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Judicial Legislation, Not Lawmaking: How the ICJ Fills Legal Gaps Without Creating New Law

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ABSTRACT

The International Court of Justice (ICJ) often faces criticism for allegedly exceeding its mandate by engaging in what some perceive as lawmaking. This debate, though not new, continues to spark significant scholarly discourse and is even echoed by some of its own judges. Although the ICJ consistently denies having a lawmaking function, its practices demonstrate its role in the development of international law. This raises the question: How can the Court contribute to the development of international law, particularly in addressing gaps, if it lacks formal lawmaking capacities? Are the criticisms of the Court exceeding its mandate valid? Existing literature often conflates 'judicial legislation' with 'lawmaking', creating a bottleneck in reasoning which causing scholars to necessarily conclude that the ICJ inevitably exceeds its judiciary mandate and engages in creating new laws. However, understanding the ICJ's role in developing international law and addressing gaps, despite its statutory limitations, requires distinguishing between 'judicial legislation' and 'lawmaking'. While the latter involves creating new laws, 'judicial legislation' refers to a method of interpretation for adapting existing laws and establishing new legal relationships to address emerging legal requirements. This article goes further to identify which types of interpretation are most effective for such judicial legislation. By examining the approaches of the UN International Law Commission (ILC), the article highlights 'evolutive interpretation' as a particularly suitable method. Evolutive interpretation enables the Court to rejuvenate existing laws, clarify ambiguities, and develop legal frameworks for unregulated issues – all while staying within its adjudicative-only mandate and avoiding lawmaking.

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Introduction

In his recent dissenting judgment of 13 July 2023 in the case concerning the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia, Judge *ad hoc* Skotnikov criticized the International Court of Justice (ICJ) as follows:

> *"In its attempt to legislate instead of interpreting and applying the existing law, the Court has disregarded its function, as provided in Article 38, paragraph 1, of the Statute. Indeed, it has ignored the fundamental principle, according to which the Court, as a court of law, cannot render judgment sub specie legis ferendae."*[1]

It is an undisputed fact that lawmaking falls outside the scope of the ICJ's functions. Article 38 of the Statute of the ICJ defines the Court's role as adjudicating disputes in accordance with international law. The Court itself has repeatedly emphasized its strong adherence to a purely judicial role, including, *inter alia*, in the 1996 'Legality of the Threat or Use of Nuclear Weapons' Advisory Opinion, where it refused to accept the suggestions of some States that it had taken on a legislative role, affirming that the Court only 'states the existing law and does not legislate.'[2] This implies that the Court regards the term 'legislation' as synonymous with lawmaking. In this context, legislation means the creation of new laws that did not previously exist. Therefore, both 'legislation' and 'lawmaking' refer to the same concept – the creation of new legal norms. By this reasoning, using the 'existing' law is not legislation. Thus, the Court cannot engage in either legislation or lawmaking, as its mandate is limited to adjudication through interpreting and applying existing law. However, it is essential to acknowledge that judicial decisions can transcend their subsidiary status. The significant role of judicial practice in international law is evidenced by the frequent citation of such decisions, underscoring their substantive value.[3] Some scholars argue that a tribunal may encounter situations where it must address legal gaps and develop applicable laws.[4] Lara M. Pair has said that:

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1 *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v Colombia) (Judgment) [2023] ICJ Rep 1, 4 [18] (Judge ad hoc Skotnikov); *Fisheries Jurisdiction* (Federal Republic of Germany v Iceland) (Judgment) [1974] ICJ Rep 175, 192 [45]: *"In the circumstances, the Court, as a court of law, cannot render judgment sub specie legis ferendae, or anticipate the law before the legislator has laid it down".*

2 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 237[18]. In his separate Opinion, Judge Guillaume reiterate this dictum: *"I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator." see:* 293 [14].

3 Alain Pellet, 'Decisions of the ICJ as Sources of International Law?' in Enzo Cannizzaro et al (eds), *Decisions of the ICJ as Sources of International Law* (International and European Papers Publishing, 2018) 7-62; Yunus Emre Acikgonul, 'Today's Notion of International Case Law: From a Subsidiary Source to a Binding Authority' (2019) 5(8) *McGill Journal of Dispute Resolution* 188, 185-215.

4 Yang Liu, 'The Judicial Construction of Gaps at the International Court of Justice' (2016) 110 *Proceedings of the ASIL Annual*

> *"[E]very judicial body makes law and that indeed, lawmaking is an essential function of the adjudicative role. The role of the judges is to state the law, and in doing so, judges necessarily add color or flavor to the rule, thereby adding and making new law."*[1]

As the ICJ has rejected any involvement in lawmaking processes,[2] it is crucial to address how development of international law by the Court can be effectively carried out. It remains important to recognize that the evolution of legislative processes is inevitable.[3] In the same vein, the concepts of international law 'were not static but were by definition evolutionary'.[4] It must be recalled that in the 1971 Namibia case, the ICJ stated that the Court "must take into consideration the changes which have occurred ... and its interpretation cannot remain unaffected by the subsequent development of law."[5] In this context, interpretation is a legal operation designed to determine the precise meaning of a rule,[6] fully encompassing all possible aspects of its application,[7] including the changes or evolutions that have occurred over time.[8] This *obiter dictum* from the ICJ raises a pertinent question: If the Court does not have a legislative or lawmaking role, how can ICJ judges address gaps created by changes in international applicable laws over time?

My response to these questions contributes to the current legal scholarship, where it is mistakenly established that the Court inevitably performs a lawmaking function that exceeds its statute and mandate. This misunderstanding sustains the unnecessary ongoing criticism and debate regarding whether the Court has the capacity to legislate.[9]

In this article, I will argue that understanding the ICJ's role in developing international law and addressing gaps, despite its statutory limitations, requires distinguishing between 'judicial legislation' and 'lawmaking' or 'legislation'. While the ICJ explicitly clarifies that it lacks the authority to legislate, meaning it cannot engage in lawmaking or create entirely new laws. However, this does not prevent the Court from engaging in what should be known as *judicial legislation*.

In other words, lacking capacity to legislate does not suggest an inability to interpret or adapt existing laws to meet the needs of the international community. While this is not 'legislation' in the traditional sense of lawmaking, 'judicial legislation' involves a dynamic

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Meeting 209, 209-12. Thirlway refers to this as *judicial activism*. Hugh Thirlway, 'Judicial Activism and the International Court of Justice' in Nisuke Ando et al (eds), *Judge Shigeru Oda Liber Amicorum* (Kluwer Law International, 2002) vol 1, 77.

1 Lara M. Pair, 'Judicial Activism in the ICJ Charter Interpretation' (2001) 8(1) ILSA JICL 181, 219.

2 *Rights of United States Nationals in Morocco* (France v United States of America) (Judgment) [1952] ICJ Rep 176, 196; *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 33 [57]; Teresa F. Mayr and Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2015) 76(1) HJIL 425, 434.

3 Narendra N. Singh, 'The Legislative Process in International Law: A General Comment' (1990) 2(2) BLR 172, 175.

4 Katayoun Hosseinnejad, 'Critical Evaluation of the ICJ Approach in Evolutionary Interpretation' (2018) 1(1) IRUS 119, 129.

5 *Rights of United States Nationals in Morocco* (n 6) 196; *Namibia Case* (n 6) 31 [53].

6 Carlos Iván Fuentes, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* (Springer, Comparative Perspectives on Law and Justice 57, 2016) 154.

7 Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) JIDS 31, 32; Odile Ammann, 'Domestic Courts and the Interpretation of International Law' (Brill, 2021) 191.

8 *Rights of United States Nationals in Morocco* (n 6) 196; *Namibia Case* (n 6) 31 [53].

9 See section 1 on review of the current legal scholarship.

mode of interpretation of existing laws to address indispensable requirements of the international community. This nuanced distinction between lawmaking, legislation, and judicial legislation is essential and often overlooked, particularly since the term was employed by Lauterpacht in the broader context of the prohibition of non-liquet in international law and the role of international courts in this regard.[1]

In my view, this distinction rectifies the erroneous conclusions in existing legal scholarship that conflate 'judicial legislation' with 'lawmaking'. This conflation creates a bottleneck in reasoning, leading scholars to falsely accept that the ICJ necessarily exceeds its statutory limitations and creates new law in some of its judgments, as there seems to be no apparent alternative explanation.

