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The Dynamics of International Law Redux

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Abstract: Law is constantly caught between stasis and dynamism, between the production of legal certainty and the adaptation to a changing environment. The tension between both is particularly acute in international law, given the absence of legislative mechanisms on the international level and the high doctrinal thresholds for change through treaties or customary law. Despite this apparent tendency towards stasis, international law is changing frequently and rapidly in many areas, though in ways that are not well understood. This article seeks to begin an inquiry into these ways of change, starting from two vignettes of recent change processes and presenting a number of conjectures about core elements of a conceptualization of change in international law. The resulting picture reflects significant variation across different areas of international law, multiple paths of change outside traditional categories, and states in different—and not always central—roles. Much change observed in contemporary international law travels on paths and is advanced by authorities created by social actors and their practices relatively independently from doctrinal representations. This presents a challenge for doctrinal categories, and it should provoke a broader, empirical reconstruction of the social life of international law today—a far more dynamic but also less orderly life than typically assumed.

Key words: International law; institutional change; customary international law; subsequent practice; authority.

1. *Introduction*

Change is a perennial challenge for law—much of the appeal of the rule of law stems from law's stability and predictability, yet at the same time, if law is to retain its legitimacy, it needs to adapt to changing

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social and political circumstances. In the domestic context, this challenge finds its institutional response in the interplay between legislatures and courts, though in certain contexts (for example constitutional rules) change faces serious difficulties.[1] Moreover, law often changes in and through social practices in ways not easily reflected in the 'law on the books', especially in settings in which the institutions of the state are relatively weak and state law coexists with other norms. Legal realists, sociologists and anthropologists have long sought to draw our attention to the 'law in action' and the complexity of its processes of change.[2]

International law faces a particular challenge when it comes to change. In the international realm, formal mechanisms for legal change are few and far between, and where they exist—as in amendment procedures for treaties—they typically erect such high hurdles that timely adaptation becomes all but impossible. This is largely due to the consensual structure of international law, which requires state consent not only for the creation of international treaty obligations but also for their alteration, thus generating a powerful force for the status quo once a treaty has been put in place. Multilateral treaties sometimes alleviate this problem through non-consensual amendment procedures, but even then change tends to require heavily qualified majorities that are difficult to attain. As for customary international law (which is not as strictly consent-bound as treaties) change is also thought to require a widespread, consistent and uniform practice of states—something difficult to come by in a vast and diverse international society.

The high hurdles for change in international law have been reiterated time and time again, most recently in the work of the United Nations' International Law Commission (ILC). Analysing the identification of customary international law, the ILC stressed—in line with the jurisprudence of the International Court of Justice—that the practice constituting a new or changed norm had to be 'virtually or substantially uniform', allowing for some but not major inconsistencies.[3] On this account, significant fluctuation and discrepancies obviate attempts at establishing a new norm or altering an existing one. The ILC took a similar approach with respect to treaties. Considering how the meaning of a treaty norm could change in practice,

[1] See, eg, B A Ackerman, *We the People: Transformations* (Harvard University Press 2000).

[2] See R Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

[3] United Nations, Report of the International Law Commission 2018, UN Doc. A/73/10, 137.

the Commission emphasized the need for an 'agreement of the parties' – where a practice is not shared by all parties, it has lesser weight (if any at all).[4] The ILC was also careful to avoid the impression that practice could modify a treaty—as opposed to adjusting its interpretation—in the absence of a formal amendment.

With such thresholds and the difficulties of generating agreement among large numbers of states, we would expect change in international law to be limited and infrequent. Yet this is not what we can observe—in many areas, from international human rights law to investment, change appears to happen more speedily and rather frequently. The emergence of individual criminal responsibility in internal armed conflicts is a prominent example. As a result of the adoption by the UN Security Council of the Statute of the International Criminal Tribunal for Rwanda and the *Tadic* decision of the International Criminal Tribunal for the Former Yugoslavia, it took only a few years for change to take hold. If in the early 1990s, most observers (and the ILC) did not see grounds for a customary law criminalizing acts in internal conflicts, by the late 1990s the position had shifted. The new approach was reflected in the Rome Statute of the International Criminal Court, and despite the continued resistance of a number of important states, it came to find widespread recognition as the new law.[5]

This case may be especially prominent, but it is by far not isolated. In many instances, international law is changing much more flexibly than the traditional picture leads us to believe—states are not always at the centre, legality is not necessarily treated as binary, and the ways in which international law changes also vary significantly across issue areas and institutional contexts. In this article, I begin to inquire into this phenomenon and propose a framework for understanding the dynamics of international law beyond doctrinal categories, trying to capture the more open processes through which international legal rules undergo change in practice. With this, I return to a central scholarly interest of one of the co-founders of *Current Legal Problems*, Georg Schwarzenberger—an interest underlying many of his contributions to the series and the focus of his 1976 collection of essays, *The Dynamics of International Law*.[6]

[4] ibid 74-75.

[5] See P Gaeta, 'The Interplay Between the Geneva Conventions and International Criminal Law', *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 745.

[6] G Schwarzenberger, *The Dynamics of International Law* (Professional Books 1976).

The article proceeds in five steps. In section 2, it traces different approaches to change in international law since the issue gained significant salience in the inter-war period, which also helps to situate Schwarzenberger's approach to the issue. Schwarzenberger's call for an 'inductive method' then provides the basis for my own account of what a proper study of the dynamics of international law would require. Section 3 makes a step towards such a study by outlining two brief vignettes of cases of change, exemplifying the contrast between standard, doctrinally-guided accounts and a more sociological approach interested in empirical processes. Section 4 lays out elements of a framework for conceptualizing change processes in international law, developing conjectures about patterns of variation, pathways of change, the place of authority and the varied roles of states in these processes. Section 5 then takes a step back from the observation of reality to the construction of legal categories and presents some implications of this framework for the ways in which international law structures and observes change on a doctrinal level. The article can only present empirical evidence in a limited fashion, but I hope that it will provide a frame for future studies of and engagement with the dynamics of international law.

