
Evaluating the Role of Precedent in International Human Rights Court Hearings: A Critical Analysis

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ABSTRACT

International human rights courts function within a legal framework that has historically rejected the doctrine of binding judicial precedent. Unlike domestic common law systems, international law does not formally recognise *stare decisis* as a source of legal obligation, primarily due to its decentralised structure and the centrality of state consent. Nevertheless, contemporary international human rights adjudication reveals an increasing reliance on prior judicial decisions, particularly by courts such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples' Rights (AfCHPR). This paper critically examines the role of precedent in international human rights court hearings by analysing both its theoretical foundations and its practical application. It explores how judicial decisions, though classified as subsidiary means under international law, have gradually acquired persuasive and authoritative value in human rights adjudication. The study further assesses the benefits of precedential reasoning, including legal certainty, consistency, and equality before the law, while also addressing the challenges it poses in terms of judicial overreach, democratic legitimacy, and state sovereignty. The paper argues that although precedent is not formally binding in international human rights law, it has evolved into a quasi-normative authority that significantly influences judicial reasoning and outcomes. This evolving role of precedent is essential for ensuring coherence, enhancing institutional legitimacy, and facilitating the progressive development of international human rights norms.

Keywords: Precedent; International Human Rights Law; Stare Decisis; Judicial Consistency; International Courts

Introduction

Precedent occupies a central and authoritative position in domestic legal systems, particularly within common law jurisdictions, where the doctrine of *stare decisis* ensures consistency, predictability, and stability in judicial decision-making. Under this doctrine, courts are generally bound to follow previous decisions of higher courts, thereby promoting equality before the law and reinforcing public confidence in the legal system. Precedent, in this sense, functions not merely as a guide but as a binding source of law that shapes the development of legal principles over time. In contrast, international law has traditionally rejected the application of *stare decisis*. This rejection stems from several structural and conceptual features of the international legal system, including the absence of a centralized legislature, the decentralized and non-hierarchical nature of international judicial bodies, and the primacy of state consent as the foundation of legal obligation. States have historically been cautious of allowing international courts to create binding norms through judicial decisions, fearing that such practices could undermine sovereignty and exceed the limits of consent-based jurisdiction.

Despite this traditional position, international human rights courts increasingly rely on precedent in their judicial reasoning. Courts such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights frequently cite earlier judgments, adhere to established lines of jurisprudence, and provide detailed justifications when departing from previous decisions. This evolving practice reflects a growing recognition that consistency and coherence in human rights adjudication are essential for legal certainty, institutional legitimacy, and effective protection of fundamental rights.

Conceptual Understanding of Precedent

More generally, precedent is the practice of using earlier judicial decisions as guidance in addressing later disputes. It embodies a style of legal reasoning in which courts consult past judicial decisions to interpret and apply the law. Precedent is used domestically and internationally to maintain legal uniformity, but the most important aspect of the concept is that it encourages similar cases to be treated similarly, ensuring consistency in adjudication. Even where it is not expressly binding, precedent serves to frame judicial process and legitimize courts by tying decisions to a body of existing law.¹

Stare decisis is a stricter, more determinate form of precedent. Stare decisis, in its most literal sense meaning "to stand by decided matters," compels lower courts to adhere to the decisions of higher courts when that court follows a hierarchical structure. The doctrine is distinctive to common law systems, such as those in the United Kingdom and the United States, where court decisions are a major source of law. Stare decisis as a rule of binding precedent serves valuable systemic goals (including continuity, predictability, and judicial self-discipline) by limiting discretion.²

But the doctrine of superior stare decisis has never held a substantial place in international law. This denial is based on the structure and norms of the international legal system. And unlike the domestic legal order, international law is not subsumed under a single territorial state's centralized legislature and overarching court system with an enforceable doctrine of stare decisis. International courts and tribunals are independent bodies with their jurisdiction based on the consent of states. For on the one hand, to apply a binding obligation in respect of precedent might violate the principle of state sovereignty and overstep the consensual grounding upon which international adjudication is predicated.³

This approach is amply expressed in Article 38 (1)(d) of the Statute of the International Court of Justice referring to judicial decisions as "subsidiary means for the determination of rules of law". Do you think, for example, that courts should be applying what is essentially political power to determine how the law applies or evolves in situations where we tread on new ground? As a result, international courts including international human rights tribunals explicitly maintain that they are not strictly bound by precedent.⁴

