

INTERNATIONAL LAW-MAKING BY THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL LAW COMMISSION

This book provides an unparalleled account of the links that draw together the International Court of Justice and the International Law Commission, exposing the depth of the relationship between these central organs of the international legal system and its profound, unintended impact. By drawing upon historical records, as well as interviews with members of both organs, the book reveals that the original vision for interaction between the Court and the Commission has been lost in time. It inquires not only into the cross-fertilization that may be traced in the output of each body, but also into the more subtle ties that they nurture; it also shows how even the rare occasions of disagreement attest to the strength of the inter-institutional relationship rather than undermine it. All this throws light on the largely intangible process of international law-making and challenges the notion that international legislation is the sole preserve of States.

OMRI SENDER is a practitioner and scholar in public international law. He acts as counsel and advisor to States, international organizations, and multinational corporations, including in international dispute settlement proceedings. His writings on public international law, like his practice, cover the full range of the discipline.

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INTERNATIONAL
LAW-MAKING BY THE
INTERNATIONAL COURT
OF JUSTICE AND
INTERNATIONAL
LAW COMMISSION

Partnership for Purpose in a Decentralized
Legal Order

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S. Horowitz & Co.*



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In loving memory of my father, Yoram Sender (1952–2018)

... if we can bring ourselves to cease following the mirage of international statute law, we may find that there is developing under our eyes the very machinery of international law-making that we have been looking for all these years.

R.Y. Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law',
13 ICLQ (1964) 385 at 397

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FOREWORD

The United Nations was established, as the Preamble of its Charter proclaims, out of a determination to establish, among other things, conditions under which justice and respect for the obligations arising out of treaties and other sources of international law could be maintained.

For that purpose, the Charter established the International Court of Justice as the principal judicial organ of the United Nations and one of its six main organs. The role assigned to the Court is to decide in accordance with international law such disputes as are submitted to it. In addition, the Court may give advisory opinions on any legal question at the request of whichever body is authorized by or in accordance with the United Nations Charter to make such a request.

The Court succeeded the Permanent Court of International Justice, active in the period 1922 to early 1940, which laid a solid basis for the judicial settlement of disputes between States and rendered twenty-seven advisory opinions.

The new court, the International Court of Justice, was thus able to build on the experience and jurisprudence of its predecessor by further developing the practice of judicial settlement of disputes, and, through its judgments and advisory opinions, make a great contribution to the development of international law.

According to the Charter of the United Nations, it is the General Assembly which shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

To assist it in the discharge of this task, the General Assembly decided in 1947 to establish the International Law Commission. Over the last seventy-four years, the Commission's activities have substantially changed the landscape of international law. While custom was a predominant form of international law at the moment of the creation of the United Nations, since then, multilateral conventions have come to the

foreground. The contribution of the International Law Commission to this phenomenon is unique. This distinguishes the period of the United Nations from the time of the League of Nations. Although, upon the request of the Assembly, the Council of the League convened the Committee of Experts for the Progressive Codification of International Law (active between 1925 and 1928), the results were rather modest. The codification conference organized by the League of Nations in The Hague in 1930 can hardly be considered a milestone in the efforts to codify and develop international law.

While the International Court of Justice is officially the principal judicial organ of the United Nations, the International Law Commission, although formally a subsidiary organ of the General Assembly, deserves to be considered the main legal organ of the United Nations due to its most valuable contribution to the progressive development of international law and its codification.

Although there is no formal link between these two United Nations organs, the work of each has an influence and sometimes strong impact on the work of the other.

This monograph by Dr. Omri Sender engages in a detailed study of how the Court's judgments and advisory opinions have influenced the work of special rapporteurs on various topics with which the International Law Commission has dealt. It considers the extent to which Members of the Commission referred in their discussions to the Court's jurisprudence, and the various ways in which this jurisprudence has found its way into the drafts and reports presented by the Commission to the Member States of the United Nations.