2. *Approaching the Problem of Change*

A. *Lauterpacht, Schwarzenberger, and Beyond*

Questions of change have preoccupied international lawyers at all times, but especially so in the inter-war period. The concern at the time was not solely academic but also eminently practical, and in the eyes of contemporary observers, 'perhaps no other problem of international law play[ed] . . . such an important role as the problem of revision'.[7] The aftermath of World War I had generated tensions around the fixity of treaties, especially deriving from political challenges to the Versailles settlement which was perceived as overly rigid, and calls for treaty revision became increasingly vociferous. As the risk of violent conflict over such issues increased—and manifested in military confrontations from the early 1930s on—many observers sought forms of 'peaceful change' that could adapt treaties to new political and factual

[7] JL Kunz, 'The Problem of Revision in International Law' (1939) 33 AJIL 33, 33.

circumstances, and the question also attracted greater political attention in the League of Nations and beyond.[8]

Much of the debate at the time circled around potential institutional solutions to the problem. Many proposals sought to make use of Article 19 of the League Covenant which gave the Assembly a role in the reconsideration of treaties that had become 'inapplicable', but that role was advisory only and widely seen as overly limited. Further-reaching proposals involved the creation of a supranational legislature or of an 'international equity court' which could decide disputes on the basis of equity rather than law.[9] Yet given the obvious practical obstacles to the realization of such ideas, many lawyers sought ways to accommodate change within established legal categories. Hersch Lauterpacht was one of them, and he devoted a substantial part of his 1933 book, *The Function of Law in the International Community*, to the exploration of the potential and limits of such ways.[10]

Although the question of peaceful change had gained much salience by the early 1930s, Lauterpacht warned not to exaggerate its importance. International law's problem with change, he argued, was not dissimilar to that of other areas of law, and the absence of a legislature did not present a particularly serious challenge as long as international law's scope was confined to the external relations of states. Legislative remedies would only be required 'when the political organization of the international community has undergone a fundamental change, so as to regulate in detail the life of its individual members in its internal aspects'.[11]

What limited change was necessary at the time could, in Lauterpacht's view, largely be accomplished by international courts. He was quick to reject calls that sought to exclude such issues from the remit of the international judiciary. In response, he stressed that courts could not decline to adjudicate an issue before them[12] and emphasized the role courts generally played in law-making and the adaptation of

[8] See PM Kristensen, '"Peaceful Change" in International Relations: A Conceptual Archaeology' (2021) 13 International Theory 36; TL Knutsen, 'Peaceful Change: The Interwar Era and the Disciplinary Context' in TV Paul, D Welch Larson, HA Trinkunas, A Wivel, and R Emmers (eds), *The Oxford Handbook of Peaceful Change in International Relations* (Oxford University Press forthcoming).

[9] See, eg, J Fischer Williams, *International Change and International Peace* (Oxford University Press, H Milford 1932); K Strupp, *Legal Machinery for Peaceful Change* (Constable & Company Limited 1937); for a survey see Kunz (n 7) 48–55.

[10] H Lauterpacht, *The Function of Law in the International Community* (2nd edn, Oxford University Press 2011).

[11] ibid 256–258.

[12] See the discussion on the question of 'non liquet', ibid 71–77.

law to changed circumstances. Because in the international realm conscious law-making through legislation was at a 'rudimentary stage', judicial law-making was "of special importance for the purpose of disposing of disputes by developing and adapting the law of nations, within the orbit of existing law, to the new conditions of international life through a process of equitable judicial interpretation and reasoning."[13] Of help in this process were open sources such as the general principles of law, but also doctrines like the *clausula rebus sic stantibus* or that of the abuse of rights which gave judges a flexible tool to infuse their reasoning with considerations of a broader kind.[14]

Lauterpacht's expansive vision of the international judicial function reflected his interpretivist, non-positivist approach to international law in general.[15] In contrast, Georg Schwarzenberger—the perhaps most focused student of international legal change in the decades after World War II—took a positivist approach as his point of departure and attacked Lauterpacht's (and others') 'deductive' method which, in his view, brought outdated natural law elements into the international legal order.[16] Schwarzenberger was also very critical of the creative role of courts so cherished by Lauterpacht. In his 1976 book on *The Dynamics of International Law*, Schwarzenberger lambasted the International Court of Justice in particular for its use of 'questionable techniques to overcome the limitations of the United Nations Charter' and for a 'process of "ever less strict interpretation"'.[17] He held up 'doctrine' against such tendencies, hoping that it would be able to provide proper disciplines for excessive creativity.

Schwarzenberger understood these doctrinal elements to be part of his 'inductive' method, focused on positive materials, such as state practice and judicial decisions, rather than abstract principles without a clear grounding. This contrasted with the deduction he identified in Lauterpacht's work (and that of many others), but it stopped short of a full embrace of empirical evidence as the basis of international legal scholarship. Thus Schwarzenberger also distanced himself from the

[13] ibid 264.
[14] ibid XIII–XIV.
[15] See M Koskenniemi, 'The Function of Law in the International Community: 75 Years After' (2008) 79 British Yearbook of International Law 353, 362–363.
[16] On Schwarzenberger's approach to international law see S Steinle, *Völkerrecht und Machtpolitik: Georg Schwarzenberger (1908-1991)* (Nomos Verlagsgesellschaft 2002); R Cryer, 'International Law and the Illusion of Novelty: Georg Schwarzenberger' in R McCorquodale and J-P Gauci (eds), *British Influences on International Law, 1915-2015* (Brill 2016).
[17] Schwarzenberger, *The Dynamics of International Law* (n 6) 29–30.

(American) case-law method, which he thought surrendered the hope for systematic consistency and eventually reduced international law to 'an inferior sort of diplomatic history by way of anecdotes'.[18] His own approach, he hoped, would achieve 'a harmonious mean … between case law and system'.[19] Still, his sociological sensitivities made him keenly aware of the empirical processes through which international law developed, and in particular the workings of power politics in and around the international legal order.[20] Even though he resisted parts of these processes, he nevertheless registered the tensions between his doctrinal account and the ways in which political forces manoeuvred the dynamics of international law. Others at the time—especially Hans Morgenthau—responded to these tensions in a more radical fashion, limiting the scope and promise of international law to a far narrower domain.[21]

Concerns about change in international law abated somewhat in the second half of the twentieth century. The New Haven School's emphasis on process could have opened doors for a more systematic analytical engagement but primarily led to policy-oriented restatements of the law.[22] Of those who focused on change, most kept probing the doctrinal categories through which change could be understood to have occurred in international law. The influential volume edited by Antonio Cassese and Joseph Weiler in 1988 is a good example here: entitled *Change and Stability in International Law-Making*, its focus was primarily on the sources of international law, and contributors pursued the question as to whether new developments or pressures—for example, towards a recognition of UN General Assembly resolutions as binding—could be made to fit into the sources framework inherited from previous times.[23] Many more recent accounts, for example those of the International Law Commission in its recent work on customary international law and the subsequent practice to treaties, follow in the same footsteps.[24]

[18] G Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 Harvard Law Review 539, 568.

[19] ibid 570.

[20] See especially G Schwarzenberger, *The Frontiers of International Law* (Stevens 1962) chs 1 and 2.

[21] See, eg, HJ Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 AJIL 260.

[22] See, eg, MS McDougal and Associates, *Studies in the World Public Order* (Martinus Nijhoff Publishers 1960); see also A Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford University Press 2016) ch 5.

[23] A Cassese and J Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988).

[24] See n 3 and 4 above.

