From Drivers to Bystanders: The Varying Roles of States in International Legal Change

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Abstract

When it comes to change processes in international law, states are typically thought to be in the centre, but in many instances, we can actually observe them playing different, more secondary roles. With this paper, we aim to conceptualize and understand the varying roles states occupy. Drawing on insights from inquiries in international law and international relations, it sets out a typology of different roles states play in international legal change processes—from drivers and blockers to catalysts, spoilers, and mere bystanders—and connects these ideal types with empirical evidence from actual cases of change. It also develops a framework for understanding when states occupy different roles, with a particular focus on states' collective action (in)capacity and the existence of alternative authority to that of states. Overall, the paper presents building blocks of a more realistic, empirically-guided account of international law, its dynamism, and the degree of statism at its core.

1. Introduction

International law is in constant movement, and any proper account of the international legal order needs to place this movement at the centre. "The course of international law needs to be understood if international law is to be understood," says James Crawford in the opening of his general course at the Hague Academy in 2013.[1] Yet rarely do we find focused and systematic attention to this 'course of international law,' to the ways in which international legal rules change, get reaffirmed, or disappear. Most international lawyers content themselves with pointing to doctrinal requirements for change in customary or treaty law, and most international relations scholars, too, pay less attention to the dynamics of international law than to questions about the effect of particular, supposedly fixed rules.

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[1] J. Crawford, 'Chance, Order, Change: The Course of International Law General Course on Public International Law (Volume 365)', (2013) *Collected Courses of the Hague Academy of International Law*, at 21

This lack of attention is all the more surprising as international law appears to change much more easily and rapidly than the typical, doctrinally-oriented image would lead us to expect. Focused as it is on the convergence of large numbers of states as the determinant of change, expressed either in the form of widespread state practice or the subsequent practice of parties to treaties, this image suggests that substantial disagreements or state inaction obviate change and leave previous obligations and understandings intact. In a divided and polarized world, in which many new treaty projects have been derailed or heavily delayed over the past two decades, we would thus expect international law to remain largely stagnant. Yet from trade and investment to human rights and environmental law, this is not what we observe—international legal rules are in fact in constant movement, but the statist approaches leave us with few tools to capture and understand this dynamism in the life of international law.

With this paper, we take a step towards a broader account of these dynamics, and we interrogate in particular the varying roles states play in them. This reflects the fact that there is a far wider range of participants in international politics and law today than has previously been the case. While this is widely recognized today, international lawyers and international relations scholars typically continue to treat actors other than states as merely supportive or secondary, and states continue to stand at the centre. This limited prism, we believe, prevents us from properly reconstructing how change processes unfold, who plays what role in them, and under what conditions legal change comes about. We thus take a step back and use an empirical lens to inquire how important states actually are and how this importance manifests itself. On a methodological level, this responds to increasing calls to reflect on the 'social construction' of international law[2]—the central place accorded to states should be the result of tracing this social construction, not its starting point.

The objective to problematize the central role that states occupy in theories and narratives of change is also driven by insights into actual instances of change in different areas of international law. If we ask specialists to give us an account of the course of international trade law or international humanitarian law, they will talk about states but not always as the key actors. Instead, the WTO Appellate Body will occupy a prominent place in trade (at least until recently), and in humanitarian law, we will learn much about the International Committee of the Red Cross, international criminal tribunals, and also scholars. In other areas, we will hear about private experts or—more frequently—organs of international organizations. All of these play a part alongside states, and states are never far from the picture. But they appear in very different roles and with different degrees of influence.

We suggest taking a closer look at such processes of change, the different roles of states in them, and the factors that lie behind these roles. This framing article sets the scene for this inquiry by first tracing the sway statist approaches continue to hold over accounts of international legal change and by highlighting the recent emergence of alternative approaches with a different and broader focus (section 2). Drawing on empirical insights from different issue areas, we then present a typology of ideal-typical roles states occupy in international change processes, ranging

[2] J. Brunnée & S.J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (2010); J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011); A. Cohen & A. Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited', (2011) 7 *Annual Review of Law and Social Science* 417–431

from that of drivers to that of bystanders, and including also those of blockers, catalysts and spoilers (section 3). Section 4 develops a positive theory of the core factors behind much of the variation observed across state involvement in actual instances of change. In section 5, we draw on this account to lay out some implications of our findings for the promise and limitations of international law in a geopolitical context increasingly rife with division and state inaction. We conclude with an overview of the ways in which the other contributions to this paper develop these themes further.

2. 'Masters' of Change

Accounts of change in international law start almost naturally with states. Throughout international law textbooks, states are presented as the 'masters' of (change in) international law—usually with a focus on the traditional sources of international law and asking how changing circumstances or politics are reflected in the doctrines around customary international law and the subsequent practice to treaties.[3] The broader range of actual participants in the international legal process is typically acknowledged, but these participants play at best influencing or supporting roles. This is equally true for more focused inquiries into change—for example, Michael Scharf's exploration of Grotian moments in the development of custom or Georg Nolte's work on the subsequent practice to treaties.[4] A similar imagery is common among students of international law from the discipline of international relations—actors other than states are usually portrayed as secondary characters, often as norm entrepreneurs at the beginning of a change process or compliance constituencies in the implementation stage.[5] One of the limiting factors in many such accounts is the primary focus on change through treaty-making, as in Paul F. Diehl and Charlotte Ku's punctuated-equilibrium model which relegates other forms of change to the background.[6] Yet also where more gradual and practice-driven forms figure more prominently, states typically remain at the centre. Wayne Sandholtz's norm-cycle approach is one example, Pierre-Hugues Verdier and Erik Voeten's exploration of change in customary international law another.[7]

Such statism is, unsurprisingly, reflected in the UN International Law Commission's recent efforts at providing guidance on sources: their focus is primarily on the conditions of, and tools for, the identification of the relevant practice of *states*.[8] Especially the conclusions on customary international law are clear about the very limited role of anything but statements and actions

[3] See, e.g., J. Crawford, *Brownlie's Principles of Public International Law* (2012); M.D. Evans (ed.), *International Law* (2010); M.N. Shaw, *International Law* (2017)

[4] M. P. Scharf (ed.), *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (2013); G. Nolte, *Treaties and Their Practice: Symptoms of Their Rise or Decline* (2019).