But in stark contrast to this express repudiation of binding stare decisis, international courts frequently treat precedent as persuasive authority. This kind of practice is especially common in the realm of international human rights law, where judges are under obligation to interpret loosely-defined legal standards such as dignity, freedom and equality. With such backgrounds, former court practice serves as valuable interpretative guidance that helps elucidate the object and content of treaty obligations. It is therefore even likely that precedent works as a stabilising factor, when ensuring some degree of uniformity and coherence in the

courts' reasoning without imposing a formal straight-jacket conditioning them to previous adjudication.⁵

The difference between those stare decisis and persuasive precedent is therefore crucial in international adjudication. Although international courts have the discretion to deviate from prior precedent, they generally do so only when there are strong reasons for doing so. That view has led to a developing expectation of uniformity, sometimes referred to as jurisprudence constante, in which precedent should hold sway when there is a fixed line of cases. In the area of international human rights adjudication, this consistency can be significant in terms of guaranteeing equal protection for rights and the legitimacy of judicial bodies.⁶

Finally, the strength of persuasive precedent also contributes to normative standing for international human rights courts. When decisions are based on settled law, courts show that their views have been thought through and developed in reasoned legal fashion rather than arbitrarily. This provides legal certainty to states and individuals, allowing national authorities to predict how international obligations will be interpreted and applied. At the same time, the non-binding imperativeness of precedent ensures that courts retain some flexibility to adjust legal standards according to changing social, political, and moral conditions.⁷

In short, the conceptual distinction between precedent and stare decisis underlies international adjudication. Although international courts deny the binding nature of stare decisis, they increasingly use precedent as persuasive authority so as to maintain coherence, legitimacy and viable human rights protection. This finely-tuned approach enables international human rights courts to reconcile the often conflicting needs for and against consistency and innovation, rendering precedent an essential, if not technically binding force in the landscape of modern international human rights law.

Theoretical Foundations of International Law

Theorizing about precedent in international law. At the building level, the theoretical basis of precedent in international law derives from the formal sources doctrine expressed by Article 38(1) of the ICJ Statute. Article 38(1)(d) explicitly refers to "judicial decisions" as a source for the identification of rules of law. This characterization shows a careful and conscious use of judicial power in the international law context. Contrary to treaties and customary international law, international judicial decisions do not constitute primary sources with self-sustaining capacity for original creation of binding legal norms. Rather, they play an interpretative role and an evidentiary one by helping courts and states determine which rules of international law already exist.⁸

The characterization of decisions as subsidiary means is closely related to the concept of sovereignty. International law is essentially consent-oriented, and the states are its principal clients as well as subjects of legal rights. The recognition of judicial decisions as binding precedent might thus allow international courts to make the law, in the sense of creating legal norms outwith express or tacit consent by states. Such an evolution would jeopardize the principle of sovereign equality and shift the balance of power from states to international judicial bodies. Thus, public international law has consistently denied the doctrine of binding precedent to maintain state autonomy and avoid judicial trespass into legislative authority.⁹

Yet another powerful justification for the non-binding character of international law precedent is the concept of “judicial law-making”. International courts are supposed to apply the law, not make it. With no supranational legislative institution, states are especially sensitive to the risk of courts acting as quasi-legislators by adopting generous interpretations of, or progressive development in legal norms. By attenuating the formal power of precedent, the system attempts to rein in judicial discretion and leave legal development firmly grounded within state practice and consent.¹⁰

Despite these limitations in theory, state practice is required for the functioning of international law and judicial decisions are indispensable. Treaty text often reflect open-textured language in need of interpretation, and customary international law is frequently shaped by the incremental elucidation of state practice and *opinio juris*. What that statement does and what the Courts do in effect are to clarify through their judicial pronouncements authoritative readings of the legal norms, clear up ambiguities and reconcile conflicting legal principles. That judicial decisions contribute to coherence and predictability within the international legal system, even though they do not enjoy binding force over future courts.¹¹ This role of judicial interpretation is more marked in the area of international human rights law. Human rights treaties are typically written in open-ended and abstract language, using such terms as “human dignity,” “fair trial,” and “inhuman or degrading treatment.” In order to apply broadly in such widely varied legal, cultural and political environment, these norms are purposefully formulated at a high level of generality. But their generality makes juridical interpretation inevitable. It would be difficult to apply such standards with any degree of uniformity without the guidance of previous decisions.¹²