This framework, however, channels the inquiry into change and stability in such a way as to render it difficult to perceive and theorize developments which take place outside that framework (or which observers keep outside it for normative reasons). If we want to understand how dynamic international law actually is, we need to transcend these limitations and begin by observing empirical reality—by asking how societal and political actors relate to processes of change, whether they recognize them and what weight they attribute to the outcome. This requires an 'inductive' method, but one that sheds the constraints of Schwarzenberger's own approach. Schwarzenberger combined the emphasis on induction with a fixed (deductively derived) framework of sources as per Article 38 of the ICJ Statute in an uneasy *mélange*. This might have been useful in order to ascertain whether developments conform to a particular, presupposed model of international law, but it is less suited to tracing broader changes in the structure of the international legal order itself. If we want to achieve the latter goal, we need to begin by observing actors, their discourses and practices—we have to take Schwarzenberger's call seriously and turn fully sociological. At a later point, we can then return to the theoretical question of whether what we observe can count as 'law'.[25]

B. *Reconstructing the Process of Change*

Reconstructing change from the ground up follows an approach typically taken by sociologists and anthropologists interested in the 'law in action' rather than that 'in the books'. It traces law in many sites and among many actors, well beyond the realm of those typically regarded as legal officials or otherwise formally entitled to make or speak the law.[26] Instead it focuses on the ways in which societal actors from different contexts perceive and interpret the law, and the ways in which they understand law as changing. When it comes to international law, this can mean observing the internal workings of international organizations just as well as investigating the vernacularization of international human rights through the local practices of communities far removed from the official corridors of international law-making.[27]

[25] See Section 5 below.

[26] See, eg, SF Moore, *Law as Process: An Anthropological Approach* (Routledge & K Paul 1978).

[27] See M Goodale and SE Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press 2007); P Levitt and SE Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in

States or governments do not fall outside this picture—on the contrary, they will often serve as key reference points in the discourses of other actors. But even if they are widely recognized as privileged, they are not the sole actors populating the field of international law.[28]

Perceptions of international law, its boundaries and its markers of change are likely to vary across the different groups engaged in and with international law. Local human rights groups will have a different view of whether a new interpretation of a right has taken hold than, say, the Russian government. Analytically, there is no reason to privilege one over the other, except if we can observe that certain actors and their statements are widely perceived as more important. The reconstruction effort necessary to trace international legal change may thus well end up revealing competing approaches to change across actors and fields.

Such a reconstruction of legal processes is not solely the domain of anthropologists or sociologists, but has recently found resonance among international lawyers, too. In *Legitimacy and Legality in International Law*, Jutta Brunnée and Stephen Toope have provided the perhaps most prominent account in this vein, focusing on interactional practices and shared understandings through which actors (re-)define the law.[29] From a somewhat different starting point, Jean d'Aspremont's *Formalism and the Sources of International Law* emphasizes the social practices underlying international law and, seeking to reformulate a positivist account, argues for an identification of international law on the basis of the converging practices of formal law-ascertainment among actors.[30]

These accounts provide important points of connection, but they also evince core limitations. Brunnée and Toope channel their inquiry into international legal practices through a framework adapted from Lon Fuller's work, which leaves the relation between empirically observable reality and normative argument somewhat in the balance.[31] Using normative criteria to select and filter relevant social practice, it

Peru, China, India and the United States' (2009) 9 Global Networks 441; G Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012).

[28] See G Sarfaty, 'Toward an Anthropology of International Law' in HG Cohen and T Meyer (eds), *International Law as Behavior* (Cambridge University Press 2021).

[29] J Brunnée and SJ Toope, *Legitimacy and Legality in International Law. An Interactional Account* (Cambridge University Press 2010).

[30] J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011).

[31] See also N Krisch, 'Review. Legitimacy and Legality in International Law: An Interactional Account' (2012) 106 AJIL 203.

bears some resemblance (despite many differences on other points) with the teleological reconstruction of international legal processes by the New Haven School, and especially Myres McDougal, as driving towards an end of human dignity.[32] D'Aspremont's positivist outlook, on the other hand, acknowledges the potential pluralization of law-ascertainment practices with varied contents but eventually falls back on a notion of communitarian semantics shared by law-applying authorities which provides a somewhat stable, common grounding for the use of sources as criteria for identifying law—yet without an empirical inquiry into the extent to which such semantics are actually shared.[33]

Scholars from other disciplinary backgrounds, especially those grounded in politics and international relations, have found it easier to leave such prior commitments behind and start fresh inquiries into actual dynamics of international law. Wayne Sandholtz's cycle model of norm change, largely focused on legal norms across different historical periods, would be one example; that of Erik Voeten and Pierre-Hugues Verdier on customary international law another.[34] In a similar vein, Ingo Venzke has highlighted how the semantic authority of legal actors is the contingent product of societal discourses, always in need of being recreated while at the same time providing a structure that conditions the way others situate themselves and their arguments.[35]

It is unnecessary here to discuss these different accounts and their respective strengths and weaknesses in detail. What they converge on is a prime focus on social practices at the heart of international law, an interest in understanding law through the prism of actors and the ways in which actors work on, through and in the norms of international law. If we want to reconstruct the dynamics of international law, we need to use this as our point of departure and trace how international

[32] See, e.g., MS McDougal, HD Lasswell and L-C Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Oxford University Press 2018).

[33] d'Aspremont (n 30) ch 8.

[34] W Sandholtz and KW Stiles, *International Norms and Cycles of Change* (Oxford University Press, USA 2009); P-H Verdier and E Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2014) 59 International Studies Quarterly 209.

[35] See also I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012); I Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law' (2015) 12 No Foundations 1.

law is treated, in practice and discourse, by societal actors of all kinds. These actors may be government officials, judges, activists or individuals; they may form tight communities of practice or loose assemblages; and in some contexts more (and more varied) actors will be involved, in others less.

It is through observing these actors, practices and discourses, without an *a priori* privilege for one or the other that we can come to understand the social life of international law, the way it is seen to change in society. This may reveal convergence as much as divergence among different constituencies; it may also reveal different paths of change in different areas and institutional contexts of international law. It may reflect more or less consolidated change—change may consist in a full shift of an accepted understanding of the law, but it may also consist in more subtle shifts in the burden of argument, or a greater scope of acceptable contestation within legal discourse.

Such changes in the social practice of law may not necessarily appear as a change of 'the law' under some doctrinal approach, for example the standard of subsequent practice to treaties. They may also result in a more messy picture than we would hope for from a vantage point of legal rationality and consistency. What I suggest here, however, is to first take a step back from the categories through which international lawyers tend to read change—such as the sources mentioned in Article 38 of the ICJ Statute—and to observe how actors empirically treat the law. We can then return to doctrinal questions in a next step—and potentially in an 'inductive' way that seeks generalization on the basis of social practice rather than abstract categories for evaluating and filtering that practice. Proceeding in this way will, I believe, allow us to engage in a richer, more contextual assessment of how, where and when international law changes.

3. *Two Vignettes of Change*

In this article, I cannot present the empirical evidence required to do justice to the research programme just outlined. Instead, I use two short vignettes of recent change processes to suggest how closer attention to the ways in which political and societal actors register change can help us advance towards a fuller picture of the dynamics of international law.

