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THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN THE DEVELOPMENT OF INTERNATIONAL LAW: A CRITICAL RESPONSE TO CHRISTIAN J. TAMS

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ABSTRACT

This response paper offers a critical assessment of Christian J. Tams' analysis of the International Court of Justice (ICJ) and argues that the Court's role in developing international law far exceeds what is formally permitted in the ICJ Statute, which restricts the ICJ to interpreting and applying already established legal principles and rules. Through analysis of key provisions of the ICJ Statute (especially Articles 38 and 59), it demonstrates the distinction between law-making in a formal sense versus the development of law, and demonstrates how judicial interpretation of existing international legal norms can result in their development without constituting legislation.

This paper analyses some landmark ICJ cases like the Barcelona Traction case, the Reparations for Injuries case, the Nicaragua case and the Jurisdictional Immunities case, to demonstrate how these cases illustrate how the ICJ plays an important role in the development of international law, particularly with regard to state responsibility, international legal personality, human rights, and the law of the sea. Also, the analysis of the interaction of the ICJ with individual states and the International Law Commission in the greater process of establishing norms in international law is done. The paper recognizes the Court's authority of interpretation and its persuasive effect; however, it also addresses concerns about the Court's judicial activism and legitimacy, and the limitations of international adjudication. It presents that while the ICJ does not perform a formal role as a lawmaker, it does play a significant role in establishing, consolidating, and progressively developing international law.

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INTRODUCTION

The Growth of International Law by The International Court of Justice by Christian J. Tams raises a very important question in the realms of public international law i.e. does the International Court of Justice simply apply the existing law or does it contribute to the development of international law? In domestic legal systems, courts often create new law through their interpretation; in international law (which does not have a worldwide legislature) this is much more complicated. The ICJ is the most important judiciary of the United Nations and it is primarily aimed at solving disputes between states. Article 38 and 59 of the Statute of the Court provides that it cannot make new law and only the decision can bind the two parties to the dispute. However, the article posits that despite these weaknesses, the ICJ plays an important role in defining, interpreting and broadening the rules of international law. The paper will thus examine the contrast between formal law-making and legal evolution of international law.

The article is quite important to the study of Public International Law. The international law system lacks a single institution to make laws on behalf of all states, as a domestic legal system. Law making in this region occurs through treaties, customary practices that have been developed over an extended period of time and common law principles. Article 38 of the ICJ Statute states that any judicial decisions would be considered as just one (subsidiary) source of law.

Even though judicial decisions can only be a single (subsidiary) method of establishing the law in the international system, the ICJ has interpreted and clarified many important principles of international law and its decisions are often consulted by many countries, international organisations, and scholars in determining the state of international law. The interpretation or formulation of the law by the ICJ is thus also crucial to the evolution of international law. The students will be provided with the feeling of the importance of judicial interpretation in a decentralised legal system in this article.

The article is topical as it deals with the issue of great concern in the international law: the role of the judicial branch in the lawmaking process. It is therefore important that a first-year law student knows where international law has its sources and the role of the ICJ in the system of international law.

OVERVIEW OF THE ARTICLE

This article concerns the question of whether or not the International Court of Justice helps or develops international law, by Christian J. Tams.

First, the author describes that traditionally, judges are regarded as applying only the existing law. According to Article 59 of the International Court of Justice ("ICJ") statute, the Court's decisions only create binding effects on the parties involved in litigation matters and are not applicable or enforceable against third parties (non-parties). Also, according to Article 38 of the ICJ statute, judicial decisions are a secondary or auxiliary source of law and do not offer a basis to establish new binding legal norms on or to the international community. Thus, it appears that the traditional perspective implies that the International Court of Justice lacks formal law-making authority.

Though this is not an official law-making authority, the author raises the question that, in practice, the International Court of Justice has a powerful influence on the development of international law. The interpretation of treaties and elucidation of customary law by the International Court of Justice will also help to define and formulate legal principles. Both practitioners and the academic community will also cite many of the Court rulings and opinions as authoritative and reliable sources of law.