Here the notion of precedent works as a stabilising tool for interpretation that allows human rights courts to build a consistently applied jurisprudence over time. By maintaining precedents, the courts can ensure that cases of like nature receive like treatment under the law and this guarantees fairness and certainty of the law. In addition, precedent institutionalizes the legitimacy of judicial decision-making by providing a sense of continuity and intellectual lineage, as opposed to random or ad hoc interpretation. While international human rights courts insist that they are not strictly bound by *stare decisis*, they often regard established case law as extremely persuasive, only departing from it in the most compelling of circumstances.¹³

Yet judicial decisions retain their subsidiary status, it seems, in order to leave a margin of flexibility necessary for the gradual evolution of international law. The interpretation of the law is still left for courts to shape as society changes, morality evolves and new social settings create fresh challenges. This tension between stability and flexibility is a hallmark of international human rights adjudication. Precedent is not, then, a straightjacket but a lodestar around which the courts interpret the constitution.¹⁴

All in all, the theoretical underpinnings of precedent in international law are a delicate balancing of state sovereignty versus pragmatic judicial interpretation. Although judicial decisions are technically placed under the heading of subsidiary means in Art. 38(1)(d) ICJ Statute, they have a much wider impact than their narrow classification may imply. In the field of international human rights law specifically, case law has become an important interpretative tool which helps to promote consistency, predictability and efficient protection of fundamental rights without undermining the consensual nature of the international legal order.

The Development of Precedent in International Human Rights Law

Human Rights Adjudication Case Law Sample: During the early years of international human rights adjudication, cross-referencing had been minimal among judicial institutions. This method was largely in line with the traditional view of international law as lacking a single binding judicial source while highlighting the consensual nature of legal obligations. The courts in the early days of human rights, especially during their fledgling years did not really prioritize “building an integrity jurisprudence” in the manner we think of today. The decisions were often narrow, ad-hoc and modest in their explanations, revealing a great deal of concern about legitimacy, state sovereignty, and the marginal acceptance of international courts in domestic law.¹⁵

When international human rights bodies were established, some tendencies toward more coherent judicial reasoning were visible. Among the main reasons for this shift was the increasing number of cases before regional human rights courts. The more requests and applications submitted to institutions like the European Court or Inter-American Court of Human Rights, the more desirable predictability and efficiency in decision was. Courts gradually began to realise that it was useful for the adjudication of cases, added predictability and clarifying guidance for states and individuals with regard to interpretation of human rights obligations.¹⁶

A second important element in the development of precedent in international human rights law was the *imperatif de cohérence*, a practical demand that treaty provisions be uniformly interpreted. Human rights agreements are made with the hope of creating common benchmarks across varying legal systems, and divergent interpretations threaten to undercut their normative force. With reference to previous rulings, courts were also able to promote some level of harmonisation in the application of human rights standards. This institution also insulates the generalized principle of equality before the law, in that like cases are treated alike irrespective of defending state or composition of the bench.¹⁷

This slow shift towards uniformity resulted in the development of the *norm jurisprudence constante* as utilized in international human rights adjudication. A series of decisions on a question of law gives persuasive but not binding authority for future cases. The concept of *Jurisprudence constante* implies the expectation that courts, as a general rule, will follow precedent established in previous cases unless there are solid reasons to deviate from it. This expectation has also gained theoretical prominence in the case law of the European Court of Human Rights, which frequently stresses the need for legal certainty and stability whilst maintaining a certain flexibility to develop its interpretations in stages.¹⁸

In addition to *jurisprudence constante*, international human rights courts have progressively employed structured reasoning from other cases. Contemporary judicial decisions often incorporate extensive citations to earlier cases, systematic examination of previous case law, and an explicit accounting of backward and forward precedential effect. He becomes a principle-preserver meaning-involver, by which the transparency and legitimacy of ruling reasons can be presented as continuous and principled rather than arbitrary. It also increases the normative legitimacy of human rights courts, institutions whose jurisprudence is portrayed as a coherent and dynamic system.¹⁹

Overall, the development of precedent in international human rights law has involved a gradual yet momentous shift from careful, [page 161] case-specific adjudication towards a more uniform and jurisprudentially-rooted method. While *stare decisis* is rejected by

international human rights courts as binding, the increased use of precedents reflects a practical need for coherence, predictability and legitimacy in human rights protection.

