



University of Baltimore Law  
**ScholarWorks@University of Baltimore School of Law**

---

All Faculty Scholarship

Faculty Scholarship

---

2002

## The Authority of the International Court of Justice

Mortimer N.S. Sellers

Follow this and additional works at: [https://scholarworks.law.ubalt.edu/all\\_fac](https://scholarworks.law.ubalt.edu/all_fac)



Part of the Law Commons

---

# The Authority of the International Court of Justice

*M.N.S. Sellers*  
*University of Baltimore*

Recently some lawyers and statesmen have begun to cite judgments of the International Court of Justice as if they were decisive evidence of the content of international law. This trend, if it continues, will tend to diminish the influence of international law on the actions of states and others, by arrogating the authoritative determination of the content of international law to a tribunal that was never intended to generate rules of universal application, is ill-equipped to do so, and ought not usually be viewed as having done so, except in very exceptional circumstances.

## WHY PEOPLE EXAGGERATE THE COURT'S AUTHORITY

The tendency to view the judgments of the International Court of Justice as if they were decisive evidence of the content of international law arises by analogy with the role of courts in certain western democracies, and particularly with that of the Supreme Court of the United States of America, which gives final and decisive interpretations

*M.N.S. Sellers*

of the constitution and laws of the United States, including international law and treaties.<sup>1</sup> Collectively, these constitute the “supreme law of the land”, and are binding throughout the Union.<sup>2</sup> As Chief Justice John Marshall explained on behalf of a unanimous court in *Marbury v. Madison* (1803) - - although “the people collectively have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness” as “supreme and paramount law”, it is “emphatically the province and duty of the judicial department to say what the law is” and therefore to “expound and interpret” the law of the land.<sup>3</sup>

The doctrine of the separation of powers, as embodied in the many written constitutions that have developed in the two-hundred years since Marshall wrote his famous opinion, have confirmed the judiciary in most such regimes as the ultimate arbiter of the content of law. Legislatures draft statutes, according to this theory, but the judiciary says what the law is. So long as the executive power in the state remains willing to enforce and to respect the courts’ decisions, then law will be whatever the courts say it is. Oliver Wendell Holmes expressed the view of many advocates accustomed to litigating under separation-of-powers constitutionalist regimes when he said that the business of lawyers is “the prediction of the incidence of the public force through the instrumentality of the courts.” Since

---

<sup>1</sup> Constitution of the United States of America (September 17, 1787) Article III.

<sup>2</sup> *Ibid.*, Art. VI.

<sup>3</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

## *The Authority of the International Court of Justice*

“in societies like ours” the “whole power of the state will be put forth to carry out their judgment and decrees.” A strictly practical man, a “bad man” as Justice Holmes put it, living under the rule of law and the separation of powers of a modern constitutional state, will pay attention to what courts say, and treat this as “law”, or suffer the consequences.<sup>4</sup>

The United Nations Charter was drafted in the same style and structure as the Constitution of the United States of America, using much of the same vocabulary. “We the Peoples of the United Nations”<sup>5</sup> echoed “We the People of the United States”<sup>6</sup> in seeking to establish conditions under which “justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”<sup>7</sup> Both establish a “House of Representatives” (United States)<sup>8</sup> or “General Assembly” (United Nations).<sup>9</sup> Both establish a “Senate” (United States)<sup>10</sup> or “Security Council” (United Nations).<sup>11</sup> Both establish an “executive” (United States)<sup>12</sup> or “secretariat” (United Nations).<sup>13</sup> And both establish a “Supreme Court” (United States)<sup>14</sup>

---

<sup>4</sup> Oliver Wendell Holmes, Jr., “The Path of the Law”, 10 *Harvard Law Review* 457 (1897).

<sup>5</sup> *Charter of the United Nations* (June 26, 1945), Preamble.

<sup>6</sup> *Constitution of the United States of America*, Preamble.

<sup>7</sup> *Charter of the United Nations*, Preamble. Cf. *Constitution of the United States*, Preamble and Article VI.

<sup>8</sup> *Constitution of the United States*, Article I.

<sup>9</sup> *Charter of the United Nations*, Chapter IV.

<sup>10</sup> *Constitution of the United States*, Article I.

<sup>11</sup> *Charter of the United Nations*, Chapter V.

<sup>12</sup> *Constitution of the United States of America*, Article II.

<sup>13</sup> *Charter of the United Nations*, Chapter XV.

<sup>14</sup> *Constitution of the United States of America*, Article III.

or "International Court of Justice" (United Nations).<sup>15</sup> The United States Supreme Court holds the ultimate "judicial power of the United States"<sup>16</sup> and the International Court of Justice is "the principal judicial organ of the United Nations."<sup>17</sup>

### THE ICJ WAS NEVER INTENDED TO DETERMINE THE LAW

Notwithstanding its many similarities with ordinary democratic constitutions, the Charter of the United Nations did not create a new system of laws, and was not intended to do so. The primary purpose of the United Nations Charter was to "save succeeding generations from the scourge of war"<sup>18</sup> by "maintaining international peace and security"<sup>19</sup> based on the "sovereign equality of all its members."<sup>20</sup> While the United Nations will "adjust" or "settle" those international disputes that might lead to a breach of the peace "in conformity with the principles of justice and international law,"<sup>21</sup> the Organization does not exist for the purpose of enforcing international law, and will not always do so. The General Assembly and Security Council are not the world's legislature, the Secretary-General is not the world's president, and the International Court of Justice is not the world's court, or the ultimate arbiter of

---

<sup>15</sup> *Charter of the United Nations*, Chapter XIV.