For this purpose, in this article, I will argue that 'judicial legislation' by the ICJ does not involve creating law from scratch, which is beyond its mandate. Instead, the Court can contribute to the development of international law by considering the needs of the international community and addressing potential gaps and ambiguities in existing legal frameworks. In doing so, the ICJ does not create new laws but rather fills potential gaps through an interpretative method and advances the development of international law. Furthermore, by reviewing reports of the UN International Law Commission (ILC), I will argue that the most suitable mode of interpretation for judicial legislation is an evolutive interpretation – also known as evolutionary, dynamic, or purposive interpretation.[2] This approach allows the Court to adapt to changes in the international community's circumstances during the interpretation process, thereby clarifying the scope of international rules and obligations.[3] I will demonstrate how the ICJ can employ these dynamic interpretative methods in its proceedings to develop international law while refraining from lawmaking.[4]

To this end, in Section 1, I will review the existing literature on the ICJ's role in developing international law and explain why most of these perspectives fall short in accurately addressing the Court's developmental function within its statutory limitations, often mistakenly perceiving the Court as exceeding its mandate. In Section 2, I will define and explain the concept of gaps in international law, areas where the development of international law is necessary. Following this, in Section 3, I will address the development of international law through 'judicial legislation' and its discrepancies with 'lawmaking' or 'legislation'. Then, in Section 4, I will turn to the evolutive method of interpretation and its application as a tool for [judicial] legislation through adjudication, concluding that this interpretive method is effective for addressing gaps in international law. Next, in Section 5, I will argue that, despite the statutory limitations of the ICJ in lawmaking, the Court's evolutive interpretation capacities enable it to clarify ambiguities, expand the scope of existing rules, and develop new legal relations in areas where the law is silent or unclear.

1 Hersch Lauterpacht, *The Development of International Law by International Court* (Cambridge University Press, 1958) 68.
2 International Law Commission uses these terms interchangeably. *See:* 'Report of the Commission to the General Assembly on the Work of its Sixty-Fifth Session' [2013] 2(II) *Yearbook of the International Law Commission* 11, 24.
3 Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6(1) EJLS 161; Zdenek Novy, 'Evolutionary Interpretation of International Treaties' [2017] 3 CYIL 205, 205-40; Gabrielle Marceau, 'Evolutive interpretation by the WTO Adjudicator' (2018) 21(4) JIEL 791.
4 *Dispute regarding Navigational and Related Rights* (Costa Rica v Nicaragua) (Judgment) [2009] ICJ Rep 214, 214; *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 13.

While the Court may not view its role as explicit lawmaking, its interpretive methodologies and reasoning have significantly shaped the progressive development of international law across various domains. The theory presented in this article provides a better understanding of how the ICJ navigates its statutory limitations and contributes to the evolving nature of international law through interpretation rather than the creation of new laws. This perspective not only supports the emphasis on the Court's limitations regarding lawmaking found in current legal scholarship but also clarifies the ambiguous boundaries of its adjudicative role. Such a perspective solves the shortcomings of the current dominant theory in legal scholarship, and aligns with the state-centric pillars of the international legal system, where States primarily drive international legislation and lawmaking, while also highlighting the crucial role of the Court in the development of international law.

1. Literature Review: The Inevitable Overstepping of Its Mandate

To fully grasp the nuanced role of the ICJ in the development of international law, it is essential to explore existing scholarly discussions. This section will examine current scholarship to shed light on how other researchers have approached the ICJ's lawmaking or legislative function in developing international law. By investigating various academic viewpoints, we can better understand how scholars have explained this issue so far, and how this article offers a new perspective more aligned with the Court's statutory limitations.

It is widely accepted among scholars that the subsidiary status of judgments under Article 38(1)(d) of the ICJ Statute, combined with Article 59 – which states that the Court's decisions are binding only between the parties involved and only with respect to the specific dispute – prevents the Court from exercising a legislative role.[1] Existing literature accurately reflects these two assumptions. However, some scholars have sought to explain how the Court can and should contribute to the development of international law, and in doing so, have made some erroneous conclusions.

One perspective holds that, despite the limitations on judicial lawmaking, such lawmaking is inevitable due to the inherent incompleteness of the international legal system.[2] In this regard, Tom Ginsburg, for example, has argued that "where there is no clear preexisting rule, the judge [of the ICJ] must thus make a new rule."[3] He contends that in such cases:

> *"[I]nternational judicial lawmaking exists is explicitly acknowledged in state practice. States in their pleadings before international courts often show a concern with the possible rule-creating functions of international judicial decisions."*[4]

The conclusion drawn from this approach is that, despite the formal limitations on lawmaking in the ICJ Statute, judicial lawmaking is considered inevitable due to the inherent gaps and incompleteness of international law. It is argued that States, when seeking adjudication before

1 Dire Tladi, 'The Role of the International Court of Justice in the Development of International Law' in Carlos Espósito and Kate Parlet, *The Cambridge Companion to the International Court of Justice* (Cambridge University Press, 2023) 70.
2 Tom Ginsburg, 'International Judicial Lawmaking' (Working Papers, Research Paper No. LE05-006, University of Illinois, 2005) 3.
3 Ibid.
4 Ibid 5.

the Court, operate under the presumption that some level of lawmaking may be necessary. For instance, parties to disputes often express concerns about the potential legislative effects of international judicial decisions in their pleadings before the ICJ, further supporting the idea that the Court holds an implicit lawmaking capacity.[1] Thus, while the Court was not originally intended to engage in legislation, the necessities of the international community and the tacit acceptance of States have allowed the ICJ to exceed its mandate and contribute to the creation of new laws. However, there are more moderate approaches that, while acknowledging the Court's statutory limitations, focus on its role in developing international law through a sector-based approach.

Christian J. Tams argues that while the ICJ cannot legislate, it can still play a significant role in the development of international law. In his article, Tams asserts that "even in the absence of formal law-making powers, there is room for influential judicial contributions to the process of legal development."[2] Referring to concepts such as *jus cogens*, the legal personality of international organizations, and obligations *erga omnes*, Tams questions whether, in recognizing these principles, the ICJ was merely engaging in legal development or actually creating new law. He concludes that "these examples serve to highlight that the perceived dichotomy between law-making and legal development is a false one."[3]

This approach frames the Court's contributions within a sector-based context, such as human rights and humanitarian law,[4] the law of the sea,[5] or environmental law,[6] where it helps to develop applicable regulations in certain *sui generis* legal regimes. After reviewing the practices of various international tribunals, Bogdandy and Venzke concluded that "although the phenomenon of international judicial lawmaking is omnipresent, it is most visible in legal regimes where courts have [a treaty-based] compulsory jurisdiction."[7] However, since ICJ judgments are only binding on the parties involved in a particular dispute, their broader effectiveness depends on their ability to persuade the international community.[8] As a result, ICJ rulings are often described as persuasive precedents.[9] As Tams explains:

> *"[W]here the ICJ engages in legal development, it is part of a broader process.*

1 Ibid 4-5; Ginsburg argues that *"international judges play an important role in generating law in the course of dispute resolution. This role, however, is and should be constrained by the interests of states."*

2 Christian J. Tams, 'The Development of International Law by the International Court of Justice' in Sara Fattorini (ed), *Decisions of the ICJ as Sources of International Law?*, (International and European Papers Publishing, Gaetano Morelli Lectures Series, Vol. 2, 2018) 66.

3 Ibid.

4 Christopher Greenwood, 'The International Court of Justice and the Development of International Humanitarian Law' [2022] 104 (920-921), IRRC 1840, 1841; Shiv R.S. Bedi, 'The Development of Human Rights Law by the Judges of the International Court of Justice' (First edition, Bloomsbury Publishing, 2007) 29-32.

5 Haritini Dipla, 'Unresolved Issues and New Challenges to the Law of the Sea' (Brill Nijhoff, Publications on Ocean Development, Volume 54) ch 9 [235–50].

6 Jorge E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment', (2008) 32 FILJ 232, 232-33.

7 Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) GLJ 979, 980.

8 Franklin Berman, 'The International Court of Justice as an 'Agent' of Legal Development?' in Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* (First edition, Oxford University Press, 2013) 12.

9 Sara Fattorini (ed), *Decisions of the ICJ as Sources of International Law?* (International and European Papers Publishing, 2018) 38; James Gerard Devaney, 'The role of precedent in the jurisprudence of the International Court of Justice: A Constructive Interpretation' (2022) 35(3) LJIL 641, 649.

