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Introduction

The International Court of Justice and the International Law Commission were both set up in the aftermath of the Second World War as part of a wider United Nations system dedicated to creating an international community that is respectful of, and bound by, international law. The Court, as the principal judicial organ of the United Nations,[1] would adjudicate specific disputes between States (and provide advisory opinions), with its decisions having no binding force except between the parties.[2] The Commission, as a subsidiary organ of the United Nations General Assembly, would promote the progressive development and codification of international law, with its products submitted to the Member States of the organization as proposals on which they may then choose to act.[3] By careful design, both organs were configured so as to guarantee that, in fulfilling their mandates, neither would be able to impose its will on States. Indeed, their sovereign masters sought jealously to retain the prerogative of international law-making and would continue to insist that it lie with them alone.

That the Court and the Commission have since then established significant links between themselves is not unknown to international lawyers. Those who follow the work of the two institutions have long observed not only that many members of the Commission have gone on to become members of the Court, but also the exceptional frequency with which each body has relied on the output of the other. Watts, for instance, observed that while the Court "is reluctant to cite as authority the work of individual writers of authority in international law, [it] has

[1] Charter of the United Nations (1945), articles 7, 92.
[2] Statute of the International Court of Justice (1945), article 59; excerpts from the Court's Statute, which is annexed to the UN Charter and forms an integral part thereof, may be found in Annex 1.
[3] Statute of the International Law Commission (1947), as amended, article 1(1); excerpts from the Statute may be found in Annex 2.

been much readier to invoke with approval the work of the International Law Commission"; he further remarked that "[i]t is not just a matter of the International Court relying on the work of the Commission, but of reciprocal action by the Commission building on and developing principles adopted by the Court in its judgments."[4] Others, including members of the Court and the Commission themselves, have similarly noted that the two organs not infrequently "borrow norms from each other"[5] and depicted this interplay as "symbiotic."[6]

When I attended several sessions of the Commission as an assistant to one of its members, I could not help but wonder whether mutual influence was all there is to it. Listening to the Commission's debates, I noticed readily the reverence – if not deference – with which the Court's pronouncements were received, and a more general sentiment that the Court's authority must not be undermined. There was also a sense that endorsement by the Court of the Commission's propositions was the ultimate prize at least some members sought for their labor. Moreover, I was intrigued to hear the President of the Court, during his address before the Commission, refer to the Court and the Commission as "the principal judicial and legal organs of the United Nations, respectively,"[7] notwithstanding the Commission's formal position as only a subsidiary organ of the General Assembly. Having earlier read that the Court and the Commission "rival" each other in their importance for international law,[8] I thought the primary mode was rather one of cooperation. I began asking myself whether consideration was ever given by the founders of the two institutions to how they were to interact, and

[4] A. Watts, *The International Law Commission 1949–1998*, Vol. I (OUP 1999) 12, 13.
[5] W.T. Worster, 'The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law', 31 *Boston University International Law Journal* (2013) 1 at 49–50.
[6] S.M. Schwebel, 'The Influence of the International Court of Justice on the Work of the International Law Commission and the Influence of the Commission on the Court', in *Making Better International Law: The International Law Commission at 50* (United Nations 1998) 161; S.M. Schwebel, 'The Inter-active Influence of the International Court of Justice and the International Law Commission', in C.A. Armas Barea et al (eds.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International 2000) 479 at 480; A. Pronto and M. Wood, *The International Law Commission 1999–2009*, Vol. IV (OUP 2010) 4.
[7] YBILC 2012, Vol. I, p. 146, para. 92 (Judge Tomka).
[8] R.Y. Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law', 13 ICLQ (1964) 385; Schwebel, 'The Influence of the International Court of Justice on the Work of the International Law Commission and the Influence of the Commission on the Court', *supra* note 6.

whether the current reality accords with any such vision. Bearing in mind the provisions of their constituent instruments, it increasingly appeared to me that a scholarly investigation into the extent and significance of the relationship between the Court and the Commission could usefully shed some light on the largely intangible process of international law-making.

A. Scope and Purpose of the Present Study

This book is about the relationship between the Court and the Commission as it has been shaped through decades of coexistence. As such, it is neither about the Court nor about the Commission per se. While the following chapters deal to a great extent with the mandates, composition, working methods, and output of the two bodies, they do so for the purpose of examining the dynamics of their interaction and the significance of that interaction for the international legal system more broadly.

