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**Legality and legitimacy of domestic court decision as a source of international law-making**

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PARTE II

# Sumário

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# Legality and legitimacy of domestic court decision as a source of international law-making*

# Legalidade e legitimidade da decisão judicial doméstica como fonte de elaboração do Direito Internacional

Eka An Aqimuddin**
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## Abstract

This article will explore the possibility of domestic judicial decisions as a source for international law-making. Considering the contemporary pattern of international law development, which is no longer state-centred, this possibility is quite plausible. In addition to examining legality, it is necessary to examine the legitimacy element to ensure that the acceptance of domestic court decisions as a source of international law-making is legitimate. This study discovered that the legal foundation of international law implicitly delegated the domestic courts to make international law. Domestic court rulings that reflect universal principles such as humanity, security, and peace will be generally considered a source of international law-making. As a result, the fulfilled element of legitimacy exists within the context of teleology.

**Keywords:** Domestic Court; International Law-making; Legality; Legitimacy.

## Resumo

Este artigo explorará a possibilidade de decisões judiciais domésticas como fonte para a elaboração do direito internacional. Considerando o padrão contemporâneo de desenvolvimento do direito internacional, que não é mais centrado no Estado, essa possibilidade é bastante plausível. Além de examinar a legalidade, é necessário examinar o elemento de legitimidade para garantir que a aceitação de decisões judiciais domésticas como fonte de elaboração do direito internacional seja legítima. Este estudo descobriu que o fundamento legal do direito internacional delegou implicitamente aos tribunais domésticos a criação do direito internacional. Decisões de tribunais domésticos que refletem princípios universais como humanidade, segurança e paz serão geralmente consideradas uma fonte de legislação internacional. Como resultado, o elemento cumprido de legitimidade existe dentro do contexto da teleologia.

**Palavras-chave:** Tribunal Doméstico; elaboração do Direito Internacional; Legalidade; Legitimidade

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## 1 Introduction

Since Jeremy Bentham coined the term international law in the 1780s[1], nation-states have played a prominent role as subjects of international law.[2] Actors other than states, such as individuals and international organizations, did not emerge as subjects of international law until the beginning of the 20th century. However, the evolution of contemporary international law has demonstrated that the position of legal entities other than the state also plays a significant role, particularly when discussing issues on international law-making.

In 1920, when the Permanent Court of International Justice (PCIJ) statute acknowledged that the formulation of international law by non-state actors was inevitable, this phenomenon started.[3] In addition, the advent of globalization and complex interactions between international actors bolsters this possibility. International law must establish standards and procedures in every sector.The inability of states to respond promptly to international events allows non-state actors to participate in formulating international law. In this situation, the domestic court is considered to play a role in developing international law.

Initially, it was believed that domestic courts were only intermediaries for enforcing international law. However, due to the increasing interaction between domestic courts and international law, the former not only act as a subject but also as adjudicator which task to apply and interpret international norms.[4] Two factors cause this interaction. First, international law is expanding. Currently, the evolution of international law accommodates not only the interests of individual states but also those of the international community as a whole. For example, territorial demarcation treaty not only facilitates the interests of the parties but also obligate states to safeguard their environment in context to reduce global warming. Second, strengthening the application of international law to domestic issues such as human rights protection. This reality influences the behavior of internal state institutions, in this case, the court.

Consequently, foreign and/or international law is frequently cited as one of the references in domestic court decisions. Consider the Constitutional Court of Indonesia. At least 62 decisions cited foreign legal sources, including international law, between 2003 and 2008.[5] However, in the early stages, domestic courts tend to restrict the application of international law to protect state interests. As an impartial institution in a democratic and the rule of law system, the domestic court evolve. The principle of exhausted local remedies in international law has demonstrated the role of correcting domestic courts to government policy.[6] In this situation, the domestic courts have two distinct personalities. It serves two purposes: first, it safeguards the state's interests, and second, it reviews regulations issued by the legislature or executive branch.[7]

As agents or recipients of international law implementation, domestic courts contribute to international law development.[8] This role can be conducted either direct or indirect. According to Hans Kelsen, abstract rules cannot be applied to concrete cases. It requires the intervention of judges, via court decisions, to interpret abstract norms, which are then used to concrete situations. In brief, the judge's interpretation of abstract norms is also an attempt to form law. By the same token, an international court's ruling attempts to make international law.[9] It can be drawn directly from domestic court decisions as a source of law. This is the direct role of domestic court decisions in developing international law.

[1] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Seventh Ed (London: Routledge, 1997), p.1.

[2] M W Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" *The American Journal of International Law* 78, no. 2 (1984): pp.408-410, https://doi.org/10.1017/s0272503700032948.

