1
The Many Paths of Change in International Law

A Frame

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1. Introduction

International politics is in constant flux. States' interests, status, and power are shifting; norms governing appropriate behaviour are getting stronger or weaker, emerging or decaying, or changing complexion and content. It is stability, rather than mutability, that requires an explanation in politics. International law, on the other hand, appears much less fluid. While it will often reflect the shifting political constellations of its time to some extent, it is not merely the mirror image of politics, nor does it track political change immediately or in its entirety. Some changes in politics will make a quick impact, some a much slower one, and yet some will fail to leave a mark on the law.

How and when political change translates into new (interpretations of) international legal rules is not well understood so far. Existing approaches portray legal change as a result of power constellations, of the properties of the norms at issue, or as a phenomenon that depends on a new confluence of state interests. But they can hardly account for the dynamic, and varied, picture that emerges when we look at change processes in different areas of international law. Moreover, most approaches focus on treaties, but treaty-making faces a high threshold, and major new agreements are few and far between. Instead, the more frequent forms of change through reinterpretation or shifts in customary rules tend to remain out of view, but it is through these that many broader transformations find reflection in the international legal order.

This volume seeks to take us closer to an understanding of how change happens in international law, and consequently of the factors that facilitate or hinder the reception of political transformations in the international legal order. In this,

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it places particular emphasis on the different pathways through which change occurs and the authorities that play a central role situated on each of these pathways. These vary across issue-areas and institutional contexts, and they are subject to change and transformation themselves. Without properly accounting for these pathways—and the social and political dynamics associated with them—we cannot begin to build a broader, more systematic account of the ways in which change processes unfold.

In this introduction, we seek to set the scene for this inquiry by clarifying core concepts and developing an instrumentarium that helps us structure the analysis of change processes in international law. We begin by taking stock of some of the key attempts at understanding international legal change in the past, focusing on recent scholarship at the intersection between international law and international relations (section 2). Addressing the shortcomings of these attempts, we build an ideal-typical model of the stages and pathways of change processes in the international legal order (section 3). Starting from a micro-level, focusing on the actors initiating, processing, and receiving attempts at changing international legal rules, we then zoom out again to develop conjectures about the factors that condition the speed, ease, and success of change processes (section 4). Understanding these conditions can help us to account for the significant variation across the different fields of international law. We then use this framework to introduce and situate the contributions to this volume and their findings with a view to developing the contours of a bigger picture of international legal change (section 5).

The picture that emerges from this endeavour is one of change processes in multiple sites, at different speeds, and involving diverse actors—and with a significant variation across the different areas of international law. It is a picture not of revolution but of polycentric reform efforts, but nevertheless, one that, we hope, will give us a clearer understanding of the dynamics of, and forces behind, much consequential change—and that will help us to better appreciate the complex politics of international law.

2. Change and Stasis in International Law

The question of change is central to international law—even more so than in other legal orders because of a lack of legislative mechanisms that would allow adapting legal rules to changing circumstances—and it has accordingly been of concern to international lawyers for centuries. The issue became particularly salient in the early twentieth century when calls for the 'peaceful change' of treaties (often concluded in highly unequal relations) gained political strength, and the absence of an international legislature was widely lamented.[1] Hersch Lauterpacht devoted a large

[1] Sir John Fischer Williams, *International Change and International Peace* (OUP, H Milford 1932).

part of his seminal work on 'The Function of Law in the International Community' to the issue, yet just as many lawyers before and after, his treatment of the question focused particularly on the doctrinal categories through which change could be rationalized, such as the '*clausula rebus sic stantibus*' or the notion of '*abus de droit*'.[2] Tellingly, though, he pointed to the relatively limited extent of the problem in international, as opposed to domestic, law. In his assessment, international law at the time was 'more static than any other law not only because of the absence of an international legislature, but principally because it regulate[d] relations which are not in themselves liable to be affected in a decisive manner by economic and other changes'. He concluded that '[o]nly 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—only then will it be possible to speak of a constant flux of changes necessitating legislative remedies'.[3]