> *It is an agent of legal development, but one agent only, acting alongside others including the General Assembly, States and the ILC. These others will often gladly receive some normative guidance from the ICJ. But where they do not, nothing stops them from ignoring ICJ pronouncements."*[1]

This perspective suggests that the 'fate of the Court's decisions' hinges on whether the ICJ's involvement in lawmaking – despite not being part of its formal mandate – is accepted or rejected by the broader international community.[2] Judge Dire Tladi echoes the same argument. Judge Tladi asserted that 'international law remains State-made and State-developed law.'[3] Emphasizing on immense impact of the Court on the development of international law, Judge Tladi argued that:

> *"Without the formal mandate to develop the law, the Court's contribution to the development of international law is dependent on the respect it attracts from States and the esteem with which it is held."*[4]

In other words, this approach recognizes that the ICJ's contribution to the development of international law is, in essence, a form of lawmaking, even if it exceeds the Court's statutory limits. When the ICJ engages in legal development alongside other entities, such as the General Assembly, States, and the ILC, these entities must willingly embrace its guidance. Therefore, although the ICJ's involvement in legal development might overstep its formal mandate, it should be assessed by considering whether this lawmaking is welcomed by those entities primarily responsible for shaping international law.[5]

Accordingly, the question of the legality or legitimacy of the ICJ's role in lawmaking or legal development lacks a definitive answer, as the response is often *'it depends'*.[6] Tams explicitly stated that 'the Court's role in law-making is a question of degree'.[7] While the Court can make significant contributions to the development of international law, its influence is highly sector-specific and shaped by external factors beyond its control, such as the receptiveness of particular areas of law to judicial lawmaking and the influence of other agents involved in legal development.[8]

In sum, while existing literature acknowledges that the ICJ, as a judicial body, lacks formal legislative authority under its statute, it nonetheless plays an inevitable lawmaking role due to inherent weaknesses in the international legal system. As a result, the prevailing view is that such a lawmaking role unavoidably exceeds the Court's judicial mandate, yet is implicitly

1 Tams (n 23) 71.
2 Ibid.
3 Dire Tladi, 'The Role of the International Court of Justice in the Development of International Law' in Carlos Espósito and Kate Parlet, *The Cambridge Companion to the International Court of Justice* (Cambridge University Press, 2023) 84.
4 Ibid.
5 Some scholars believe that the ICJ will perfectly master this task *'by delivering specific answers to specific questions.'* Therefore, these answers to questions in a sector-based context must be accepted by audiences. *See:* Gyorgy Szenasi, 'The Role of the International Court of Justice in the Development of International Environmental Law' (1999) 40(1-2) AJH 43, 53.
6 Niels Petersen, 'Lawmaking by the International Court of Justice - Factors of Success' (2011) 12(5) GLJ 1295, 1316: *"Lawmaking by the ICJ is the exercise of public authority and, in principle, requires justification. However, the necessary degree of justification depends on the nature of public authority."*
7 Tams (n 23) 99.
8 Fattorini (n 30) 4.

accepted by States. However, this perspective in contemporary international legal scholarship is flawed.

As I will argue in the following sections, the Court does not overstep its mandate, as any judicial lawmaking it undertakes remains within the bounds of its statutory functions.

2. Gaps in International Law Where Judicial Legislation is Needed

Before its implementation, any rule or law must be interpreted[1] to clarify the content and scope of substantive rules of international law.[2] However, in every legal system, there are issues that have not been discussed or have remained unaddressed. This is partly because community in general, and legal relations therein, in particular, are in constant development and change.[3] Evolutions or political considerations of stakeholders in their relationships[4] and the advancement in technology create a situation where certain matters seem not to be regulated by the applicable legal system or are not addressed within the framework of that legal system.[5] More than domestic legal systems, however, this is particularly true for the international legal system, where existing legal frameworks do not provide explicit guidance to emerging issues. These situations highlight the notion of *non-liquet* or gaps in international law.[6]

It is self-evident that it may not be possible to specify all the desired legal relationships and legislate for all possible circumstances.[7] Rapid advancements in technologies often outpace the

1 Some scholars view [international] law as a communicative language where legislation serves as an interactive tool. They argue that many rules of interpretation are common-sense aids applicable to any document meant to convey a message. Therefore, understanding an Act starts with asking, *'what message is the legislature conveying?' See:* John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) MULR 627, 627. Some argue that there is a subtle distinction between treaty interpretation and application. Mitchell & Heaton suggest that it can be challenging to determine whether a WTO Tribunal is applying international law or interpreting WTO provisions using international law. They note that this distinction may not have significant practical implications. *See:* Andrew D. Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 *Michigan Journal of International Law* 561, 570. However, this approach has its critics. *"[T]reaty interpretation and application are distinct processes with independent functions. Treaty interpretation seeks to uncover the correct meaning of treaty terms ...; whereas treaty application involves identifying and applying the legal source." See:* Chang-fa Lo, 'The Difference Between Treaty Interpretation and Treaty Application and the Possibility to Account for Non-WTO Treaties During WTO Treaty Interpretation' (2012) 22(1) IICLR 1, 9; Gourgourinis (n 11) 31.

2 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) 6.

3 Stephen C. Neff, 'In Search of Clarity: Non Liquet and International Law' in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Brill-Nijhoff, 2009) 64: *"It is obvious that a gap in the law can exist. That is to say, that a situation might arise for which a legal system (whether international or domestic) does not have a ready-made specific rule to apply."* Anatoliy Kostruba, Mykola Haliantych, Svitlana Iskra and Andrii Dryshliuk, 'Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them' (2023) 44(2) SLR 1, 1: *"legal relations are constantly disappearing and new legal relations are emerging, ... Under such circumstances, it is not surprising and quite natural that so-called defects of the legal system' appear, which traditionally include gaps."*

4 An example of such evolution in international relations among states is seen in defining gender in the new Convention on Crimes Against Humanity. UN ILC's Special Rapporteur Sean D. Murphy has opted not to define gender, citing strong criticisms that the existing definition in the Rome Statute of the International Criminal Court is outdated and not widely accepted in contemporary international law. *See:* Sean D. Murphy, Special Rapporteur, *Fourth Report on Crimes Against Humanity*, UN Doc A/CN.4/725 (18 February 2019) 43 [101-2].

5 *"In contrast to this accelerating pace of technology, the legal frameworks that society relies on to regulate and manage emerging technologies have not evolved as rapidly." See:* Gary E. Marchant, 'The Growing Gap Between Emerging Technologies and the Law' in Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer, 2011) 19, 19.

6 At some point, it should be considered that a gap does not exist based on only lagging of regulatory frameworks at the international level, but as the *"relevant actors utilize ... silence in their practices of negotiating and constructing legal concepts and norms in the international scenario."* See: Juliana Santos de Carvalho, 'The Powers of Silence: Making Sense of the Non-Definition of Gender in International Criminal Law' (2022) 35(4) LJIL 963, 964.

7 This is not a problem of international law only but domestic legal systems as well. For instance, in its 2002 report, the

ability of existing regulatory framework to adapt.[1] Innovation in certain scientific areas is far ahead of the policy and regulatory environment, which remains fragmented and incomplete both nationally and internationally.[2] International law, given the diversity of events, cultures, and the conflicting and inconsistent interests of its subjects – i.e. States, international organizations, non-governmental entities, incorporations and to some extent individuals[3] – is no exception to this proven rule in the science of probability. As Raz wrote:

> *"There is a gap in the law when a legal question has no complete answer. Understanding a question is knowing what counts as a correct answer. This does not mean knowing which is the correct answer. It means knowing which statements are possible answers, i.e. which statements would be, if true, the correct answer. A legal question is a question all the possible answers to which are legal statements. A legal gap exists if none of the possible complete answers to a legal question is true."*[4]

Since international law operates in the shadow of global politics within the framework of international diplomatic practices, it is impossible to legislate for application in all conceivable conditions[5] as sometimes there is no room to find a persuasive answer for a legal question.[6] Acknowledging gaps as a fact in all legal systems, scholars often raise immediately the issue of how a gap, or a legal lacuna, must be addressed. Gleider Hernández explained that gaps in international law reveal situations that the legislator did not anticipate. He pushed a step forward and stipulated that "the judicial function's role is then to assume an essentially suppletive role, applying principles rooted in the system itself so as to extend the law into that particular dispute."[7]

There is also an opinion on the division of gaps into 'full' or 'incomplete', depending on the non-existence of applicable rules or contradictions between existing rules and regulations. Although this perspective is primarily associated with domestic legal systems, it has been shared

Commonwealth Government of Australia stated that *"it may not be possible to specify all the desired relationships in terms of existing legal definitions and without resorting to an evaluative concept such as close relationship. Such evaluative concepts are 'undesirable' in this context because they necessitate the forensic examination and assessment of the nature and quality of intimate human relationships in a way that may bring the law into disrepute."* Commonwealth of Australia, *Review of the Law of Negligence* (Final Report, September 2002) 141-2; See also: [Name Redacted]. *Statutory Interpretation: General Principles and Recent Trends* (United States Congressional Research Service, 5 April 2018) 18.

1 Marchant (n 43) 26.

2 Kieran Tranter, 'The Laws of Technology and the Technology of Law' (2011) 20(4) *Griffith Law Review* 753, 753: *"Cultural anxieties surrounding certain technologies can be seen as being channelled into the legal domain through lawyer-scholars identifying gaps within jurisdictions. The task appears to be identification of what law there is and what law there should be."*; Rowena Rodrigues, 'Legal and Human Rights Issues of AI: Gaps, Challenges and Vulnerabilities' [2020] 4(100005) JRT 1, 3.

3 Davorin Lapaš, 'Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?' (2022) 59(1) Canadian YIL 1; Alexandra Porumbescu and Livia Dana Pogan, 'Transnational Corporations, as Subjects of International Law in the Globalization Context' (2019) 64 RSP 65; Davorin Lapaš, 'Inter-Regional Organisations – Contemporary Participants in International Legal Relations or New Subjects of International Law: Is There a Difference?' (2016) 53(2) ZRPFS 413; Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge; 2012).

4 Joseph Raz, 'Legal Reasons, Sources, and Gaps' in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) ch 4. Nicole Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27(2) EJIL 329, 330.

