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Introduction

Introduction: Judicial Precedent in International and European Law

Judicial precedent is central to the activity of courts and the object of extensive scholarly debate, but its function and value are not self-evident. In domestic common law systems, judicial precedent is famously binding, according to the *stare decisis* principle; however, the effects of precedents are less clear in other systems, particularly in the case of international and supranational legal orders. Indeed, previous rulings are not binding for courts under either international law or EU law. Nevertheless, case law plays a fundamental role in guaranteeing certainty and consistency in international and supranational legal systems, reducing the risk of fragmentation arising from the expansion of these systems and facilitating the coexistence between courts belonging to different legal orders.

To meet the need for certainty and consistency, international and EU judges have created a dense network of intra- and inter-systemic references. This tendency led to the establishment of a sort of 'settled jurisprudence':[1] the same principles or rules tend to be interpreted in a similar, though not always identical, manner, even when they are applied by different judges, and even in distinct legal systems. Moreover, when international and EU judges depart from this 'settled jurisprudence' they usually justify their decisions by alleging the presence of new elements, such as new scientific knowledge, or contingent elements, such as the specific factual circumstances they are called upon to assess. This practice increases the consistency and predictability of the law but raises several theoretical and practical problems, which are explored and discussed in this *special issue*.

1 See e.g. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, para. 33.

The articles contained in this special issue are revised versions of the papers presented at the 18th Conference of Young Scholars of International Legal Studies (*Incontro giovani cultori delle materie internazionalistiche*), which took place at the University of Bologna on 10 December 2021. For several years, young Italian scholars of International and EU law have been organising yearly conferences dealing with topical issues, with presentations by PhD candidates and postdoctoral fellows and the contribution of established scholars acting as discussants. The 18th Conference of Young Scholars marked a return to the 'in person' format for this event, facilitating a lively debate among the speakers and the members of the audience.

This special issue addresses three main facets of precedents in international and European law, by focusing on the recent practice of international and EU courts. The first theme concerns the *effects of judicial precedent* in international law and, particularly, the effects of the advisory decisions of international courts. Khrystyna Gavrysh analyses the effects of the advisory opinions of the European Court of Human Rights ("ECtHR"), showing that, consistently with the practice of other international courts, they have the so-called effect of *res interpretata*. They indeed produce *erga omnes partes* effects and are even taken into account by the domestic tribunals of countries that have not ratified Protocol no. 16. The effects of the advisory opinions of the International Court of Justice ("ICJ") may even go beyond *res interpretata:* as discussed by Niccolò Lanzoni, a recent decision of the International Tribunal on the Law of the Sea ("ITLOS") suggests that a previous ICJ advisory opinion may *de facto* solve a dispute and thus have the authority of substantial *res judicata.*

The second aspect of judicial precedent investigated in this special issue concerns the *external precedent*, i.e. the use, by an international court, of a precedent created by another court. Caterina Milo argues that, although international courts are not legally bound to take other courts' precedents into consideration, they often refer to external precedents to fill the lacunae in their procedure and thus increase the legitimacy of their decisions. Roberto Ruoppo provides further evidence in support of the above argument, by focusing on the use of ECtHR precedents in international investment arbitration, alleging that arbitral tribunals often employ ECtHR case law by analogy benefitting from the similitude between the two legal frameworks, which are both concerned with individuals whose interests can be unilaterally undermined by state authorities.

The third topic of this special issue concerns the *purpose of judicial precedent* and its use by international courts. Precedent can, perhaps obviously, be used to buttress a court's legal reasoning. Yet, that is not always the case: by investigating a set of decisions under the Energy Charter Treaty, Niccolò Zugliani shows that previous case law did not have a determinant role in the

delimitation of the tribunals' deference to state authorities; only a case law that reaches a sufficient level of uniformity (*'jurisprudence constante'*) may perhaps decisively guide treaty interpretation. At any rate, judicial precedent can be used also for other, more 'strategic' purposes: Martina Di Gaetano, who analyses the case law on the rule of law of the Court of Justice of the European Union ("CJEU"), suggests that the CJEU used judicial precedent to widen the powers of EU institutions, including its own. By referring to to settled case law while simultaneously introducing innovative elements, the CJEU progressively extended the competence of EU institutions regarding the control of the independence of the judiciary.

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Gian Maria Farnelli
Department of Law, University of Bologna, Bologna, Italy
gianmaria.farnelli2@unibo.it

Federico Ferri
Department of Law, University of Bologna, Bologna, Italy
federico.ferri5@unibo.it

Mauro Gatti
Department of Law, University of Bologna, Bologna, Italy
m.gatti@unibo.it

Susanna Villani
Department of Political and Social Sciences, University of Bologna, Bologna, Italy
susanna.villani2@unibo.it