The question continued to be discussed during the Cold War,[4] but it has been the turn to an international law of 'governance', with a significant impact on domestic politics in many areas,[5] that has—as foreseen by Lauterpacht—brought the problem to the fore with yet greater urgency. Many have pointed to the structural difficulties of bringing about effective regulation on issues of global concern, such as climate change,[6] and to the limits on adapting existing international law to changing political views, as in the case of world trade law for environmental and development concerns, or in investment law for concerns about domestic regulation in the public interest.[7] Many of these limits derive from the high hurdles for change through the traditional categories of international law. Treaties require the consent of the parties to begin with, and usually the agreement of all parties is seen as necessary for their adaptation through 'subsequent practice'. And customary international law requires, according to standard doctrine, a widespread and uniform practice of nearly all states.

While these difficulties may have led actors to seek solutions outside the formal international legal order,[8] there are also indications that they have led to adaptations of the traditionally rigid ways of making formal law. This is especially the

[2] Hersch Lauterpacht, *The Function of Law in the International Community* (2nd edn, OUP 2011).

[3] ibid 257–58.

[4] Antonio Cassese and Joseph HH Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988).

[5] Joseph HH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 547.

[6] David G Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (CUP 2011); Thomas Hale, David Held, and Kevin Young, *Gridlock: Why Global Cooperation Is Failing When We Need It Most* (Polity 2013).

[7] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2011); Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

[8] Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 American Journal of International Law 1.

case in a number of specialized issue-areas, such as (international) environmental law, human rights law, humanitarian law, criminal law, or the law of international organizations.[9] Tendencies towards a more dynamic approach to legal change have also been observed in core areas of general international law, such as state responsibility,[10] the law on the use of force,[11] or customary law,[12] typically with particular attention to the influence of international institutions on the development of international law.[13] Most existing accounts remain, however, limited to particular contexts and issues,[14] and many are driven by normative precommitments in favour of particular mechanisms for (or limitations to) change.[15] Moreover, observed differences in perceptions about the applicable secondary rules among actors have not been taken up systematically.[16] The greater dynamism visible in some areas is then often treated as exceptional, also because it tends to be contested on normative grounds.[17] Broader attempts at restating the norms of international legal change—especially in the United Nations (UN) International Law Commission (ILC)—tend to return to traditional conceptualizations of subsequent practice or customary law.[18]

[9] Monica Hakimi, 'Secondary Human Rights Law' (2009) 34 Yale Journal of International Law 596; Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale Journal of International Law 289; Alexander Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change* (Herbert Utz Verlag 2015); Yuval Shany, 'Sources and the Enforcement of International Law: What Norms Do International Law-Enforcement Bodies Actually Invoke?' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017); Jutta Brunnée, 'Sources of International Environmental Law: Interactional Law' in Besson and d'Aspremont (eds), The Oxford Handbook of the Sources of International Law; Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71 Current Legal Problems 119.

[10] James Crawford, 'The International Court of Justice and the Law of State Responsibility' in CJ Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013).

[11] Monica Hakimi and Jacob Katz Cogan, 'The Two Codes on the Use of Force' (2016) 27 European Journal of International Law 257.

[12] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' [2001] American Journal of International Law 757; Niels Petersen, 'Der Wandel des Ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung' (2008) 46 Archiv des Völkerrechts 502; Curtis A Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016).

[13] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012).

[14] For exceptions, see Michael P Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2013); Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013).

[15] See eg Rebecca Crootof, 'Change Without Consent: How Customary International Law Modifies Treaties' (2016) 41 Yale Journal of International Law.

[16] Hakimi and Cogan (n 11); Lauri Mälksoo, *Russian Approaches to International Law* (OUP 2015).

[17] Marcelo G Kohen, 'Keeping Subsequent Agreements and Practice in Their Right Limits' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013).

[18] International Law Commission, 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading' (2016); International Law Commission, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee' (2016).