[3] Jan Klabbers, *International Law (3rd Edition)* (UK: Cambridge University Press, 2021), p.115.

[4] Antonios Tzanakopoulos, "Domestic Judicial Lawmaking," in *Reserach Handbook on the Theory and Practice of International Lawmaking*, ed. Catherine Brölmann and Yannick Radi (UK: Edward Elgar Publishing, 2016), 222–41.

[5] Pan Mohammad Faiz, "Legitimasi Rujukan Hukum Asing Dalam Putusan MK," *Majalah Konstitusi* (Jakarta, 2014), p.62.

[6] Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts," *European Journal of International Law* 4, no. 1 (1993): pp.160-161.

[7] Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law," *International and Comparative Law Quarterly* 60, no. 1 (2011): p.59, https://doi.org/10.1017/S0020589310000679.

[8] Antonios Tzanakopoulos and Christian J. Tams, "Introduction: Domestic Courts as Agents of Development of International Law," *Leiden Journal of International Law* 26, no. 3 (2013): 531–40, https://doi.org/10.1017/S0922156513000228; Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law."

[9] Armin von Bogdandy and Ingo Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals," in *The Oxford Handbook of International Adjudication*, ed. Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (Oxford: Oxford University Press, 2014), p.505.

On the contrary, domestic court decisions play an indirect route as the state's practice to interpret international treaties or as part of customs. State practice, not domestic court decisions, determines international law-making.[10] This discourse examines the legality of domestic court decisions as a source of international law-making. Another consideration is legitimacy. This perspective is necessary for determining how the international community recognizes domestic court decisions as a source of international law development. Legitimacy can be obtained under international law through three channels: source of authority, procedural, and objective, or all three.[11] Therefore, testing for legitimacy will indicate the international community's recognition of domestic judicial decisions in forming international law.

The connection between international law and domestic courts has been increasingly intense and routine since the early 1900s.[12] This interaction made domestic courts' decision cannot dismiss international law's influence. Domestic court decisions can use international law to justify its decision or to rule a new interpretation of international norms. To put in context, domestic court decisions, as independent institutions, can counterbalance the state-driven process of international law formation.[13] Legality and legitimacy are important features to discuss in this issue. Not only how international law regulates the role of domestic court decisions, but it is also important to further looking how the international community legitimizes domestic court decisions as a source of international lawmaking.

## 2 Method

This study employs a descriptive-analytical approach. It will start with evaluating secondary data such as library materials or authorized legal sources. In this case, international law-making norms will be assessed and analyzed. It includes examining the evolution process of the development of international law. Furthermore, the practice of the court, particularly the domestic court, will be spotlighted as a mean of developing international law. After that, it will address the legality and legitimacy of the domestic court decision as a source of international law-making.

## 3 Discussion and results

### 3.1. How was International Law made?

Although various theories exist regarding the origins of international law, some scholars acknowledge that international law has existed at least since the Middle Ages, when the Roman Empire and the Papacy united Europe. The origin term was known as *"jus gentium"* or the law of nations, which governs interactions between individuals and independent communities/nations that transcend territorial boundaries.[14] According to the scholastic school of natural law, *"jus gentium"* is a natural condition. This school of thought considers *"jus gentium*" as a component of natural law, which is descended from the eternal law. According to this concept, "jus gentium" is not an original law because it is founded on the eternal law, which only God knows.[15]

Hugo Grotius[16] entered the academic discourse in order to contest scholastic concepts. Grotius was not only a theorist but also a practitioner as a legal counsel for the *Verenigde Oost Indische Compagnie* /VOC or Dutch East India Company.[17] Although both were from the

[10] Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law."

[11] Rüdiger Wolfrum, "Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations," in *Legitimacy in International*, ed. Rüdiger Wolfrum and Volker Röben (Berlin: Springer, 2008), p.6.

[12] Shaheed Fatima, *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005), p.xi.

[13] Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts," p.183.

[14] Wilhelm G. Grewe, *The Epochs of International Law* (New York: Walter de Gruyter, 2000), p.11.

[15] Randall Lesaffer and E. Janne Nijman, eds., *The Cambridge Companion to Hugo Grotius*, *Grotius and Law* (New York: Cambridge University Press, 2017).

[16] Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), pp.810-812.

[17] Inge Van Hulle, "Grotius, Informal Empire and the Conclusion of Unequal Treaties," *Grotiana* 37, no. 1 (2016): pp.44-45. in the early-modern age. Hugo Grotius in particular wrote extensively on unequal treaties and alliances through his familiarity with the Dutch East India Company's exploits in the East Indies, where the conclusion of treaties with indigenous rulers formed the cornerstone of Dutch imperialism. This article delves into the early-modern roots of unequal alliances and discusses how the Grotian analysis of unequal alliances influenced other

school of natural law, Grotius offered two criticisms. First, there is no distinction between eternal law and natural law. According to Grotius, natural and eternal laws are identical and can be revealed by reason. As a result, humans can learn about God's will through logic.