The Role of Precedent in the European Court of Human Rights (ECtHR)

The development of international human rights case-law The European Court of Human Rights has a pivotal role in the evolution of international human rights case law. For all that the Court insists it is not strictly bound by precedent, it depends on case-law to provide a measure of consistency, predictability and legal certainty in its understanding of the European Convention on Human Rights. The method of the Court represents a well-calibrated equilibrium between flexibility and consistency that enables it to transpose human rights norms in tandem with changing social circumstances, while at the same time preserving coherence and predictability to its case-law.²⁰

The ECtHR has expressly ruled out the doctrine of binding precedent or *stare decisis*. The Court has consistently held that it is not bound by its prior decisions, and each case must be resolved based on the particular facts of that case. But the Court has also stressed that legal certainty compels it to apply its own precedents unless there are “cogent reasons” for doing so. This has resulted in what is known as *jurisprudence constante*, a line of decisions which draws upon and refers to previous cases which have similar facts and similar issues.²¹

A number of fundamental principles of the ECtHR have been developed and evolved through this use of case-law. Among these is the so-called doctrine of the living instrument, according to which the Convention must be applied as a “living organism” in changed circumstances. This doctrine enables the Court to evolve human rights norms over time, while remaining unimpeded by the initial intention of framers. This evolutionary pattern of interpretation is largely based on precedent, with the Court developing past rulings in order to justify incremental shifts in interpretation.²²

One other doctrine heavily influenced by precedent is the margin of appreciation. The Court has established in a consistent line of its case-law that national authorities are in principle best placed to evaluate local needs and conditions, particularly as they can obtain more readily the relevant information on the spot than a supra-national Court; this is especially true where sensitive moral, religious or social policy issues fall to be resolved. The margin of appreciation that the Court has adopted has been progressively outlined, through numerous citations to previous cases, resulting in a mechanism by means of which the court is able to reconcile respect toward national difference with its duty to safeguard a certain threshold of human rights. “The development of this doctrine further illustrates the stabilizing role precedent plays in our jurisprudence.”²³

Positive obligation theory also descends primarily from to-precedent reasoning. In a line of cases, the Court has interpreted the Convention as not only imposing negative obligations on States to refrain from interference but also positive duties to protect rights through proactive measures. This state expanding interpretation of responsibility has been gradually unfolded based on previous case law, making it possible for the Court to argue that the progressive development of obligations can be done without discontinuity from existing law.²⁴

The Court has utilized precedent to substantiate an evolutionary interpretation (e.g. landmark cases such as *Tyrer v United Kingdom*). The Court in *Tyrer* notoriously declared the Convention to be a living instrument interpreted by reference to present-day conditions. While the case was an important milestone in human rights interpretation, the Court based its

logic on existing precedent to show that precedent can be used as a mechanism for legal change rather than as a barrier to it.²⁵

Soering v United Kingdom Similarly, Soering v United Kingdom is a game-changer in the Court's case law on extraterritorial responsibility. In the present case, the Court found that to return a person to a country where he or she was exposed to a real risk of treatment contrary to A similar approach was adopted by the ECHR in Selmouni v France (2000) 29 EHRR 403 at paras [121–25]. Referring to its previous case law interpreting Article 3, the Court applied the principle of extraterritoriality. This case is a clear example of how the Court can apply the precedent to evolve human rights protection in complex transnational situations.²⁶

Beyond these specific reasons of the functions – from openness to insurance and predictions, and even beyond human-rights systems with particular role for precedents covered in this paper (if any), the reliance on precedent in the ECtHR seems attractive. First, it leads to legal certainty by allowing states and individuals to predict how the Convention will be interpreted. Secondly, it fosters consistent application of human rights norms in Member States and thus promotes the principle of legal equality. Third, precedent-based reasoning adds institutional legitimacy to the Court by showing that it is playing fair and making principled decisions.²⁷

Yet, despite these benefits, the Court's use of precedent has been broadly condemned. One of the most frequently heard objections to the ECtHR is that it engaged in judicial activism, both in interpreting and extending Convention rights beyond what was proposed by states. Critics maintain that doctrines like positive obligations and evolutionary interpretation, constitute nothing less than judicial legislation against the will of democratic legitimacy and state sovereignty. What's more, some states argue that the Court has gone too far in relying on precedent and has not been respectful enough of national legal traditions and policy preferences.²⁸

To this criticism, the ECtHR has increasingly been insistent that more must be made of subsidiarity and margin of appreciation (and 'balance' in order to justify any interference), particularly since the adoption of Protocol No 15 to the Convention. This represents a continuing attempt to recalibrate this balance of judicial and state power, 88 while preserving the virtues of precedential consistency.²⁹

Ultimately, the function of precedent is as central as it is complex in the ECtHR. Although the Court explicitly refuses to be bound by any past decision, it does consistently build upon established case law in creating and applying human rights norms. Through this approach, the Court has been able to maintain coherence, flexibility and legitimacy in its jurisprudence but it has also stimulated debate about the correct balance of judicial interpretation within international human rights law.