In the growing interdisciplinary literature at the boundary between international law and international relations, the question of change has surprisingly attracted only limited attention.[19] Much of this literature—especially that operating in a rational-choice framework—seeks to explain or understand the creation of, or compliance with, particular norms at a given point, without paying much attention to the dynamics of changing legal norms over time. Andrew Guzman's influential account is a good example here: concerned primarily with the relevance of international legal rules for state behaviour, he starts from a fixed content of these rules and focuses on the factors that may drive states to comply with them. In terms of law-creation and change, only treaty-making comes into clearer view.[20] The latter point is also remarkable for many prominent engagements with international law by international relations scholars. The path-breaking 'legalization' project,[21] or Barbara Koremenos' recent work focus almost exclusively on treaties and treaty design.[22] The dynamic construction of international law over time remains largely outside the picture.

This is somewhat different for constructivist approaches that pay particular attention to the processes through which norms are socially constructed. However, the constructivist literature on norm development, for the most part, does not address international law specifically.[23] When it does, it often sees legal norms merely as reflections of social norms as they have evolved, without theorizing the more complicated ways in which the two are related.[24] Such a close linkage is, for example, characteristic of the prominent work of Jutta Brunnée and Stephen Toope, for whom international legal norms—understood as social norms—rest on shared understandings within a community of practice. Their particularly legal character stems from a grounding in an inclusive 'practice of legality', a requirement derived primarily from normative considerations, but one that leaves the possible (and actual) distance between social and legal norms out of sight.[25]

Broader accounts of change in international law as such have thus remained relatively isolated. One of these, by Wayne Sandholtz and Kendall Stiles, adopts a constructivist frame and views legal change as driven primarily by norm

[19] See eg Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012).

[20] Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008).

[21] Judith L Goldstein and others (eds), *Legalization and World Politics* (MIT Press 2001).

[22] Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (CUP 2016).

[23] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887. But see also Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 International Organization 743.

[24] Christian Reus-Smit, 'The Politics of International Law' in C Reus-Smit (ed), *The Politics of International Law* (CUP 2004).

[25] Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP 2010).

tensions: cycles of action produce arguments over existing norms and shift the normative space step by step. The focus here is primarily on discursive change rather than transformation through treaties or political action, and they emphasize the internal dynamics of international law.[26] Another broad account has been advanced by Paul Diehl and Charlotte Ku, who combine a focus on internal tensions in the law (mainly between what they call the 'operating' and the 'normative' systems in international law) with an appreciation of external factors that help to move international law from one punctuated equilibrium to another.[27] They emphasize sudden rather than gradual forms of change, and much of their argument centres on 'legislative' interventions, especially the adoption of new treaties, rather than processes of change internal to the legal system. Moreover, they mostly propose a theoretical framework with possible pathways and relevant factors, and they use empirical cases as illustration rather than for systematic analysis.

Their focus on sudden change is shared by a recent attempt at theorizing change in customary international law by Pierre-Hugues Verdier and Erik Voeten.[28] Verdier and Voeten start from a precedent-based explanation of why countries comply with customary norms and link it to a tipping-point model of change, with long periods of stability punctuated by periods of rapid change. This account offers valuable starting points and provides a well-grounded critique of prominent approaches that dismiss customary law's relevance outright, but it has difficulties explaining the relative stickiness of customary rules even as state interests change, or the ways in which the influence of power relations is qualified in the modification of customary law.[29]

Some of these problems are addressed by the recent practice-based constructivist literature that focuses on incremental change, in particular, through subsequent state practice. For example, Mark Raymond's analysis on social practices of rulemaking, interpretation, and application comes from this tradition. It highlights the role of secondary rules for the success or failure of states' change attempts.[30] Zoltán Búzás and Erin Graham have helpfully employed the notion of 'emergent flexibility' to explain how creative rule users successfully change rules that lack design flexibility.[31] Yet, these approaches remain underspecified when it comes to

[26] Wayne Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder' (2008) 14 European Journal of International Relations 101; Wayne Sandholtz and Kendall W Stiles, *International Norms and Cycles of Change* (OUP 2009).

[27] Paul F Diehl and Charlotte Ku, *The Dynamics of International Law* (CUP 2010).

[28] Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory' (2014) 108 American Journal of International Law 389.