Furthermore, "jus gentium" is the original law because it is a part of natural law. What do we know about God's plan? The answer provided to this inquiry inspired Grotius' second notion. A treaty or relationship between nations across territorial borders is a divine plan or natural law based on the presence of shared concepts or values among nations, the pursuit of peace.[18]

In the 1780s, Jeremy Bentham coined the word international law to replace the term "*Jus Gentium."*[19] Bentham asserted that international law only encompasses legal relations committed between states to distinguish the concept from "*Jus gentium."* In other words, Bentham's perspective on international law is restricted to the subject matter, namely, legal ties between independent states. Individual relations across international boundaries are governed by domestic law. Bentham's concept spawned the distinction between international (public) law and international private law. [20] The term "*jus gentium,"* which initially referred to rules governing relations between nation-states and people across territorial borders, was replaced with the term international law, which only applied to interactions between states. As a result, state-centred relations are the foundation of international law. This shift clarified that states created international law through agreements or customary international law derived from state practice.

In the early 1900s, the concept of state-centred international law began to evolve. The state's authority as the sole subject of international law is being eroded by globalization and advancing technological development. Although states remain the primary subject of international law, other actors have emerged and been recognized as essential entities. The new subjects of international law are individuals, international organizations, international tribunals, and non-governmental organizations.

This novel phenomenon has an indirect impact on the development of international law. Chinkin and Boyle[21] clearly demonstrate how international organizations, international tribunals, and non-governmental organizations contribute to the development of international law. Following 1945, the pattern of international relations shifted from direct state-to-state interactions to the formation of multilateral organizations. [22] As a result, international organizations have become increasingly important since they have the capacity to make international law. It also happens to international tribunals. For example, decisions or advisory opinions from the International Court of Justice (ICJ) have created new norms in international law.[23] As a consequence of this change, the pattern of international law formation has become more decentralized or less state-centric.[24]

Based on the above analysis, one might conclude that establishing international law was first restricted to the state. This is because international law is viewed as a collection of norms and practices governing state-to--state relations. Globalization and technological advancements have changed the nature of international law, giving rise to new international actors other than states, such as international organizations and international tribunals, to be more involved in international law-making.

authors of the classic law of nations.","author":[{"dropping-particle":"","family":"Hulle","given":"Inge","non-dropping-particle":"Van","parse-names":false,"suffix":""}],"container-title":"Grotiana","id":"ITEM-1","issue":"1","issued":{"date-parts":[["2016"]]},"page":"43-60","title":"Grotius, Informal Empire and the Conclusion of Unequal Treaties","type":"article-journal","volume":"37"},"locator":"pp.44-45","uris":["http://www.mendeley.com/documents/?uuid=24be5503-639f-440a-92a7-38b13235619b"]}],"mendeley":{"formattedCitation":"Inge Van Hulle, "Grotius, Informal Empire and the Conclusion of Unequal Treaties," Grotiana 37, no. 1 (2016

[18] Lesaffer and Nijman, *The Cambridge Companion to Hugo Grotius*.

[19] Brian Z Tamanaha, "What Is International Law?," *St. Louis Legal Studies Research Paper*, 2016, pp.2-5.

[20] Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" pp.408.

[21] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), pp.36-38.

[22] Jose E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2006), p.xi.

[23] Christian J. Tams and James Sloan, eds., *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013), pp.3-6.

[24] A. N. Pronto, "Some Thoughts on the Making of International Law," *European Journal of International Law* 19, no. 3 (2008): pp.601-602, https://doi.org/10.1093/ejil/chn031.

### 3.2 Judicial Institution as an International Lawmaker

#### 3.2.1. General Overview

Following 1990, dozens of international tribunals were established. This is a striking development compared to the prior years when only six international tribunals existed.[25] Each international tribunal has its authority conferred by its members who established it. Generally, it is the authority to adjudicate disputes between international law subjects in certain international legal regimes. The international administrative court is one of the most fascinating.[26] This court can resolve disputes between international organizations as employers and workers. The emergence of this institution is due to the inability of existing international or domestic tribunals to resolve disputes in this area due to the immunity of international organizations. However, international tribunal proliferation has both positive and negative effects. The positive effect of these tribunals is that they increase the scope for resolving disputes in particular international legal regimes with distinctive characteristics. The disadvantage is the potential for divergent decisions regarding the same problem. [27]

