The contribution of international courts and tribunals to the methodology of international law

OC - (ILA-14177) - THE CONTRIBUTION OF THE AUTHORITY OF ICJ PRECEDENTS TO THE ARGUMENTATIVE METHODOLOGY IN INTERNATIONAL LAW

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Abstract

The Authority of the ICJ precedents in International Law

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The importance that legal operators assign to precedents of international courts and tribunals is evident in international law. Their precedents in legal argumentation is capable of constrainingbehaviour of international legal operators, either consciously or unconsciously. But among the different international courts and tribunals, it is undeniable that decisions of the International Court of Justice (ICJ) have a special power in the field, particularly in shaping the method that we –international lawyers– use to perform in international law. For instance, despite the fact that the ICJ's advisory opinions are not legally binding and its judgments only bind the States parties to the case[2], legal operators grant *authority**[3]*to them, constraining them most of the time to follow the same legal reasoning or reach the same outcome in different areas of international law, regardless of agreeing or disagreeing with the ICJ.

The authority granted to ICJ decisions can be understood if we first consider that "precedents", in general, work like "a system of argumentative constrains meant to build past-based and future-determinative coherence."[4]In that sense, the authority of precedents is used to convince and compel others, by way of past-based and future-determinative constrains, to behave in a certain way or reach certain outcomes. With the ICJ precedents being embedded in this theoretical framework, and unlike other courts and tribunals, the authority of ICJ precedents are specially boosted by the authority that the international law community grants to ICJ itself[5]. As a result, then, the ICJ decisions have impacted the argumentative methodology in international law. For

instance, the former ICJ judge Guillaume describes precedents as "the starting point of judges' reflections".[6]We can see that in the case *Land and Maritime Boundary between Cameroon and Nigeria* before the ICJ. There, the court stated that, indeed, the legal reasoning used in the *Right of Passage over Indian Territory*had no direct effect on the case; however, "[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[7]

But further reflections from Guillaume are also quite telling of the other reasons for granting authority to ICJ precedents. For instance, he manifests that judges hold on to precedents "for the sake of legal certainty."[8]Indeed, one of the effects of this constraining power of ICJ precedents is that they have contributed to increase international law predictability and certainty. It is true that legal operators do not always follow precedents, however, in general terms, the authority of ICJ precedents is considered the rule most of the time, with occasional deviances.

With the above in mind, this paper is aimed to analyse precisely the contribution of the ICJ precedents in the argumentative methodology in international law. It will expose that an important part of the practice of international law is performed by relying on the ICJ precedents. They have rendered International Law practice into "an argumentative practice that operates in institutional contexts characterized by adversity".[9]Hence, the authority of ICJ precedents in International Law is a constraining power but also a source of stability providing the field with predictability and certainty.

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[2]Article 59 of the ICJ Statute prescribes that its decision "has no binding force except between the parties and in respect of that particular case"; whereas in its article 38 states that the Court shall apply, "subject to the provisions of Article 59, judicial decisions (…)" as a subsidiary mean for the determination of rules of law.
[3]Authority in the sense of a "deference entitlement" socially sanctioned and enforced, that constrains behaviour based on both, a collective belief in voluntarily deferring their assessments to other (to trust in others' judgments, in this case, the ICJ) and on actors' capacity to make others believe that. See: Zarbiyev, 'Saying Credibly What the Law is: On Marks of Authority in International Law', 9 *Journal of International Dispute Settlement*(2018) 291, at 294-295; Ibid, at 297; Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law', 4 Transnational Legal Theory (2013) 354, at 362-363.
[4]d'Aspremont, 'The International Court of Justice and the Irony of System-Design', 8*Journal of International Dispute Settlement*(2016) 366, at 368.
[5]Given our perception of ICJ being the most authoritative, objective, impartial, and thus the most important, Court in international law, entitled to "say" what the law is, representing the different legal systems in the world.
[6]Guillaume, 'The Use of Precedent by International Judges and Arbitrators', 2 *Journal of International Dispute Settlement*(2011) 5, at 2.
[7]*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, I. C.J. Reports 1998, p. 275, s 28.
[8]Guillaume, *supra note* 6, at 2.
[9]Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', 26 *International Relations* (2012) 3, at 19. See also: d'Aspremont, *supra note*4, at 368.

Palavras-chave : precedents, authority, methodology