5 Jan Klabbers, 'On Epistemic Universalism and the Melancholy of International Law (2018) 29(4) EJIL 1057, 1060; Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15(3) IJCL 671, 676.

6 Helen Quane, 'Silence in International Law' (2014) 84(1) BYIL 240, 240.

7 Ibid; see also: Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford Academic Press, 2014) 87.

by some legal scholars, such as S.I. Vilnyansky, who noted that gaps can occur both where current provisions are incomplete and where there are mutually contradictory provisions.[1] Such situations may arise from the novelty of a subject, sudden developments, or circumstances that were not anticipated at the time of drafting or adopting legal regulations,[2] or due to deficiencies in the international legal system.[3]

However, this is not the only reason cited by various schools of thought for the emergence of gaps in international law. Critical perspectives within legal scholarship, such as feminist and Third World Approaches to International Law, offer alternative interpretations of these gaps –as they term them, 'silence' – viewing them as a legal phenomenon intrinsic to the current dominant legal order.[4]

Apart from origin and explanatory theories, legal scholars have been developing potential responses to situations where there are gaps in the law. In general, international courts are expected to address gaps and resolve ambiguities, with their jurisprudence positively influencing international law by articulating rules, identifying potential issues, and highlighting gaps that prompt further legal developments.[5] Therefore, one of the initial responses to a gap in applicable law is often to refer the matter to a court, including the ICJ, that is:

> *"[E]ntitled to 'fill the gaps' in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purpose."*[6]

While an issue may not be explicitly addressed within the framework of existing international rules due to gaps, lacunae, or non liquet, it may still be examined by applying rules and principles commonly used in international judicial proceedings or arbitrations. However, the matter is not as simple as it may seem. Some argue that when faced with a legal lacuna, not all such gaps should necessarily be addressed.[7] In other words, given the absence of a pertinent rule in a specific situation, the nature of international law implies that the matter 'is neither prohibited, nor required, nor permitted' and 'is regarded as falling completely outside the remit of international law.'[8]

1 Kostruba (n 41) 10.

2 Gaps mostly arise from the emergence of new circumstances; W. Michael Reisman, 'International Non-liquet: Recrudescence and Transformation' (1969) 3(4) IL 770, 770-74; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011) 60-61; Propser Weil, 'The Court Cannot Conclude Definitively…Non Liquet Revisited' [1998] 36 CJTIL 109.

3 This deficit, which is the lack of an authoritative and superior centric legislative organ in face of a lacuna, is a unique feature of international law compared to domestic legal systems. *See:* Hernández (n 52) 1: *"... a distinctive characteristic of international law remains the diffuse and multi-layered process through which it is developed. In no small part because it has no legislature."*; Mariano J. Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non-liquet in International Law' (2008) 48(1) ICLQ 3, 4-5.

4 Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) AJIL 379; Bhupinder S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) ICLR 3.

5 Tim Stephens, 'The Role of International Courts and Tribunals in International Environmental Law' (PhD Thesis, University of Sydney, 2005) 11.

6 Bertrand Ramcharan, *Modernizing the Role of the International Court of Justice* (Asser Press, 2022) 6-7; Hernández (n 52) 240-80.

7 Scholars who support this idea, separate 'legal lacuna' from other so-called gaps, obscurities ('obscurités') and deficiencies ('carences'). *See:* Hernández (n 52) 247. Others provide different point of views and examined a legal gap with legal conflicts: *"A gap occurs when there is no regulation whatsoever. A gap is created where there is a radical contradiction of provisions of equal force, when one of them eliminates the other."*; Kostruba (n 41) 8-9.

8 Hernández (n 52) 255-56; Quane (n 51) 244.

The complexity of addressing gaps in international law highlights the inherent challenges in its application and interpretation. Navigating these gaps demands a nuanced understanding of both the limitations and the evolving nature of international legal frameworks. Although the ICJ does not have a formal lawmaking function, it plays a crucial role in addressing gaps and silent enigmas in international law through its interpretive competence. The key to understanding this role lies in differentiating between the *development* of international law and *lawmaking*. In this context, my argument is that the ICJ's role is to develop international law in times of ambiguity, rather than lawmaking, given its statutory limitations. Further analysis will be provided in the subsequent sections.

3. Development of International Law by the Court: Making Law Visible

Like almost all notions in international law, there are competing approaches to defining and specifying the concepts of lawmaking or the development of international law by courts.[1] The concept of progressive development has been crucial in shaping international legal relations from its inception to the present day. Progressive development in international law refers to the process of evolving and enhancing international legal norms and frameworks to address emerging issues, reflect contemporary values, and respond to changes in the global environment. It involves the continuous adaptation and expansion of international law to keep pace with new developments and challenges. This concept is crucial for ensuring that international law remains relevant and effective in a rapidly changing world. At first glance, this process involves 'international legislation' which is lawmaking driven by States within State-dominated forums through the establishment of treaties, conventions, or the formation of customary international law. However, what role do other entities, such as the ICJ, play in the development of international law?

According to Hersch Lauterpacht, the development of international law by international courts – what he terms *judicial legislation* – is an essential progressive feature of the international legal order, which would indispensably be materialized through a court with such a capacity.[2] Emphasizing judicial legislation as the 'permanent feature of administration of justice in every society',[3] Lauterpacht conceived it as a process of 'changing the existing law'.[4]

Building on this insight, Martti Koskenniemi underscores the paradox at the heart of judicial lawmaking: while legal systems formally deny the legitimacy of courts creating law – maintaining the 'fiction' that judges merely interpret existing norms – judicial legislation 'exists everywhere' and is in fact a structural necessity.[5] This paradox does not pose a problem for Lauterpacht, as he views all legal systems, including international law, as being grounded in certain foundational 'fictions'.[6]

1 Singh (n 7) 175; Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289, 291-92.

2 Hersch Lauterpacht, *The Development of International Law by International Court* (Cambridge University Press, 1958) 5; Ernest Nys, 'The Development and Formation of International Law' (1912) 6(1) AJIL 1; Van der Vyver, 'The Development of International Law through the Unauthorised Conduct of International Institutions' (2015) 18(5) PELJ 1301; Rosalyn Higgins, 'The Development of International Law by the Political Organs of the United Nations' (1965) 59(3) PASIL 116, 117.

3 Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) GLJ 979, 993.

4 Lauterpacht (n 62) 258; In the following pages, I will explain Lauterpacht's theory on how judicial legislation operates.

5 Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8(2) EJIL 215, 255.

6 Reut Yael Paz, 'Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law' (2012) 4(2) GJIL 417, 435-436.

As Koskenniemi observes, this contradiction is managed through the *legal fiction* that the court's articulation of new rules is 'no more than an application of an existing legal principle or an interpretation of an existing text'.[1] In doing so, the judicial role in shaping the law is rendered both legitimate and concealed. This fiction, he argues, enables the ICJ to act creatively without openly departing from legal orthodoxy, allowing it to progressively develop international law while preserving the appearance of fidelity to existing sources. In this context, development and lawmaking are distinct. A quote by Judge José Maria Ruda, which delineates this distinction, helps to draw a clear line between these two concepts:

> *"[T]he word development stands for the Court's contribution to the interpretation and application of existing rules of international law and not to the establishment of new rules. The work of any court, be it national or international, consists of the interpretation and application of existing law and not the creation of new law."*[2]

The key concept I want to emphasize is the focus on *existing* law. This distinction clarifies that judicial legislation is not about creating new rules or overstepping the ICJ's functions. Instead, the Court's role is to develop international law through interpretive methods, extending the scope and applicability of existing rules and regulations to address the evolving needs of the international community.[3]

In the same vein, some judges of the ICJ have used the term *international legislation* to refer to the development of applicable law in response to the necessities of the international scene. Judge Alejandro Álvarez described international legislation as a framework within which States can find their consensual legal obligations. His wording suggests that legislation by the court is, in fact, a development of international law to adapt to the evolving international community:

> *"As a result of the great changes in international life that have taken place since the last social cataclysm, it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect, all the more so because in virtue of Resolution 171 of the General Assembly of the United Nations of 1947, it is at liberty to develop international law, and indeed to create law, if that is necessary, for it is impossible to define exactly where the development of this law ends and its creation begins. To proceed otherwise would be to fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited.*[4]

Judge Kotaro Tanaka also used the term to explain international legislation and the functions of the Court within the international legal system:

> *"[T]he Court cannot exceed the limitation incumbent upon it as a court of law.*

1 Koskenniemi (n 65) 255.
2 Jose Maria Ruda, 'Some of the Contributions of the International Court of Justice to the Development of International Law' (1991) 24(1) NYU JILP 35, 35.
3 This aligns with the Court's statutory limitations, which prevent it from creating new laws on its own.
4 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 50 (Judge Alvarez).

> *Undoubtedly a court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and difficult matter. Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the raison d'être of a legal system, legal institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled."*[1]

By acknowledging the limitations of the ICJ, Judge Tanaka implicitly highlights the distinction between 'judicial legislation' and legislation in a sense of lawmaking. He explains that while the Court can interpret and clarify legal relationships within the existing legal framework, it cannot independently create new laws. The ICJ's role is to define new legal relations based on established laws and to apply these laws to new contexts. Judges may use creative reasoning to address gaps or ambiguities. However, their role is confined to inferring the intent of existing laws rather than creating entirely new rules.

