

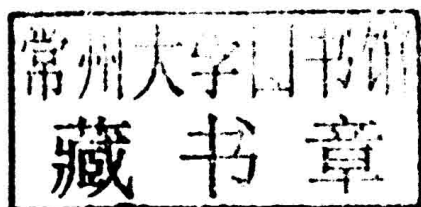
A. MARK WEISBURD

# Failings of the International Court of Justice

OXFORD

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**A. MARK WEISBURD**



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# Failings of the International Court of Justice

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TO THE MEMORY OF MY PARENTS

*Everard Johnson Weisburd, July 11, 1913–September 24, 2008*

*Helen Ruth Waller Weisburd, May 31, 1919–April 8, 2012*

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# Introduction

Consider the following excerpt from an international law casebook widely used in American law schools:

[International Court of Justice] decisions are, on the whole, regarded by international lawyers as highly persuasive authority of existing international law. The very fact that state practices are often divergent or unclear adds to the authority of the Court. Its decisions often produce a degree of certainty where previously confusion and obscurity existed . . .

A decision of the International Court of Justice is generally accepted as the “*imprimatur* of jural quality” when the Court speaks with one voice or with the support of most judges . . . Judgments and advisory opinions are not always compelling to states . . . [But] notwithstanding these reactions, the Court’s pronouncements, especially in non-political matters, are a primary source for international lawyers. Every judgment or advisory opinion is closely examined, dissected, quoted and pondered for its implications. They are generally lengthy and learned analyses of relevant principles and practices . . . [T]he case-law and associated opinions of the two “World Courts” constitute a substantial *corpus juris* relevant to many questions of international relations.

A complex problem concerns the roles of the Court in “developing” international law and reaching decisions that go beyond declarations of existing law. . . . The Court needs to show that its decisions are principled and in accord with the agreed basic concepts of international law. This requirement leads to reliance on broad doctrinal concepts and precepts

taken from treatises and prior case-law. When applied to new situations, the abstractions of basic doctrine create new law. Though many governments hesitate to accept or recognize this, international lawyers acknowledge the formative role of the Court while recognizing the political necessity for the Court to appear solely as an organ for declaring and clarifying the existing law.<sup>1</sup>

To judge from the foregoing, the International Court of Justice (I.C.J. or the Court) plays a crucial role in creating international law, to the point that its decisions ought to be taken extremely seriously. And, in fact, there have been a number of circumstances in which great weight has been placed upon its decisions. Thus the British House of Lords treated an I.C.J. opinion as conclusive on a matter of sovereign immunity.<sup>2</sup> Similarly, the German Federal Constitutional Court concluded that German courts should defer to international courts' readings of international law and read German statutes, if possible, to conform to the I.C.J.'s decisions, even if Germany was not involved in the I.C.J. cases that produced those decisions.<sup>3</sup> A panel arbitrating a dispute between the government of Sudan and the Sudan People's Liberation Movement likewise treated I.C.J. decisions as authoritative.<sup>4</sup> Further, very large numbers of scholars cite decisions by the I.C.J. as establishing rules of international law.<sup>5</sup>

1. Lori F. Damrosch et al., *INTERNATIONAL LAW: CASES AND MATERIALS* 255–56 (5th ed. 2009).

2. *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and another*, [2006] UKHL, paras. 24 (Bingham, L.J.), 48–49 (Hoffmann, L.J.)

3. See K.F. Gärditz, *Article 36, Vienna Convention on Consular Relations—Treaty Interpretation and Enforcement—International Court of Justice—Fair Trial—Suppression of Evidence*, 101 *AMER. J. INT'L L.* 627–29 (2007).

4. Final Award in the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and The Sudan People's Liberation Movement/Army on Delimiting Abyei Area and the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, between the Government of Sudan and the Sudan People's Liberation Movement/Army (July 22, 2009), available at [http://www.pca-cpa.org/showpagefb0a.html?pag\\_id=1306](http://www.pca-cpa.org/showpagefb0a.html?pag_id=1306) (last visited Aug. 25, 2015).

