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JUDICIAL LAW-MAKING IN INTERNATIONAL LAW: THE EXPANDING ROLE OF INTERNATIONAL COURTS AND TRIBUNALS

AUTHORED BY - SUBHAM KUMAR SAHU

PhD Research scholar, Jawaharlal Nehru University, New Delhi

Abstract

The classical doctrine of international law has traditionally located law-making authority in the consent of states, primarily through treaties and customary international law. Yet the growing influence of international courts and tribunals has complicated this orthodox picture. Judicial bodies such as the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the International Criminal Court (ICC), and the dispute settlement organs of the World Trade Organization (WTO) increasingly shape legal norms through interpretation, clarification, and gap-filling. This article critically examines the phenomenon of judicial law-making in international law and argues that international adjudication has evolved from a merely declaratory function into a significant normative force. The article explores the doctrinal foundations of judicial law-making, analyzes leading jurisprudence, evaluates competing theories regarding judicial legitimacy, and assesses the implications for the international legal order. While judicial creativity can enhance coherence, effectiveness, and protection of global values, it also raises concerns regarding democratic legitimacy, state consent, and fragmentation. The article concludes that international courts have become indispensable participants in international law-making, though their authority remains contingent upon persuasive reasoning, institutional acceptance, and the continuing support of states.

Keywords

International law; judicial law-making; international courts; International Court of Justice; customary international law; treaty interpretation; judicial activism; international adjudication; legitimacy; fragmentation.

I. Introduction

International law has long been understood as a decentralized legal order grounded in state consent. The traditional account identifies treaties, custom, and general principles as the primary sources of international law, while judicial decisions are regarded merely as subsidiary means for determining legal rules. Nevertheless, the contemporary international legal landscape reveals a growing judicial role in shaping, developing, and sometimes effectively creating international norms. International courts and tribunals have multiplied since the late twentieth century, and their jurisprudence increasingly influences state behavior, treaty interpretation, and the evolution of customary law.

This development has generated an enduring debate over whether international judges merely apply pre-existing law or participate in law-making. The question is particularly significant because international judges lack the formal legislative authority associated with domestic parliaments. Their legitimacy depends largely upon state consent, institutional design, and the persuasive force of legal reasoning. Yet many judicial decisions have had profound normative effects extending far beyond the immediate dispute before the court.

This article argues that judicial law-making has become an important feature of contemporary international law. Although international courts remain formally constrained by treaties and the consent of states, their interpretive practices often involve choices that shape legal development. The article proceeds in five parts. Part II examines the doctrinal foundations of judicial law-making. Part III analyzes the mechanisms through which international courts influence legal norms. Part IV evaluates key examples from major international tribunals. Part V considers legitimacy concerns and competing scholarly perspectives. Part VI concludes by assessing the future trajectory of judicial law-making in international law.

II. Doctrinal Foundations of Judicial Law-Making

The starting point for any discussion is Article 38(1) of the Statute of the International Court of Justice, which lists judicial decisions as a “subsidiary means for the determination of rules of law.”¹ On its face, the provision appears to deny courts any autonomous law-making authority. The traditional declaratory theory therefore portrays judges as discoverers rather than creators of law. Under this view, international courts merely identify rules that already exist through treaty, custom, or general principles.

However, several features of international adjudication complicate this picture. First, international legal rules are often framed in broad or indeterminate language. Treaty provisions such as “fair and equitable treatment,” “inhuman treatment,” or “due diligence” require judicial interpretation. Second, customary international law frequently depends on contested assessments of state practice and *opinio juris*. Third, international courts must sometimes address legal gaps where no clear rule exists.

Scholars have therefore increasingly recognized that interpretation itself can have law-making effects. Hersch Lauterpacht argued that judicial function inevitably involves creative elements because judges must adapt legal principles to new circumstances.² The distinction between interpretation and legislation is thus one of degree rather than kind. Even when judges claim merely to apply existing law, they often select among competing interpretations, prioritize certain values, and articulate principles that subsequently guide future conduct.

The Vienna Convention on the Law of Treaties further underscores the significance of judicial interpretation. Articles 31 and 32 establish interpretive methods based on text, context, object and purpose, and supplementary means.³ These rules provide a framework but do not eliminate judicial discretion. International courts frequently rely on teleological reasoning, systemic integration, and evolving understandings of treaty objectives. Such interpretive choices can substantially expand or reshape legal obligations.

III. Mechanisms of Judicial Law-Making

International courts influence legal development through several distinct mechanisms.

