

## International Court of Justice in Development of International Law

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### Introduction

Judges at international level during resolving disputes makes law like judges at national level.<sup>1</sup> Judicial lawmaking fills-up the incompleteness of any system of rules.<sup>2</sup> As per *Judge Robert Jennings* though the most important requirement of the judicial function is to apply existing, recognized rules, or principles of law, but it creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction...<sup>3</sup> Therefore it is clear that ICJ contributes a lot in developing IL. Thus, under this article I will focus on the areas where ICJ has impacted most through developing IL and its acceptance in the international community.

### ICJ and Development of IL

ICJ has played a crucial role in the development of IL both in direct and indirect way. The contribution and impact of ICJ is stated briefly as follows:

#### *Legal Norms and Principles*

ICJ has given rise to new norms of IL which have been sometimes questioned by the scholars whether ICJ has authority to develop and evolve new norms or/and principles of IL.<sup>4</sup> To fill up the gaps in international law, ICJ implies power to create norms when there are no preexisting norms. Instead of rendering or invalidating such norms, states have substantially followed the same. Sometimes, these gain the status of customary law or are incorporated in the treaty law. In case of uncertainty as to the exact legal status, they still play a part in the development of IL and have been accepted by the international community as an authoritative norm.<sup>5</sup> For instances, the court in *Temple of Preah Vihear* developed the principle of acquiescence<sup>6</sup> and in the *North Sea Continental Shelf* cases ICJ have emerged equitable principle.<sup>7</sup> These principles are being seen to be used vastly in many cases with full acceptance. It has developed from the *Fisheries Jurisdiction Case*<sup>8</sup> that islands can be used as base points for straight baselines in demarcating maritime boundaries under a coastal state's jurisdiction. Which emerged as a general rule of international law since it was adopted in the 1958 Law of the Sea Convention<sup>9</sup>.

#### *Customary International Law (CIL):*

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<sup>1</sup> Tom Ginsburg, *International Judicial Lawmaking* (Berkeley Law: University of California, 2005)

<sup>1</sup> <[http://www.law.berkeley.edu/files/spring05\\_Ginsburg.pdf](http://www.law.berkeley.edu/files/spring05_Ginsburg.pdf)> accessed 12 September 2018.

<sup>2</sup> Vaughan Lowe, 'The Politics of Lawmaking: Are the Method and Character of Norm Creation Changing?' in *The Role of Law In International Politics: Essays In International Relations And International Law* (Michael Byers, ed., 2000) 207, 214-15.

<sup>3</sup> Ginsburg (n1) 3

<sup>4</sup> Avneesh Kumar, 'Role of the ICJ in Developing and Evolving International Law', Virtual Centre of International Law, 2015. <<http://webcache.googleusercontent.com/search?q=cache:http://www.publicinternationallaw.in/node/120>> accessed 9 August 2018.

<sup>5</sup> Niels Petersen, 'Lawmaking by the International Court of Justice: Factors of Success' (2011) 12 *German Law Journal*, volume no 1295 <[http://www.germanlawjournal.com/pdfs/Vol12-No5/PDF\\_Vol\\_12\\_No\\_05\\_1295-1316\\_Beyond%20Dispute%20Special\\_Petersen%20FINAL.pdf](http://www.germanlawjournal.com/pdfs/Vol12-No5/PDF_Vol_12_No_05_1295-1316_Beyond%20Dispute%20Special_Petersen%20FINAL.pdf)> accessed 13 August 2018.

<sup>6</sup> *Temple of Preah Vihear, Cambodia v Thailand*, Merits, Judgment, [1962] ICJ Rep 6, ICGJ 160 (ICJ 1962), 15th June 1962, International Court of Justice [ICJ] ¶26.

<sup>7</sup> *North Sea Continental Shelf, Germany v Denmark*, Order, International Court of Justice [ICJ], 26th April 1969, P. 40.