Previous academic comment on the interplay between the Court and the Commission has been brief and/or noncomprehensive. For the most part, such accounts are found in works that are devoted primarily to one institution or the other,[9] or that zoom in on their impact on a specific field of law.[10] In common with Schwebel's more focused writing on the

[9] General works on the International Court of Justice say very little, if anything, about the Court's relationship with the Commission, but some articles do examine it from that angle: see, for example, S. Villalpando, 'On the International Court of Justice and the Determination of Rules of Law', 26 LJIL (2013) 243–251; P. Tomka, 'Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification', in L. Lijnzaad and Council of Europe (eds.), *The Judge and International Custom* (Brill Nijhoff 2016) 1–24; and M. Đorđeska, 'The Process of International Law-Making: The Relationship between the International Court of Justice and the International Law Commission', 15 *International and Comparative Law Review* (2015) 7–57. For a view from the side of the Commission, see, for example, B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Brill Nijhoff 1977) 15–17; I. Sinclair, *The International Law Commission* (Grotius Publications 1987) 127–136; Watts, *supra* note 4, at 12–14; and R. Higgins et al, *Oppenheim's United Nations*, Vol. II (OUP 2017) 944–945, MN 25.48–25.49.

[10] See, for example, S. Villalpando, 'Le codificateur et le juge face à la responsabilité internationale de l'État: interaction entre la CDI et la CIJ dans la détermination des règles secondaires', 55 AFDI (2009) 39–61; C.J. Tams, 'Law-Making in Complex Processes: The World Court and the Modern Law of State Responsibility', in C. Chinkin and F. Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 287–306; J. d'Aspremont, 'Canonical Cross-referencing in the Making of the Law of International Responsibility', in S. Forlati, M.M.

topic (now over twenty years old),[11] none is intended to be exhaustive. Moreover, no author seems to have situated the relationship between the Court and the Commission in the broader historical experience of international law, or to go much further than discussing the citations by one organ to the work of the other (and possibly the frequent migration of Commission members to the Court).

This study aims to offer more than a tour d'horizon of the cross-fertilization between the Court and the Commission and to delve deeper than pointing to those tangible instances of explicit reliance by one organ on the work of the other. In putting the relationship between the two institutions under the microscope, it seeks to provide a comprehensive account of all the links that draw them together and to examine them from the point of view of both organs. By uncovering and evaluating the way – indeed ways – in which the Court and the Commission interact, this study hopes to demonstrate that, over time, such interplay has had a profound impact not only on the work and standing of the two bodies but also on the wider phenomenon of international law-making. It will be argued, more specifically, that the relationship between the Court and the Commission runs deeper than what was envisaged when they were founded and what is appreciated still today: that, in effect, it enables them to "legislate" for the world.

While this book is centered on the Court and the Commission, they are by no means the only bodies implicated in international law-making. Indeed, several important developments in the law of nations have occurred without their participation and large swaths of the law so far have remained outside of their reach. Yet the Court and the Commission do occupy a unique position in the international legal system, not least for having mandates that are potentially wide enough to encompass the entire fabric of the law. Their output often constitutes the first port of call for those seeking to learn what the law is and their authority in expounding that law is generally unrivaled.

The picture emerging from this study may be of particular interest to scholars, practitioners, and students of international law. It is hoped, however, that it will capture the attention of larger circles too. While the idea that international legislation is the sole preserve of States continues to hold a deep paradigmatic grip on the imagination of many, it may be

Mbengue and B. McGarry (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (Brill 2020) 22–40.

[11] See *supra* note 6.

time to acknowledge that both the Court and the Commission often do more than assist in this activity.

B. A Note on Methodology

The research conducted for the present study entailed the examination of a large and varied body of information. Primary materials included some three hundred and thirty judgments, orders, and advisory opinions handed down by the Court since its establishment, as well as many of the individual opinions appended by its judges and some of the pleadings of States appearing before it. The Commission's annual reports to the General Assembly over the past seventy-four years have been combed through as well, along with the thousands of pages recording the Commission's plenary discussions throughout that period and the reports of its special rapporteurs. Other United Nations documents examined include the records of the San Francisco Conference of 1945 (and some of its preparatory papers) as well as the summary records of the meetings held in 1947 by the Committee on the Progressive Development of International Law and Its Codification, which prepared a draft of the Commission's Statute. Archival materials dating from the League of Nations era, including the *procès-verbaux* of the proceedings of the Advisory Committee of Jurists that prepared a draft of the Statute of the Permanent Court of International Justice, were also studied. All these were supplemented by numerous independent observations, made in person, of the Commission and the Court in session.