[5] See, e.g., M. Finnemore & K. Sikkink, 'International Norm Dynamics and Political Change', (1998) 52 *International Organization* 887–917; B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009)

[6] P.F. Diehl & C. Ku, *The Dynamics of International Law* (2010); see also, B. Koremenos, *The Continent of International Law: Explaining Agreement Design* (2016)

[7] W. Sandholtz & K.W. Stiles, *International Norms and Cycles of Change* (2008); P.H. Verdier & E. Voeten, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory', (2014) 108 *American Journal of International Law* 389–434

[8]

taken by states—resolutions of international organizations, judicial decisions and scholarship are all treated as secondary, "subsidiary" tools for the identification of custom.[9] The situation is perhaps less clear-cut in the Commission's conclusions on the subsequent practice to treaties which take the practice of the parties to a treaty as their main focus yet also contain certain cautious openings, giving rise to disagreement also among members of the Commission.[10]

The dominantly statist picture is, of course, not without exceptions, and an increasing number of scholars from both international law and international relations have pointed to a stronger role of actors other than states. Courts are often the main focus here—already Hersch Lauterpacht, in his classical treatment of change and stability in *The Function of Law in the International Community*, placed emphasis on the creative role of courts and tribunals, allowing them to adapt international law to changing circumstances and rendering the need for (state-led) legislative mechanisms less pressing.[11] In later years, adherents of the New Haven School have perhaps been most expansive in the recognition of a wider circle of 'participants' in the legal process, though often without specifying their respective roles and weights,[12] while others have pushed for a recognition of multilateral fora or international organizations as makers of (customary) law.[13] Contemporary accounts also recognize the importance of the International Court of Justice (ICJ) and other institutions for the development of international law in particular areas.[14]

Perhaps the most far-reaching attempts at rethinking the role of states in processes of international legal change come from accounts with a sociological bent, which unpack the social processes through which meaning is made in international law. This is particularly evident in approaches that accord a central place to social practices and especially to 'communities of practice', 'interpretive communities' or social fields.[15] States play a role in these practices primarily through individuals that represent them, and these are not alone but may—depending

[9] International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, Yearbook of the International Law Commission, vol. II, Part Two, A/73/10 (2018).

[10] International Law Commission (2018) See also D. Tladi, *Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?*, 30 August 2018, EJIL: Talk!, available at https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/.

[11] H. Lauterpacht, *The Function of Law in the International Community* (2011)

[12] M.S. McDougal et al, 'The World Constitutive Process of Authoritative Decision', (1966) 19 *J. Legal Educ.* 253; R. Higgins, *Problems and Process: International Law and How We Use It* (1995)

[13] See, e.g., J.I. Charney, 'Universal International Law', (1993) *American Journal of International Law* 529–551, at 543–544

[14] See, e.g., S. Sivakumaran, 'Making and Shaping the Law of Armed Conflict', (2018) 71 *Current Legal Problems* 119–160; K. Daugirdas, 'International Organizations and the Creation of Customary International Law', (2020) 31 *European Journal of International Law* 201–233; N. Stappert, 'Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts', (2020) 12 *International Theory* 33–58

[15] I. Johnstone, 'The Power of Interpretive Communities', (2005) 185 *Power in Global Governance (M. Barnett and R. Duvall, eds.)* 185–204; Brunnée & Toope (2010); M. Waibel, 'Interpretive communities in international law', in *Interpretation in International Law (A. Bianchi, D. Peat and M. Windsor, eds.)* (2014), 147; J. Meierhenrich, 'The Practice Of International Law: A Theoretical Analysis', (2014) 76 *Law and Contemporary Problems* 1–83; A. Bianchi, 'Knowledge Production in International Law: Forces and Processes', in *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (2021), 155

on the area in question—be joined by a host of other actors, public or private in character.[16] It is often these other actors (judges, brokers, rule-users, international civil servants, etc.) that manage to reshape legal discourses in ways the formal rule-makers may not have anticipated and no longer control.[17] One important implication of such more sociological accounts is that the configuration of the space in which international law is interpreted and changes is not a given but is instead construed in and through social action itself.[18] This generates leverage for moving away from an *a priori* understanding of international law as a whole and allows us to capture differences in the way law is understood, accepted, and internalized across different geographical and issue areas. It also forces us to address empirically whether states are indeed the 'masters' of international law—or what other roles they may occupy in change processes.

Such an empirical inquiry cannot operate with an overly predetermined notion of what constitutes 'international law' lest it risks turning circular—if international law were defined through statist law-making processes, we would by definition be unable to observe a distance between them. Instead, if we treat international law as a social practice, we can try to understand how social actors—including, but not limited to, lawyers and judges—approach it, what discourses they produce about international law, and we can try to trace what leads them to acknowledge that a change in its content or structure has occurred. It is such shifts in the burden of argument in international legal discourses that we take as a reference point.[19] This implies that we also do not need a preliminary determination of the actors entitled to create or merely ascertain international law. Change does not have to come about through a directed, deliberate act of a recognized creator—it may be the result of more unruly interactions and can, as in traditional custom, be the result merely of a change in the way societal actors approach the norms that bind them. Whether particular actors are recognized as 'authorities' to make or ascertain the content of law will always be endogenous to social practices, not something that lies prior to them.[20]

3. The Variety of State Roles: A Typology

This paper explores the varied roles of states in international legal change, and in order to embark on this exploration, we first need tools for a broader mapping than we have been used to. The basic typology we present in this section is intended as a step in this direction. Inductively created from existing accounts of change processes in international law, it is not meant to reflect the frequency with which one role or the other is found in reality—for this, we would need a broader

[16] See, e.g., Brunnée & Toope (2010), ch 2

[17] Z.I. Búzás & E.R. Graham, 'Emergent Flexibility in Institutional Development: How International Rules Really Change', (2020) 64 *International Studies Quarterly* 821–833

[18] See T. Aalberts & I. Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice', in A. Nollkaemper et al (ed.), *International Law as a Profession* (2017), 287

[19] See also I. Venzke, 'What Makes for a Valid Legal Argument?', (2014) 27 *Leiden Journal of International Law* 811–816

[20] See B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (2001), at 159–166 See also, J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011), at 203–213, who seeks to apply a similar insight but stops short of its broader implications in order to avoid excessive indeterminacy.

and more fine-grained empirical inquiry. The suggested typology offers a starting point and helps to generate a more complex picture of the ways in which states take part in international legal change.

The different types presented here correspond to different degrees of influence of states over the change process, as depicted in Figure 1. They correspond to central roles—as in the traditional depiction of international legal change—as well as ones of moderate or only marginal influence. The pairs (drivers/blockers as well as catalysts/spoilers) reflect the different directionalities with which states intervene in change processes, by attempting to either further them or stop them in their tracks. This rough typology does not, of course, capture all nuances of the ways in which states intervene in such change, but by focusing on two dimensions—influence and directionality—it provides us with a sufficiently clear and parsimonious scheme to serve as a useful starting point.