A. *The Shifting Sands of 'Public Bodies' in WTO Subsidies Law*[36]

The first vignette circles around the regulation of subsidies in international trade law. Since the creation of the World Trade Organization (WTO), subsidies are subject particularly to the Subsidies and Countervailing Measures (SCM) Agreement. According to the Agreement, only financial contributions from 'a government or any public body' constitute subsidies,[37] yet views on how to distinguish a public from a private body diverge. This results in large part from the very different roles state-owned enterprises and banks perform across different economies. Countries with a large portion of state-owned economic entities typically prefer a more restrictive understanding of 'public body', while the opposite is usually true for countries which are less directly engaged in economic operations and seek possibilities to counter indirect subsidies by others.[38]

WTO panels took up the issue from the mid-2000s on. In these cases, the panels sought to define a clear line between public and private by using a test based on 'control' – on whether a body was not only legally but in fact controlled by the government.[39] This approach defined the understanding of the SCM Agreement for government and scholars in the field, and it came to underlie US policies which from 2007 onwards began to use countervailing duties against certain non-market economies, especially China.[40] For the Chinese government, however, this was a burdensome approach, and so it challenged these measures and also sought to change the general understanding of public bodies with a view to restricting the scope of WTO subsidy disciplines (and consequently that of countervailing measures by the US and others). In *US—AD/CVDs (China)*, the panel stayed the original course,[41] but the Appellate Body in its 2011 report changed tack and

[36] In the analysis of this case I have benefitted from NT Kiderlin, 'Subsidies: A Changing Approach to "Public Bodies"' (2020) unpublished manuscript.

[37] Article 1.1 Subsidies and Countervailing Measures Agreement.

[38] See, eg, G Messenger, *The Development of World Trade Organization Law: Examining Change in International Law* (Oxford University Press 2016) ch 6.

[39] WTO, *Korea—Measures Affecting Trade in Commercial Vessels*, Panel Report of 7 March 2005, WT/DS273/R, paras 7.49–50; *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, Panel Report of 30 June 2010, WT/DS316/R, para 7.1359.

[40] CP Bown and JA Hillman, 'WTO'ing a Resolution to the China Subsidy Problem' (2019) 22 Journal of International Economic Law 557, n 22.

[41] WTO, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report of 22 October 2010, WT/DS379/R, para. 8.94.

moved a step towards Chinese views. In the AB's view, governmental control or delegation may, but need not, be sufficient to ground the public nature of a body: 'the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.'[42] While this passage points to a flexible approach, the AB also insisted on a more restrictive line focused on the question of whether an entity 'possesses, exercises or is vested with governmental authority.'[43]

From the perspective of many, this was a momentous move: it 'effectively transformed the "public body" test into a "government action" test'.[44] It was also a move taken over the explicit opposition of important WTO members, including not just the US, but also the EU, Canada, Mexico and Turkey, among others,[45] and it was inscribed in an increasingly antagonistic economic relationship between the US and China. Nevertheless, even governments that disagreed on substance recognized that the Appellate Body finding would 'serve as a reference for the conduct of any investigating authority'.[46] This may not have held true for the US which continued to focus on government ownership and control and thereby provoked new cases in WTO dispute settlement. But for panels and the Appellate Body, the new approach provided the yardstick for future cases.[47]

The issue became more blurred again in a string of reports by panels and the AB after 2018.[48] These reports, somewhat more deferential to US views, were adopted already in the midst of the crisis surrounding, and eventually incapacitating, the Appellate Body; how WTO law will develop in the future is uncertain. Yet the shifts in the understanding of 'public body' in subsidies law give us a glimpse of an important change process in international law in recent years. The issue may

[42] *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body of 11 March 2011, WT/DS379/AB/R, para 317.

[43] ibid.

[44] See the statement by Turkey, in WTO, Dispute Settlement Body, Minutes of Meeting, 9 June 2011, WT/DSB/M/294, para 107. See also D Ahn, 'Why Reform Is Needed: WTO "Public Body" Jurisprudence' (2021) 12 Global Policy 61, 63–64.

[45] See WTO, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report of 22 October 2010, WT/DS379/R, para. 8.42-8.52.

[46] See the statement by Mexico, in WTO, Dispute Settlement Body, Minutes of Meeting, 9 June 2011, WT/DSB/M/294, para. 103.

[47] See, eg, WTO, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Appellate Body Report of 19 December 2014, WT/DS436/AB/R, para.4.29.

[48] See Ahn (n 44) 64–67.

appear as arcane and technical, but in the US-China contest it acquired major importance. The Appellate Body played the central role in this process—in line with a development since the creation of the WTO,[49] but nevertheless remarkable as it breaks out of the statist framework typically used for change through subsequent practice. In this case it is all the more remarkable as the shift was far from consensual among the membership—on the contrary, the majority of interveners in *US—AD/CVDs (China)* argued in favour of the *status quo*. The shift may not have become fully consolidated afterwards, as contestation and instances of non-compliance continued. It nevertheless resulted in a new balance of argument and provided a new reference point for the legal debate, reflected, for example, in the way in which the law came to be presented in trade law textbooks (a broader societal debate on this issue was not to be expected).[50] Overall, even though the typical threshold for 'subsequent practice' had not been met, by the mid-2010s the law had changed, and it would have been unprofessional to restate the law on the basis of the previous control test.

B. *The Emergence of the Right to Water*[51]

Despite the importance of access to water to individuals' health and well-being, a particular 'right to water' was long regarded as absent from international human rights law. Neither the Universal Declaration of Human Rights nor the International Covenant on Social, Economic and Cultural Rights (CESCR) mentioned such a right, and when an entitlement to water was construed, it was merely as part of the right to an adequate standard of living.

This changed from the early 2000s on when the UN Committee on Economic, Social and Cultural Rights—an expert body charged with the interpretation and monitoring of the CESCR—initiated a process that would anchor the right firmly in the canon of internationally protected rights.[52] The move of the Committee was, of course, not born

[49] R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 EJIL 9.

[50] See, eg, J Pauwelyn, A Guzman and JA Hillman, *International Trade Law* (Wolters Kluwer 2016) 507–512; P van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2017) 783–787.

[51] For the analysis of this case, I am indebted to the work of (and discussions with) Nina Reiners, especially N Reiners, *Transnational Lawmaking Coalitions for Human Rights* (Cambridge University Press forthcoming).