Case law before the Inter-American Court of Human Rights (IACtHR)

The Inter-American Court of Human Rights (IACtHR) presents one of the boldest attitudes towards precedent amongst international human rights tribunals. In contrast to other tribunals, that consider precedent perhaps only as persuasive authority, the IACtHR gives a high weight to its own jurisprudence considering itself an authoritative guide for interpreting and applying the American Convention on Human Rights. This consideration mirrors the broader Court's objective of securing homogenous protection of human rights throughout the

member states and issuing coherent directives to domestic courts on how to apply Inter-American standards.³⁰

Central to the Court's use of authority is its abundant referencing of prior cases in contentious and advisory decisions. Judgments are increasingly using past cases to justify judgements, to fix the content of human rights standards and specify state obligations. Advisory opinions, in particular, are acknowledged as a source of authoritative norms. Although advisory opinions are authoritatively non-binding, the Court does refer to them in later judgments for the purpose of attaining interpretative leadership and doctrinal coherence.³¹

One of the most important outcomes resulting from this model is the principle of conventionality control. This is a doctrine that obliges the domestic courts to examine whether their own laws, practices or decisions are consistent with the interpretation of the American Convention. Through such consistent referencing to its case law, the IACtHR has given effect to the conventionality control, whereas states in inter-American system would move closer toward their legal systems' harmonization with regional human rights standards.³²

This approach has had a profound effect. On the other, it reinforces human rights protection throughout the region by setting out unambiguous and authoritative interpretations to be followed by domestic courts. It provides greater legal certainty and adds to the progressive development of human rights in the Americas. Stemming this tide, however, the Court's aggressive use of precedent and its imposition of conventionality control have sometimes led to backlash by states. Opponents of this strategy further contend that it could restrict domestic legal autonomy, encroach on national sovereignty, and cause friction between the Court and member states over the allocation of judicial authority.³³

Notwithstanding these challenges, the IACtHR argues that the systematic application of precedent is also necessary for effective human rights protection and for its court's authority to be legitimate. By grounding its decisions on precedent, the Court shows consistency, principled argumentation, and commitment to uniform interpretation of the Convention all are factors that strengthen the authority and normative force of IAHRL.³⁴

African Court of Human and Peoples' Rights (AfCHPR)

The African Court on Human and Peoples' Rights (AfCHPR) is a new child in the family of African human rights jurisprudence, which was created to supplement the protection mandate of the African Commission on Human and Peoples' Rights. Given the relative short institutional memory of the Court has, it relied increasingly on precedent to gain credibility and enhance its authority, as well as build a stable and coherent body of legal decisions. In drawing on its own precedents, and those of the African Commission, the AfCHPR attempts to make its interpretations of the African Charter on Human and Peoples' Rights relatively predictable and consistent.³⁵

One such example of it taking precedent into account is *Tanganyika Law Society v Tanzania* (2013) in which the AfCHPR analysed the procedural duties imposed on states by the Charter,⁵ and used existing jurisprudence to expound upon these obligations. It revealed the necessity for crafting continuity and coherence in adjudication especially when complex issues of state responsibility, on the one hand, and individual rights protection, on the other are at stake.³⁶

Notwithstanding such strides, the Court is not easily able to rely upon precedent. Its member states, first of all, only half-heartedly subscribe to its jurisdiction, which severely circumscribes the range and influence of its rulings. Second, observance of its rulings is uneven, evidencing the enduring tussle between the Court's legitimacy and state autonomy. All of these challenges point to the importance of thoughtful and responsible construction of precedent, one in which the Court's jurisprudence enhances rather than erodes its legitimacy and capacity to achieve its rightful place as guardian both of our public values and individual freedoms.³⁷

In sum, the AfCHPR's developing jurisprudential reliance on precedent reflects a balancing act confronted by 'young' human rights courts more generally: to create authoritative law while also maintaining legitimacy, ensuring compliance, and respecting different legal cultures and political conditions in member States. As such, precedent is not just a device of legal reasoning but also an instrument of institutional development and incremental human rights norms realization throughout Africa.³⁸

Comparison with ICJ weapons the International Court of Justice (ICJ)

The function of precedent in international adjudication differs widely according to the nature, mandate and subject-matter of the judicial institution concerned. As the 'principal judicial organ' of the United Nations, ICJ has shown a high degree of conservatism regarding precedent - even when compared with established supranational human rights courts such as the ECtHR, IACtHR and AfCHPR. Human rights courts are at the vanguard of the movement towards coherence and legitimacy through reference to previous decisions,³⁶ whereas the ICJ has typically given a lower importance in doctrinal terms to precedent.³⁹