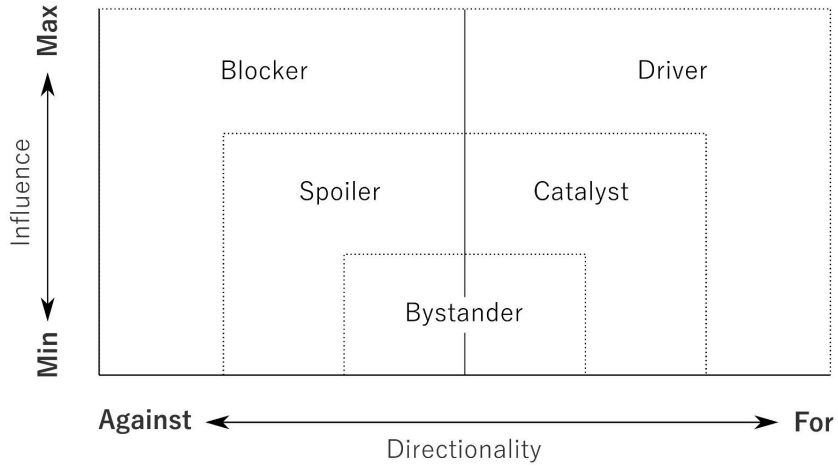

Figure 1: Five types of state roles in international legal change

What we are interested in with our typology is the cumulative impact of states on a given change process relative to that of other actors. We can, of course, not measure their exact influence, but the examples for such roles as laid out below demonstrate discernable patterns that promise to be applicable beyond the examples shown. While we theorize that these roles pertain to the influence of states *overall*, not individually, we take into account that different states will often occupy different individual roles in a given change process, especially where their views on the change attempt in question diverge. Some countries will also wield greater influence because of the power position they occupy or the diplomatic capital they expense in a particular instance. At times, states may act in unison—either because they adopt a collective role (as, for example, when they decide on a treaty in a multilateral forum) or because they converge around a certain change attempt, either in support or in rejection.

Such roles can vary over time. Especially when change processes unfold over a longer period, state roles may change, for example because an issue gains greater salience or because (some) states reassess their substantive position on a change attempt and decide to intervene. While we seek to capture primarily the overall influence of states on the change process as a whole, we

believe it is important to keep temporal variation in view, also in order to identify regularities regarding the stages in which states' interventions are particularly important or consequential.

For the purposes of our inquiry, we treat states as unitary entities. This is naturally reductionist and excludes from view the variations of actors operating within the state—variations that have become more visible as a consequence of scholarly moves to 'disaggregate' the state.[21] Yet it allows us to zoom in on a core distinction that structures the typical statist accounts briefly discussed above—that between actors that are able to act on behalf of a state (to commit the state, to form its practice, etc.,) and actors which, because they cannot claim such a mandate, are typically seen to be secondary. We can understand this distinction as treating the state as unitary not as a matter of fact but of ascription—the multiple actors operating as the state can do so because they all trace their authority back to an entity holding the monopoly over the legitimate use of symbolic violence, as Bourdieu might put it.[22]

It would indeed be interesting to systematically inquire into variation in influence also *among* different state actors and unpack 'the state' in this respect. Our main interest here, in contrast, is in querying the distinction from the other direction. We seek to establish the extent to which other actors have become so authoritative as to overtake the states' primacy. These other actors will often not be independent of states—some may be seen as private, but many of them are in one way or another "state-empowered", such as courts or organs of international organizations.[23] Yet they often operate away from direct state control and enjoy *de facto* authority beyond the limited mandates given to them by states.[24] These alternative authorities have traditionally been seen as relevant, but largely secondary actors when it comes to law-making processes.

States at the Helm

The first types we focus on, *drivers* and *blockers*, are most commonly associated with the image of states being at the centre of the international legal order. In these roles, states are at the helm of change processes—even if other actors may play a supporting role or influence the process, the interaction of states is key to understanding the outcome. This is clearest in treaty-making. Here, even in cases in which other actors—NGOs or expert bodies—play a significant role in the initiation of the process, the preparation of a text or the creation of alliances, it is only through the collective authority of signatory states that new law is created, and it is because of the blockage of (certain or all) states that treaties fail. The Paris Agreement, for all the important input from civil society and interest groups, only became law through the collective action of states.

Similarly, states may be the drivers of the less formalized processes around customary international law or the transformation of treaty terms through subsequent practice. The

[21] See, e.g., A.M. Slaughter, *A New World Order* (2004)

[22] P. Bourdieu, *Practical Reason: On the Theory of Action* (1998), at 33 See also P. Bourdieu, *On the State: Lectures at the Collège de France, 1989 - 1992* (2018)

[23] E.g., the state-empowered entities in focus in S. Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law', (2017) 55 *Columbia journal of transnational law* 343–394

[24] See, e.g., M. Barnett & M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004); A. Grigorescu, *The Ebb and Flow of Global Governance: Intergovernmentalism versus Nongovernmentalism in World Politics* (2020)

adjustment of the law of the sea in the wake of the Truman Proclamation,[25] or the reinterpretation of the requirement of 'concurring votes' in Security Council decision-making are cases in point.[26] The number of states actually driving these processes will often be limited, with other states intervening with varying intensity, some usually acting as bystanders.

In the classical image of international law, states are also the quintessential 'blockers' of change—when they reject a change attempt, that attempt will typically be frustrated. Think of the resistance of (especially Northern) states to the recognition of human rights obligations of transnational corporations as put forward by the UN Subcommission on the Promotion and Protection of Human Rights in 2003.[27] This resistance aborted the change process by preventing an endorsement by the Commission on Human Rights, yet it also drove movement away from formal international law into the area of non-binding norms, as expressed in the UN Guiding Principles adopted several years later.

Such a shift can occur also between different paths of change within international law. Recent literature shows that states managed to block inter-state processes of change through treaty-making or institutional statements in international trade and humanitarian law, but this did not signal the end of the respective change attempts—these proceeded instead in other forms (through expert bodies and quasi-judicial pronouncements) in which state resistance was less consequential.[28]

States Out of Center

The more interesting—and often ignored—roles are those in which states are not protagonists but rather supporting actors or mere spectators. If we look at actual cases of international legal change, we often find states in such roles played by not only weaker or more marginal states, but also powerful ones. Here we trace three types of such roles 'out of center'. In the next section, we shift the focus to the factors that lie behind the adoption of such roles.