<sup>16</sup> *Constitution of the United States of America*, Article III.

<sup>17</sup> *Charter of the United Nations*, Chapter XIV.

<sup>18</sup> *Ibid.*, Preamble.

<sup>19</sup> *Ibid.*, Article 1.1.

<sup>20</sup> *Ibid.*, Article 2.1.

<sup>21</sup> *Ibid.*, Article 1.1.

## *The Authority of the International Court of Justice*

international law, even under the terms of its own statute.

The Statute of the International Court of Justice creates a body of fifteen judges,<sup>22</sup> elected by majority vote in the United Nations General Assembly and Security Council,<sup>23</sup> for nine-year terms, and eligible for re-election.<sup>24</sup> In this, the International Court of Justice differs from the supreme courts of modern constitutional democracies such as the United States, where Justices are selected by democratically elected officials<sup>25</sup> and hold their seats *quam diu se bene gesserint*, which is to say, for life.<sup>26</sup> The judges of the International Court of Justice are selected with the significant participation of the many non-liberal, non-democratic governments that hold seats in the United Nations General Assembly and Security Council, and inasmuch as the judges are eligible for periodic re-election, they remain subject to the continuing influence of non-democratic and illiberal regimes. This deprives the International Court of Justice of the democratic legitimacy and independence necessary before any court can deserve the deference of its subjects. The International Court of Justice lacks the basis in the people, collectively, that gave John Marshall's court its decisive authority.

The Court's own Statute recognizes this shortcom-

---

<sup>22</sup> *Statute of the International Court of Justice*, Article 33.

<sup>23</sup> *Ibid.*, Articles IV, VIII, and X.

<sup>24</sup> *Ibid.*, Article 13.

<sup>25</sup> *Constitution of the United States of America*, Article II, cl. 2.

<sup>26</sup> *Ibid.*, Article III, cl. 1.

ing, by extending the jurisdiction of the International Court of Justice only to those cases "which the parties refer to it", either directly, or by treaty.<sup>27</sup> Many cases are not heard by the full court, but rather by smaller chambers of judges approved by the parties to a particular dispute.<sup>28</sup> In any case, the statute of the International Court of Justice makes it clear that the decisions of the Court have "no binding force except between the parties and in respect of that particular case."<sup>29</sup> According to the terms of its own statute, the International Court of Justice will refer to judicial decisions, including its own, only as "a subsidiary means for the determination of rules of law," on the same level of authority as the teachings of publicists, and inferior to international conventions, custom, and the general principles of law accepted by civilized nations.<sup>30</sup>

### THE ICJ IS ILL-EQUIPPED TO DETERMINE THE CONTENT OF INTERNATIONAL LAW

The International Court of Justice is ill-equipped to determine the content of international law for precisely the same reasons that it is so well designed to "adjust" or to "settle" international disputes, which is to say, because it is subject to the political control and oversight of interested states. As part of the United Nations System, the Court's primary emphasis is on the peaceful settlement of disputes, and not on the enforcement of

---

<sup>27</sup> *Statute of the International Court of Justice*, Article 36.

<sup>28</sup> *Ibid.*, Article 26.2.

<sup>29</sup> *Ibid.*, Article 59.

<sup>30</sup> *Ibid.*, Article 38.

## *The Authority of the International Court of Justice*

justice. Cases come before the Court only when parties to a dispute have agreed that they should do so. This implies a general willingness in advance to abide by its decisions, but creates no actual mechanism for imposing unwelcome decisions of the International Court of Justice on recalcitrant parties, unless the Security Council makes an independent decision to do so, in response to a threat to the peace.

The International Court of Justice is subservient in the first instance to the Security Council<sup>31</sup> and in the second instance to those states that use it to resolve their disputes. While the Court should arbitrate such disputes “on the basis of international law,” it may also decide them *ex aequo et bono*, or on the basis of other stipulations made by the parties.<sup>32</sup> The settlement of disputes within the United Nations System seeks solutions “by peaceful means in such a manner that international peace and security . . . are not endangered.”<sup>33</sup> This requires the International Court of Justice to consider the particular situation and relative power of the parties, rendering all decisions of the Court too idiosyncratic to be decisive “except between the parties and in respect of that particular case.”<sup>34</sup>

Determining the content of law requires procedures designed to elicit the objective requirements of justice with greater accuracy and stability than would be possi-

---

<sup>31</sup> *Charter of the United Nations*, Article 94(2).

<sup>32</sup> *Statute of the International Court of Justice*, Article 38.

<sup>33</sup> *Charter of the United Nations*, Article 2(3).

<sup>34</sup> *Statute of the International Court of Justice*, Article 59.



ble through the separate and independent judgment of the law's own subjects, acting without legal control. Domestic legal systems within states claim this authority, which they actually deserve only to the extent that states maintain the liberal and democratic institutions that justify political power. The International Court of Justice makes no claim to decisive authority to determine the content of international law, because it lacks the democratic and liberal foundations that would support such a claim. Instead, the International Court offers a useful forum for the peaceful settlement of disputes between consenting states. Extending this authority to restrict the independent legal judgments of democratic and liberal states would undermine international law, by separating the law from its ultimate foundation in justice.

## CONCLUSION

The authority of the International Court of Justice has a limited scope, which does not extend beyond settling those disputes that states decide to set before it. These settlements have no precedential value, and should play no more than a subsidiary role even in the court's own subsequent judgments, let alone anyone else's. The International Court of Justice exists to settle disputes, not to declare or to create international law. Capacious claims for the court's decisive authority undermine this useful function, by giving the court's settlements an imperial power, which will dissuade many just and law-abiding states from bringing their disputes before it.