In the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court used both terms, *lawmaking* and *legislation*, while indicating the limitation of the Court in this regard:

> *"[I]t has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a 'law-making' capacity. It is clear that the Court cannot 'legislate', and, in the circumstances of the present case, it is not called upon to do so."* [2]

The terminology used by the ICJ is significant. The Court refers to both 'lawmaking' and 'legislation' as synonyms. In this context, the ICJ explicitly states that it cannot legislate, meaning it cannot create entirely new laws or rules that did not previously exist. Despite this limitation, the Court is not precluded from engaging in what is known as 'judicial legislation' as described above. Therefore, the Court's assertion that it cannot legislate does not mean it is incapable of judicial interpretation or adaptation which called *judicial legislation*. This subtle distinction between *lawmaking*, *legislation*, and *judicial legislation* is crucial, as legal scholars and ICJ judges also use the term *international legislation* to refer to the process of lawmaking.[3]

Some may interchangeably consider the term *rulemaking* with the concept of lawmaking.[4] Sometimes scholars provide a broad definition such as 'the term international legislation is used to describe the process and the product of the conscious effort to make additions to, or changes in, the law of nations,' which encompasses international judicial legislation.[5] Nonetheless, it

1 *South West Africa* (Liberia/ South Africa) (Second Phase) (Judgment) ICJ Rep 6, 277.
2 *Nuclear Weapons* (n 2) 237 [18].
3 Arnold Duncan McNair, *The Law of Treaties* (Oxford University Press, 1986) 730; *see also:* Singh (n 7) 172; International Law Commission, Memorandum Submitted by the Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission,* UN Doc A/GN.4/1/Rev.l (10 February 1949) 5.
4 Leo Park, 'The International Court and Rule-Making: Finding Effectiveness' (2018) 38(4) UPJIL 1065, 1084: *"the Court can develop laws in a way that is respected under various theories of the law's influence."*
5 Richard Reeve Baxter, 'Introduction to International Law' (1958) 11(7) NWCR 4, 12.

should be noted that the international community lacks any legislative body, in comparison to domestic legal systems, and the term 'legislation' can only be a figurative description of the legislative status quo of international law.[1]

Some traditional views consider lawmaking as the codification of unwritten laws and, in general, the expression of the will of States.[2] In this regard, the concept of lawmaking overlaps with the notion of codification. Alain Pellet, who served as a Special Rapporteur of the ILC, suggests that progressive development entails some measure of legislation.[3] The ILC has stipulated that 'primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.'[4] Dire Tladi accurately explained this State-centric approach taken by the ILC:

> *"The primarily in [the ILC's] statement is not meant to indicate that resolutions or decisions of non-State actors can constitute practice for the purposes of customary international law. Rather, it indicates that under limited circumstances, the conduct of international organisations may constitute practice and contribute to law-making."*[5]

To establish rulemaking, a rule should impose general obligations that endure beyond a specific timeframe.[6] Rulemaking processes often encompass efforts to create legally binding regulations,[7] taking on various forms including delegated lawmaking procedures within the international system[8] that encompass all relevant subjects,[9] regardless of whether all member States have explicitly consented to a rule before its inception.[10]

Emphasizing the ICJ's role in international rulemaking, some argue that judicial legislation relies on two key elements: First is the observation of a legal development, and second is recognizing that this development is caused by an ICJ judgment.[11] In essence, the legislative

1 Gennadiĭ Mikhaĭlovich Danilenko, *Law-making in the International Community* (Nijhoff, 1993) 7.

2 I.C. Van Der Vlies, 'Legislation in a Global Perspective' in Julia Arnscheidt and Jan Michiel Otto (eds), *Lawmaking for Development: Explorations into the Theory and Practice of International Legislative Projects* (Leiden University Press, 2008) 133, 133.

3 Nikolaos Voulgaris, 'The International Law Commission and Politics: Taking the Science Out of International Law's Progressive Development' (2022) 33(3) EJIL 761, 778.

4 International Law Commission, *Draft Conclusions on the Identification of Customary International Law*, UN Doc A/73/10 (2018) 130.

5 Dire Tladi, 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?' (2017) 16(3) CJIL 425, 444-445.

6 Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer International Publishing AG, 2022)

7 Hubert Mayer, 'Changes in International Lawmaking: Actors, Processes, Impact' (Conference Report, Annual Meeting of the European Society of International Law (ESIL), 9-11 September 2021) 98-99.

8 Andrew Guzman, 'The Consent Problem in International Law' (Berkeley Program in Law and Economics, 2011) 11: Guzman believes that delegated lawmaking is exceedingly rare. He cites the EU as the most obvious international entity with such authority. The Security Council also has the authority to create binding rules through a voting system, but this authority is highly constrained.

9 Alona Manyk, 'Participation of the Nonclassical Subjects of International Law in Law-Making and Law-Enforcement' (2018) 5(1) EJLPA 46, 52.

10 Alain Pellet observed that consensus is not needed in international lawmaking to codify a rule. In international law, the Assembly has become a key tool for States to articulate their national interests and garner general support. Assembly resolutions express common interests and the *'general will'* of the international community, often aimed at transforming this will into law. *See:* Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' [1989] 12 AYIL 22, 51; Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2017) 108(1) AJIL 1.

11 Niels Petersen, 'Lawmaking by the International Court of Justice: Factors of Success' (2011) 12(5) GLJ 1295, 1295.

actions of the Court influence State's obligations through legal discourse, and their effectiveness hinges on the degree of persuasion they achieve.[1] Put differently, they shape rulemaking through legal evolution, wherein the impact of ICJ judgments is contingent upon their reception within the legal discourse.[2]

However, the concept of development itself offers limited scope for equating codification with legislation, as the ILC, entrusted with the development of international law, is not inherently a legislative body.[3] Additionally, it poses a challenge to the notion that the Court can surpass established principles of international law to fill gaps, as this would imply an overreach of its judicial role.[4] Consequently, if codification is not synonymous with legislation in the progressive development of international law, as mandated by the ILC's statute, then what exactly constitutes this progressive development?[5]

Lauterpacht employs the terms *development* and *clarification* interchangeably, wherein development broadly entails *making law visible*.[6] This effort to elucidate the law aligns with the ILC's mandated task by the UN General Assembly:

> *"[P]rogressive development of international law is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression codification of international law is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."*[7]

Determining the exact moment of law development and creation is challenging, if not outright impossible. In his individual opinion appended to the advisory opinion of April 11, 1949, on 'Reparation for Injuries Suffered in the Service of the United Nations', Judge Alejandro Álvarez stated:

> *"While recognizing that the United Nations has the capacity to bring an international claim in the case in point and for the purposes set forth in the Request for the Opinion, the Court has proclaimed a new precept of international law. To Say that, in so doing, it has developed that law, or that it has created a new precept, is a mere matter of words, for in many cases it is quite impossible to say where the development of law ends and where its creation begins."*[8]

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1 Ibid 1316.
2 Judgments of the ICJ are not transformed into constraining standards of behavior *per se*.
3 Voulgaris (n 78) 779.
4 Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4(1) MJIL 29, 56.
5 Teresa F. Mayr (n 6) 436: *"judicial legislation takes a different form than codification by a legislative body. Instead of giving detailed provisions as to definition and application of the new legal norm, judicial law-making focuses on laying down broad principles which are applied in the case at hand."*
6 Lauterpacht (n 62) 42-43; Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation', (2011) 34(1) LLA ILR 99, 101.
7 Patrícia Galvão Teles, 'The ILC's Past Practice on Progressive Development and Codification of International Law-An Empirical Analysis Focusing on the Law of the Sea, Law of Treaties and State Responsibility' (2019) 13(6) FIU LR 1027, 1028.
8 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 190 (Judge Alvarez).

Amidst this ambiguity, it has been asserted that the development of international law, serving as a mechanism for filling legal gaps, is not a novel concept in the jurisprudence of the Court.[1] Arguably, it stands as a valuable judicial tool for determining the rights and obligations of international law subjects, particularly in scenarios where the process of lawmaking is deemed necessary to prevent confusion and inconsistency in grey areas of international law.[2] Nevertheless, there exists significant opposition to the broad competence of the ICJ in lawmaking, as "adjudicative law-making may be barred or limited in some respect by the sources of law that are available or authorized to the dispute settler."[3] Judge Alvarez further elucidates why international adjudication's capacity to develop international law is constrained, noting that the trajectory of legal development through dispute settlement is often unpredictable and not fully foreseeable by those who establish such systems, thereby not wholly driven by the interests of domestic groups setting up these mechanisms.[4]

Judge Sir Robert Yewdall Jennings offers another perspective on this limitation which is in line with the distinction between *lawmaking* and *judicial legislation*:

> *"Where a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate reasonably and logically from existing and previously ascertainable law."*[5]

According to Judge Jennings, while the ICJ cannot create new laws *ex nihilo*, it can engage in judicial legislation by interpreting and applying *existing* legal principles to new contexts. This perspective supports the idea that although the Court is restricted from making entirely new laws, it can still develop international law by adapting the scope of established legal norms to address emerging legal issues. Thus, Judge Jennings' view underscores that the Court's role is not confined to mere interpretation but includes the ability to shape and clarify the application of existing rules in light of new circumstances.