On the opposite end of the spectrum from drivers and blockers lies the role of the *bystanders*—a role in which states exercise marginal influence on the process. Merely observing change processes driven by others—and thereby potentially "acquiescing"—is a frequent stance of many states, but we focus here on the collective influence of states. Indeed, states are sometimes observed to "cede some of their influence in lawmaking" in change processes dominated by other actors, for example, expert groups with codification efforts.[29] These have become especially important in international humanitarian law, with the International Committee of the Red Cross (ICRC) often centrally involved. Giovanni Mantilla traces the shift from state-driven to non-state

[25] D.C. Watt, 'First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945', (1979) 3 *Marine Policy* 211–224

[26] J. Klabbers, *An Introduction to International Institutional Law* (2009), at 209–11

[27] C.F. Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', (2003) 4 *German Law Journal* 1065–1080

[28] G. Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (2020); H.M. Kinsella & G. Mantilla, 'Contestation before Compliance: History, Politics, and Power in International Humanitarian Law', (2020) *International Studies Quarterly* 1–8; N. Lamp, 'Discord, Deference, Opportunism, and Pragmatism: How WTO Members Became Bystanders in the Development of WTO Law',

[29] Sivakumaran (2017)

law-making in this area. The ICRC's customary international law study is a case in point—here states were involved, but rather on the sidelines, and even in the final stage, criticism by some powerful states (especially the US) does not seem to have undermined the prominence and influence of the study as a restatement of IHL.[30] We can observe similar dynamics in human rights law, exemplified by Nina Reiners' work on the emergence of the human right to water.[31] Reiners explains how a coalition of non-state actors, composed of the members of a UN expert body and human rights activists, managed to construct an autonomous right to water and sanitation within the span of few years and with little state involvement. This construction caused many actors to shift their interpretation of the international bill of rights,[32] but it also provoked greater interest (and contestation) among states, with them shifting from bystanders to catalysts in the later stages of the process.

States are also regular bystanders in some areas in which international courts have acquired centrality: in European human rights law, the state of the law is largely determined by the European Court of Human Rights, and though the Court takes developments in the domestic law of state parties into account, its evolutive interpretation typically does not require states to have voiced a position on their understanding of the European Convention.[33] A good example is the development of states' positive obligations to protect the physical integrity of individuals, which despite being solely a judicial innovation significantly widened the scope of obligations imposed on states.[34] By the same token, the criminalization of rape as a weapon of war is the legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR).[35]

Between the poles of drivers and bystanders lie roles—*catalysts* and *spoilers*—which allow states to influence change processes in a significant way, but largely alongside other actors and without being able to control the outcome. In most such cases, change is centrally propelled on a non-state path and finds a significant amount of acceptance but its full consolidation is conditioned by state support or rejection. This dynamic is well visible in Reiners' study in which the emergence of a right to water and sanitation, initially engineered by civil society actors and UN experts, became consolidated as a result of approval in the UN General Assembly (albeit initially with many abstentions) and the UN Human Rights Council. The change process in this case would not have occurred in the same way and with the same degree of conclusiveness

[30] See also Mantilla, Lawmaking under Pressure (2020); *Saying Authoritatively What International Humanitarian Law Is: On the Interpretations and Law-Ascertainments of the International Committee of the Red Cross* (2020)

[31] N. Reiners, *Transnational Lawmaking Coalitions for Human Rights* (2021); N. Reiners, 'Despite or Because of Contestation? How Water Became a Human Right', (2021) 43 *Human rights quarterly* 329–343

[32] M. Baer, *Stemming the Tide: Human Rights and Water Policy in a Neoliberal World* (2017)

[33] L.R. Helfer & E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', (2014) 68 *International Organization* 77–110; E. Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights', (2020) 31 *European Journal of International Law* 73–99

[34] E. Yildiz, *Between Forbearance and Audacity: The European Court of Human Rights and the Norm Against Torture* (2023)

[35] A. Adams, 'The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape', (2018) 29 *European Journal of International Law* 749–769

without the involvement of states, but states were merely catalysts and far from controlling the process.[36]

A similar story could be told of the work of the ILC, especially in the Articles on State Responsibility which were widely received well before the General Assembly took note and "commend[ed] them to the attention of Governments."[37] The criminalization of war crimes in non-international armed conflicts is another illustrative example—here the International Criminal Tribunal for the former Yugoslavia played the central role, and states supported the process first through action in the Security Council, then through involvement in the proceedings before the Tribunal, and finally through the recognition of change in the Rome Statute of the International Criminal Court. States—not all, but some states—were influential in the process, especially at the end, but a large part of the change was due to judges and their broader audience of scholars, activists and other judges.[38]

On the other hand, states can also be *spoilers* in processes primarily propelled by other actors. Rather than enhancing the consolidation of change, they counteract it and thus leave the results of the process in doubt without, however, being able to block it. An example is the shift in subsidies rules at the World Trade Organization. Here, the WTO Appellate Body revised the understanding of what constitutes 'a public body'—a central term for determining the reach of subsidy disciplines—so as to limit its application in economies with strong state control. The US and a number of other states were heavily critical of this shift, but it was nevertheless recognized as the state of the law in the following years. The criticism did, however, keep it from fully consolidating, generating further room for maneuver to panels and the Appellate Body later on.[39] Likewise, state criticism of the ICRC attempt to codify rules on the 'direct participation in hostilities' in IHL—especially important in conflicts involving non-state actors—contributed to limiting, or at least delaying, the consolidation of the ICRC approach. Still, the latter continues to represent an important reference point in the legal debate on the issue.[40]

While these examples concern primarily challenges by groups of states, we can also observe instances of broader collective spoiling, though perhaps less frequently—in part because collective resistance is more likely to succeed in blocking a change attempt rather than merely destabilizing it. Examples of collective spoiling come especially from instances in which states mobilize in one forum against developments in another, thus generating irritation but not controlling change.[41] The Biosafety Protocol is a case in point: born in an environmental context and emphasizing precaution, it represented a rejection by many states of the restrictive approach to precautionary considerations in the regulation of genetically-modified organisms that had

[36] Reiners (2021); Reiners (2021)

[37] UN GA Res 56/83, 28 January 2002.