The author also comments on the difference between law-making and legal development and elaborates that such a distinction is hard to define. There is a possibility that an already existing rule of law can be interpreted by the International Court of Justice in a new manner so that it will appear that a new law has been passed, but in an actual sense, the International Court of Justice has simply interpreted the same rule of law differently.

The author contends that, as far as the ICJ is concerned, there are other actors in the development of international law other than the ICJ: the States, international organisations and the International Law Commission. The author provides instances of how the ICJ has played a role in illuminating legal principles and developing legal standards by analysing the three areas: human rights law, state responsibility and the law of the sea. To determine the implications of the argument posed by the author, he concludes that the ICJ, even though it does not legislate, helps in the making and formulation of international law by interpreting and clarifying international law.

ASPECTS OF PUBLIC INTERNATIONAL LAW INVOLVED

The role of judicial decisions is the subject matter of the article, which is of significance in the field of public international law. The Statute of the ICJ 38(1)(d) takes judicial decisions as the second category of the source of law and it implies that the International Court of Justice (ICJ) is not a legislative institution. Nevertheless, the judgments of the ICJ remain significant since they aid in the interpretation and exposition of laid down legal principles.

A centralised international legal system does not have laws that are enacted by a central authority and are applicable to all states, as is the case with domestic law systems. Thus, the law has to be discovered in the treaties and customs as well as in general principles. The role of courts in a decentralised legal system is important and unique, in the sense that they interpret these sources and give them meaning in a way that they are construed by the countries to which they are applied.

The other notion covered in this article is precedent in international law. The ICJ is not bound to its own precedents as some national courts are to theirs, but the rulings of the ICJ are frequently regarded as persuasive. Thus, even though the ICJ cannot create law in the traditional meaning of the term, it can influence the interpretation of the law by the courts and the application of the law by the courts.

Lastly, the paper reveals the interaction of different actors in international law, such as states, the International Law Commission (ILC) and international organisations. The ICJ is not the sole actor in the law-making, but it is one of numerous.

LEGAL PROVISIONS APPLICABLE

The article mainly deals with the provisions of the Statute of the International Court of Justice, which provide the role and restrictions of the Court.

Article 38(1)(d): According to this provision, judicial decisions are a secondary source of the establishment of rules of international law. It clarifies the fact that the ICJ does not make binding law for all states.

Article 59: Under this article, the decisions made by the ICJ are only binding to the parties in a certain case. This restricts the legal impact of its decisions and prevents them from being universally binding precedents.

The other indirect mention of the role of the Court is its dispute settlement role, which is its main role in the UN system.

In addition to these provisions, the article also discusses the interaction of customary international law and treaties with judicial decisions. Though the ICJ is not a law-making body, its interpretations are more likely to help in clarifying such sources and molding them in the future.

ISSUES REFERRED IN THE ARTICLE

The article poses some significant questions about how the ICJ works:

1. Whether the international courts or the ICJ are considered as lawmakers or law-applicants?
2. What is the difference between “law-making” and “legal development”?
3. Whether the decisions and authority of the international court are binding in international law?
4. Does the ICJ play a role in the international law-making process?
5. What is the difference in the influence of the ICJ in various fields of international law?

ANALYSIS AND INTERPRETATION

The article provides a clear understanding of the contribution of the International Court of Justice (ICJ) to the evolution of international law through its decisions. Although the Court does not have formal law-making power, its interpretation of the rules of law often has an effect on the interpretation and application of international law in practice.

One of the primary arguments of the author that the ICJ is a law-developing organ is the interpretation. The Court does not merely apply rules when making decisions on a case. Rather, it describes the extent, connotation, and boundaries of legal principles. This process of interpretation can have an influence on how states, scholars and other international bodies interpret such rules over time.