Also, constraining interpretation to *existing* laws does not imply that these rules remain stagnant over time. On the contrary, international courts and tribunals interpret legal instruments not merely based on the historical intentions of States, but rather on their *objective will* as expressed by the provisions of conventions. This interpretation may also be influenced by the necessity to adapt conventions to inevitable societal changes.[6]

Drawing from the aforementioned opinions, which encompass a spectrum of interpretations for the concept of development ranging from clarification to transformation, it can be argued

1 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15(3) IJCL 671, 672.

2 Fergus Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) 9(1) MJIL 47, 58; Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57(1) HILJ 111.

3 José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) 561.

4 Ibid 576.

5 Son Tan Nguyen, 'The Applicability of Res Judicata and Lis Pendens in World Trade Organisation Dispute Settlement' (2013) 25(2) BLR 123, 143; Son Tan Nguyen, 'The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement' (2016) 35(1) UTLR 95, 106 nn 61.

6 Daria Sartori, 'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29(2) *Tul. Eur. & Civ. L.F.* 46, 49.

that the dichotomy between development and lawmaking by the ICJ is a matter of distinct categories.[1] Interpretation serves as the preceding stage of judicial legislation, and as it approaches its highest degrees, it converges closer to the concept of development. At this juncture, we sometimes observe that the advancement of law development intertwines with rulemaking. The ICJ, in certain cases, interprets rules in a manner that not only unveils the meaning and purpose embedded in treaties and other sources of international law but also takes into account the evolving needs of the international community, thereby contributing to the development of international law based on the existing laws. Occasionally, this process extends to the point of implicitly crafting rules, where decisions of this international judicial body give rise to new applicable rules for governing new legal relations, without actually creating new laws.

4. Interpretation and its Significance

4.1. Interpretation as a tool of Development of International Law

Interpretation plays a crucial role in comprehending the content and ramifications of international acts and instruments, thus receiving extensive attention in both legal doctrine and jurisprudence.[2] It can be argued that interpreters often encounter an artificial dichotomy within traditional conceptions of legal interpretation: one that revolves around *discovering* the precise meaning or scope of a rule, and another that involves *creating* new horizons for the application of previously established *rules*.[3]

In the realm of discovery, interpretation, grounded in existing rules, aims to unveil, and elucidate a fact or a concept, essentially revealing what already exists; thus, the interpreter functions as a discoverer rather than a creator of the existing matter. However, can interpretation be stretched to the extent where it results in the formation of new rules and assumes a generative and constructive role? Within a dynamic theory of meaning, it is plausible to uphold the notion that legal interpretation embodies *a mixture of discovery and creation.*[4] To assess this, it is imperative to distinguish between interpretation and filling legal gaps.

As the international community evolves and the pace of change in pertinent issues accelerates, the sources of international law risk remaining static within their own temporal boundaries. Consequently, there may arise situations where international law fails to address evolving matters, leading to gaps and instances of *non liquet*. Hence, some contend that international law, and by extension its sources, possess a fluid content despite maintaining a static form and structure.[5] In essence, during the application of legal rules, scenarios such as legal gaps or the silence of laws may arise.[6]

Considerable debate surrounds the question of whether interpretation can effectively fill the gaps in international law, with various viewpoints being expressed. The first group, proponents

1 Robert Y. Jennings, 'General Course on Principles of International Law' in Recueil des Cours de l'Académie de La Haye (Brill-Nijhoff, 1967) 323, 341.
2 Orakhelashvili (n 40) 285; Venzke (n 92) 100.
3 Vittorio Villa, 'A Pragmatically Oriented Theory of Legal Interpretation' (2010) 12(2) JCTPL 89, 112-13.
4 Ibid 113.
5 Maurice Mendelson, 'Formation of International Law and the Observational Standpoint' in *International Law Association Report of the Sixty-Third Conference* (First Report of the Rapporteur, 1986, Anne 1) 9-11.
6 Stephen C. Neff (n 41) 65.

of the influential role of interpretation in gap-filling, argue that interpretation encompasses two dimensions: one involves identifying the pre-existing meaning, while the other pertains to the creative aspect of interpretation, which has the capacity to establish rules and address gaps.[1]

An example illustrating this is the UNIDROIT Principles of International Commercial Contracts (PICC). The PICC serves the primary purpose of facilitating negotiations and the formation of international commercial contracts by offering uniform rules, which notably include detailed regulations concerning contract interpretation. These norms pertaining to contract interpretation are encapsulated in Chapter 4 of the PICC, which consists of eight distinct provisions (Articles 4.1– 4.8). It is noteworthy that Chapter 4 also addresses an issue closely related to contract interpretation, albeit not strictly falling within its scope – namely, the matter of gap filling.[2]

Interpretation, *stricto sensu*, entails the extraction of 'pre-existing' meanings purportedly embedded within the forms of international legal discourse, thus encompassing the clarification and elucidation of existing text.[3] In a broader sense, interpretation is viewed as a mechanism to develop applicable laws and fill gaps. Within this context, the aim of interpretation is to arrive at a legal solution aligned with the needs and interests of society or the international legal system.[4]

Achieving this objective necessitates that an international judge be capable of assuming a constructive role, extracting legal obligations, and imposing them on parties involved in a dispute. Within this framework, interpretation not only elucidates *existing* laws but also uses them to contribute to the creation of new rules for governing new legal relations, thereby playing a pivotal role in shaping international law.[5]

4.2. Different Methods of Interpretation

In this regard, how a judge can create new rules through judicial legislation involves differentiating between interpretative methods in international law, which can be categorized into four main types: *textual*, *systematic* (or contextual), evolutive (in the literature, similar approaches are also referred to as purposive or teleological), and *historical*.[6]

Textual (or literal) interpretation involves utilizing the ordinary meaning of written acts to ascertain the law. It is evident that interpreters employing this approach do not intend to create law or exceed the current regulations.[7] According to certain perspectives, interpreters should refrain from supplementing the text with elements not explicitly included within it. In this regard, textual interpretation "helps respect the intentions of the lawmaking States, which the text is presumed to reflect."[8]

1 Cecilia Medina Quiroga, 'The Role of International Tribunals: Law-Making or Creative Interpretation?' in Dinah Shelton, (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 649, 650-52.
2 Alexander Komarov, 'Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles' (2017) 22(1) RDU 29, 31.
3 Jean d'Aspremont, 'Two Attitudes towards Textuality in International Law: The Battle for Dualism' (2022) 42(4) OJLS 963, 968.
4 Andraž Zidar, 'Interpretation and the International Legal Profession: Between Duty and Aspiration' in: Andrea Bianchi et al. (ed), *Interpretation in International Law* (Oxford Academic Press, 2015) ch 6, 133.
5 Jan Klabbers, 'How Interpretation Makes International Law: On Semantic Change and Normative Twists' (2013) 24(2) EJIL 718, 719-722.
6 Ammann (n 11) 195.
7 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) 106.
8 Ammann (n 11) 197, 199.

In other words, as Alexander Orakhelashvili articulated, interpretation is intricately tied to the structural framework of international law, which is grounded in consent and agreement. Consequently, the content and scope of rules must be determined through interpretation to elucidate the boundaries of the original consent.[1] According to the ICJ:

> *"If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."*[2]

Therefore, while certain methods of interpretation are inherently limited and deemed unsuitable for judicial legislation or development of international law, a purposive or evolutive interpretation approach that considers the dynamic nature of circumstances proves to be an apt tool for law development through adjudicatory bodies.

4.3. Judicial Legislation and Relativity of Judgments

It is worth noting that the drafters of the Statute of the ICJ aimed to regard its judgments as relative, stating that "the decision of the Court has no binding force except between the parties and in respect of that particular case", thereby restricting the Court's capacity for lawmaking and gap filling.[3] Nevertheless, some scholars contend that at least certain aspects of certain types of judgments should be binding on third parties.[4]

Jörg Kammerhofer suggests that it may not always be feasible to limit the personal scope of ICJ judgments to the involved parties, especially when the judgments concern questions of status. He posits that such judgments – for instance on territorial status – form an exception to the relativity of *res judicata*, being opposable to all States, not just the parties to the case, because status-based issue is *une situation objective ayant effet erga omnes*.[5] Hence, the arguments and interpretations put forth by the Court in situations where adjudication is necessary to shape certain aspects of international law are pivotal in its judicial legislation process.