[38] See E. Yildiz & N. Krisch, 'Authority Matters: Structures of Norm Change in International Politics', *manuscript*

[39] D. Ahn, 'Why Reform Is Needed: WTO 'Public Body' Jurisprudence', (2021) 12 *Global Policy* 61–70; N. Krisch, 'The Dynamics of International Law Redux', (2021) 74 *Current Legal Problems* 269–297

[40] D. Endres, 'Direct Participation in Hostilities', in *P. Martinez Esponda, D. Endres and E. Yildiz, Paths of International Legal Change: Case Studies* (forthcoming),

[41] See also N. Krisch et al, 'Order at the Margins: The Legal Construction of Interface Conflicts over Time', (2020) 9 *Global Constitutionalism* 343–363

come to prevail in WTO jurisprudence.[42] Though the Protocol did not manage to undo the WTO approach, it helped to destabilize it, and later WTO jurisprudence was more cautious than the earlier trend.[43] Such forms of influence may become more frequent in today's complex and fragmented international legal order, but they may also mean that states seeking influence have to do so indirectly, coming sideways to developments driven by others.

4. Why out of Centre? Factors behind State Roles

What accounts for the different roles states are cast in? The shape and success of change processes result from a variety of factors, not the least geopolitical structures, power constellations, and ideational frames.[44] Here is not the place to trace them all, nor do we inquire into the factors that drive states' positions in favour or against certain change attempts. Questions of public choice, electoral politics, ideological currents, and many more would play into these questions. Here we are interested instead, more narrowly, in the *process* of change—in how such exogenous factors translate into law, how they are processed, and what factors facilitate or hinder state influence in this regard.

On the basis of existing scholarship and our own case studies, some aspects appear to stand out. Some of these obviously concern individual-level factors: in order to influence how change happens, a state (or a coalition of states) needs sufficient political capital and it needs to be willing to use it for or against a particular cause.[45] Some actors, such as the US and European countries, tend to be more actively and consequentially involved, due to their power and wealth as well as their international legal capacity and their willingness to exercise influence on a broad range of issues.[46]

Yet the roles of states are not just, and perhaps not even primarily, determined by such individual-level factors. States are the 'masters' of international law primarily in the collective—the entire international community holds authority over customary international law, and the collective of parties over treaties. The ability to act collectively is thus likely to play an important part. But we also need to look beyond actors to the structures in which they are embedded—if we take the sociological frame discussed above seriously, we need to pay attention to the ways in which actors are positioned and conditioned, and the potential variation across different contexts in this respect. Here we focus in particular on authority structures—i.e., actors, institutions, or texts that enjoy authority in determining the meaning and scope of norms and understandings.[47]

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[42] N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010)

[43] S. Lieberman & T. Gray, 'The World Trade Organization's Report on the EU's Moratorium on Biotech Products: The Wisdom of the US Challenge to the EU in the WTO', (2008) 8 *Global Environmental Politics* 33–52; M.A. Pollack & G.C. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (2009)

[44] For an elaboration see N. Krisch & Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame', in N. Krisch & E. Yildiz (ed.), *The Many Paths of Change in International Law* (Forthcoming)

[45] Diehl & Ku (2010); Sandholtz & Stiles (2008)

[46] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (2020); G.J. Ikenberry, 'Liberalism and Empire: Logics of Order in the American Unipolar Age', (2004) 30 *Review of International Studies* 609–630; D.F. Vagts, 'Hegemonic International Law', (2001) 95 *American Journal of International Law* 843–848

[47] Yildiz and Krisch, 'Authority Matters: Structures of Norm Change in International Politics'.

Other, less central factors are likely to play a role in conditioning state roles as well. Actors other than states may, for example, be more successful in their change attempts when they build them on existing understandings, i.e., 'norm adjacency'.[48] The more change can be presented as based on existing norms, especially as a mere restatement of existing law, the easier it will be for epistemic authorities to find recognition and assume leading roles. Likewise, such attempts are likely to flourish more easily in moments of opening, especially extreme ones, such as critical junctures.[49] In a situation of crisis with a widely perceived need for action, opportunities for change generally increase, and so it will also be easier for an authority to define the path of international legal change. Yet these factors are likely to be relevant more generally for change attempts, even those driven by states. While these cross-cutting factors may give clues about the likelihood of change and its rate of success, the variation in state roles is largely determined by the following two conditions.

Collective Action (In)Capacity

If states act collectively in favour or against a certain change attempt, they are typically able to decisively influence the process. Our examples for states as drivers or blockers reflect a collective engagement of all or at least a substantial number of states. Yet collective action of almost two-hundred states (or a large part of them) faces high hurdles.[50] In a diverse international society, agreement is difficult to achieve under any circumstances, and it is more so today in a multipolar world in which common values are elusive, 'liberalism' is no longer a shared frame, and thinking in terms of relative gains and zero-sum games is increasingly hampering inter-state cooperation.

On many issues, we will thus find divergences among states that make a collective stance elusive, and many observers have thus diagnosed 'gridlock' as a common outcome across many fields of international politics.[51] This problem is exacerbated when the stakes are high on a given issue—it is then usually harder for states to reach an agreement, be it on new treaty provisions or a common position in more informal contexts. Take the situation in the WTO since the beginning of the Doha Round. As Nicolas Lamp shows, not only have states been largely unable to formulate new agreements or amendments to existing ones, but they have also failed or refrained from defining common positions on contested issues of legal interpretation in world trade law.[52] Likewise, as Giovanni Mantilla shows, discrepancies among states on the laws of war since the adoption of the Additional Protocols have been so deep as to render new law-making through treaties largely illusory.[53] However, treaty fatigue goes well beyond these areas—a stagnation and decline in the creation of new multilateral treaties have been observed for some time now,[54] and the same dynamics are likely to affect the creation of new customary rules as well.

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[48] Finnemore & Sikkink (1998)

[49] See G. Capoccia & R.D. Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism', (2007) 59 *World Politics* 341–369

[50] See, e.g., T. Sandler, *Global Collective Action* (2004)

[51] See, e.g., T. Hale et al, *Gridlock: Why Global Cooperation Is Failing When We Need It Most* (2013)

[52] Lamp

[53] G. Mantilla, 'From Treaty to (Claims about) Custom: Shifting Paths in the Recent Development of International Humanitarian Law',

[54] J. Pauwelyn et al, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', (2014) 25 *European Journal of International Law* 733–763; N. Krisch, 'The Decay of

If divergence poses the most common problem for collective action, indifference poses another, often equally serious one. Finding a common position through negotiating and bargaining is a costly enterprise,[55] and states are likely to engage these costs only if they have sufficient stakes in them. When issues have limited salience, states may not want to spend resources on the diplomatic processes necessary to generate commonality.