[29] See eg Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999); Stephen Toope, 'Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP 2003).

[30] Mark Raymond, *Social Practices of Rule-Making in World Politics* (OUP 2019)3.

[31] Zoltán I Búzás and Erin R Graham, 'Emergent Flexibility in Institutional Development: How International Rules Really Change' (2020) 64 International Studies Quarterly 821.

understanding variations in the success of efforts at reshaping law through subsequent practice.

The picture that emerges from existing engagements with change in international law is one that raises more questions than it provides answers. There is a gulf between different accounts as to the degree of stability or flexibility of international law—while some, especially from the legal side, emphasize high hurdles for change, others, especially from the more interdisciplinary realm, highlight greater flexibility. There is also a contrast between those who identify gradual change as the main pathway for flexibility and those who focus on sudden instances of change. Power- or interest-based accounts are challenged by alternatives that emphasize the dynamics internal to normative processes. State-centric accounts compete with those which focus on the role of international institutions or, as is often the case in the general literature on norm change, civil society organizations. Many of these contrasts relate to broader disagreements about the nature of international politics, and the empirical evidence on international law as such remains scattered. And most of them—those of lawyers as well as political scientists—provide accounts that work across the different fields of international law, and across different historical periods, thus downplaying the enormous variation in the ways of international legal change that can be gleaned from anecdotal evidence.

3. The Process of Change

In this volume, we seek to reconstruct the many paths of change in the different fields of international law, especially in change processes that cannot be reduced to treaty-making. Treaties are the most prominent path for modifying the law, and they have been widely studied, but treaties are relatively rare occurrences given how difficult they are to conclude. Observers have also found treaty-making to have stagnated over the past two decades.[32] On the other hand, much change in international law runs on different tracks—involving state action, courts, expert bodies, etc. We know much less about the shape or operation of these latter ways of change and understanding them better is at the centre of our interest. In this section, we introduce core concepts and categories that help to provide building blocks for an account of such informal change in international law.

By change, we understand any modification of the burden of argument for a particular position on the content of the law.[33] This conception goes well beyond

[32] Robert A Denemark and Matthew J Hoffmann, 'Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making' (2008) 43 Cooperation and Conflict 185; Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 European Journal of International Law 733.

[33] This account of legal change goes back to a suggestion in Ingo Venzke, 'What Makes for a Valid Legal Argument?' (2014) 27 Leiden Journal of International Law 811.

the idea that change requires the replacement of one norm with another, typically underlying doctrinal approaches. It instead acknowledges that there are different degrees of change, some more limited, others more radical, and that no clear line can be drawn between a mere change in interpretation and the appearance of a new rule. At any given point in time, we will be confronted with various interpretations of a given norm, with some positions being more widely accepted than others. Change occurs when, at a second point in time, the scope of possible interpretations or the weight of particular positions in legal discourse has shifted. This may or may not correspond with doctrinal reconstructions of what the law is—at times, the law practised by actors in a given field will differ from what, say, an application of the doctrinal requirements for new customary law would result in. Here we are primarily interested in the 'law in action' or 'in discourse', in order to allow us to detect the distance that may exist with the 'law in the books' and to understand the dynamics behind actual change processes in international law.

3.1 Practices and Authorities

International law's operation is typically portrayed as centred on states, with other actors making an appearance largely in supporting roles. Doctrinal lawyers understand international law as interstate law, created by and generating obligations for states. Rational-choice scholars focus on state interests to explain treaty-making and compliance. And even constructivists, more open to other norm entrepreneurs at the initial stages of change processes, often focus exclusively on states when they seek to assess whether norms have actually changed.

This focus stands in some contrast with real-world examples of international legal change in which states play only a supporting role.[34] Especially in areas where courts have become central actors, it is often these courts—rather than the views or practices of states—that become a reference point for understanding whether a norm has changed and what it entails at a given point. The European Court of Human Rights shifted understandings of European human rights law, for example in the area of LGBT rights, even though a sizeable number of member states had not embraced such a shift.[35] The World Trade Organization (WTO) Appellate Body (AB) was, for more than two decades, the focal point of action in world trade law, redefining the law even in the face of opposition by important states.[36] But

[34] Nico Krisch and Ezgi Yildiz, 'From Drivers to Bystanders: The Varying Roles of States in International Legal Change' (May 23, 2023). <https://ssrn.com/abstract=4456773> <http://dx.doi.org/10.2139/ssrn.4456773>.