The ICJ's resistance to the use of its own case law results from both structural and normative factors. Article 38(1) (d) of the ICJ Statute refers to court decisions as a subsidiary method of establishing rules of law, not as sources. This formal categorization serves as a reminder that the Court's decisions are not binding precedent outside of the particular litigants and circumstances. Accordingly, as per the ICJ case law each case has to be judged exclusively on its own facts, reflecting impartiality and *égalité des parties* by the Court.⁴⁰ The Court has reiterated this position in a number of advisory opinions as well as disputes judgments, emphasizing that although past decisions may provide persuasive guidance, they cannot determine the result in new cases.⁴¹

The ICJ's caution in this regard is also a result of the nature of the controversies that comes before it. While human rights courts are mostly tasked with deciding cases brought by individuals or groups alleging violations of fundamental rights, the ICJ decides cases between states that can involve technical and legalistic questions of treaty interpretation, sovereignty and territorial jurisdiction. These kinds of disputes are so inherently fact-bound and often so fraught with political sensitivities. Any binding precedent in this field would in effect limit state sovereignty, or might lead to results that one of the parties considers unjust. Accordingly, the ICJ uses precedent selectively, sometimes focusing on previous judgments as an example of evolving jurisprudence or to clarify its interpretation without referencing binding authorities.⁴²

Human rights courts, on the other hand, are situated in a different normative and procedural world. They exist to secure the rights of individuals and observe international human rights standards. As these norms are mostly vague, broad principles of an abstract nature, judicial interpretation is very important to specify the content and scope of rights. Here, reliance on

precedent is not only a matter of convenience, but an important means by which we promote coherence, predictability, and equality under the law. Therefore, human rights courts have established rich jurisprudential traditions in which their own case law is given serious persuasive authority to allow for the development of a coherent and dynamic body of law that continues to remain open-ended because it can evolve alongside new conditions.⁴³

The difference between ICJ and HRC is further accentuated by jurisdictional and institutional design. The ICJ is not a court of general jurisdiction; the Court determines its own jurisdiction pursuant to consent by the states (for example, treaty or special agreement) or reciprocity. Its decisions are only binding on the parties to the controversy, thus severely limiting the practical value of precedent for third-party nations. Human rights courts, in contrast, have jurisdiction based on regional human rights treaties that bind member states together. Accordingly, the jurisprudence that emanates from these courts has far greater normative inflection resulting in the desirability and indeed necessity of consistency from case to case.⁴⁴

Several examples illustrate this distinction. In the North Sea Continental Shelf Cases, the ICJ stressed how its previous judgment should not be considered definite and binding on future cases involving different factual and legal issues.⁴⁵ The Court specifically stressed the need for contextualization and discretionary reasoning in judicial deontic powers. In contrast, in *Tyrer v United Kingdom* and *Soering v United Kingdom* the ECtHR drew on earlier case law to justify its evolutionary approach to the Convention and extra-territorial reach of human rights norms, highlighting how functionally more important precedent is under human rights adjudication.⁴⁶

Notwithstanding these differences, the ICJ is not entirely oblivious to previous pronouncements. Indeed, certain ICJ judgments have assumed persuasive authority with time, especially when dealing with repeating legal issues like the interpretation of customary international law or rules on state responsibility. This choice of reliance is selective and pragmatic: the Court draws on precedent when this serves to promote consistency and legal certainty, but it does not try to make its hand appear more tied than they actually are due to concerns with respect for case law or international law.⁴⁷

Therefore, the greater weight of precedent in human rights litigation makes sense once it is understood that the type of rights engaged, normative framework, and court goals matter. Human rights courts are challenged with the balancing act between universal justice and the diversity of legal representative systems within their jurisdiction. Precedent offers a means of standardization, so that like violations are similarly treated and people in one state receive similar protection as do their neighbors. It also adds to the legitimacy of courts, as a proof that decisions are made in a coherent and reasoned way, thereby strengthening the authority of human rights law within national jurisdictions.⁴⁸

In addition, human rights courts commonly enter into a judicial dialogue, referencing judgments of each other across regions in order to build global human rights norms. By contrast, the ICJ is a forum that operates essentially as between states (for which there is no comparable demand for cross-jurisdictional conversation or a shared interpretative corpus). The comparison underscores how the distinct institutional missions of these courts condition the function and value of precedent.⁴⁹

In the end, although the ICJ is very wary of precedent and stresses fact-specific adjudication, human rights courts grant much persuasive value to previous cases in order to bring about consistency, coherence and legitimacy. This disparity is rooted in a dichotomy of jurisdiction, mandate and aims: while the ICJ decides on inter-State disputes wherein sovereignty and consent are to be revered, human rights courts assert individual protection (namely through the 'creative' development of norms). An appreciation of this difference is crucial in grasping why precedent takes a much stronger and more central position in international human rights adjudication than in other areas of international legal dispute settlement.