[52] On this process, see ibid.

in a vacuum. Since the late 1970s, activists and policy-makers had highlighted the central role of access to water—the right to water is already mentioned in the UN Water Conference's *Mar del Plata Declaration* in 1977 and aspects of it are enshrined in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. In the ensuing decades broader advocacy networks emerged around the issue and generated a widespread recognition of water as a basic need, especially in the development community.[53]

The shift towards a legal recognition of a right to water did, however, require the activation of other avenues, and the Committee emerged as a suitable and open forum.[54] Issues around water had been addressed by a number of states in their reports to the Committee during the 1990s, and with the Third World Water Forum looming, the Committee decided in 2001 to embark on the elaboration of a General Comment on the right to water. The work on the General Comment proceeded quickly, much helped by active collaboration from NGOs, and concluded in 2002 with the adoption by the Committee as a whole.[55]

The General Comment came as a surprise to many in the international legal community, and it raised questions as to the extent of the powers of the Committee—given that it was seen to develop the law further, rather than merely interpret rules existing in the CESCR.[56] Still in 2007 the US voiced serious criticism and emphasized that it did 'not share the view that a "right to water" (. . .) exists under international human rights law'.[57] By that time, however, the position of the Committee had found broader support.[58] For example, in 2004, the Sub-Commission on the Promotion and Protection of Human Rights of the then Commission on Human Rights at the UN had asked for the elaboration of 'draft guidelines for the realization of

[53] See, eg, PH Gleick, 'The Human Right to Water' (1998) 1 Water Policy 487.
[54] See Reiners (n 51).
[55] UN Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002): The Right to Water, UN Doc. E/C.12/2002/11 of 20 January 2003.
[56] M Langford, 'The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?' (2005) 21 International Journal of Water Resources Development 273, 275.
[57] Views of the United States of America on Human Rights and Access to Water - Submitted to the Office of the United Nations High Commissioner for Human Rights (June 2007) <https://www2.ohchr.org/english/issues/water/contributions/UnitedStatesofAmerica.pdf> accessed June 2021, 2.
[58] See also AK Gerlak, M Baer and P Lopes, 'Taking Stock of the Human Right to Water' (2018) 6 International Journal of Water Governance 108, 113–114.

the right to drinking water supply and sanitation'.[59] In 2006 the UN Human Rights Council had requested a report on the issue from the High Commissioner for Human Rights who found a year later that '[i]t is now the time to consider access to safe drinking water and sanitation as a human right'.[60] The Human Rights Council then appointed an independent expert on the issue, thus signaling its general support.[61]

These elements, as well as related jurisprudence from the Inter-American Court of Human Rights and the inclusion of the right in a growing number of domestic constitutions, provided the ground for the attempt to gain explicit recognition of the right to water through the political organs of the UN. In 2010, the General Assembly adopted a resolution to that effect, though it met with forty-one abstentions and statements from a number of (especially Western) countries, including the US and the UK, denying that the right had a basis in existing international law.[62] A few months later, the Human Rights Council followed suit by consensus without a vote.[63] The US had now explicitly 'joined the consensus' (also in light of the fact that the Human Rights Council resolution had a slightly more limited focus than that of the GA), though some other countries, especially the UK, continued to hold on to their previous, negative position.[64] Then, in 2015, a new resolution of the General Assembly affirming the right was eventually adopted without a vote.[65]

Despite the reservations throughout the process, the human right to water (and sanitation) has become widely recognized as part of international human rights law. Already after the General Comment in 2002, many actors—from governments to civil society activists and multinational firms operating in the water sector—began to acknowledge the right.[66] This process broadened after 2010, firmly anchoring the right not only in the international human rights community, but also embedding it in many local and national discourses about

[59] UN Doc. E/CN.4/Sub.2/2005/25 of 11 July 2005.
[60] UN Doc. A/HRC/6/3 of 16 August 2007.
[61] UN Human Rights Council Resolution 7/22 of 28 March 2008.
[62] UN General Assembly Resolution 64/292 of 3 August 2010.
[63] UN Human Rights Council Resolution 15/9 of 6 October 2010.
[64] M Baer, 'The Human Right to Water and Sanitation: Champions and Challengers in the Fight for New Rights Acceptance' in A Brysk and M Stohl (eds), *Expanding Human Rights: 21st Century Norms and Governance* (Edward Elgar 2017) 104–105.
[65] UN General Assembly Resolution A/RES/70/169 of 17 December 2015.
[66] Gerlak, Baer and Lopes (n 58) 115–123.

implementation.[67] The right has also become a pillar for broader engagement around water, for example in the UN High-Level Panel on Water whose final report in 2018 pointed to the right to water at several points; in their endorsement, the UN Secretary-General and the World Bank President likewise mentioned 'our human right to access to safe drinking water and sanitation' as if self-evident.[68] While contestation continues to reign about the scope and extent of protection the right offers,[69] contestation of the right's existence as such has all but subsided.

4. *Patterns of Change*

These short vignettes cannot give a full account of how change processes in the two cases unfolded, nor can they pretend to capture the broader picture of change in international law. But they are suggestive regarding the ways in which actual change processes differ from the traditional, sources-oriented accounts typically employed. Doctrinally-driven accounts of change tend to register only certain elements of social practice, and they often shoehorn others into unsuited, formal categories (for example hard and soft law)—they privilege an interpretation of actual practices along the lines of existing categories rather than an interpretation of these categories along the lines of actual practices. In the following I use the two vignettes—as well as insights from many other cases[70]—to develop a number of conjectures about an alternative framework more suited to the empirical reality of international law's dynamics.

A. *International Law as Many*

In accounts of law-making and change, international law is typically treated as a unitary field, and variation across different contexts and

[67] See M Baer and A Gerlak, 'Implementing the Human Right to Water and Sanitation: A Study of Global and Local Discourses' (2015) 36 Third World Quarterly 1527; Gerlak, Baer and Lopes (n 58).

[68] High-Level Panel on Water Outcome Document, 14 March 2018, <https://sustainabledevelopment.un.org/content/documents/17825HLPW_Outcome.pdf> accessed 27 September 2021.

[69] E Fantini, 'An Introduction to the Human Right to Water: Law, Politics, and Beyond' (2020) 7 WIREs Water e1405.

[70] As part of our project on 'The Paths of International Law' we survey cases of change and trace change processes in detail in twenty-five of them.

issue areas is understood as mere variation in the presence of different elements of international law's sources. In the work of the International Law Commission, for example, the requirements for 'subsequent practice' to modify existing rules are the same throughout the entire field of international law, with the only possible exception constitutional instruments of international organizations.[71] In the scholarly commentary on the ILC's work, the unity of treatment has also hardly been called into question.[72]

Yet our two vignettes suggest that change varies significantly across issue areas and institutional contexts. The focal role of the WTO Appellate Body in the subsidies case, for example, does not find many analogues in other contexts, and with the blockage of the AB it has become clear how historically contingent this role was even in the trade law context. Most other areas do not have a similarly focal institution—even where issue-specific courts exist, they are often not as central for change processes. The law of the sea is a good example: despite the existence of the International Tribunal for the Law of the Sea, change here is typically less court-driven, in part because many issues do not come before the Tribunal.[73] In other areas, courts are largely absent or only tangentially relevant, as in international environmental law which has no 'own' dedicated tribunals and other international courts, such as the ICJ or the ITLOS, have limited jurisdiction over certain aspects only. Such variation is reflected in the ways in which participants in international legal discourse speak about change and its requirements. An argument about the state of European human rights law would miss the point if it did not focus centrally on the jurisprudence of the European Court of Human Rights, while one about international rules on state immunity would be heavily incomplete without a detailed consideration of national court judgments.