[35] See Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 International Organization 77.

[36] Gregory Shaffer, Manfred Elsig. and Sergio Puig, 'The Extensive (But Fragile) Authority of the WTO Appellate Body' (2016) 79 Law and Contemporary Problems 237.

also beyond the realm of courts we find examples of authorities central to change processes—the UN High Commissioner for Refugees when it comes to the interpretation of the 1951 Geneva Convention,[37] the International Committee of the Red Cross for the development of international humanitarian law,[38] or the ILC, an expert body, for the codification of the law of state responsibility[39] or clarifying the rules of treaty interpretation, as Fuad Zarbiyev explains in his contribution to this volume.[40]

These examples point not only to a limited role of states, but also to a variation in the role of other institutions that is not easily reduced to formal mandates. Some courts have developed far-reaching authority in their issue-areas, while others have not.[41] Some international organizations are key legal players in their domain, while others play a secondary part, and variation is yet more pronounced in the role of expert bodies and private institutions. We can only account for this variation if we take into consideration the social processes through which the authority of different actors is generated. These processes are not necessarily the same across international law, but often vary across its different fields. 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.[42] The differences are visible according to the experts recognized in each field, and in the institutions whose views and pronouncements are seen to matter.[43] As emphasized by Giovanni Mantilla, the International Committee of the Red Cross (ICRC) is widely accepted as an authority when it comes to the interpretation of international humanitarian law.[44] In human rights, different institutions and actors struggle for influence; Nina Reiners' contribution to this volume highlights the ways in which bodies such as the UN Committee on Economic, Social and Cultural Rights cultivate authority by forming network-based informal coalitions.[45] Other fields, such as international environmental law, have not produced a similar institutional authority, and different constellations of actors and texts matter there. At the same time, as Dorothea Endres shows in her

[37] Ingo Venzke, 'Semantic Authority' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar 2019).

[38] Giovanni Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press 2020).

[39] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002).

[40] Zarbiyev, this volume.

[41] Karen Alter, Laurence Helfer. and Mikael Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79 Law and Contemporary Problems 1.

[42] Nico Krisch, 'The Many Fields of (German) International Law' in A Roberts and others (eds), *Comparative International Law* (OUP 2018).

[43] See also Venzke, *How Interpretation Makes International Law* (n 13); Anthea Roberts, *Is International Law International?* (OUP 2017).

[44] Mantilla (n 38).

[45] Reiners, this volume.

chapter, we can often observe divergences within a given field regarding who and what counts as authority, leaving authority contested.[46]

The different fields of international law are linked with one another, but they do not form a common whole. What kinds of arguments are acceptable in legal discourse is 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. Approaching these as 'practices' in a narrower sense appears fruitful also because they are not simply external to actors and thus at their disposal to accept, reject, or modify.[47] They instead provide the structure in which actors operate. These practices are not just discourses in an ideational realm but are 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.[48]

An interest in practices, and communities of practice, has recently gained more traction in the international legal realm, especially in the work of Jutta Brunnée and Stephen Toope, and Tanja Aalberts and Ingo Venzke.[49] Such a focus can save us from falling into the trap of reproducing the entrenched dichotomies between 'agency and structure', 'material and discursive' factors, and 'continuity and change'.[50] The particular role of practices in linking agency and structure also helps make sense of the stickiness of law.[51] Practices, as structures in which actors operate, appear as stable in the first place. However, they are not immutable but instead subject to reflection, contestation, and reinterpretation as long as they continue to be recognized as the frame for the identity of actors within the field.[52] Change in the 'ground rules' of practice within the fields of international law is thus likely to be gradual and slow. At the same time, those ground rules establish under what conditions ordinary legal change is recognized—what acts or statements suffice to bring about a modification of existing norms. These conditions may be strict or permissive; they may erect high hurdles or allow for rapid change.