Benefits of Precedent in Human Rights Decisions

Precedent has an essential influence on the jurisprudence of international human rights courts and facilitates coherence, legitimacy and effectiveness of human rights protection. Legal certainty is one of the main virtues of precedent. Human rights standards, such as those articulated in the European Convention on Human Rights, the American Convention on Human Rights and African Charter on Human and Peoples' Rights tend to be abstract and couched in general terms. Precedent offers a basis for the courts to interpret these norms uniformly, so that states, attorneys, and individuals have some idea of how rights are generally going to be associated in specific situations. This predictability limits the risk of discretion and guarantees that human rights law is consistently applied in the face of similar situations or across jurisdictions.⁵⁰

Another benefit of precedent is predictability, the cousin of legal certainty. When courts apply binding precedent, they establish an organized and predictable body of case law that shapes the adjudication of future disputes. Predictable results instil public confidence in the justice system, and foster compliance with human rights obligations. Clear guidance for the application of international human rights norms is also beneficial to national courts as it supports a fruitful interaction between regional or international tribunals and domestic legal systems. That predictability also enables States to bring domestic laws and policies in line with international obligations, which is a way of reducing tension and the danger of breaches occurring again.⁵¹

Equally as important, precedent serves to ensure equality under the law by facilitating the uniform treatment of like cases. Human rights tribunals are frequently required to decide cases with similar legal and factual issues in different jurisdictions. In following established case law, courts can guarantee similar infractions will be punished with similar expressions of legal proportionality thus avoiding disparities in the protection of rights based on geography, cultural and political considerations. This commitment to the principle of equality supports the normative power of human rights and enhances the legitimacy of judicial bodies vis-à-vis State parties as well as individuals.⁵²

In addition to promoting uniformity and fairness, it is undeniable that precedent also assures the degree of judicial economy. Precedent, by indicating a path to follow in solving those transitory legal problems provides an easier and quicker means for the courts not to have to consider anew basic rules of rights every time a case is presented. It permits courts to process increased caseloads effectively and devote more resources to novel or difficult questions, thus preserving the legitimacy and authority of judicial rulings. Efficiency is especially important for international human rights courts, commonly with high collections of individual petitions waiting on a pending list back at home.⁵³

A second crucial benefit of precedent is that it can increase institutional legitimacy. The court that shows coherence, and principles over long term gains more authority and credibility. Human rights courts enhance public confidence and encourage states to comply with their decisions when they demonstrate that the basis for their rulings is previous case law not ad hoc or arbitrary judgments. This legitimacy is vital to secure compliance, particularly in so far as enforcement mechanisms of international human rights law much depends on the cooperation of states.⁵⁴

At last, precedent helps to establish organized uniformity in human rights. By the accretion of court logic, courts establish new meaning for rights as they explain, over time, what duties are clearly contained. This disciplined progress contributes to converting generalized treaty norms into tangible and actionable standards of applicable law. In so doing, precedent does not only function as a guide for adjudication but also as a device for the methodical growth of international human rights law thus being not only stable but also adaptable to new social and political contexts.⁵⁵

Critique and Resistance to the Use of Precedent in Human Rights Adjudication

Although domestic human rights jurisprudence provides many benefits for international human rights adjudication, it is not free from criticism. One consideration is democratic legitimacy. Human rights courts frequently act on the basis of the consent of states to treaties, and yet if they look primarily or largely to precedent, courts may appear to engage in an exercise of judicial law-making that is based at least partly on state non-consent. By doing so, however, courts run the risk of treading on both legislative and executive power by gradually extending rights or transforming duties simply by continually invoking previous cases. One of the criticisms leveled at this "importation" is that it threatens to erode a fundamental democratic norm: legal authority in the making of law is predicated primarily on representative institutions; judges are not unelected but they, rather than states or societies themselves, somehow possess normative dignity.⁵⁶