One prominent example is the evolutive interpretation adopted by the Court in its advisory opinion of 11 April 1949, on *Reparation for Injuries Suffered in the Service of the United Nations*, wherein the Court stated that:

> *"To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization. The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the 'development of international law has been influenced by the requirements of international life', and the progressive increase in the collective activities of States has already given rise to instances of action upon*

1 Orakhelashvili (n 17) 286.
2 *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8.
3 Statute of the International Court of Justice art. 59.
4 Jörg Kammerhofer, 'Beyond the Res Judicata Doctrine: The Nomomechanics of ICJ Interpretation Judgments' (2024) 37(1) LJIL 206, 209.
5 Ibid.

> *the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable."*[1]

Another notable example that underscores the implicit rulemaking role of the Court through its purposive interpretation is the landmark 1970 *Barcelona Traction* case, where the Court's response shaped the modern framework of the hierarchy of norms and principles in international law. In its judgment of 5 February 1970, the ICJ introduced the concept of obligations *erga omnes* as a result of its interpretations.[2] It was the Court's interpretations that initially recognized and introduced obligations *erga omnes* as a legal concept, alongside addressing the legal personality and implied powers of international organizations. These interpretations were subsequently reaffirmed in related cases, influencing the practices of states, impacting the perspectives of legal scholars, and solidifying themselves as established international legal principles.

5. Judicial Legislation through Evolutive Interpretation

The law of international treaties establishes the general rule of interpretation by prioritizing the text of the treaty in the interpretative process. Additionally, *purposive* or *teleological* interpretation is recognized as the third method of treaty interpretation according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). Another provision related to teleology is Article 31(3)(b) of the VCLT, which permits recourse to subsequent treaty practice and thus considers changing circumstances.[3] In this method, purposive or teleological interpretation aims to ascertain the object and purpose of the treaty.[4]

In this context, treaties or applicable laws within different international legal regimes – such as those concerning human rights, environmental protection, territorial treaties, and humanitarian treaties pertaining to the safeguarding of civilians during armed conflicts[5] – require distinct approaches to interpretation due to the specific nature of the commitments therein. It is essential to consider the principles of international law relevant to interpreting treaties, given their nature as *lex specialis* or *lex generalis.* Therefore, the adoption of the interpretative method must account for the relevance of these principles.[6]

This becomes crucial as evolutive interpretation is employed to identify general principles of international law.[7] In essence, the nature of rules derived from the level of obligation in the hierarchy of norms and principles within the international legal system significantly influences the interpretative process of a treaty.[8] Interpretation of any legal relationship among States by international courts and tribunals, which may evolve into obligations *erga omnes* due to their

1 *Reparation for Injuries* (n 94) 178.
2 *Barcelona Traction* (Belgium v Spain) (Second Phase) (Judgment) [1970] ICJ Rep 3, 32 [33].
3 Ammann (n 11) 209.
4 James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, , 2012) 379.
5 Julian Arato, 'Accounting for Difference in Treaty Interpretation Over Time', in: Andrea Bianchi et al. (ed), *Interpretation in International Law* (Oxford Academic Press, 2015) ch 10, 205-206.
6 Orakhelashvili (n 40) 371.
7 Ammann (n 11) 210.
8 Ibid 218.

nature, permits dynamic interpretation. This dynamic interpretation results in quasi-rule making or, more accurately, the development of international law through interpretation.[1]

5.1. Evolutive Interpretation

Some regard evolutive interpretation as a form of dynamic interpretation that takes into account the *status quo* at the time of interpretation.[2] Similarly, like the ILC, the European Court of Human Rights has employed the term *evolutionary interpretation* to adapt the content of relevant conventions to ensure effective protection of the rights enshrined in them amidst changing circumstances within the international community.[3] This is because attaining a thorough understanding of the object and purpose of the treaty provides a basis for interpreting treaties in light of present conditions.[4]

Evolutionary interpretation stems from the intent of the parties and takes into account the meaning of the treaty at the time of its interpretation.[5] While Article 31 of the Vienna Convention does not explicitly mention the then-intent of the parties and underscores the primacy of the text over the discovery of intent, this has sparked some debates. According to Arbitrator Max Huber, the meaning of treaty provisions and the circumstances at the time of the conclusion of the treaty are preferable to be interpreted, referred to as static interpretation or the principle of contemporaneity, contrasting with dynamic interpretation.[6] Also, Judge Bedjaoui noted in his separate opinion in the case concerning the *Gabčíkovo-Nagymaros Project*:

> *"The intentions of the parties are presumed to have been influenced by the law in force at the time the Treaty was concluded, the law which they were supposed to know, and not by future law, as yet unknown ... as the law which did not yet exist at that time could not logically have any influence on this intention."*[7]

However, as the ILC has concluded, the idea of interpreting treaty terms *as capable of evolving over time* has received broad acceptance from States.[8] Additionally, various international courts and tribunals that have employed evolutive interpretation appear to have done so on a case-by-case basis. The ICJ, in particular, is perceived to have developed two branches of jurisprudence, one leaning towards a more *contemporaneous* interpretation and the other towards a more *evolutionary* one. In a case concerning the *Dispute regarding Navigational and Related Rights*, the Court considered that:

> *"[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and*

1 Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 10-13.
2 Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 42(3) FILJ 765, 765; Tim Clark, 'The Teleological Turn in the Law of International Organisations' (2021) 70(3) ICLQ 533, 562.
3 *Tyrer v United Kingdom*, 26 Eur. Ct. H.R. (ser. A) 26 (1978); Dothan (n 129) 775-76.
4 Inagaki Osamu, 'Evolutionary Interpretation of Treaties Re-examined: the Two-Stage Reasoning' (2015) 22(2-3) JICS 127, 137.
5 'Report of the Commission to the General Assembly on the Work of its Sixty-Fifth Session' [2013] 2(I) Yearbook of the International Law Commission 1, 71 [98].
6 Georg Nolte, Special Rapporteur, *First Report on the Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, UN Doc A/CN.4/660 (19 March 2013) 24 [2-3]; Oliver Dorr, *Schmalenbach, Kirsten, Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 533-34; *Rights of United States Nationals in Morocco* (n 6) 189.
7 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7, 121-22 [7].
8 Georg Nolte, Special Rapporteur, *Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, UN Doc A/CN.4/715 (28 February 2018) 21-23 [71-79].

> *where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."*[1]

As evident, the Court's support for evolutive interpretation seems to pertain to general terms of international law. However, arguably, when the ICJ grapples with treaty-specific terms, it appears that the Court tends to decide based on a contemporaneous approach. In his Declaration in the case concerning the *Dispute regarding Navigational and Related Rights*, Judge *ad hoc* Guillaumem, citing various case laws, explains that in identifying and interpreting technical or treaty-specific terms – such as water-parting, centre of the main channel, thalweg, mouth of a lake – the Court 'must seek to ascertain the intention of the parties at the time'.[2] Therefore, *a contrario,* the *generic nature* of a particular term in a treaty and the treaty's designation as *of continuing duration* may give rise to an evolving meaning.[3]

5.2. Application of Evolutive Interpretation in Judicial Legislations of the ICJ

It is pertinent to acknowledge that evolutive interpretation has significantly contributed to aligning the international legal system with the needs of the global community. International courts and tribunals have consistently employed this method of interpretation, taking into account changes in circumstances. This assertion finds validation in the jurisprudence of various international adjudicatory bodies. In its advisory opinion of 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court's dictum serves as an example of evolutive interpretation:

> *"Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - the strenuous conditions of the modern world and the well-being and development of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the sacred trust."*[4]

As the Court has elucidated, certain international legal terms are *by definition evolutionary*, and judges should attribute to these terms an evolving meaning by considering the evolution of the international community to address any potential gaps. Additional examples can be found in the jurisprudence of the ICJ. In its judgment of 19 December 1978 in the *Aegean Sea Continental Shelf*, the Court maintained that certain terms, by their very nature, are dynamic, and this dynamism should be reflected in their interpretation:

> *"It hardly seems conceivable that ... terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law."*[5]

1 *Navigational and Related Rights* (n 17) 243 [66].
2 Ibid, 295 [11] (Judge ad hoc Guillaume).
3 ILC (n 15) 25 [6].
4 *Namibia Case* (n 6) 31[53].
5 *Aegean Sea Continental Shelf* (Greece v Turkey) (Judgment) [1978] ICJ Rep 3, 32 [77].