As a result of either divergence or indifference, states in the collective may fail to turn into drivers of change. The traditional image of a statist international law suggests that under such circumstances change attempts would be frustrated, at least as a matter of binding rules. Yet scholars of historical institutionalism would expect that change blocked inside an institution might be pursued elsewhere if other suitable sites exist.[56] Observers do indeed point to such a shift in international law—especially one towards non-binding agreements and regulation or to unilateral regulation by individual states (or groups of states).[57] The trajectory of the emerging field of business and human rights is a good example—when the recognition of corporate human rights obligations was frustrated by Northern resistance, action shifted towards softer forms—the UN Guiding Principles—and domestic fora, including both litigation and legislation.[58] Moreover, the potential gains of alternative options—such as greater flexibility and lower sovereignty costs—are likely to influence states' decisions as to whether they are ready to incur the costs of effectively engaging (collectively) in international legal change.

Yet action *outside* international law is not the only possible alternative route—the blockage of traditional forms of law-making can also push actors to find other paths *within* international law. In the WTO context, many countries found the dispute settlement system an amenable, albeit not always predictable, alternative to protracted negotiations, thus shifting the weights from state-driven to quasi-judicial processes. Actors other than states also gained opportunities from the lack of collective action by states. As Mantilla's contribution shows vividly, in the context of international humanitarian law disagreement among states drove the ICRC away from a focus on new treaties or protocols toward an exploration of other tools, especially to restatements and commentaries, thus pushing states into less central roles.[59] Indifference can have similar consequences. Reiners traces this in the context of the emergence of the human right to water in which there was little state interest in the beginning, with states adopting largely a bystander

Consent: International Law in an Age of Global Public Goods', (2014) 108 *The American Journal of International Law* 1–40

[55] K.W. Ramsay, 'Cheap Talk Diplomacy, Voluntary Negotiations, and Variable Bargaining Power', (2011) 55 *International Studies Quarterly* 1003–1023

[56] J. Mahoney & K. Thelen, 'A Theory of Gradual Institutional Change', in J. Mahoney & K. Thelen (ed.), *Explaining Institutional Change: Ambiguity, Agency, and Power* (2010), 1; O. Fioretos, 'Historical Institutionalism in International Relations', (2011) 65 *International Organization* 367–399; Capoccia & Kelemen (2007)

[57] Krisch (2014); Pauwelyn et al, When Structures Become Shackles (2014); C.B. Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance Are Shifting, and Why It Matters* (2020); O. Westerwinter et al, 'Informal Governance in World Politics', (2021) 16 *The Review of International Organizations* 1–27

[58] J.G. Ruggie, 'The social construction of the UN Guiding Principles on Business and Human Rights', in S. Deva & D. Birchall (ed.), *Research Handbook on Human Rights and Business* (2020), 63

[59] Mantilla

role.[60] Activists used this space to approach (and then collaborate with) a UN expert body, the Committee on Economic, Social and Cultural Rights, whose General Comment became the central reference point in the change process—leaving only less central roles to states that sought to intervene later.

Alternative Authorities

As the examples suggest, the space opened up in the absence of collective action is not in itself sufficient for states to assume roles other than drivers or blockers in international legal change processes. Normally, inaction of or disagreement among states is likely to frustrate change attempts; alternative paths only open up if actors other than states are able or willing to assume central roles in the change process.

A crucial factor that facilitates the opening of such paths, therefore, is the existence of alternative authorities in the area in which change is sought. Authority—as the recognized ability to induce deference among actors[61]—is socially produced and can vest in public as well as private actors and institutions; it is part of the configuration of the social field in which international law operates. The importance of authority in the international realm has recently found increasing attention—the rise of authority has even been described as a 'system change' in world politics.[62] In the legal sphere, authority takes a particular form—it can come as 'political' authority to make new law or as 'epistemic' authority to identify existing law.[63] As the former is largely seen to be vested in states (and rarely international organizations), much non-state authority relevant for change processes comes in an epistemic guise. Yet the existence and strength of such authority vary heavily across issue areas and geographical and institutional contexts. In some fields, there is a clear, focal authority to speak the law—the European Court of Human Rights is one example, the WTO Appellate Body used to be another.[64] In other fields, authority is still significant but weaker, as in the ICRC for humanitarian law or UNHCR for international refugee law—these institutions may be able to set reference points in legal discourse that other actors find difficult to ignore.[65] This may even be true for private expert bodies, such as the Institut de droit international, or other groups engaging in restatements of the law on the basis of particular expertise.[66] In some areas, authority is also heavily dispersed, as in the universal human rights

[60] N. Reiners, 'The States-as-Bystanders Effect in Human Rights Law',

[61] R. Friedman, 'On the Concept of Authority in Political Philosophy.', in J. Raz (ed.), *Authority* (1990), 56

[62] D.A. Lake, 'Rightful Rules: Authority, Order, and the Foundations of Global Governance', (2010) 54 *International Studies Quarterly* 587–613; O.J. Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (2015); N. Krisch, 'Liquid Authority in Global Governance', (2017) 9 *International Theory* 237–260; M. Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (2018)

[63] See also F. Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law', (2018) 9 *Journal of International Dispute Settlement* 291–314

[64] See M. 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* 141–178; G. Shaffer et al, 'The Extensive (but Fragile) Authority of the WTO Appellate Body', (2016) *Law & Contemporary Problems* 237–273

[65] See I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), paragraph III

[66] W. Werner, 'The Making of Lawmaking: The ILC Draft Conclusions on the Identification of Customary Law', in *The Many Paths of Change in International Law*

field, where no one, central institution exists but expert bodies, international political institutions and regional courts all have a relevant place.

If little or no such alternative authority exists—or is created—in a given field, state inaction will frustrate change attempts. Yet if it does exist or can be created, the space left by state indifference or disagreement may allow change attempts to be channelled through those authorities. The fate of these attempts will then hinge, to a significant extent, on the receptiveness of the authority (or authorities) in question. How consequential the construction of change by an authority is will then depend, to a large extent, on the strength and focality of that authority. If the European Court of Human Rights takes up a particular cause, this will often settle the matter (unless states mobilize effectively against it, but this requires a major effort, as the history of the Brighton Declaration shows[67]).[68]

Where authority is less strong and focal, states may retain an important, though not a central, role. As we see in Reiners' article, a positive statement by a UN expert body such as the Committee on Economic, Social and Cultural Rights could have significant effects on many actors.[69] Yet, in order to fully consolidate, the change proposal required further uptake by other authorities and states. Such efforts can also be derailed if uptake does not take place or if other authorities or a sufficient number of states push back.[70] In such cases, states remain in secondary roles—catalysts, spoilers, or even bystanders—unless they can mobilize collectively to regain control of the process. The actions of an alternative authority may also facilitate or even trigger such mobilization, as in change attempts that are seen to go too far, leading to politicization and, potentially, backlash.[71] The initiation of collective reform processes in investment arbitration, for example in UNCITRAL, can be seen in this vein as a response to a widely perceived overreach of investment tribunals.[72] Yet the collective action problems of such attempts to regain control will often render their success elusive.[73]