In addition to resolving disputes, international tribunals have the capacity to create international law. Theoretical models of international judicial law-making include explicit, implicit, and non-consensual delegation. By explicit delegation, international tribunals typically obtain the authority to enact laws explicitly spelt out in international agreements between states. As an illustration, consider the International Tribunal for the Former Yugoslavia. (ICTY). The United Nations Security Council (UNSC) expressly authorizes the ICTY to establish rules of evidence in carrying out its functions, which lead to the formulation of norms in international criminal law. This type of delegation is also known as external delegation because it delegates authority to a third entity outside the state. [28]

The implicit delegation of authority to an international court to interpret a provision of an international treaty or state practice on establishing international customs conferred the capacity to create a new international law norm. Despite not explicitly mentioning the power to legislate, this delegation reaffirms the capacity of international tribunals to establish international law.[29] In the Nicaragua Case, ICJ's interpretation of "effective control" established a new standard that the International Law Commission incorporated into the draft law of state responsibility.[30] Non-consensual law-making implies that international tribunals can only render legal opinions in situations where there is no contentious dispute. Although the conclusion of the legal opinion does not compel the parties to comply, it does establish a new international law standard. [31]

#### 3.2.2. International Court of Justice (ICJ)

Article 92 of the UN Charter states that the ICJ is the principal judicial organ of the UN. The functions of the ICJ are determined by a separate statute which is an integral part of the UN Charter. As a judicial institution, the ICJ's role is not limited to resolving disputes but can provide legal advice to other institutions under the UN. Article 36 of the ICJ Statute states that the jurisdiction of the ICJ includes all cases granted by the state, either based on special agreement or compulsory jurisdiction. Meanwhile, Articles 65-68 of the ICJ Statute regulate jurisdiction in providing advisory opinions to institutions under the UN.[32]

The primary function of the ICJ based on Article 38 and Article 68 of the ICJ Statute is to resolve disputes and provide advisory opinions. These provisions explicitly state the scope of the ICJ's authority. Normatively, the ICJ does not have the authority to make law. Some international law experts differ on whether the ICJ has

[25] Chester Brown, "The Proliferation of International Courts and Tribunals: Problems and Prospects" (Singapore, 2010), https://cil.nus.edu.sg/event/the-proliferation-of-international-courts-and-tribunals-problems-and-prospects/.

[26] Chris De Cooker, "Proliferation of International Administrative Tribunals," *Asian Journal of International Law* 12, no. 2 (July 16, 2022): 232–47, https://doi.org/10.1017/S2044251322000170.

[27] Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?," *Leiden Journal of International Law* 14, no. 2 (2001): pp.268-269, https://doi.org/10.1017/S0922156501000139.

[28] Tom Ginsburg, "International Judicial Lawmaking," Illinois Law and Economics Working Paper, 2005, pp.11-20, https://doi.org/10.1628/186183406786118507.

[29] Ginsburg, pp.11-20.

[30] Robert Kolb, "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (1984 to 1986)," in *Landmark Cases in Public International Law*, ed. Eirik Bjorge and Cameron Miles (Oxford: Hart Publishing, 2017), 349–76.

[31] Ginsburg, "International Judicial Lawmaking," pp.20-22.

[32] "UN Charter" (1945), Article 96.

the authority to make international law. Lauterpacht, for example, states that the court only has to apply the law, especially the existing law. The ICJ does not have the function of changing or making the law conform to ICJ decisions.[33] Hans Kelsen proposed a different opinion. Applying or interpreting the law in resolving disputes is part of law-making. The idea comes from the understanding that abstract legal rules cannot be used in making concrete decisions. Judges need to interpret abstract rules so that they can be applied in specific cases.[34]

Historically, the ICJ's founders intended it to exist solely to settle disputes and render legal opinions. Baron Deschamps, one of the experts involved in forming the ICJ, stated unequivocally that doctrine and precedent do not produce law but only support the application of existing law. This perspective is supported by the Legality of the Use or Threat of Nuclear Weapons, which states:[35]

> *"It is clear that the Court cannot legislate . . . Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules . . . The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate"*

Although the ICJ statute does not explicitly "recognize" jurisdiction to create law, the ICJ plays a substantial role in forming international law. The ICJ applies and interprets international law, including international treaties, customs, and general legal principles, when resolving disputes, consequently also developing international law. Therefore, this authority may imply that the ICJ is implicitly conferred the power to create laws.

