

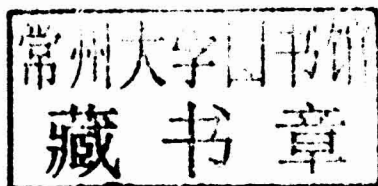
The International Court of Justice and the Judicial Function

Gleider I Hernández

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GLEIDER I HERNÁNDEZ



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for my parents

Foreword

In the past few years, the International Court of Justice has received increased attention in international legal scholarship, undoubtedly due to the marked increase in its use for the settlement of international disputes of an ever greater variety. This volume represents an important contribution to the literature, distinguishing itself from the manuals and commentaries that have recently come to assist us by approaching its subject from the angle of the question of the function of the Court in the international legal system. The author thus asks what the international judicial function can possibly aim at, how the creators of the Court's Statute saw it, what it takes to fulfil this function, how the Court evinces its understanding of its roles in the present international legal system, and how it is equipped, and is equipping itself, for these roles. Within the theoretical framework thus set out, the study offers insights into issues which are not just of fundamental importance for the functioning of the Court as a genuine judicial institution, but which make the study of the Court and its jurisprudence particularly interesting. In this regard, let me mention the author's successful treatment of the ICJ's more than cautious self-understanding of its contribution to international law-making, of its role as a gatekeeper *vis-à-vis* community features in the law like the acceptance of *jus cogens* and obligations *erga omnes*, its capacity and willingness to fill gaps in the law, and the handling of the institution of precedent by a Court designed as a hybrid reconciling civil law and common law expectations of the judicial function. All of this is described and analysed in a thorough and measured manner which the author manages to combine with a certain passion for his subject. He does not hide his disappointment with the ways in which the Court denies for itself a more pro-active role in the development of the law. He accepts in principle that the Court is more a mirror of the law that its makers find to their liking than a driving force towards what an idealistic observer might regard as progress, but the spirit of his book is one of subtle encouragement to the Court to dare going a bit further towards the 'ought'.

In sum, this is a remarkable book, a great scholarly achievement, written in a spirit which is at the same time realist and constructive. It deserves to be read with attention by any observer of the Court.

Bruno Simma
The Hague/Munich, December 2013

The International Court of Justice, the principal judicial organ of the United Nations, has been fulfilling its mandate to decide international disputes for almost seventy years. It is the role of the Court that forms the subject of this exciting and innovative work, in which Dr Gleider Hernández examines the Court's practice with a view to assessing how the judicial function is conceived in international law. In doing so, he makes an important contribution to understanding the Court's

relationship with the international legal order and its role in the development of international law. Indeed, this volume constitutes a welcome addition to the literature.

Dr Hernández engages in a review of the history of the Court's creation, its nature and the various aspects of its judicial function. He provides important insights into the Court's processes, examining the manner of drafting judgments, the nature of constraints on individual judges—including as to the requirements of judicial impartiality—and the role that precedent plays in the Court's decisions. Combining a review of the practice of the Court with a theoretical analysis, Dr Hernández illuminates the Court's claims to authority and legitimacy, the competing tensions between State sovereignty and the legalization of the international order with which the Court is faced, and what kind of role the Court can play in contributing to the development of international law.

In a welcome inclusion, Dr Hernández devotes two chapters to the notions of 'international community' and completeness in international law. In a nuanced and thorough analysis, he examines the concepts of *jus cogens*, *erga omnes*, and *non liquet* as they appear in the Court's decisions, and argues that the Court does not claim for itself a role in establishing an objective legal order that is complete and coherent.

Some may disagree with the author's conclusions as to the limited influence of the Court's decisions on the development of international law. However, all will be able to appreciate certain key points: that the Court is a product of its history and structure, that it must exist within the framework of international law, and that there are significant risks in demanding too much of it in terms of progressive development. The Court certainly plays a key role in the settlement of international disputes, and in the identification and application of international law, but Dr Hernández cautions that the influences and constraints on the Court are complex and multifaceted, and that we must be realistic and careful in ascribing to the Court roles beyond its function. On this front, the author's pragmatic analysis is effective.

The International Court of Justice has been fortunate to have engaged the experience of Dr Hernández, both during his time as an Associate Legal Officer, and now in the careful attention that he has paid to the Court's functions within the international legal order. He must be commended for the breadth of this research. His study sheds light on how the World Court understands its role within the international legal order, thereby offering greater insight to outsiders into the inner workings of this judicial institution. Indeed, the Court's role in the development of international law is of theoretical—but also great practical—interest. This book will undoubtedly be given careful consideration by international law practitioners and scholars with a desire to better understand the functions of the International Court of Justice, and indeed, the role of international tribunals in international law more generally.

Peter Tomka
President of the International Court of Justice
The Hague, January 2014

Acknowledgements

The covers of books are misleading, and not merely with reference to the trite commonplace that one should not judge a book by its cover. To list but one author is to over-simplify the process that leads to the final, published volume. The guidance, inspiration, and support received along the way that were so instrumental in writing this book go unnoticed. Any such list is necessarily incomplete, but I would like briefly to acknowledge some of those friends, mentors, and colleagues who have helped me to refine my thoughts, who have challenged my ideas, and who have contributed so meaningfully to my first book.

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To my parents, above all for their love and for showing me that nothing comes without sacrifice and hard work, and for showing me that no matter how outlandish the dream, one can bring it to fruition. This book is dedicated to them. A final thank you to my brothers, Ian and Kevin, who have always supported me in my ambitions, despite these leading me very far away at times.

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Gleider I Hernández
Durham, December 2013

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List of Abbreviations

ABILA	American Branch of the International Law Association
AC	Appeals Court (United Kingdom)
AIDI	Annuaire de l'Institut de Droit International
ASIL Proceedings	Proceedings of the American Society of International Law
CUP	Cambridge University Press
Can-TS	Canadian Treaty Series
Cmd	Command Papers (United Kingdom)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EUD	Editions Universitaires de Dijon
FRY	Federal Republic of Yugoslavia
GA/UNGA	General Assembly of the United Nations
HMSO	Her Majesty's Stationery Office
HUP	Harvard University Press
HLC	House of Lords Committee, United Kingdom
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep	Reports of the International Court of Justice
ICJ Ybk	Year Book of the International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, SC Res 955, UN Doc S/RES/955 (8 November 1994)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, UN Docs S/25704/36, annex (1993) and S/25704/Add.1 (1993), UN Doc S/RES/827 (25 May 1993)
ILA	International Law Association
ILC	International Law Commission
ILC Statute	Statute of the International Law Commission, <i>as annexed to</i> UN Doc. GA/Res/174 (II) A/519, 105 (21 November 1947)
ILC Ybk	Year Book of the International Law Commission
ILM	International Legal Materials
ILOAT	Administrative Tribunal of the International Labour Organisation
ILR	International Law Reports
IRRC	International Review of the Red Cross
ITLOS	International Tribunal for the Law of the Sea
Kokusaiho	
Gaiko Zassi	Kokusaiho Gakkai/Japanese Society of International Law, Kokusaiho Gaiko Zassi/Journal of International Law and Diplomacy