In this sense, the two factors presented here are not independent, and they may vary over time. Alternative authorities' statements can trigger fresh collective action in response, but they may also—as suggested in the previous sub-section—make it easier for states to remain inactive when they promise more favourable (or less costly) outcomes. The interaction between the two

[67] On the Declaration and its consequences, see M.R. Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?', (2017) 9 *Journal of International Dispute Settlement* 199–222

[68] See, e.g., Yildiz (2023)

[69] Reiners

[70] See also Baer, Stemming the Tide (2017)

[71] Zürn, Binder and Ecker-Ehrhardt, 'International Authority and Its Politicization', 4 *International Theory* (2012) 69; Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 197; Alter and Zürn, 'Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison:', *The British Journal of Politics and International Relations* (2020)

[72] M. Langford et al, 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction', (2020) 21 *The Journal of World Investment & Trade* 167–187

[73] But see also the tools identified by A. Roberts & T.S. John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty Systepm', (2022) 116 *American Journal of International Law* 96–149 The situation is different where, as in the case of the WTO Appellate Body, a single country has tools to thwart non-state authority.

factors can also go the other way—prolonged inaction by states on a given issue may also allow alternative authorities to assume a more central role, which, in turn, might help them to establish greater authority. The WTO Appellate Body, for example, may have remained in a more limited role had it not been for the unwillingness of states to develop international economic law, and the same might be said of the ICRC for humanitarian law. Space left by states facilitates the emergence and growth of non-state authority, just as the existence and exercise of non-state authority may change the attitude of states, either in favour of inaction, support, or pushback.

5. Implications: International Law in a Fractured World

Our approach and ideal-type typology are suggestive, not conclusive. Solely based on the material we present here we cannot easily generalize or draw conclusions as to the breadth or frequency of occasions in which states appear in secondary roles. Yet the cases we study in greater depth are important in and of themselves, and there are many more that suggest that we are not dealing with isolated instances but rather a broader picture. In an ongoing project, we identify similar patterns. In more than half of the 25 cases we analyzed in-depth,[74] we found change attempts to be dominantly processed and realized on alternative paths, with state-led paths enjoying sole dominance only in 20 percent of cases.[75] Moreover, both group of change attempts had similar success rates, suggesting that in many contexts change in international law can come about with limited engagement from states.

This picture, if confirmed by further empirical evidence, challenges typical understandings of change processes in international law, but it also points, we believe, to potential broader lessons about the place of international law in today's world. More than before, and very much in contrast to the sentiment of the 1990s, the current international order has left behind notions of 'liberal' consensus and community. It is instead seen to be fractured, with multilateralism under challenge, and characterized by distrust and tension between major powers and fragmented yet blurry spheres of power and authority, between East and West, North and South, and public and private actors.[76]

The prospects of international law in such a world—perhaps even more so than in the 'divided world' of the Cold War[77]—are limited. As mentioned before, the scope for agreement is narrow, treaty-making has stagnated, and cooperation on the global level has become increasingly

[74] On the basis of a review of established textbooks, we selected four cases from General International Law, and three cases from each of the seven following fields: Human Rights, IHL, ICL, Environment, Trade, Investment, and Law of the Sea. The change processes in these cases mostly took place over the past forty years. See P. Martinez Esponda et al, *Paths of Change in International Law: Case Studies* (forthcoming)

[75] State-led paths comprise *state action* (i.e., change through modification of state behaviour) and *multilateral* (i.e., change generated through statements issued by many states). In contrast, the alternative pathways involve *judicial* (i.e., change as a result of rulings of courts and quasi-judicial bodies), *bureaucratic* (i.e., change through texts produced by actors within organizations), and *private authority* (i.e., change via statements or reports by recognized authorities in a personal capacity). See also Krisch & Ezgi Yildiz (Forthcoming)

[76] See, e.g., A. Acharya, 'After Liberal Hegemony: The Advent of a Multiplex World Order', (2017) 31 *Ethics & International Affairs* 271–285; M. Eilstrup-Sangiovanni & S.C. Hofmann, 'Of the Contemporary Global Order, Crisis, and Change', (2020) 27 *Journal of European Public Policy* 1077–1089

[77] A. Cassese, *International Law in a Divided World* (1986)

cumbersome. The hegemonic phase of international law, especially during the last decade of the 20th century, appears in retrospect as one of exceptional blossoming and growth—quite in line with the insight that stability and the provision of public goods in the international order are far more easily achieved in the presence of a hegemonic power.[78] The international law of governance, and even that of cooperation—rather than that of mere coexistence[79]—might be more difficult to sustain under such circumstances, at least when it comes to the universal level, and much action might move towards informal tools and fora rather than binding international law, as pointed to above.[80]

Yet the insights gained in this paper suggest that the picture may not be quite as grim. Quite apart from the continuing possibilities of cooperation even between ideologically distant states, our findings suggest that international law might continue to develop even in the shadow of friction and disagreement—largely because change can travel on other paths that are less dependent on state involvement. We see this here in examples in trade, humanitarian and human rights law but we may observe similar dynamics in other areas, such as the law of the sea, the law of international organizations, or international criminal law.[81]

This points to an international legal order with a certain 'autonomy' from its political environment[82]—a semi-autonomy which, however, is bound to depend on the strength and degree of consolidation of non-state authority that can interfere and shape change processes in a given context. Where such authority is weak or dispersed, successful change will typically depend on state support and might thus not come about in the face of friction or disagreement. Yet, where such authority is settled, it may channel change attempts and confer recognition even in the absence of backing from states.[83] As we have seen in the previous section, such recognition might be easier if change is circumscribed and represents merely gradual steps from previous positions—even for relatively settled authorities, further-reaching change is likely to face obstacles unless it meets with a positive reception from states. Overreach runs the risk of counterreactions—ranging from rejection to backlash—from individual states or groups of them. In the extreme, as emerges from examples such as the SADC Tribunal or the WTO Appellate Body, such reactions can endanger the position, powers, and even survival of an institution.[84]

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[78] See Kindleberger, Charles P., 'Dominance and Leadership in the International Economy', (1981) 25 *International Studies Quarterly* 242–254

[79] See J.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547–562

[80] See *supra* note 57.