A. Authoritative Interpretation

The most common mechanism is authoritative interpretation of treaties and customary rules. Judicial decisions often clarify ambiguous provisions and establish interpretive standards that are subsequently followed by states, international organizations, and other tribunals. The ICJ's jurisprudence on maritime delimitation, for example, has developed detailed methodologies that were not explicitly prescribed in treaty texts.⁴

B. Identification and Formation of Customary International Law

Courts also play a significant role in identifying customary international law. In doing so, they evaluate state practice and *opinio juris*, but their own assessments can influence subsequent

perceptions of what the law requires. The ICJ's decision in the Nicaragua case is frequently cited as a landmark example.⁵ The Court's articulation of customary rules concerning the use of force and non-intervention had a lasting impact on international legal discourse.

C. Gap-Filling and General Principles

Where positive law is incomplete, courts may resort to general principles of law. This process can effectively create new normative standards. International criminal tribunals, for instance, have developed doctrines concerning command responsibility, joint criminal enterprise, and procedural fairness that were not fully elaborated in existing treaty texts.⁶

D. Progressive Development Through Precedent

Although international law formally rejects stare decisis, prior judicial decisions exert substantial persuasive authority. Courts frequently cite their own jurisprudence and that of other tribunals. This practice creates a de facto precedent system that contributes to the gradual development of legal doctrine.⁷

IV. Judicial Law-Making in Practice

A. The International Court of Justice

The ICJ provides perhaps the clearest illustration of judicial law-making through interpretation and custom identification. In *North Sea Continental Shelf*, the Court articulated criteria for the formation of customary international law that continue to shape scholarly and judicial analysis.⁸ The decision did not merely apply existing custom; it provided a conceptual framework for understanding how custom emerges.

Similarly, in *Nicaragua*, the Court held that customary rules prohibiting the use of force existed independently of the United Nations Charter.⁹ This reasoning reinforced the autonomous status of customary norms and influenced subsequent debates about humanitarian intervention and collective self-defense.

The ICJ's advisory opinions have also contributed to legal development. The *Reparations for Injuries* opinion recognized the international legal personality of the United Nations, despite the absence of an explicit treaty provision.¹⁰ This judicial recognition fundamentally shaped the law of international organizations.

B. The European Court of Human Rights

The ECtHR has been particularly influential through its “living instrument” doctrine. The Court

interprets the European Convention on Human Rights in light of present-day conditions rather than the original intentions of the drafters.¹¹ This approach has enabled the Convention to address issues such as privacy, gender equality, environmental harm, and digital surveillance. Critics argue that the living instrument doctrine permits excessive judicial activism by allowing judges to expand rights beyond the text of the Convention. Supporters respond that dynamic interpretation is necessary to maintain the effectiveness of human rights protection in changing social contexts. Regardless of one's normative assessment, the ECtHR's jurisprudence demonstrates how interpretation can function as a powerful law-making mechanism.

C. International Criminal Tribunals

The ad hoc tribunals for the former Yugoslavia and Rwanda significantly developed international criminal law. In the Tadić jurisdiction decision, the ICTY broadened the concept of armed conflict and clarified the applicability of international humanitarian law to internal conflicts.¹² The tribunal's jurisprudence on command responsibility, sexual violence, and modes of liability subsequently influenced the Rome Statute system and national prosecutions. These tribunals often confronted situations where treaty provisions were incomplete or ambiguous. Their judicial innovations contributed to the maturation of international criminal law as a coherent legal field.

D. WTO Dispute Settlement

The WTO Appellate Body developed extensive jurisprudence on trade law interpretation. Although WTO members did not formally authorize judicial law-making, the Appellate Body's reports effectively shaped the operation of the multilateral trading system. Its interpretations of concepts such as “like products,” “necessity,” and environmental exceptions had significant economic and regulatory consequences.¹³

Some member states later criticized the Appellate Body for judicial overreach, arguing that it created obligations not negotiated by governments. The controversy illustrates the tension between effective dispute resolution and respect for state consent.

V. Competing Perspectives on Judicial Law-Making

A. The Restrictive View

The restrictive view maintains that international courts should exercise judicial restraint. Because international law lacks a global legislature, courts should avoid creating new obligations without clear state consent. Excessive judicial creativity, according to this

perspective, risks undermining legitimacy and provoking state backlash. Scholars associated with this view emphasize the consensual foundation of international law and warn against transforming judges into unelected lawmakers.¹⁴

B. The Pragmatic View

The pragmatic view accepts that judicial law-making is inevitable and often beneficial. International legal rules are frequently incomplete, and courts must provide workable solutions to resolve disputes. From this perspective, judicial development enhances legal certainty, coherence, and effectiveness. The absence of a centralized legislature makes judicial interpretation an important mechanism for adapting international law to new challenges.¹⁵

C. The Constitutionalizing View

A third perspective sees international courts as contributing to the constitutionalization of the international legal order. Courts help articulate fundamental principles such as human rights, the rule of law, and accountability. Judicial law-making is therefore understood not merely as gap-filling but as the gradual construction of a more integrated global legal system.¹⁶ This approach has been particularly influential in human rights and international criminal law scholarship. However, critics contend that constitutionalization rhetoric may obscure persistent disagreements among states and legal traditions.