As indicated by the Bibliography attached to this study, a large volume of academic literature has proven highly useful, too. Writings by former and contemporary members of the Court and the Commission were often of particular interest, as were those examining in detail some of the work products of the two organs. Much of the earlier scholarship was instrumental in making it clear that a number of the pressing questions of the present are, in fact, age-old – and must be approached with that in mind.

Personal interviews were held with some twenty former and present members of the Court and the Commission in order to complement other data by receiving an unmediated insider's perspective on the inter-institutional relationship.[12] These interviews, which indeed have proved

[12] See also S. Brinkmann and S. Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing*, 3rd ed. (Sage 2015) 3: "qualitative interview research approaches

invaluable, were conducted mostly at The Hague and in Geneva on a not-for-attribution basis, to allow interviewees (whose names are listed in Annex 3) to speak freely.

While the Court and the Commission are, of course, institutions composed of changing casts of individuals, in the present study they are conceived of in a corporate form rather than as collectivities of their members. Observing them as unitary actors is justified given that their powers are assigned to them as such; their work is of a collective nature; and a consistent framework of institutional rules and traditions has guided them over the decades. At the same time, the role of individuals in shaping the relationship between the two organs is duly acknowledged and not infrequently highlighted.

In seeking to provide a detailed exposition of the history and extent of the interplay between the Court and the Commission, the following chapters are perforce descriptive in places. The information presented, however, has been distilled and synthesized, and is considered essential to the offering of abstractions that are embedded in facts.

A final caveat concerns the fact that international lawyers – and the author of this book among them – are for the most part only "amateur social theorists."[13] Our knowledge of political science is often equally limited at best. Immersing myself in some of the leading works on international relations, including those dealing with international organization and international norm dynamics, has greatly enriched my appreciation of the interplay between the Court and the Commission; it has also allowed me to endeavor to apply to this study some of the insights of those neighboring disciplines. The result, however, can only be a modest one in an inquiry so deeply planted in the international legal field.

people not as objects, mechanically controlled by causal laws, but rather as persons, i.e., as subjects who act and are actively engaged in meaning making."

[13] M. Koskenniemi, 'The Normative Force of Habit: International Custom and Social Theory', 1 FYIL (1990) 77 (explaining that "[i]n seeking to understand what goes on in the international society [international lawyers] necessarily do this from the vantage point of a theory. For the meaning [of] human behaviour – social actions and events – does not come before the observer's eyes 'an sich'. It appears through multilayered, even chaotic complexes of facts, ideas and texts. Reaching an understanding involves establishing meaningful relationships between these disparate facts, ideas and texts. This again requires that we are in the possession of a code for making distinctions – separating the essential from the non-essential, the cause from the effect, the rule from the regularity, and so on. This code is our more or less explicit social theory. Only by possessing such a code we can understand human behaviour and, by extension, events or actions concerning groups or nations").

Further such attempts may no doubt be worthwhile, especially if one bears in mind that all law-making – including on the international plane – is quintessentially political.

C. Structure of this Book

The book proceeds as follows. Following this brief introduction, Chapter 2 sets the scene for an appreciation of the contemporary relationship between the Court and the Commission by tracing its roots in the broader ideal of the pacific settlement of disputes and the rule of law in international affairs. Taking stock of developments dating back to the nineteenth century, it illustrates that the long-standing movements for an international court and for an international code were not unrelated, and that a certain vision did exist for the way in which their present institutional manifestations were to interact. That original vision, which was lost in time, has thus far attracted less attention from commentators than its importance requires.

Chapter 3 provides a detailed account of the impact that the Commission's work has had in shaping the Court's case-law. In addition to surveying and classifying all those instances in which the Court has to date been ready to refer expressly to the Commission's output, it demonstrates that reliance on the Commission's work has often been more implicit. The question is then posed as to the basis for such recourse and the advantage afforded by it.

Chapter 4 examines the unparalleled influence that the Court's decisions have had on the Commission's codification and progressive development of areas of the law under its consideration. It illustrates not only the great extent to which many of the Commission's propositions have borrowed their authority from the pronouncements of the Court, but also the significant impact of the latter on the Commission's choices concerning terminology and program of work. The chapter further demonstrates the Commission's conscious efforts to support the Court's cause more broadly, including by encouraging the expansion of the Court's jurisdiction and by promoting the doctrine of the sources of international law enshrined in its Statute.

Chapter 5 addresses the relationship between the Court and the Commission beyond the printed page. By focusing attention on the movement of members from one institution to the other, and on the customary exchanges in Geneva between the members of both, it reveals

the extent and contribution of the more subtle ties that bind the Court and the Commission.