This divergence does not mean that the process of international law can simply be characterized as 'disorderly', as Monica Hakimi has recently argued with respect to customary international law.[74] While hard and fast—and uniform—secondary rules may indeed be hard to find, this does not imply that there is nothing more to international

[71] See Conclusion 12 on Subsequent Agreement and Subsequent Practice, n 4 above.
[72] See, eg, the special issue on the topic of the *International Community Law Review* 22:1 (2020).
[73] See R Roland Holst, 'Change in the Law of the Sea. Context, Mechanisms and Practice' (PhD Thesis, Utrecht University 2020).
[74] M Hakimi, 'Making Sense of Customary International Law' (2020) 118 Michigan Law Review 1487, 1504.

custom (or other international law for that matter) than the acceptance or not of particular positions on its content.[75] Instead, based on our previous observations it appears likely that particular areas of international law—defined by issue area, geographical region or institutional sphere—have developed their own, particular structures of change. Participants in these areas, sometimes belonging to tight epistemic or interpretive communities,[76] tend to have an intuitive sense of what counts as important, even if it does not correspond with practices in other areas. There may not always be full convergence on such structures—human rights treaty bodies, for example, may be very important for some, less so for other voices in international human rights law. But in the discourses on legal change distinct constellations for the areas in question tend to become visible, and they point to forms of structural variation within international law which contrast with recent diagnoses of a 'farewell' to fragmentation.[77]

B. *Different Pathways of Change*

Our vignettes also indicate that change can travel on different pathways, and that the constellation of these pathways—which of them have emerged and are available and recognized—are likely to be defining for a given area. International lawyers traditionally focus on state-centric forms in keeping with their established doctrine of sources, and they have been hesitant to broaden this focus, in part for normative reasons.[78] But in empirical cases, we can actually observe a much greater variety of forms and processes leading to change in legal practice, many of them generated in an interplay between formal creation and delegation and informal recognition and consolidation.

To structure the analysis of this variety, we can distinguish five main, ideal-typical pathways with distinct operating logics. On the first path, the *state action path*, change is identified when states modify their

[75] ibid 1510.

[76] See, eg, M Waibel, 'Interpretive Communities in International Law' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2014).

[77] See M Andenas and E Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015). This does not necessarily imply that such structural fragmentation is problematic; it can well engender forms of coupling as described in A Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671.

[78] See, eg, M Wood, 'International Organizations and Customary International Law' (2015) 48 Vanderbilt Journal of Transnational Law 609.

behaviour and make corresponding statements. As in the standard image of change in customary international law and subsequent practice to treaties, this path derives its legitimacy from the authority of states. Although change attempts may be initiated by a few states, their success depends on building a broader consensus around the suggested change, and while traditionally such consensus was thought to require virtually universal acceptance or acquiescence, the threshold may be less far-reaching in practice today.

On the second, the *multilateral path*, change is generated as a result of statements issued by many states within the framework of an international organization. It relies on the collective authority of states, but also the institutional authority of the organization that serves as a forum. This was visible in the example of the right to water in which a resolution adopted by the UN Human Rights Council became a central element—and certainly more weighty than a collective statement by the same states outside the organizational framework.

On the *bureaucratic path*, change is identified as the result of decisions or statements produced by international organizations in contexts that do not involve the direct participation of states in the decision-making process. It relies on delegated authority or bureaucratic authority deriving from expertise, capacity and procedures, though it might also reflect principled (moral) authority.[79] The role of the Committee on Economic, Social and Cultural Rights in the right to water case is a good example. The UN's International Law Commission, too, derives its weight from both its mandate and the recognized expertise of its members, and in some areas—especially in general international law on which other authorities are relatively scarce—its views tend to carry significant weight.

The fourth path—the *judicial path*—operates through decisions and findings of courts and quasi-judicial bodies, as we have seen in the WTO subsidies vignette. It relies on judicial expert authority and often also on the delegation from states, and typically comes about through mechanisms of (broader or narrower) interpretation or channelling of views expressed in other legal instruments (both soft and hard).[80] International courts are the typical anchor of this path, but quasi-

[79] On the different sources of international organizations' authority, see M Barnett and M Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) ch 2.

[80] See also A von Bogdandy and I Venzke (eds), *International Judicial Lawmaking, vol 236* (Springer Berlin Heidelberg 2012).

judicial institutions and national courts interpreting international law form part of it as well.

On the final, the *private authority path*, change follows statements or reports by recognized authorities in a private capacity without a clear affiliation to or mandate from states or international organizations. This path's claim to legitimacy is built upon authority from expertise, capacity or principle, potentially also on inclusive procedures. It often operates through the production of technical manuals, standards, and regulations—responding to new demands not (yet) addressed through other pathways—but in other cases such as the ICRC, private authority can also weigh heavily in lasting change of established rules.[81]

Change in international law is then rarely the result of the activation of a single pathway. Only where an authority is consolidated and sufficiently focal in a particular context will it alone shift an accepted understanding of legal rules—the WTO case came at least close to this. Otherwise, as reflected in the right to water vignette, change will typically be the result of an accumulation of statements produced in the same or different pathways, sometimes in quick succession, sometimes over a significant period of time. These statements will typically serve initially to irritate and destabilize prior understandings and then (potentially) reconsolidate in the direction of a new, settled rule or interpretation. Yet such consolidation will often be a matter of degree, with a certain amount of contestation frequently persisting for long.

C. *Authority in and through Practice*

Why does change travel on certain paths in some areas and not in others? Much depends, of course, on the formal institutions present in a given issue area. The WTO dispute settlement system and the UN Human Rights Council were able to play key roles in our cases because they had been vested with significant powers by states through treaties and resolutions. Yet this delegatory framework is unlikely to explain their role entirely, and it is less suited in other contexts.

Neither the Appellate Body nor the Human Rights Council (or the UN General Assembly, for that matter) were created as law-making entities, and still their statements carried important weight in the process of legal change in our two vignettes. And institutions with

[81] See, eg, L Mührel, 'Saying Authoritatively What International Humanitarian Law Is: On the Interpretations and Law-Ascertainments of the International Committee of the Red Cross' (Freie Universität Berlin 2020).

formally similar mandates play very different roles in the dynamics of international law—think only of the influence of the International Criminal Tribunal for the Former Yugoslavia on international criminal law, as opposed to the far more muted role of ITLOS in the development of the law of the sea.[82] The European Court of Human Rights has assumed a role—that of a 'constitutional court' for Europe, with law-creating powers through evolutionary interpretation—well beyond what was envisaged when it was established, and largely independently of formal delegation.[83] Moreover, some important actors in international legal change come without formal mandates altogether. The International Committee of the Red Cross is the most prominent example here but private expert groups play a significant role too—permanent ones such as the Institut de Droit International or *ad hoc* ones such as the group behind the Tallinn Manual on cyberoperations.[84]

Understanding these roles requires us to take into view not only different self-understandings of the the actors and institutions in question, but also the social processes through which their authority is generated.[85] International law today can be understood as comprising multiple social fields with their own structures of actors, authorities, boundaries, and fundamental norms. These fields are differentiated along issue areas and regions, national boundaries as well as practical and academic contexts.[86] The differences are visible according to the experts recognized in each field, and in the institutions whose views and pronouncements are seen to matter.[87] In international refugee law the UNHCR plays a significant part, while other fields, such as international environmental law, have not produced a similar institutional authority.