Another instance of the application of such an evolutive method in interpretation by the ICJ is evident in the judgment of 13 July 2009, on the *Dispute regarding Navigational and Related Rights*, where the Court asserted that the content of an international rule is capable of evolving:

> *"[T]he subsequent practice of the parties, within the meaning of article 31, paragraph 3 (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was... to give the terms used... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law."*[1]

The ICJ has clearly articulated that treaties should be interpreted in light of the common intent of the parties at the time of their conclusion. The intent of the parties may lend meaning or significance to treaty terms that have the potential for evolution and change. Such intent need not be explicitly stated; it may be presumed.[2] In its judgment of April 20, 2010, in the case concerning the *Pulp Mills on the River Uruguay*, the Court observed that 'neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment.'[3] The Court recalled its previous statement in the 2009 Dispute Regarding Navigational and Related Rights, affirming that there are situations in which terms used by States have *a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law*.[4] These cases demonstrate that, according to the Court's perspective, terms or phrases can be dynamically interpreted to develop international applicable law.[5]

Other international judicial bodies also occasionally employ an evolutive approach to interpretation, albeit with varying degrees of openness towards such interpretation.[6] On occasion, the ITLOS, for instance, has demonstrated its readiness to utilize a dynamic and evolutive method of interpretation. The ITLOS has regarded certain notions as variable concepts that "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."[7]

Thus, when deemed appropriate, the Tribunal interprets relevant international legal regimes in an evolutive and dynamic manner, presumably in line with the object and purpose of the provision, to address grey areas and potential gaps. In summary, this type of interpretation serves as a valuable tool for international judges to infuse dynamism into their judgments. One of the hallmarks of an effective legal system is its ability to adapt to the variable needs and demands of

1 *Navigational and Related Rights* (n 17) 242 [64].
2 Ibid 242 [63-64]; Nolte (n 133) 74-75 [118].
3 *Pulp Mills* (n 17) 73 [205].
4 Ibid 72-73 [204].
5 Martin Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua' (2011) 24(1) LJIL 201, 201.
6 Nolte (n 133) 66 [63].
7 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) (International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011) [117]; Yoshifumi Tanaka, 'Reflections on Time Elements in the International Law of the Environment' (2013) 73(2) HJIL 139, 141-42.

the international community. International law is no exception to this principle; as a system with rules governing relations among members of the international community, it must reflect changes within this community. As the ICJ has emphasized, "throughout its history, the development of international law has been influenced by the requirements of international law."[1]

Therefore, a sustainable international legal system is one that considers methods of judicial legislation in accordance with its contemporary needs. In this regard, judges of international courts and tribunals, in particular the ICJ, serve as the dynamic architects of international law, playing a pivotal role in its evolution within the framework of the court. Even when engaged in interpreting legal texts, judges wield significant latitude to contribute to the development of the law.

Conclusion

The effectiveness and longevity of a legal system hinge on its ability to adapt with changes in community it governs.[2] This holds true for all legal systems, including international law in its entirety, as they inherently balance stability and flexibility. Stability fosters predictability and compliance, while flexibility allows legal systems to adapt to evolving needs and circumstances. As George Nolte, the Special Rapporteur of the ILC once remarked "legal systems must also leave room for the consideration of subsequent developments to ensure meaningful respect for the agreement of the parties and identification of its limits."[3]

Thus, change becomes inevitable. As the international community evolves, international legal norms must also adapt to reflect these changes within international community.[4] Sometimes, States themselves establish a framework to regulate new legal relations. Sometimes, this evolution has been manifested in judgments of international courts and tribunals, chiefly the ICJ.

While the ICJ asserts that it does not possess a lawmaking role, it undeniably plays a significant role in the development of international law. The boundaries between lawmaking and the development of international law, however, remains blurred. This ambiguity often invites criticism, with some arguing that the Court occasionally oversteps its adjudicatory mandate and intrudes the domain of legislation.

In my view, the extent to which the Court can contribute to the development of international law is inherently tied to its reliance on 'existing' law. This means that as long as the ICJ draws upon established laws, principles, concepts, rules, and regulations within the current framework of the international legal system, it remains within its adjudicatory mandate. By grounding its decisions in the existing legal corpus, the Court avoids the overreach of entering the realm of lawmaking. Thus, the ICJ's contribution to the development of international law is achieved through the careful interpretation and application of existing legal norms, rather than through the creation of new laws.

The Court advances this development of international law by employing a dynamic approach to interpretation, which showcases its capacity to evolve legal principles within the

1 *Reparation for Injuries* (n 94) 178.
2 Thomas F. McInerney, 'Factors Contributing to Treaty Effectiveness: Implications for a Possible Pandemic Treaty' (Global Health Centre Policy Brief, Graduate Institute of International and Development Studies, 2021) 7.
3 Kathryn Gordon and Joachim Pohl, 'Investment Treaties Over Time: Treaty Practice and Interpretation in a Changing World' (OECD Working Papers on International Investment, 2015/02, 2015) 6.
4 Nico Krisch, 'The Dynamics of International Law Redux' (2021) 74(1) CLP 269, 269-70.

existing framework. This dynamic interpretative method allows the ICJ to adapt and refine international law in response to contemporary challenges without overstepping its judicial role.

Although it is somewhat difficult to distinguish between lawmaking and judicial legislation in terms of terminology, I have continued to adhere to the term used by Lauterpacht, who referred to the ability of international courts and tribunals to influence the development of international law as 'judicial legislation'.[1] As argued in this article, these terms should be distinguished as 'lawmaking' involve creating new laws, whereas the 'judicial legislation' involves adapting existing laws and establishing new legal relations to address emerging legal requirements. This capacity for 'judicial legislation' underscores the ICJ's unique position in shaping international law while remaining anchored to its adjudicatory mandate.

In this sense, judicial legislation enables the Court to effectively fill gaps through interpretative method and advance the development of international law. At this point, it is important to note that methods of interpretation vary depending on the context, circumstances, and purpose of each case. Therefore, when engaging in 'judicial legislation', the Court must carefully select an interpretative method that considers the scope and the applicability of existing rules, as well as the evolutive nature of international law concepts. This approach ensures that the Court can effectively address the evolving needs of the international community while adapting established legal norms to meet contemporary challenges. By doing so, the ICJ not only applies the existing law as it stands but also contributes to its development in a manner that is both responsive to change and consistent with the overarching framework of international law.

In this context, the UN ILC, in its delineation of modes of interpretation, has recently outlined a method which may be the most suitable for the ICJ to employ when engaging in judicial legislation. As the ILC expressed, the evolutionary interpretation serves as a purpose-oriented approach guided by subsequent practice and other developments in international relations or society.[2] Judicial legislation provides a foundation that responds to the evolving needs of the international community, addressing social and legal developments and leading to contemporary and pragmatic outcomes. However, evolutive interpretation as a method of judicial legislation does not involve creating laws but rather rejuvenates *existing* rules to ensure they appropriately address the necessities of newly emerged situations.[3]

Through an evolutive interpretation, which considers the object and purpose of existing laws in light of changing circumstances and the needs of the international community, the ICJ can provide a judicial legislation. This approach allows the Court to clarify ambiguities, expand the scope of existing rules, and develop international law in areas where the law was previously silent or unclear.

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1 However, from my perspective, the term *'interpretive legislation'* more accurately conveys the role of the ICJ in the development of international law than judicial legislation. While Lauterpacht's terminology emphasizes the Court's influence, *interpretive legislation* underscores its essential function of clarifying and applying existing legal norms. This distinction is crucial; it highlights that the ICJ does not create new laws but interprets established legal frameworks to adapt to emerging needs and circumstances. By adopting this terminology, we acknowledge the ICJ's pivotal role in shaping international law while remaining firmly grounded in its adjudicatory mandate.

2 Helmersen (n 16) 166; Alice Lloyd, 'A Purposive Approach to Interpreting Australia's Complementary Protection Regime' (2020) 43(2) MULR 654.

3 Jeffrey Goldsworthy, 'Is Legislative Supremacy Under Threat?: Statutory Interpretation, Legislative Intention? And Common-Law Principles' [2016] (28) *Quadrant* 36, 57.

Recognizing the statutory limitations of the ICJ as a court of law that cannot engage in lawmaking, evolutive interpretation serves as an optimal tool for exercising the Court's judicial legislative capacities. It allows the Court to extend the application of existing laws beyond these limitations and address unregulated areas.[1] Various areas of international law, including the law of treaties, the law of international organizations, human rights law, foreign investment law, and international trade law, have been profoundly influenced by the case law established by diverse international tribunals. It is noteworthy, for example, that the emergence of the concept of *erga omnes* obligations, which has brought about fundamental changes in the understanding and conceptualization of modern international law, can be traced back to a mere *obiter dictum* contained in a judgment of the ICJ.[2]

As an authoritative voice in the international legal system, the ICJ can use dynamic interpretation to adapt rules to new contexts. This method implicitly fosters the emergence of new norms and practices while staying within its judicial boundaries and not encroaching on lawmaking. Judicial legislation allows the Court to navigate the balance between stability and flexibility in international law. It preserves the integrity of the existing legal framework while enabling principled adaptations to maintain its relevance amid the evolving landscape of global affairs. This interpretive approach reinforces the ICJ's crucial role as a steward of an international legal order that responds to the changing demands of the international community. Consequently, with all due respect, Judge *ad hoc* Skotnikov's criticism is not valid; the Court was engaged in *judicial legislation* rather than *lawmaking*.

1 Helmersen (n 16) 130.

2 Fuad Zarbiyev, 'Judicial Activism in International Law-A Conceptual Framework for Analysis' (2012) 3(2) JIDS 247, 247-8. A judge is not a mere follower. The grandeur and majesty of their position are based on the creative power they possess. For reasonings in this regard, *see:* Ronald Sackville, 'Courts and Social Change' (2005) 33(3) FLR 373; Lara M. Pair (n 5) 181.

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