<sup>8</sup> *Fisheries Jurisdiction, Germany v Iceland*, International Court of Justice [ICJ], 12th July 1973, P.134

<sup>9</sup> Law of the Sea: Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 1608, 29th April, 1958

On the basis of state practice and opinio juris certain norms are declared as CIL. Most of the time norms get recognition by declaration of forming CIL through a court. Unless any norm is recognized as CIL it does not form a part of IL. Though CIL is nominally made by states undertaking actions with a sense of legal obligation,<sup>10</sup> in practice customary law is declared by courts.<sup>11</sup> An example is found in the *Jan Mayen case*<sup>12</sup> that relying solely on an early ICJ Chamber decision in the *Gulf of Maine*,<sup>13</sup> (rather than on an examination of state practice) the Court found that the rule that delimitation should be with a provisional median line constituted customary international law.<sup>14</sup> After getting recognized as CIL, judicial declaration of custom will be considered binding.<sup>15</sup>

#### *International Environmental Law (IEL)*

ICJ decisions have been considered as an important source of IEL.<sup>16</sup> It has been argued by *Jorge E. Vinuales*, that the ICJ has developed several very important rules in the field of IEL by way of interpretation.<sup>17</sup> The judgment of the *Pulp Mills*<sup>18</sup> case declared the status of, and tried to clarify, the content of environmental impact assessment and sustainable development as IL norms and these are conceded significant for the development of IEL.<sup>19</sup> Environmental impact assessment is considered an international obligation after the pronouncement of judgment by ICJ on April 20, 2010.<sup>20</sup>

#### *Law of the Sea*

IL of due diligence and negligence has derived from the case of *Corfu Channel*<sup>21</sup> which gave rise to give appropriate publicity of any danger to navigation which was later on incorporated in *article 24* of UNCLOS. Furthermore, the right of innocent passage over territorial sea addressed in the case was inserted in UNCLOS under *articles 18-19*.<sup>22</sup> ICJ created new rules through the recognition of the delimitation of unique baseline by Norway in *Anglo-Norwegian fisheries case*<sup>23</sup> which was incorporated in *article 7* of UNCLOS. Furthermore, *article 83* was featured in UNCLOS from ICJ principle in the case of *North Sea Continental Shelf*<sup>24</sup>.

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<sup>10</sup>Ginsburg (n1) 8.

<sup>11</sup>Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems', 15 Eur. J. Int'l L. (2004),523 <<http://ejil.org/pdfs/15/3/360.pdf>> accessed 10 August 2018.

<sup>12</sup>*Maritime Delimitation in the Area between Greenland and Jan Mayen, Denmark v Norway*, Judgment, Merits, International Court of Justice [ICJ] I 4<sup>th</sup> June 1993, P. 38.

<sup>13</sup>*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada v United States*, Appointment of Expert, Order, International Court of Justice [ICJ] 30<sup>th</sup> March 1984, P. 246.

<sup>14</sup>Michael Byers, *Custom, Power and the Power of Rules: International Relations And Customary International Law* (CUP1999) 122-23.

<sup>15</sup>Ginsburg (n1) 9.

<sup>16</sup>Xiaoqin Zhu and Jinlong He, 'International Court of Justice's Impact on International Environmental Law: Focusing on the Pulp Mills Case', Yearbook of International Environmental Law, Volume: 23(1), 2013 <<https://academic.oup.com/yielaw/article-abstract/23/1/106/1669162?redirectedFrom=fulltext>> accessed 17 September 2018.

<sup>17</sup>Dr. Jorge E. Vinuales, 'The Contribution of International Court of Justice to the Development of International Environmental Law' (2008) 32(1), P. 232. <<https://ir.lawnet.fordham.edu/ilj/vol32/iss1/14>> accessed

<sup>18</sup>*Pulp Mills on the River Uruguay, Argentina v Uruguay*, Order, Provisional Measures, International Court of Justice [ICJ] 13<sup>th</sup> July 2006

<sup>19</sup>Ibid Pp.178-80.

<sup>20</sup>Cymie R. Payne, 'Environmental Impact Assessment as a Duty under International Law', Berkeley Law: University of California, Vol. 1, No. 3 (2010), pp. 317-324 <<https://www.law.berkeley.edu/article/the-international-court-of-justice-recognizes-environmental-impact-assessment-as-a-duty-under-international-law/>> accessed 7 September 2018.

<sup>21</sup>*Corfu Channel, United Kingdom v Albania*, Judgment, Merits, International Court of Justice [ICJ] 9<sup>th</sup> April 1949, P. 22.

<sup>22</sup>M Rafiul Islam, "*International Law: Current Concepts and Future Directions*", (Lexis Nexis Butter Worths, Australia 2014) 502.

<sup>23</sup>*Fisheries, United Kingdom v Norway*, Merits, Judgment, International Court of Justice [ICJ], 18<sup>th</sup> December 1951, P. 116.