[82] On the varying authority of international courts, see KJ Alter, LR Helfer and M Rask Madsen (eds), *International Court Authority* (Oxford University Press 2018).

[83] On the trajectory of the ECtHR's authority, see M Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141.

[84] See MN Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press 2017); D Efrony and Y Shany, 'A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice' (2018) 112 AJIL 583.

[85] See also F Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 Journal of International Dispute Settlement 291.

[86] N Krisch, 'The Many Fields of (German) International Law' in AE Roberts, P Stephan, P-H Verdier and M Versteeg (eds), *Comparative International Law* (Oxford University Press 2018).

[87] See also Venzke (n 15); A Roberts, *Is International Law International?* (Oxford University Press 2017).

What authority exists in legal discourse is then endogenously defined through the practices of law within each social field—practices that typically connect with, but also generate variations on, rules about sources and interpretations in other areas and 'general' international law. 'Authority' in this respect is typically limited and 'liquid' – dispersed over various sites and operating in degrees rather than have commanding weight.[88] The practices that generate such authority may not always converge, and actors may retain competing views on the weight to give to statements of a particular institution. Using frames such as 'interpretive communities'[89] or 'communities of practice'[90] may thus generate excessive associations of cohesiveness. At the same time, we can often observe practices in a given area to be sticky: they are not simply external to actors and thus at their disposal to accept, reject or modify but instead provide—as 'practices' in a narrower sense[91] – a structure in which actors operate. They are also not just discursive but embodied by actors: proper participants in legal interactions are only those who understand 'how to' make legal arguments, how to work within the field. Being an international lawyer (or an international human rights lawyer, international criminal lawyer, etc.) is largely defined by the practical mastery of key techniques.[92]

Practices in a given field will often evince common understandings about what counts as authority—and what degree of deference an authority is due—but they may also reflect continuing contestation. Authority may also be limited to a particular field and not travel beyond it. For example, the UN Human Rights Committee may enjoy strong authority in the field of human rights—among human rights lawyers and international NGOs, to an extent also local activists—but less in other areas of international law or in general discourses about it. Yet it is such variation in authority that will help us to account for the distinct pathways of international legal change across issue areas and institutional contexts.

[88] N Krisch, 'Liquid Authority in Global Governance' (2017) 9 International Theory 237.

[89] I Johnstone, 'The Power of Interpretive Communities' (2005) in M Barnett and R Duvall (eds), *Power in Global Governance* 185; Waibel (n 76).

[90] Brunnée and Toope (n 29) 56–65.

[91] C Bueger and F Gadinger, *International Practice Theory* (2nd edn, Springer 2018).

[92] See NM Rajkovic, T Aalberts and T Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge University Press 2016). On the distinctive characteristics of the practice of law, see also P Bourdieu, 'La force du droit: Eléments pour une sociologie du champ juridique' (1986) 64 Actes de la recherche en sciences sociales 3.

D. *The Varied Roles of States*

In the change processes we are reconstructing here states play an important role, but not always that of drivers or masters. This is reflected in our vignettes: in the right to water case, states began to occupy a central position at a later stage of the change process and largely as members of UN organs, while in the subsidies case they sought to influence the process but then were to an extent bystanders of developments centered on the Appellate Body.

Appreciating the role of states thus requires greater nuance—apart from being drivers and bystanders, we may see them in the role of catalysts, spoilers or blockers, interacting in particular ways with other authorities involved in change processes. Understanding the role of states also requires a recognition of the fact that, in many cases, some states will play a significant part while others do not. The development of the right to water came to be focused on UN human rights bodies with limited membership, and change happened despite the continued opposition of the UK and a number of other countries (up to a certain point, also the US). Likewise, the shift in the understanding of 'public body' was pushed by China and resisted by the US, with other countries supporting one side or the other. We thus need to distinguish between the role of states as a collective and the part individual states play.

Which role states play, and can play, will depend in large part on their ability to adopt a collective stance. Whenever they can act together (or in a large coalition) change is likely to be driven by their collective authority, either through a treaty or an informal process. Momentous changes in treaty regimes—such as the creation of an enabling clause for developing countries in the GATT in the 1970s or the shift from the parallel system of access towards an equity-interest model in the deep-seabed mining regime in the context of the International Seabed Authority—are examples of states being in the drivers' seat when they generate collective momentum.[93] Yet in a diverse world, agreement is often elusive, and when states are divided or not sufficiently invested in a topic to mobilize, they leave greater space for other actors.

[93] See E Yildiz, 'Revising the "Parallel System of Access" Rule for Seabed Mining' (2020), unpublished manuscript; P Martinez Esponda, 'Differentiated Treatment and the Generalized System of Preferences in the GATT System' (2020) unpublished manuscript.

Whether this space can be used will typically hinge on the availability of authorities that can direct or influence the change process. The importance of this factor is clearest in the WTO vignette—without a strong Appellate Body, the division among states would likely have frustrated any attempt at change. When states are largely inactive, rather than heavily divided, other authorities are likely to find it yet easier to guide or catalyze change processes. The recognition of crimes in internal armed conflicts is a good example here—the ICTY was a young institution with little pre-established authority, but its *Tadic* decision became central to a change process in which most states did not express strong views. Aided by the public anti-impunity sentiment developed around the conflicts in the former Yugoslavia and Rwanda, it managed to establish a reference point which became dominant despite criticism from influential actors such as China, India and Turkey.[94]

Where authority is recognized, even the opposition of important states may thus not be sufficient to block change process. A broader alliance of states might be necessary to achieve this: the clear and consistent rejection by Western states of the Draft Norms on the Responsibilities of Transnational Corporations, adopted in 2003 by the UN Subcommission on the Promotion and Protection of Human Rights, managed to frustrate the process towards a broader recognition of the Draft Norms which have remained a symbol of a failed change attempt. Lesser opposition, however, may be unable to frustrate norm change if that change is pushed forward by a widely recognized authority.

5. *Politics or Law?*

The observations presented above all have some basis in empirics, but they would need far more systematic work, taking into view a greater number of issue areas and cases. Even with such a broader base, however, many legal commentators will ask: so what? They may think that the account offered here is useful from a political science perspective—one that traces how change really works—but that it is of limited use for lawyers as it does not give us a proper answer to the question what the law is as a result. For them, it might be interesting to know how actors position themselves towards the more dynamic processes

[94] See text at n 5 above.

reconstructed here, but they will insist that actual change in law only occurs if it meets more exacting requirements, namely those of customary international law or the subsequent practice to treaties.