5. For such citations for the year 2010 alone, see, e.g., A. Anastassov, *Are Nuclear Weapons Illegal?*, 15 *J. CONFLICT & SEC. L.* 65, 73–74, 87 (2010); M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 *VA. J. INT'L L.* 269, 316 (2010); K.J. Keith, *The International Court of Justice and Criminal Justice*, 59 *INT'L & COMP. L.Q.* 895, 909–10 (2010); Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 *E.J.I.L.* 387 *passim* (2010).

In one sense, it is unsurprising that the I.C.J. seems to play a significant role in the development of international law; it is, after all, described by the United Nations Charter as “the principal judicial organ of the United Nations.”<sup>6</sup> However, under the I.C.J. Statute, the I.C.J.’s decisions in “contentious” cases, that is, cases brought by states against other states,<sup>7</sup> are binding only “between the parties and in respect of that particular case.”<sup>8</sup> In other words, the legal instrument constituting the Court treats its decisions as having no law-creating effect for states not involved in the case in which the decision is rendered. And, although the Court also has jurisdiction to render advisory opinions “at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request,”<sup>9</sup> such opinions are, by definition, advisory rather than binding.

There thus appears to be a contradiction between the significance for international law accorded the I.C.J.’s decisions by tribunals and scholars and the formal authority accorded to the Court in its Statute. If the tribunals and scholars are correct, the Court’s authority, it must be stressed, is no small thing. International law governs the behavior of states and of individuals acting on behalf of states or other political groupings.<sup>10</sup> Because all human beings are

6. U.N. CHARTER art. 92.

7. The I.C.J. has jurisdiction to hear cases between states that are parties to its Statute, Statute of the I.C.J. arts. 34, 35, and have consented in some way to its jurisdiction, which extends to all cases “the parties refer to it,” *id.* art. 36.1, and to cases brought against states making a declaration accepting the “compulsory” jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

provided that the state bringing the case has also made such a declaration, art. 36, paragraph 2. In practice, contested cases arrive at the court by three avenues: (1) a state that has made an article 36 declaration may bring a case against another state that has made such a declaration; (2) the states concerned may agree to have the court decide a particular matter; and (3) the parties to a treaty may include within the treaty an article whereby the parties agree that disputes regarding the treaty will be decided by the I.C.J.

8. *Id.* art. 59.

9. Statute of the I.C.J. art. 65.

10. The first observation is uncontroversial. Regarding individuals, it is clear that some acts are forbidden by international law only if carried out by someone acting at least at the behest of a state or of a group taking part in a non-international armed conflict, see, e.g.,

residents, and virtually all are nationals, of states, international law therefore controls the behavior of everyone in certain circumstances, and can prohibit actions that a state's population might want the state to take. In this situation, the I.C.J.'s decisions could have broad-ranging effects on large numbers of people if they are accorded the deference they received from the casebook editors and tribunals quoted above.

The basic thesis of this book is that the casebook editors and judges quoted above are mistaken in their assessment of the importance of the Court. More specifically, the book puts forward four propositions: (1) the Court lacks the formal authority to determine the content of international law; (2) although one could imagine that the Court could have demonstrated so great a degree of judicial competence over its lifetime that it could have properly come to be seen as possessing very significant *de facto* authority over international law, whatever the limits on its *de jure* authority, the Court has not performed well enough to have earned that type of authority; (3) states—as opposed to the legal scholars and judicial bodies quoted above—have not relied on the Court to a very great degree either to settle particular disputes or to establish rules of law governing subjects seen by states as involving significant political stakes; and (4) the environment within which the Court must function makes this result more or less predictable.

The next chapters flesh out these admittedly sweeping assertions. Chapter 1 discusses the processes that led to the creation of the Court's predecessor, the Permanent Court of International Justice (P.C.I.J. or Permanent Court) and of the Court itself, focusing on the authority these bodies were intended to possess. Chapter 2 addresses an abstract but fundamental issue: where the Court, or anyone seeking to determine the content of international law, could legitimately look to determine the substance of that body of law. Chapter 3 addresses the cases in which the Court has made errors regarding procedural aspects of its decisions; Chapter 4 does the same thing regarding the Court's substantive errors. Chapter 5 summarizes the Court's performance, describes its working environment, and seeks to explain the consequences of that environment for the Court's performance.