<sup>24</sup>*North Sea* (n 7).

### *Treaty Law*

It has been argued by *Judge Lauterpacht* that law is created not just by agreement, customs or legislature, but it is also created by judges by way of interpreting the existing law,<sup>25</sup> such as treaty provision which was previously unknown to the international community e.g. the ICJ declared that the conditions laid down under article 4 of UN charter for the admission of States were exhaustive and that if these conditions were fulfilled by a State which was a candidate then that country shall qualify to be a member of UN.<sup>26</sup> In addition, the ICJ implicitly affirmed its power to interpret the Charter in several cases. In the *Reparation case*<sup>27</sup>, it interpreted the Charter as recognizing the legal personality of the UN which became a landmark in the progressive development and in the *International Status of South-West Africa case*<sup>28</sup> it interpreted the Charter as affirming the supervisory power of the GA with regard to the administration of the territory of South-West Africa.<sup>29</sup>

### **Impact Assessment of ICJ Contributions**

The renowned jurist *Oppenheim* observed that, “Judicial decision has become a most important factor in the development of international law, and the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally.”<sup>30</sup> ICJ has contributed or has a great impact in the development of IL through delivering many judicial decisions and advisory opinions. According to *article 59* of ICJ Statute, “The decision of the Court has no binding force except between the parties and in respect of that particular case.” However, it is evident that ICJ referred its own cases in dissolving other cases. Precedent of ICJ is not binding but it has persuasive force. Therefore, referring or citing its own rules/principles or cases are not in violation of the said article. Thus, the derived norms and principles can form IL.

Moreover, *article 38* of the ICJ statute, paved the way of ICJ to create or contribute in developing IL since it states that judicial decisions are source of IL. For example, The ICJ opined that Charter intended to confer on the United Nations, the legal personality to possess rights and duties, and “right to bring a claim on behalf of its personnel” was one such conferred right.<sup>31</sup> This decision of ICJ is globally recognized. Hence, the normative value of pronouncements of the ICJ is not limited to their particular cases; rather they have some general character.<sup>32</sup> This new rule had been welcomed by international community, and today it is regarded as a well-established rule of international law. The *Nicaragua case*<sup>33</sup>, is extensively referred in the area of use of force and the “effective control” rule developed in this case is considered as an important rule of international law though the judgment was not accepted by one party of the case.<sup>34</sup>

### **Conclusion**

Though being not empowered by the UN or by ICJ Statute, it has countless impact in development of IL. In some circumstances ICJ has been criticized for its judicial activism.

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<sup>25</sup>H. Lauterpacht, ‘The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals’ (1930) 11 Brit. Y.B. Int’l L. 134,143; R P ANAND, *Compulsory Jurisdiction of International Court* (2<sup>nd</sup> edn, Hope India publication 1958) 75-76

<<http://www.publicinternationallaw.in/sites/default/files/books/CJICJ.pdf>>accessed 17 October 2018.

<sup>26</sup>*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, International Court of Justice [ICJ], 28th May 1948, P. 57.

<sup>27</sup>*Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, International Court of Justice [ICJ] 11th April 1949.

<sup>28</sup>*International status of South-West Africa*, Advisory Opinion, International Court of Justice [ICJ], 11th July 1950

<sup>29</sup>Mohamed Sameh Ahmed Mohamed, ‘The Role of The International Court of Justice as The Principal Judicial Organ of The United Nations’ (DPhil Thesis, University of London),1997123-25.

<sup>30</sup>Robert Jennings, Arthur Watts KCMG QC (eds), *Oppenheim’s International Law* (9<sup>th</sup> edn, OSAIL 1992) 41.

<sup>31</sup>*Reparation* (n 27).

<sup>32</sup>Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 20.

<sup>33</sup>*Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States*, International Court of Justice [ICJ], 26th November 1984

<sup>34</sup>Avneesh (n 4).

Nevertheless, the contribution of ICJ towards the development of IL can't be ignored. IL is largely based on the concept of *pacta sunt servanda* which means that IL is created by the state consent and the decision of ICJ is accepted and welcomed by the international community means there is no room for doubt that the ICJ indeed has huge impact in development of IL.No system of law can be regarded comprehensive enough to contain all the rules to deal with all the problems which may arise in future, therefore, the implied law making power of the ICJ is not just necessary, but it is inevitable.