VI. Legitimacy Challenges

Judicial law-making raises several legitimacy concerns.

State Consent

International law traditionally derives authority from the consent of states. When courts appear to create new obligations, states may question whether they ever consented to such rules. The controversy surrounding the WTO Appellate Body illustrates how perceptions of judicial overreach can generate institutional resistance.

Democratic Deficit

International judges are not directly accountable to global electorates. Critics argue that significant normative choices should be made through political processes rather than judicial interpretation. This concern is particularly acute when courts address controversial social or economic issues.

Fragmentation and Consistency

The proliferation of international tribunals creates the possibility of divergent interpretations. Different courts may develop conflicting doctrines regarding investment protection, human rights, trade law, or state responsibility. Judicial law-making can therefore contribute both to legal development and to fragmentation.

Compliance and Effectiveness

The authority of international courts ultimately depends on compliance by states and other actors. Judicial decisions that are perceived as excessively activist may encounter resistance, while decisions grounded in persuasive reasoning and broader acceptance are more likely to influence behavior.

VII. Scholarly Observations

Several observations emerge from the foregoing analysis. First, the distinction between applying law and making law is often difficult to sustain in practice. Interpretation, custom identification, and gap-filling inevitably involve normative choices. International courts therefore participate in legal development even when they deny any legislative role.

Second, judicial law-making is not uniform across tribunals. Human rights courts tend to adopt more dynamic interpretive approaches, while trade and investment tribunals often face stronger political constraints. The extent of judicial creativity depends on institutional design, subject matter, and the expectations of participating states.

Third, judicial authority in international law is primarily persuasive rather than coercive. Unlike domestic supreme courts, international tribunals generally lack direct enforcement powers. Their influence depends on the quality of reasoning, consistency with broader legal principles, and acceptance by states, international organizations, and other courts.

Fourth, judicial law-making has contributed significantly to the protection of global values. Developments in human rights, humanitarian law, environmental law, and international criminal law often owe much to judicial interpretation. At the same time, courts must remain attentive to legitimacy concerns if they wish to preserve long-term authority.

VIII. Conclusion

The expanding role of international courts and tribunals has transformed the international legal order. Although classical doctrine continues to emphasize treaties and custom as the primary sources of law, judicial interpretation increasingly shapes the content and evolution of international norms. Through authoritative interpretation, custom identification, gap-filling, and reliance on precedent, international courts have become significant participants in international law-making.

This development presents both opportunities and challenges. Judicial law-making can enhance coherence, adaptability, and protection of fundamental values, particularly in areas where political law-making is slow or fragmented. Yet it also raises questions about state consent, democratic legitimacy, and the proper limits of judicial authority.

Ultimately, the legitimacy of judicial law-making in international law depends less on formal claims of legislative power than on the capacity of courts to provide reasoned, principled, and widely accepted interpretations. International judges cannot replace political law-making, but neither can they avoid contributing to it. The contemporary reality is that international law is increasingly shaped through an ongoing dialogue among states, international organizations, courts, and other actors. In that dialogue, international courts have become indispensable architects of legal development.

Footnotes

1. Statute of the International Court of Justice art. 38(1)(d).
2. Hersch Lauterpacht, *The Development of International Law by the International Court* 3–4 (1958).
3. Vienna Convention on the Law of Treaties arts. 31–32, opened for signature May 23, 1969, 1155 U.N.T.S. 331.
4. *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. 61 (Feb. 3).
5. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14 (June 27).
6. See generally Antonio Cassese, *International Criminal Law* 225–45 (2d ed. 2008).

7. Armin von Bogdandy & Ingo Venzke, In Whose Name? A Public Law Theory of International Adjudication 42–45 (2014).
8. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).
9. Nicaragua, *supra* note 5.
10. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).
11. Tyrer v. United Kingdom, App. No. 5856/72, 26 Eur. Ct. H.R. (ser. A) (1978).
12. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
13. See generally Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go? 95 Am. J. Int'l L. 535 (2001).
14. John H. Jackson, Sovereignty, the WTO, and Changing Fundamentals of International Law 87–89 (2006).
15. Rosalyn Higgins, Problems and Process: International Law and How We Use It 202–03 (1994).
16. Anne Peters, The Constitutionalization of International Law, in *The Oxford Handbook of International Law* 1001–25 (Daniel Bodansky et al. eds., 2007).

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