes might create legal uncertainty about international human rights protection.

The potential for conflict in legal thinking has brought about several attempts at harmonization. The statute of the Special Court for Sierra Leone specifies that the court “shall be guided by the decisions” of the International Criminal Tribunals for the former Yugoslavia and Rwanda.\(^7\) Participants were surprised to note that this is the only international court to create such correlations at its inception. As one judge noted, “When creating courts, there should be a disposition allowing courts to look at each others’ jurisprudence.” However, certain patterns of judicial reference have developed, despite the absence of formal provisions requiring it. The ECJ, for example, regularly refers to the findings of the ECHR when it considers cases involving human rights issues. The ICTY and ICTR share an appeals chamber, which creates a unified body of jurisprudence. Avoidance of conflict might also be necessary at the internal level of a court. The ECHR, with its broad geographic jurisdiction of 47 nations, has found it necessary to ensure consistency in its own jurisprudence. It thus has a unit charged specifically with harmonizing the decisions produced by the five different chambers of the court. Some BIIJ participants wondered if a body could similarly be established to harmonize jurisprudence across courts in the international judicial system.

But are such attempts to promote interdependence in legal reasoning enough? One judge, a veteran of several international courts, observed, “Rules of interpretation to soften conflicts, and respect for each other’s decisions, are approaches that do not go to the heart of the matter.” The heart, several agreed, is the need to maintain consistency and coherence in the law and universality in applying the law. BIIJ participants generally agreed that conflicting jurisprudence can indeed raise problems in the international system. But they also concurred that the problems are not yet serious enough to require immediate attention. This, then, is a challenge that the international legal regime will likely face in the future.