This can be clearly seen in the *Barcelona Traction*.² case. The ICJ, in this instance, came up with the concept of obligations ‘Erga Omnes’, which means obligations towards the whole international community. This ruling, before this concept was not well defined. The Court acknowledged this notion, thus providing a wider interpretation of some international duties like the ban on genocide and aggression. The Court did not pretend to have created a new rule, but its interpretation had a far-reaching effect on the future evolution of international law.

² *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports (1970)

Similarly, in the *Reparations for Injuries*³ case, the ICJ recognised that the United Nations has international legal personality. This was a major development as it became apparent that international organisations had rights and duties under international law. The Court came to this conclusion relying on the functions and purposes of the UN, and not on a certain legal provision. This demonstrates how the Court can broaden its legal knowledge by reasoning and interpreting.

The other interesting case is the *Nicaragua*⁴ case, where the ICJ answered the questions on the use of force and the responsibility of the state. The Court considered the traditional international law and clarified the provisions of non-intervention and the prohibition of the use of force. It further distinguished between treaty law and customary law, which helped to discern the relationship between different sources of international law. This case is frequently referred to as a good example of how the ICJ helps to clarify and develop legal principles.

The other case that was referred to in the article is the *Jurisdictional Immunities*⁵ case, the ICJ addressed the question of the conflict of state immunity and the violation of human rights. The Court said that even gross abuse of human rights does not necessarily deprive a state of its immunity before foreign tribunals. This ruling is significant as it demonstrates the way the ICJ strikes a balance between conflicting legal principles. It further emphasises that the Court is not necessarily progressive, but rather attempts to ensure stability and consistency in international law.

The other case on which the rule is based is the *Chorzów Factory*⁶ case, where the Court ruled that a state which has wrongfully acted must recompense in full. This principle has become a fundamental principle of the law of state responsibility and is generally accepted nowadays. This rule was not formally enacted in any treaty at the time, but the reasoning of the Court rendered it very potent.

The paper goes further to outline the connection between the ICJ and the International Law Commission (ILC). The law of state responsibility has been developed by the ICJ and the ILC in a complementary way. For example, in the *Tebzan Hostages*⁷ case, the ICJ discussed when the acts of private individuals can be attributed to a state. This argument was later reiterated in the Articles on

³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, para. 185.

⁴ *Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, at para. 268

⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99

⁶ *Factory at Chorzów, Merits*, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 47

⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980) 3, para. 74.

State Responsibility of the ILC in Article 11. This shows that the ruling of the ICJ can directly influence the development of international rules.

At the same time, the ICJ has been contributing to and strengthening the ILC efforts as well. The *Gabčíkovo-Nagymaros*⁸ case recognised the necessity concept as a defence in international law, which helped it to secure its place in the draft articles of the ILC. This indicates that the ICJ and the ILC are not one-sided in their relationship, but cooperative.

Another point that the article makes is that the impact of the ICJ is not equal in all fields of international law. To illustrate, in human rights law, the Court has a minor role to play as specialised bodies and treaties are more significant. In other aspects, however, like state responsibility and maritime delimitation, the Court has had a far more significant impact. This shows that the role of the ICJ is relative to the subject of law.

The other important point that the author brings to the fore is that the decisions that are made by the ICJ are not binding on all the states, but they possess some persuasive effects. Other courts, tribunals and even states tend to use ICJ judgments as a guide. This persuasive effect allows the Court to influence the law creation without necessarily creating law.

Overall, the discussion suggests that the ICJ is a law-influencing, but not a law-making institution. It participates in the interpretation, clarification and even expansion of legal principles. There is a thin line between the application of law and the development of law, and in most instances, the interpretations made by the Court result in incremental reforms in international law.

SOCIAL AND GOVERNMENTAL IMPACT

The ICJ is a central institution of the UN and contributes significantly to international governance by aiding in the promotion of peace and security around the world. As such, it provides a space for the peaceful settlement of disputes, which prevents disputes from escalating to the point where violence or armed conflict occurs between states. The ICJ employs its ability to issue judgments and advisory opinions to help reinforce the concept of rule of law, thus encouraging states to resolve their disagreements in a legal way instead of through political or military means.