This influence, as the monograph demonstrates, has not been one way. While in the early stage of their work, the Commission benefited perhaps more from the Court's jurisprudence than the Court from the work of the Commission, later on, once the latter elaborated various important codification drafts, which were subsequently adopted as international conventions, the Court started to pay much closer attention to the Commission's work. It regularly turned to the Commission's commentaries when it was required to interpret either the conventions adopted on the basis of the Commission's drafts, or even to draft articles which had not been transformed into conventional instruments. One may thus say that there has been a reciprocal influence between these two important organs of the United Nations. This has had a positive impact on the development and strengthening of the international legal order.

There have been occasional disagreements on substantive issues between the Court and the Commission. They do not escape the attention of Dr. Sender.

He also details the personal connections between the Members of the Court and Members of the Commission, which should not be overlooked. Sometimes the Commission is considered an *antichambre* of the Court; more than one-third of the Members of the Court in its history served on the Commission prior to their election to the principal judicial organ of the United Nations. Significantly, the book also unearths the original vision for the possible interaction between the Court and the Commission, explores the complementarity of their functions, and evaluates the impact of their close relationship on the international legal system.

The book is the result of a meticulous study of a wide array of documents. It is also based on interviews with a number of Members of the Court and Members of the Commission. It is a very solid piece of scholarly research. It represents an important contribution to the literature on these two major legal organs of the United Nations. I have no doubt that it will be of particular interest to all those who follow the activities of the Court and the Commission, their interaction, and their contributions to international law in their respective fields of responsibility.

Peter Tomka
Peace Palace, The Hague

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This book is a revised and updated version of a doctoral dissertation I submitted in May 2020 to the George Washington University Law School. While working both on that dissertation and on this book, I have incurred debts which it is a pleasure here to record.

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I am privileged also to have benefited from the knowledge and advice of other exceptional public international lawyers, including Michael Becker, Eyal Benvenisti, Eirik Bjorge, Gleider Hernández, Robert Kolb, David Malone, David Nanopoulos, Federica Paddeu, Arnold Pronto, and the late Hugh Thirlway. Several past and present members of the International Court of Justice and the International Law Commission have very generously made themselves available to be interviewed for this study, and I am deeply grateful to them for their time and for their trust.

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ABBREVIATIONS

AFDI	<i>Annuaire français de droit international</i>
APDI	<i>Anuário português de direito internacional</i>
AJIL	<i>American Journal of International Law</i>
BYIL	<i>British Yearbook of International Law</i>
CJICL	<i>Cambridge Journal of International and Comparative Law</i>
CJIL	<i>Chinese Journal of International Law</i>
CUP	Cambridge University Press
CYIL	<i>Canadian Yearbook of International Law</i>
EJIL	<i>European Journal of International Law</i>
FYIL	<i>Finnish Yearbook of International Law</i>
GJIL	<i>Georgetown Journal of International Law</i>
GYIL	<i>German Yearbook of International Law</i>
HICLR	<i>Hastings International and Comparative Law Review</i>
HILJ	<i>Harvard International Law Journal</i>
HLR	<i>Harvard Law Review</i>
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
IJIL	<i>Indian Journal of International Law</i>
ILC	International Law Commission
IOLR	<i>International Organizations Law Review</i>
JIDS	<i>Journal of International Dispute Settlement</i>
LAPE	<i>Law and Practice of International Courts and Tribunals</i>
LJIL	<i>Leiden Journal of International Law</i>
MPEPIL	<i>Max Planck Encyclopedia of Public International Law</i>
MPYUNL	<i>Max Planck Yearbook of United Nations Law</i>
MUP	Manchester University Press
NILR	<i>Netherlands International Law Review</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
OUP	Oxford University Press
PASIL	<i>Proceedings of the Annual Meeting (American Society of International Law)</i>
PCIJ	Permanent Court of International Justice

xvi	LIST OF ABBREVIATIONS
RdC	<i>Recueil des Cours de l'Académie de La Haye</i> (The Hague Academy Collected Courses)
SAYIL	<i>South African Yearbook of International Law</i>
UNCLOS	United Nations Convention on the Law of the Sea
YBICJ	<i>Yearbook of the International Court of Justice</i>
YBILC	<i>Yearbook of the International Law Commission</i>
YLJ	<i>Yale Law Journal</i>