The application or interpretation of the ICJ on international treaties has contributed to the meaning of treaty norms. In fact, international treaties constitute an exchange of rights and responsibilities between the signatory states. The consequences of an international treaty are only binding on the parties, whereas, to some extent, treaties impact the international community's universal values. In this instance, the ICJ must interpret international treaty norms to protect the interests of the international community, not just those of the disputing parties.[36]

International custom as a source of international law consists of two elements, state practice and recognition of the custom as law (opinio juris) [37] Regarding the meaning of state practice in general as international custom, ICJ has provided its interpretation. It does not require a lengthy period; not all states must comply, and only states that protest continuously are excluded from the custom, which interprets state practice. The next phase involves defining opinio juris. The simplest definition is opinion juris is a custom has legally binding. On the contrary, 'usage' is defined as an unenforceable custom. [38] In the Fisheries Jurisdiction case in 1974, for example, ICJ successfully interpreted the concept of 12

[33] H Lauterpacht, *The Development of International Law by the International Court of Justice* ((London: Stevens & Sons, 1958), p.75.

[34] Bogdandy and Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals," pp.505-506.

[35] Boyle and Chinkin, *The Making of International Law*, pp.310-354.

[36] Vera Gowland-Debbas, "The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties," in *The Development of International Law by the International Court of Justice*, ed. Christian J. Tams and James Sloan (Oxford: Oxford University Press, 2013), pp.25-52.

[37] Malcolm N Shaw, *International Law*, Fifth Edit (Cambridge: Cambridge University Press, 2003), 70–88.

[38] James Crawford, *Brownlie's Principles of Public International Law*, Eight Edit (Oxford: Oxford University Press, 2013), pp.33-34.updated by James Crawford, builds on the reputation of its predecesors, providing outstanding, lucid and up-to-date treatment of all of the main issues in international law today. The sources of international law -- The relations of international and national law -- Subjects of international law -- Creation and incidence of statehood -- Recognition of states and governments -- International Organizations -- Forms of governmental authority over territory -- Acquisition and transfer of territorial sovereignty -- Status of territory : further problems -- The territorial sea and other maritime zones -- Maritime delimitation and associated questions -- Maritime transit and the regime of the high seas -- Common spaces and the co-operation in the use of natural resources -- Legal aspects of the protection of the environment -- The law of treaties -- Diplomatic and consular relations -- Unilateral acts; estoppel : Succession to rights and duties -- Sovereignty and equality of states -- Jurisdictional competence -- Privileges and immunities of foreign states -- The relations of nationality -- Nationality of corporations and assets -- The conditions for international responsibility -- Consequences of an internationally wrongful act -- Multilateral public order and issues of responsibility -- The international minimum standard : persons and property -- International human rights -- International criminal justice -- The claims process -- Third-party settlement of international disputes -- The use of threat of force by states.","author":[{"dropping-particle":"","family":"Crawford","given":"James","non-dropping-particle":"","parse-names":false,"suffix":""}],"edition":"Eight Edit","id":"ITEM-1","issued":{"date-parts":[["2013"]]},"publisher":"Oxford University Press","publisher-place":"Oxford","title":"Brownlie's Principles of Public International Law","type":"book"},"locator":"pp.33-34","uris":["http://www.mendeley.com/documents/?uuid=6fb34e2e-f0c7-4fc6-b98d-e5de695be51c"]}],"mendeley":{"formattedCitation":"James Crawford, Brownlie's Principles of Public International Law, Eight Edit (Oxford: Oxford University Press, 2013

miles of exclusive fisheries zone and the right of preference for coastal states, which later became customary international law.[39] In the context of international custom, it can be seen how ICJ provides interpretations to the elements of custom, which are then considered norms by the international community. Thus, ICJ has formed a law regarding the interpretation of international customs that can be used as a source of international law.

The proposal of the initiators, Root and Philimore, was accepted by all parties at the initial stage of the ICJ's establishment. According to their proposal, the purpose of Article 38(1)(c) was to the principles recognized as law by civilized countries' domestic laws. This does not, however, imply that ICJ explicitly adopts a country's material or formal law, but rather a model of legal reasoning and comparative analogy to deduce a coherent set of rules for litigation in ICJ. This principle is interpreted, for example, in the Corfu Channel case, 1949, which says that all national legal systems acknowledge indirect evidence as a legal principle.[40] As a result, ICJ can employ it. ICJ practice in legal concepts also demonstrates how ICJ can "borrow" domestic law to be used as a source of law in deciding a case or giving an opinion.