[81] A. Boyle, 'Further Development of The Law of The Sea Convention: Mechanisms for Change', (2005) 54 *International & Comparative Law Quarterly* 563–584; J. Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations', (2013) 38 *Yale Journal of International Law* 289–358; N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (2014)

[82] See also I. Venzke, 'The Path not Taken: On Legal Change and its Context', in N. Krisch & E. Yildiz (ed.), *The Many Paths of International Law* (forthcoming),

[83] See also J. Kucik & S. Puig, 'The Appellate Body's Judicial Pathway: Precedent, Resistance and Adaptation', in N. Krisch & E. Yildiz (ed.), *The Many Paths of Change in International Law*

[84] See K.J. Alter et al, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', (2016) 27 *European Journal of International Law* 293–328

This image—of change processes with authorities of different strengths and varying degrees of recognition and reception of a given change proposal—is more complex than typical depictions of change in international law. In particular, it is an image with many shades of grey, quite in contrast with the binary distinctions so typical in legal discourse. Throughout this article, many of the change processes in view did not result in entirely clear-cut positions, and this reflects much broader observations about the course of contemporary international law. While legal argument operates with a binary code, participants in legal discourses are all too aware of the fact that some arguments carry greater, others lesser weight, that the state of the law is often undetermined, and that change may remain somewhat contested.[85] This is exacerbated by the increasing involvement of authorities other than states whose position as law-makers is often unsettled, and by the widespread use of informal instruments—from guiding principles to restatements or 'conclusions'—to effect legal change. If this coincides with structural discrepancies between states, as can be expected in a more multipolar order, we may often be confronted with change processes that are too far advanced to be ignored and yet not sufficiently widely recognized (or indeed too contested) to count as consolidated.

If we start from an understanding of law as a process,[86] this situation is rather unexceptional —the legal process simply generates greater or lesser certainty at different points in time. From a perspective of law as rules, we will often find greater skepticism. In international legal circles, Prosper Weil's critique of 'relative normativity' continues to resonate with many, and it certainly points to problems law-appliers encounter when trying to come to binary conclusions about the state of the law.[87] Theoretically, though, the problem is less grave—scholars like Scott Shapiro acknowledge that "legality itself is not a binary property but also comes in degrees" and move on.[88]

Shades of grey are bound to multiply with the diversification of authorities and paths of change. This may be difficult to capture for judicial authorities in particular, even if these, too, have found ways of pointing to the 'emerging' character of norms such as the precautionary principle, conferring it some weight even if it remains below ordinary thresholds of law-making.[89] In a global order fragmented along various lines—issue areas, institutions, geographies—international legal change will often fall short of being universally recognized and might thus be held in abeyance.[90] Law might thus often fall short of full consolidation, becoming 'liquid' instead,[91] and with varying degrees of acceptance among different audiences. A jurisprudence based on social practice will have to take into account the pervasiveness of this phenomenon as a

[85] See, e.g., Venzke, How Interpretation Makes International Law (2012)

[86] S. F. Moore, *Law as Process: An Anthropological Approach* (2000); on international law, see R. Higgins, *Problems and Process: International Law and How We Use It* (1995].

[87] P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 *The American Journal of International Law* 413–442

[88] S. Shapiro, *Legality* (2011), at 224

[89] See, e.g., ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 47§ 134.

[90] See D. Endres, 'Whose International Law is Changing? – The Practice of Fragmented Communities Constructing Legal Change', in N. Krisch & E. Yildiz (ed.), *The Many Paths of International Law* (forthcoming),

[91] See Krisch (2017)

common way of doing law. The likely result is a more complex and contested picture and this raises interesting questions regarding the effectiveness of international legal rules. Yet it also appears as an order that is more dynamic than we might expect in the face of a contested, even fractured global environment.

7. Conclusion

Change in international law is not uniform across issue areas and institutional contexts. States play different roles in these contexts—sometimes central ones as drivers or blockers, sometimes secondary ones as catalysts, spoilers, or mere bystanders—and this suggests that the typical image of a statist international law ought to be rectified. Other actors, such as courts, international organizations, expert bodies, scholars, etc., play a significant role not only as participants or subjects of international law, but also as central actors. In many instances, it is them driving change in international law – especially when states are unable to act collectively and alternative authorities are present in a given field.

Our endeavour in this paper has been focused on understanding the shape of change processes, rather than the ultimate causes of change itself. These may lie in the changing domestic politics of certain states—as, for example, in rising pressure on governments from companies keen on more favourable rules. They may lie in shifting power constellations among states, and in ideological transformations, as in the liberal turn (in both economic and political terms) in the 1990s. Such contextual changes may find an easier way into international law through the less statist paths we have traced here—NGOs may find UN expert committees more open to their concerns than inter-state fora, companies will value their direct access to investment tribunals, and environmental issues have recently found a favourable audience in some domestic (and international) courts. International organizations have opened up increasingly to private participation[92] and are thus likely to be more directly responsive to concerns beyond those raised and pushed by states. Yet our insights about the politics of the many institutions involved in legal change are still too limited to allow for a broader account of how the shifts in the process of legal change affect the link between causes and outcomes.

With this article, we do not take a stance as to the desirability of such change processes. Change may appear as good or bad, often depending on one's normative perspective. For long, much change has gone into liberal and economically neoliberal directions, while over the past decade many change attempts pursue opposite directions, seeking to turn back human rights protections and create space for a stronger role of the state in markets.[93] International law needs a certain degree of adaptability to its political and social context as it is unlikely to play an effective role if it is too far removed from them. On the other hand, it also needs a certain distance from them as it otherwise loses its normative pull. As it oscillates between these poles,[94] it would be

[92] J. Tallberg et al., *The Opening up of International Organizations: Transnational Access in Global Governance* (2013); Grigorescu, *supra* note 31.

[93] See, e.g., W. Sandholtz, 'Resurgent Authoritarianism, Rights, and Legal Change', in N. Krisch & E. Yildiz (ed.), *Many Paths of Change in International Law* ; N. Kiderlin, 'World Trade Law and the Rise of China: Struggles over Subsidy Rules', in N. Krisch & E. Yildiz (ed.), *The Many Paths of Change in International Law* (2023),

[94] See also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005)

interesting to try to define where, normatively, the right line between stability and flexibility ought to be drawn and what role states ought to play in change processes. We do not undertake this task here, but it is an important next step.

The insights about the varying roles of states should thus spur a wide-ranging program for future research. We need more systematic inquiries into what roles states ought to occupy, how and why their roles vary, how this variation affects outcomes, and how it is processed in legal discourse—for example, regarding the extent to which the liquid, less consolidated forms of law we have diagnosed find broader recognition and reflection in practice. This may eventually change our approach to law also from a doctrinal standpoint.[95] With this paper, we hope to have made a step towards a richer account of the 'course of international law'.

[95] See Krisch (2021) , page 293–296