Tied to this is the fear that deferring to precedent may itself be a form of judicial activism. Courts can forge new obligations not envisioned by the treaty drafters, i.e., through a kind of reasoning from part to whole (or the other way) and in this sense even "positive obligations," or Proadiktionen that elaborate on the broader formula. Although that might lead to an improved protection of human rights, they can also be seen as a step too far for the judiciary, which would effectively create norms without direct consent by the state. This tension is the tension between principled development and overreach that courts must walk.⁵⁷

The second is one of cultural relativism. International human rights law works in many different legal, social and cultural environments. Excessive resort to the past, especially if it finds expression in the case law of courts sharing a particular regional or cultural point of view, may end up prescribing norms which are not entirely compatible with local traditions and social mores. Critics contend that reliance on pre-existing jurisprudence, and particularly Eurocentric norms derived from cases of the ECtHR or IACtHR, could potentially alienate non-Western countries or delegitimize human rights law in less culturally homogeneous environments.⁵⁸

Another criticism is that of the risk of jurisprudential rigidity. Consistency based on case law is a good thing, but too much reliance on earlier decisions will lead to an ossification in the law that limits the system's ability to evolve with norms and flex as needed. If a court is too wedded to precedents of its own making, it may lack capacity to respond to new challenges,

new technologies and shifting cultural values such that human rights law becomes less attuned to the realities of today.⁵⁹

Finally, there is also a risk that excessive reliance on Eurocentric jurisprudence or interpretations formulated in Western settings would lead to normative disequilibrium. Human rights norms, being universalistic in ambition, can at times be filtered through lenses coloured by specific juridical traditions and social practices. When such interpretations are treated as quasi-authoritative through precedent they may, inadvertently exclude other readings or curtail the possibility of regional courts, such as the AfCHPR, to produce contextually relevant case law. This critique highlights the need for precedent to be used in an intelligent and context-sensitive manner and not as a one-size-fits all basis for decision-making.⁶⁰

In conclusion, precedent serves an important function of maintaining consistency, predictability and legitimacy in human rights dispute resolution but it is also subject to substantial criticisms. Democratic legitimacy, judicial activism, cultural relativism, orthodoxy and Eurocentrism risk point to the importance for courts of combining stability with flexibility. Human rights decision-makers need to navigate carefully to maintain the legitimacy, authority and transformative role of international human rights law.

Recommendations

- Reasonable Application of Precedent: The Courts must make use of precedent to promote uniformity and certainty, but refrain from excessive adherence that inhibits legal progress.
- Transparency of Departure: Courts should articulate a reason when departing from established practice to improve its legitimacy.
- Cultural Sensitivity: Precedent should be "considered in light of pertinent cultural differences which might affect their outcome" 1 and cannot be used to impose 'foreign norms'.
- Judicial Dialogue: Cross-referencing of the decisions of other regional courts can 'enhance' global human rights standards and day as 'a guarantor of diversity'.
- Capacity-Building: Educating judges and lawyers in the proper usage of cases will encourage consistency and sounder reasoning.
- Periodic review: Courts should periodically reflect on their jurisprudence to make sure it is relevant and adapted to the evolution of human rights issues.
- Legitimacy and innovation in harmony: Precedent should strengthen the credibility of decisions rather than constrain the Court's capability of dealing with novel human right concerns.

Conclusion

Precedent has become a major and much debated aspect of the practice of international human rights adjudication, wedded to the tension between consistent legal interpretation on fixed terms as opposed to judicial discretion. Whereas the classic international law has refused binding stare decisis, human rights courts such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples' Rights (AfCHPR) tend to pay rather more attention to preceding decisions in order to guide interpretation and maintain normative coherence. Precedent functions as a quasi-normative instrument, in virtue of which the courts elaborate doctrines like the living tree, positive duties, and conformity control that generate predictability of outcomes, equality before the law, and institutional legitimacy. It also

promotes judicial economy, by avoiding that courts face the increasing volume of cases having to solve again and again primary legal questions. But it is not all smooth sailing on the precedent front. It can raise questions of democratic legitimacy, as courts may be seen to “invent” law without the consent of states. Other concerns involve lack of cultural awareness, reliance on Eurocentric traditions, judicial over-activism and possible doctrinal stiffening which could make the legal regime unable to keep pace with a changing society. To address these problems, courts should develop a transparent, situational model that accommodates the dual imperatives of uniformity and flexibility. Used conservatively, precedent enhances the authority, credibility and effectiveness of human rights courts in a way that keeps them responsive to changing circumstances while at the same time protecting core values of precedent can enhance the authority, credibility and impact of human rights courts to safeguard constitutional values in face of new challenges.

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