The ICJ is also authorized to form international law in non-consensual law-making. The authority to provide advisory opinions to institutions under the UN has also been proven to contribute to the formation of international law. Although the results of the advisory opinion apply in a limited manner only to the parties, the impact of the idea has created new norms in international law.[41]

In conclusion, the ICJ's legitimacy in shaping international law derives from the implicit and non-consensual delegation of authority. This interpretation is obtained by examining how ICJ decisions and advisory opinions play a role in forming international law. Although explicitly, the ICJ is not given the authority to create law, at least the ICJ has provided modalities for the state to develop international law.[42]

The next issue is whether the ICJ's role in shaping international law has legitimacy. Institutionally, the ICJ is not explicitly given the authority to make law. However, as explained earlier, the ICJ has the power to form law because it has an implicit and non-consensual delegation of authority. Although legally, the ICJ's authority to create international law is not intact, the legitimacy of the ICJ's decisions and advisory opinions will help strengthen this authority.

ICJ decisions must be authoritative in light of their constitutive function, role, and reputation to achieve legitimacy.[43] The legitimacy of the ICJ in the law-making process is most likely to be accepted if the international community trusts the ICJ's credibility, impartiality, and authority. Moreover, legitimacy will be enhanced if the ICJ's decision-making is consistent with generally recognized legal principles and procedures and the outcome is fair.[44] Legitimacy can also be attained if the objectives pursued by the ICJ are values acknowledged by the international community. [45] Precedents of ICJ indicate that the ICJ decisions and advisory opinions have led to establishing new norms or at least provided modalities in forming international law. This demonstrates that the ICJ has acquired legitimacy from the perspectives of the international community.

[39] Boyle and Chinkin, *The Making of International Law*, p.323.

[40] Shaw, *International Law*, p.95.

[41] Ginsburg, "International Judicial Lawmaking," pp.20-22.

[42] Tams and Sloan, *Dev. Int. Law by Int. Court Justice*, pp.384-388.

[43] Malcolm N. Shaw, "The International Court of Justice: A Practical Perspective," *International & Comparative Law Quarterly* 46, no. 4 (1997): 831–65, https://doi.org/10.1017/S0020589300061236.one is struck by the variety of perspectives from which one may view that institution. These include those adopted by the Court itself, academic theorists, practitioners both private and governmental, states more generally, international organisations and individuals. Each of these manifests its own methodology, needs and interests. Academics, for example, are keen to examine the intellectual basis and consistency of decisions and to infer, analyse and criticise the existence and nature of rules and institutions. Practitioners seek to equip themselves with the knowledge and tools necessary in order to enable their clients to win before the Court. States cautiously seek to uphold the dispute resolution role of the Court in general terms without losing any cases or putting themselves in a position where this is a possibility. International organisations and individuals look at the Court with keen and hopeful eyes.","author":[{"dropping-particle":"","family":"Shaw","given":"Malcolm N.","non-dropping-particle":"","parse-names":false,"suffix":""}],"container-title":"International & Comparative Law Quarterly","id":"ITEM-1","issue":"4","issued":{"date-parts":[["1997"]]},"page":"831-865","publisher":"Cambridge University Press","title":"The International Court of Justice: A Practical Perspective","type":"article-journal","volume":"46"},"uris":["http://www.mendeley.com/documents/?uuid=0e1be22a-fca5-3ab9-81c9-191600857bcb"]}],"mendeley":{"formattedCitation":"Malcolm N. Shaw, "The International Court of Justice: A Practical Perspective," International & Comparative Law Quarterly 46, no. 4 (1997

[44] Boyle and Chinkin, *The Making of International Law*, p.344.

[45] Thomas M. Franck, "Legitimacy in the International System," *American Journal of International Law* 82, no. 4 (1988): 705–59, https://doi.org/10.2307/2203510.

According to the preceding explanation, the ICJ can create international law, even if it is implicit and non-consensual delegation. Although member states explicitly grant the ICJ the authority to resolve disputes and gave advisory opinions by applying existing law, it can be demonstrated that the results of the ICJ, both decisions and legal opinions, have succeeded in forming international legal norms or becoming a source in the formation of international law through judicial law-making. ICJ decisions and legal opinions have legitimacy because they are issued by authoritative institutions (source), impartial (procedural), fair, and in line with accepted legal principles (teleology).

### 3.2.3. Domestic Courts

In contrast to international courts, whose authority is determined by the subject of international law, the source of domestic courts is entirely subject to each national law. Although the functions of domestic courts are governed differently in each country, the separation of powers is typically a feature of national constitutions. [46] The legislature is responsible for making laws, the executive for implementing them, and the judiciary for enforcing them. Separating powers will create checks and balances toward a democratic state that upholds the rule of law.

