

Contents

<i>Foreword</i>	<i>page</i> xiii
<i>Preface</i>	xvii
<i>List of abbreviations</i>	xviii
1 Introduction	1
Decisional authority	1
The juridical basis of the Court's functions	3
The concept of precedents	6
Different ways in which a system of precedents may operate	9
2 The growth of the Court's case law	13
Increase in the relative importance of case law	13
The experience of the Permanent Court of International Justice	16
Continuity in the judicial system	22
Reliance by the International Court of Justice on the practice of the Permanent Court of International Justice	23
Reliance by the International Court of Justice on its own case law	26
The importance which the Court attaches to its case law	29
3 Range of precedential resources	32
Accessibility	32
Range of admissible precedents	35

Contents

4	The bases of the system	40
	Introductory remarks	40
	The general jurisprudential basis	40
	The specific statutory basis	47
5	The Advisory Committee of Jurists	48
	Ambivalence in the work of the Committee	48
	Some draft schemes assumed that the Court would make law	49
	The drafting of Article 38 of the Statute	52
6	The view taken by the League of Nations	55
	Introductory remarks	55
	The right of intervention	55
	Draft intervention schemes	61
	The object of Article 59 of the Statute	63
7	The possibility of judge-made international law	67
	Introductory remarks	67
	Whether precedents can serve only as inputs in the pro- cesses of creating customary law	69
	The Court's 'function is to decide in accordance with international law'	73
	Judicial decisions may operate in two ways	76
	Judicial <i>dicta</i> on the point	83
	Scholarly opinion	86
	Possible instances of judicial law-making	90
	Conclusion and caveat	91
8	<i>Stare decisis</i>	97
	<i>Stare decisis</i> does not apply	97
	<i>Stare decisis</i> and the Statute	99
	Judicial <i>dicta</i> on the point	102
	Scholarly opinion	103
	To hold that the Court can create law does not imply that <i>stare decisis</i> applies	105
	The exclusion of <i>stare decisis</i> does not also exclude the precedential force of decisions of the Court	107

Contents

9 Distinguishing	110
Introductory remarks	110
The case may not have established the principle for which it is cited	112
The principle of the case may be qualified by later legal developments	114
The legal or factual framework may be significantly different	117
But differences do not always preclude recourse to a precedent	119
Case law is not statute law	122
The relevance of arguments	124
Limits to the utility of distinguishing as a method of developing the law	125
10 Departing from a previous decision	128
Existence of the power to depart from a previous decision	128
Undesirability of a departure <i>sub silentio</i>	130
The power to depart is to be exercised with caution	131
The extent to which the power to depart is exercisable	134
Absence of argument	136
The standing of a particular bench	141
Unanimity and the question of authority	142
Changes in the composition of the Court	145
Can the Court overrule?	147
Possible cases of departure	149
11 Ratio decidendi and obiter dictum	152
Introductory remarks	152
The distinction at the level of the Court	153
The distinction at the level of individual opinions	160
The interplay between <i>motifs</i> and <i>dispositif</i>	161
12 Advisory opinions and decisions of chambers	165
Precedential value of advisory opinions	165
Precedential value of decisions of a chamber	171
13 The precedential impact of individual opinions	177
Introductory remarks	177

Contents

Holdings resting on a false consensus	180
Criticism of judgment	181
A dissent on a point may not necessarily oppose the majority view on the point	186
When a judge is bound by the decision of the Court	188
The utility of separate opinions and dissenting opinions	191
Individual opinions are part of the collective work of the Court	195
The Court's view	200
The influence of the legal cultures represented in the Court	203
14 Effect and scope of the Court's case law	209
Some practical effects	209
The influence of case law on the litigation strategy of parties	213
Judicial self-restraint	215
The scope of the Court's developmental function	221
15 Conclusion	234
<i>Index</i>	242