While not an individualised human rights court of law, the ICJ also promotes predictability, transparency, and consistency through its interpretations of treaties, customary international law, and

⁸ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, para. 51

general principles of international law. The Court's clarity on the rights and obligations that states have as a result of international law aids in the establishment of a predictable and consistent legal framework that helps states better comprehend international legal standards and shape their behaviour to adhere to such standards.

Moreover, international law often directs the functioning of international organisations such as the UN or the International Law Commission; however, ICJ influence is not without limits. The ICJ has limited enforcement authority; therefore, how effective the Court is and how much its decisions will be applied will depend on how willing states are to apply them. Therefore, while the ICJ has significant global impact for shaping the global legal system, the degree of that impact depends upon cooperation by states and the acceptance of states of the Court's authority.

CRITICAL EVALUATION

Although the article offers a fair and realistic perspective of the role of the ICJ, it can be criticized to downplay certain issues and shortcomings of judicial powers in international law. A key issue is that the article seems to accept the informal law-making role of the ICJ without doubting its validity. When the Court is not democratically accountable, and the States have not specifically granted it the authority to make law, then its increasing power by interpretation can be a cause of concern about judicial overreach. The article does not deny that the ICJ cannot legislate, but it does not vigorously criticise the dangers of the Court indirectly formulating rules not as originally intended by the States.

The other weakness is that the article appears to be based too much on the efficiency and compliance with the ICJ judgments without adequately discussing instances where States disobey or defy them. Though it briefly states that decisions can be rejected or overridden, it does not explore in depth how this undermines the power of the Court. As a matter of fact, strong States might not adhere to the ICJ reasoning, and this begs the question whether the influence of the Court is really consistent or only effective when it is in line with the interests of the States.

The debate on the difference between law-making and legal development is also somewhat unclear and inconclusive. While the article rightly points out that the line between the two is blurred, it does not provide a clear framework to deal with this problem. This leaves the reader in doubt on how best to categorise the role of the Court, which is significant to both the legal theory and practice.

Moreover, the analysis of various areas presented in the article, including human rights and the law of the sea, indicates that the influence of the ICJ is not the same, yet it does not delve into the reasons why such disparities exist in terms of structure or politics. Consequently, the description is somewhat descriptive and not analytical.

In general, the article is very informative, but it might have been more critical of the limitations, risks, and power dynamics of the role of the ICJ in the development of international law.

CONCLUSION

Finally, the paper gives a clear and balanced insight into the role of the International Court of Justice (ICJ) in the evolution of international law. It demonstrates that the Court is not an official law-making institution, but it still has a significant influence on the development of the law through its interpretations and arguments. The legal system, particularly the ICJ Statute, constrains the Court in its powers by indicating that its decisions are binding only between the parties and are secondary sources of law determination. But in reality, the decisions of the Court are highly persuasive and are extensively used by States and other actors.

Another point that the article makes is that the ICJ functions within a more decentralised and wider system in which there are several actors that help in the formulation of international law. This implies that the Court does not operate in isolation, but it engages with States, treaties, and institutions such as the International Law Commission. Its power is mostly based on the reception and acceptance of its decisions by the international community. The Court has been very influential in certain aspects, including state responsibility and maritime delimitation, and in other aspects, including human rights law, its influence is minimal.

At the same time, the article makes it clear that the ICJ's authority is not absolute. Its rulings are subject to challenge, disregard, or even being overruled by subsequent events in international law. This is an indication of the dynamic and changing international legal system.

All in all, the article makes us realise that the ICJ is in a special and complicated position. It is not a pure law-maker, or a mere interpreter. Rather, it serves as a significant source of legal development, contributing to the clarification and orientation of international law, but staying within its formal boundaries.