Although there is no structural connection between domestic courts and international law, the increased scope and penetration of international law into internal state affairs have indirectly pushed domestic courts to incorporate international law into their judicial responsibilities. Anthea Roberts identifies two faces of domestic courts from an international law perspective: law enforcement and law creation.[47]

The first face of domestic courts is that they merely receive international law as a legal enforcement apparatus. When performing its decision-making function, a domestic court will consider or apply international law which supports national policies. In contrast, the domestic court recently enforced international law as a sword or against domestic policies. These phenomena are usually identified as the domestication of international law. [48] The position of international law in a nation's legal system can influence national courts' resistance to or acceptance of international law. Whether a country adheres to the school of thought that international law and national law are one because they derive from the same source (monist) or considers them two separate legal systems. (dualism).[49]

A state may employ international law directly if it has ratified it, or it may first need to be transformed into national law. In other practices, international agreements that fall into the "self executing" category can automatically be applied directly or indirectly.[50] Practically, the national interest becomes the state's primary consideration. Due to the increasing interdependence of the international community, confronting solely national interests might seem highly self-centred. The central issue is how to achieve an equilibrium between national interests and the international community.[51] The second face of domestic courts in the perspective of international law is as an agent of international legal development.[52] The notion of agent here is in the broad sense of the ability of an actor or entity to influence the law-making process. Domestic courts, as agents in forming international law, operate within a system with certain powers and limits.[53]

Domestic court decisions can be interpreted as state practice in interpreting international law. Concerning treaties, Article 31 (1) letter b of the 1969 Vienna Convention on the Law of Treaties (VCLT) states that the "subsequent practice" of international treaties can be seen from domestic court decisions. It means state attitude toward international law norms can be found in domestic court decisions. Although the interpretation

[46] Andreas L. Paulus, "The International Legal System as a Constitution," in *Ruling the World? Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), p.100.

[47] Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law," p.61.

[48] Tzanakopoulos and Tams, "Introduction: Domestic Courts as Agents of Development of International Law," pp.533-534.

[49] Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011), pp.2-3.

[50] Simon Butt, "The Position of International Law Within the Indonesian Legal System Within the Indonesian Legal System," *Emory International Law Review* 28, no. 1 (2014): p.3.

[51] Atip Latipulhayat and Susi Dwi Harijanti, "Indonesia's Approach to International Treaties: Balancing National Interests and International Obligations," *Padjadjaran Journal of International Law* 6, no. 2 (2022): pp.201-202, https://doi.org/10.23920/pjil.v6i2.915.

[52] Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law."

[53] Tzanakopoulos and Tams, "Introduction: Domestic Courts as Agents of Development of International Law."

of state practice through domestic court decisions has less significance than the interpretation through regulations, it demonstrates how domestic court decisions might be used as a source of international law. Through customary international law, state practice is also one of the sources of international law. If the practice is interpreted as a legally binding rule, the second criterion of international custom, namely opinion juris, is also met. Domestic court decisions can also be used as a source of law for ICJ in the category of general legal principles as stipulated in Article 38 paragraph (1) letter c of the ICJ Statute. Domestic court decisions can also fall into the category of additional sources of law in the form of doctrine and jurisprudence. Thus, based on the ICJ source of law approach, domestic court decisions are agents in developing international law.[54]

### 3.3 Legality and Legitimacy of Domestic Courts Made International Law

The development of international law is no longer dominated solely by the state. Non-state actors also make similar contributions. The lack of legislative institutions in the international legal system has enabled the emergence of non-state actors in the formation of international law. In the preceding discussion, the potential involvement of domestic court decisions in forming international law was inevitable. The following inquiry is whether domestic court decisions have a legality and legitimacy basis.

Legality can be interpreted as an action or policy taken following legal norms and/or precedents.[55] Normatively, international law does not regulate the authority and jurisdiction of domestic courts. This is part of state sovereignty and is usually regulated in the Constitution. No specific international legal instrument regulates the function of domestic court decisions in forming international law. This fact is understandable because international law generally regulates state behavior. Because the court is part of a state institution, the domestic court decision is interpreted as state practice.

State practice as an element of the source of international law formation always refers to the doctrine of sources of international law stipulated in Article 38, paragraph (1) of the ICJ Statute. The element of state practices is required to make treaties, international customary law and the general principles of law as primary sources. In international treaties, domestic court decisions are considered a state practice because they can be interpreted as a State attitude in interpreting international treaties. There are two potential outcomes for the decision of the domestic court. Accepting or enforcing international law within domestic jurisdiction without reserves. Second, it can have a different interpretation and consequently develop new international legal norms. Likewise, the determination of international custom requires state practice. Again, domestic court decisions can be a source of international law formation. As for general legal principles, this provision refers to the legal principles recognized by each legal tradition at the time of its formation. Domestic court decisions in a country's legal system that adheres to precedents can be taken as a source in the construction of international law. It also plays as jurisprudence as stipulated in Article 38 (1) point d of the ICJ statute.