I cannot do justice to the important theoretical aspects of this challenge in the present article; these have much to do with how we understand 'law' in the first place. Yet it is important to highlight some of the internal tensions in a challenge along those lines. For the requirements of custom or subsequent practice—a widespread, uniform practice or an evidence of agreement among the parties—are themselves typically understood as restatements of the way international law is practiced.[95] Yet most of the time, these restatements dispense almost entirely with an inquiry into the actual practices in and around international law and satisfy themselves with references to statements by international courts which merely use prior restatements to come to their conclusions. For example, the ILC often refers to decisions of the International Court of Justice which in turn relies on the work of the ILC.[96] This is not only a citation cartel, but it also moves ever further away from the aspiration to reflect the practice 'on the ground'.[97]

If we want to reconstruct this practice, we have to broaden our focus and take into view a more diverse set of actors and interactions around international law, and we cannot limit ourselves to abstract rationalizations about supposed requirements for change but have to consider also when and in what circumstances actors do in fact register change. The present article commences an inquiry along such lines, and it hopes that many of its suggestions are recognizable by practitioners in the respective fields. For this purpose it also leaves behind three core assumptions that often underlie traditional accounts of the sources of international law: that states are at the centre of international law, that international law needs to be understood as a unity, and that lawfulness under international law is a binary question. These assumptions are not necessarily wrong, but we often wrongly take them as starting

[95] See, eg, the reference to 'evidence . . . in international practice' in the ILC's commentary on interpretation rules in the draft of the Vienna Convention on the Law of Treaties, *Yearbook of the International Law Commission* 1966, vol. II, 218. Similarly, the ILC emphasizes that its conclusions on customary international law 'reflect the approach adopted by States, as well as by international courts and organizations and most authors'; UN Doc. A/73/10 (2018) 123.

[96] S Villalpando, 'On the International Court of Justice and the Determination of Rules of Law' (2013) 26 Leiden Journal of International Law 243, 245–251.

[97] On the very selective use of practice (primarily of Western capitalist countries), see BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1, 20–36.

points of our inquiry rather than as potential results of empirical observation.

If law does not derive from transcendental truths but instead from social facts, as is the core of positivist legal theory, we need to first be interested in the social facts through which law is constituted and from there reconstruct 'legal order'.[98] This is easier in settled and formalized orders of the domestic kind, in which we can, for example, identify common points of reference in the practice of legal officials, as H.L.A. Hart sought to do.[99] Once we move away from this paradigm, however, the notion of 'legal officials' itself dissipates, and focus needs to shift to the (far more disorderly) societal and institutional practices surrounding legal norms.[100] This may be especially complicated for the very diverse and multi-sited practices surrounding international law, but it is only through such a shift in focus that we can draw conclusions on whether international law is a unitary system, what its secondary norms are, and whether legality comes in binary form or in degrees. Such conclusions may be easier in areas of international law with settled, shared understandings on what counts as law and legal change—even if these depart from the criteria used traditionally by international legal doctrine. In other areas, though, different approaches to legal change may stand in competition, with some actors upholding traditional criteria and others applying a different approach. In such a situation, individual actors may make a choice (potentially a morally-inflected choice) regarding their own assessment of what the law is and whether it has changed. A scholarly perspective, however, can only register the practices actors engage in—where these generally converge, it may conclude that a particular legal system (with particular secondary norms) is in place; where they diverge, it has to regard the state of the law as unsettled.[101]

Both theoretically and empirically, much more work would need to be done to come to conclusions as to actual social and institutional practices and their relevance for international law. I cannot undertake such a far-reaching inquiry in this article, which only presents a first

[98] See also d'Aspremont (n 30) 196–203.

[99] HLA Hart, *The Concept of Law* (2nd edn, Oxford: Clarendon Press 1994) 100–117.

[100] See, eg, BZ Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 166–169; K Culver and M Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press 2010) ch 4.

[101] See J Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon Press 1980) 206–207, on the coexistence and competition of different legal systems in a given space.

step to open up the space for further investigations. Yet it is important to note that sociological or political-science approaches to the mechanisms of international law are not merely useful contributions from other disciplines but may well, depending on their focus and design, help us reconsider what counts as law in the global space. If law is a social construct, we cannot ultimately know it without an account of its practice in society.

6. *A Conclusion*

Taking its cue from Georg Schwarzenberger's interest in the dynamics of international law, this article has sought to present a framework for understanding how international law changes. It has tried to do so by suspending, for some time, the doctrinal categories in and through which international lawyers often reconstruct processes of change. Instead, it has taken as its point of departure two vignettes of actual change processes in international law in recent years—the shift in the understanding of 'public body' in WTO subsidies law and the emergence of the right to water in international human rights law.

These and the other instances I have drawn upon do not present a full, systematic picture, but they point to important insights about the paths on which international law travels. They suggest that, at a time when international law has indeed come to 'regulate in detail the life of its individual members in its internal aspects',[102] it has developed modes of adaptation that make it significantly more dynamic than we would expect in light of the high doctrinal hurdles for change so often cited in the literature. The insights developed here also show that modes of change vary heavily across issue areas and institutional contexts, complicating the typical, unitary image of international law and its sources. And they suggest that change travels on particular pathways, each with a distinct set of actors and authorities, and that it is the authority of actors and institutions—endogenously produced by societal processes—that determines which pathways are open and consequential. In many instances of change, states play important roles—but roles that vary heavily, ranging from that of drivers of change to mere bystanders.

This article sets the stage for further, empirical inquiries into processes of international legal change. These should take into view not

[102] See the quote from Hersch Lauterpacht and the discussion supra at n 11.

only the classical sites of legal reproduction, such as international courts or multilateral fora, but venture out further into the 'social life' of international law, the ways in which it is understood (and reinterpreted) in the many capillaries of its practice.[103] Such inquiries may bring to light convergence but also divergence across different actors and discourses, spurring questions about a comparative international law[104] but also about how different 'vernaculars' of international law[105] feed back into expert discourses in formal institutions in Geneva, The Hague or New York.[106] They should also open up a broader consideration of how change in particular international legal norms relates to broader changes in international society—to ideational shifts as well as geopolitical shifts in material terms. The vignettes discussed here hint at tight connections with such broader processes—the rise of China as well as broadening rights discourses—but they also suggest that the way in which such processes are translated into law is not straightforward and can lead to conflicting and inconsistent results.

Such explorations are largely for future work. What the approach presented here promises is a more grounded account of the dynamics of international law and potentially a revised image of international law itself—one that is open about the political and social processes underlying the law, and one that invites, rather than closes down, more questions about the politics of international law.

[103] cf N Fraser, 'Foucault on Modern Power: Empirical Insights and Normative Confusions' (1981) 1 PRAXIS International 272.

[104] AE Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018).

[105] Levitt and Merry (n 27).

[106] See, eg, C Rodriguez-Garavito, 'The Globalization of the Vernacular: Mobilizing, Resisting, and Transforming International Human Rights from Below' in P Alston (ed), *Festschrift for Sally Merry* (forthcoming).