Rome Statute of the International Court, June 17, 1998, art. 8, A/CONF/183/9, available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) [hereinafter "Rome Statute"] while others, though not in terms limited to persons acting for states or other political groupings, are difficult to imagine as taking place except in the context of actions by such entities; see, e.g., *id.*, arts 5, 6.

# The Formal Authority of the Court

## I. INTRODUCTION

Consideration of the scope of the authority of the International Court of Justice (I.C.J.) must begin with analysis of its Statute. However, key articles of the I.C.J. Statute are taken more or less *verbatim* from the Statute of the Permanent International Court of Justice (P.C.I.J.), and the drafting history of the I.C.J. Statute<sup>1</sup> makes clear that the authority of the new tribunal was not intended to be significantly broader than that of its predecessor. The history of the drafting of the Statute of the P.C.I.J., therefore, is necessarily the history of the drafting of the Statute of the I.C.J., and throws light on the originally intended meaning of important language in the legal instrument that constitutes the Court. This chapter therefore begins with a discussion of the drafting of the P.C.I.J.'s Statute; it then addresses the drafting of the I.C.J.'s own Statute.

1. See discussion at notes 48–58, *infra*.



## II. THE DECISION TO ESTABLISH THE PERMANENT COURT

Article 14 of the Covenant of the League of Nations<sup>2</sup> required the League's Council to develop a plan for establishing a "Permanent Court of International Justice"; the Court was to be "competent to hear and determine any dispute of an international character which the parties thereto submit to it."<sup>3</sup> Pursuant to this charge, the Council appointed an Advisory Committee of Jurists to prepare plans for creating that Court.<sup>4</sup> The Committee's draft plan was then considered by the League Council, which modified it in some important respects. It was then taken up by Assembly of the League, which made additional changes to the draft. The Assembly then formally adopted the Statute and opened it for signature and ratification by the members of the League.<sup>5</sup> The records of the deliberations of the Advisory Committee, the Council, and the Assembly as they addressed this subject indicate the type of institution these bodies were attempting to create and the objectives they hoped to attain.

As to the latter point, the first objective was made explicit in Article 14—the Court would settle international disputes. The Court would be "a tribunal whose sentences should guarantee the maintenance of peace."<sup>6</sup> Providing a

### 2. That article provided:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

### 3. League of Nations Covenant, art. 14.

### 4. 1 LEAGUE OF NATIONS OFFICIAL JOURNAL 33–37 (1920).

5. Resolution concerning the Establishment of a Permanent Court of International Justice Passed by the Assembly of the League of Nations at Geneva on December 13th, 1920, LEAGUE OF NATIONS, DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL OF THE LEAGUE OF NATIONS UNDER ARTICLE 14 OF THE COVENANT AND THE ADOPTION BY THE ASSEMBLY OF THE STATUTE OF THE PERMANENT COURT at 257 (1921) [hereinafter DOCUMENTS CONCERNING ADOPTION OF THE STATUTE]. International Court of Justice July 11, 2008 at 2:02 pm, available at [http://www.icj-cij.org/pcij/serie\\_DD\\_documents\\_conseil\\_de\\_la\\_societe\\_des\\_nations.pdf](http://www.icj-cij.org/pcij/serie_DD_documents_conseil_de_la_societe_des_nations.pdf), website of the International Court of Justice (last visited Aug. 3, 2015).

6. ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, JUNE 16TH–JULY 24TH, 1920 WITH ANNEXES AT 6 (1920) [hereinafter JURISTS, PROCÈS-VERBAUX], available at [www.icj-cij.org/pcij/serie\\_DD-documents](http://www.icj-cij.org/pcij/serie_DD-documents)