Regarding legality, there is no explicit delegation given by international law to domestic courts as agents of shaping international law. However, when referring to the doctrine of sources of international law, it can be interpreted that there is an implicit delegation that domestic court decisions can have a role in forming international law. In practice, such decisions can be used directly. For example, in deciding a case or providing legal opinion, the ICJ will refer directly to domestic court decisions that give rise to new norms. States or the ICJ took the indirect route as a reference to form new international law from domestic court decisions.

In general, legitimacy is the abstract concept that supports the existence of the law. However, there are disagreements between scholars.[56] For the purpose of this article, the legitimacy of domestic court decisions as international lawmakers will be assessed from the three elements: source of authority, procedural and purpose, or three of them. The basis of competence for domestic court decisions as international lawmakers is implicitly obtained from Article 38 Paragraph (1) of the ICJ Statute. As previously explained, this fact is typical because the State, as the primary international legal entity,

[54] Tzanakopoulos and Tams.

[55] Vesselin Popovski and Nicholas Turner, "Legality and Legitimacy in International Order" (New York, 2008), p.3.

[56] Janaína Gomes Garcia de Moraes and Patricio Alvarado, "Game Theory and the Legitimacy of International Adjudicative Bodies," *Revista De Direito Internacional/ Brazilian Journal of International Law* 16, no. 1 (2019): p.154.

is still reluctant to give its authority as an international lawmaker. It can be seen from the history of the establishment of the ICJ that the founders did not intend to make the court a law-making institution but only as law enforcement. However, changes in the structure of international society, such as the emergence of international organizations, non-governmental organizations, and individuals, as well as the encroachment of international legal norms on State sovereignty, leave space that the State cannot entirely fulfil. Thus, the State no longer dominates actors in the development of international law today.

The procedure in the formation of international law carried out by the State is based on agreement. Thus, a successfully formed norm has legitimacy if many States accept it. This process reflects democratization and openness. This assumption can be justified if the position of States is equal. However, state relations in the international law-making process are typically influenced by the pressure of superpower states. Thus, interests are negotiated rather than cooperation for noble values.

In contrast, the process in domestic courts refers to a State's Constitution and internal laws. Regarding the separation of powers, the courts are impartial institutions that perform checks and balances on the executive and legislative branches. The problem is that domestic court decisions are limited to a particular state's territory. Thus, it is challenging to reach the stage of general acceptance of the state as one of the requirements for fulfilling the elements of international custom.

Domestic courts should to engage in inter-judicial cooperation. The aim is that this cooperation will protect the authority of the courts from outside intervention and protect the democratization process.[57] Universal values, such as democracy and the rule of law, are the meeting point of such inter-judicial cooperation. On this basis, decisions will be harmonized because they are based on the same values. The legitimization procedures adopted by domestic courts ultimately lead to the realization of universal values.

Adherence to noble values is a prerequisite for legitimacy. In the past, domestic courts tended to be hostile to international law, but more recently, they have utilized international law against the executive to promote democratic values. However, there are disadvantages to relying excessively on domestic courts to promote universal values. There is no assurance that a single branch of power, including the courts, will not engage in injustice.[58] Consequently, there must also be control of domestic tribunals.

In the context of domestic court decisions as a source of international law formation, viewed through the lens of international law's universal ideals. Humanity, peace, and security will always be the guiding principles in the development of international law. These values derived from domestic court decisions can be used to create international law. In developing international law, domestic court decisions fulfil the legitimacy requirements of authority, procedure, and teleology. Among the three legitimacy elements, however, teleology or the purpose is the strongest element for domestic courts to develop international law.

## 4 Conclusion

As a source of international law-making, domestic court decisions have met the requirements of legality and legitimacy. The legal authority of domestic courts is derived from the implicit delegation, which refers to the interpretation of the source of law contained in Article 38, paragraph 1, of the Statute of the ICJ. Domestic court decisions can be construed as acts of the state, which can influence the interpretation of international treaty norms and the formulation of international customary law. The legitimacy of domestic court decisions as a source of international law is determined by the decision's intended outcomes. If a domestic court decision upholds noble universal values, it can be used directly or indirectly as a source for formulating international law.

[57] Eyal Benvenisti and George W. Downs, "National Courts, Domestic Democracy, and the Evolution of International Law," *European Journal of International Law* 20, no. 1 (2009): p.65, https://doi.org/10.1093/ejil/chp004; Eyal Benvenisti, "Reclaiming Democracy : The Strategic Uses of Foreign and International Law by National Courts," *The American Journal of International Law* 102, no. 2 (2008): pp.273-274.

[58] Jacob Katz Cogan, "National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs," *The European Journal of International Law* 20, no. 4 (2010): pp.1019-1020, https://doi.org/10.1093/ejil/chp094.

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