Chapter 6 addresses in detail those rare occasions in which the Court and the Commission have adopted differing positions on the legal questions before them. In exploring both the potential for such disagreements and how they have been handled, the chapter shows that these instances attest to the strength of the inter-institutional relationship rather than undermine it. It also points out, however, that harmony comes at a cost.

Finally, Chapter 7 seeks to provide an overall assessment of what draws the Court and the Commission together and of the impact that their "special relationship" has produced. By pulling the threads together, it explains that the interaction between the two organs has turned out differently to that which was originally envisaged and that the great weight accorded by each of them to the work of the other has challenged the exclusive basis of State consent for international law's validity. In a legal system that remains heavily dependent on unwritten rules of customary international law that require authoritative determination, the ultimate result has been that the Court and the Commission together assume a public order role not foreseen for either of them by their founders.

2

The International Court of Justice and the International Law Commission: Joined at the Hip

> There can be no real court without law to control its judges, and there can be no effective law without institutions for its application to concrete cases.
>
> (Elihu Root addressing the American Society of International Law, 1921)

> There was naturally a close relationship between the Court as the adjudicator and the Commission as the codifier of international law. Without precise and unambiguous law the adjudicator would be very handicapped, but codification of international law without the existence of an adjudicatory body would be tantamount to law-making in a vacuum. Justice needed both the judge and the legislator.
>
> (Nagendra Singh, Vice-President of the International Court of Justice [and former member of the International Law Commission] addressing the International Law Commission, 1978)

Neither the International Court of Justice, established in 1945, nor the International Law Commission, established two years later, came into being as original, spontaneous creations. Both are reincarnations of older institutions, revived embodiments of ideas the roots of which were planted long before. While the Court is the current working manifestation of the long-standing effort to settle international disputes through judicial means, the Commission is the present pinnacle of the persistent endeavor to reduce the law of nations to a comprehensible set of rules and to secure general agreement upon them. These two movements – one for a world court, the other for a world code – were not unrelated. Those advocating for (or resisting) international adjudication were conscious from the outset that achieving greater clarity with regard to the rules to be applied was of the essence. Codification of international law, for its part, was expected to bring more matters under the sway of an international court, which would, in turn, assist in making more certain the rules in force among the nations (and in further developing or

refining them). The historical backdrop to the establishment of both the Court and the Commission is, therefore, not only fascinating in itself, but it is also of vital importance to any attempt at fully comprehending the relationship between the two organs today.

A. The First International Tribunals: "Courts without Law"

The first so-called permanent international court, the Permanent Court of Arbitration, was never intended to be a court. The twenty-six States that established it at The Hague in 1899 had opted instead for a standing International Bureau – one that would do no more than maintain a roster of potential arbitrators from which an ad hoc tribunal might be formed in the event that States sought to settle their dispute in this way. But the States parties to The Hague Convention on the Pacific Settlement of International Disputes did seem to mean it when they chose for their new entity the descriptor 'Arbitration' over 'Justice,' having envisaged the settlement of disputes through this vehicle not in accordance with law, but only "on the basis of respect for law."[1] While there was "no inherent quality of lawlessness in arbitration,"[2] it was regarded as a species of diplomatic process given that "[t]here was at times a tendency for the arbitrators to consider themselves as mediators rather than as faithful interpreters of Law, as diplomats rather than as judges, as conciliators called upon to decide between States in the way least painful to each of them, rather than as judges, whose duty it is to administer impartial justice."[3] The reluctance of States to submit themselves to a system in

[1] 1899 Convention on the Pacific Settlement of International Disputes, article 15. This text was left unchanged in article 37 of the 1907 Convention on the Pacific Settlement of International Disputes.

[2] M.O. Hudson, 'The Permanent Court of International Justice', 35 HLR (1922) 245 at 254.

[3] Final Report of the Advisory Committee of Jurists, in *Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* (Van Langenhuysen Brothers 1920) (hereinafter: *Procès-Verbaux*), p. 694; see also at p. 695 ("It is to be feared that the judges of the Court of Arbitration, being inclined to regard the case from a political standpoint, may not give sufficient weight to the rules of Law") and p. 696 ("Arbitration can take account of a thousand elements of fact and a thousand contingencies and, often, of certain necessities of a political kind. The decrees of justice take account only of a rule defined and fixed by law"). Mr. Léon Bourgeois, speaking to the members of the Advisory Committee on behalf of the Council of the League of Nations, had said that "[t]here is between the sentence in an arbitration and the judgment of a tribunal an essential difference, a difference as profound as that which exists between equity and justice. Arbitration can take account of a thousand elements of fact and a thousand contingencies, and often of certain necessities of a political