[46] Endres, this volume.

[47] Christian Bueger and Frank Gadinger, *International Practice Theory* (2nd edn, Springer 2018).

[48] See Nikolas M Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016).

[49] eg Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010); Tanja Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice' in André Nollkaemper and others (eds), *International Law as a Profession* (CUP 2017).

[50] Emanuel Adler and Vincent Pouliot, 'International Practices' (2011) 3 International Theory 1.

[51] Ezgi Yildiz, 'Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights' (2020) 34 Temple International & Comparative Law Journal 309.

[52] Ted Hopf, 'Change in International Practices' (2018) 24 European Journal of International Relations 687.

As an example: the ground rules of international law may themselves be resistant to change but they allow for (relatively quick) legal change through the adoption of treaties. In some fields, they may recognize particular authorities, such as the courts mentioned before, as central to processes of norm change. In others, they may assign a greater role to domestic courts, or pronouncements of diplomatic gatherings.

3.2 Pathways

The practices in each field produce different pathways along which change can travel. 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.[53] But as already highlighted, we can actually observe a much greater variety of forms and processes leading to change in legal practice, and the mix of available pathways varies significantly from issue-area to issue-area.

In order to structure our inquiry, we here identify five main, ideal-typical pathways present in different contexts. Each path has its own operating logic and relies on a certain vested authority. Propositions for a change in meaning are bound to be more successful if they stem from, or are ratified by, an actor, or set of actors, recognized as authority.[54] Each path also comes with its own mechanisms through which change occurs or upon which actors rely to propose change attempts.

1. *The state action path.* On this path, change is identified when states modify their behaviour and make corresponding statements, as in the traditional 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. The mechanism of change typically consists of two steps: proposing a new norm or establishing a new practice (which destabilizes existing understandings, pushes existing boundaries, or goes beyond set standards), and then building consensus around these new understandings. Traditionally, such consensus was thought to require virtually universal acceptance or acquiescence, but the actual threshold may be lower in practice.

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

[54] Venzke, *How Interpretation Makes International Law* (n 13); for a relevant overview of different sources of authority, see Deborah D Avant, Martha Finnemore, and Susan K Sell, 'Who Governs the Globe?' in Deborah Avant, Martha Finnemore, and Susan K Sell (eds), *Who Governs the Globe?* (CUP 2010).

2. *The multilateral path.* Here 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. A resolution adopted by the UN Human Rights Council, for example, will often appear more authoritative than a collective statement by the same states outside the organizational framework. Change attempts on this path are typically realized by means of the introduction of new ideas via declarations and soft law documents as well as the adoption of formal treaties, which might shift opinion on customary rules or the interpretation of existing agreements even if they are not universally ratified.
3. *The bureaucratic path.* Change on this path 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 processes. It relies on delegated authority or bureaucratic authority deriving from expertise, capacity, and procedures, though it might also reflect principled (moral) authority. Sources of authority will often be mixed and depend on the particular organ in question. The UN's ILC, for example, derives its weight from both its mandate and the recognized expertise of its members. This path typically operates through the production of texts for purposes of clarification and interpretation and thus in a more technical vein. Although such attempts may sometimes involve new norms and organizational mission creep, they usually avoid open pretensions to legal change.
4. *The judicial path.* Change in this form is recognized as the result of decisions and findings of courts and quasi-judicial bodies. It relies on judicial expert authority and often also on the delegation from states. Change typically comes about through mechanisms of (broader or narrower) interpretation or channelling of views expressed in other legal instruments (both soft and hard)—without open claims to effecting change. International courts are the typical anchor of this path, but institutions such as the UN human rights treaty bodies or the OECD National Contact Points feature here as well just as much as national courts when they interpret international (rather than national) law.
5. *The private authority path.* Change in this modality 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. Its mechanisms for change are often solution-oriented interventions in specific issue-areas, and they are realized through the production of technical manuals, standards, and regulations—responding to new demands not (yet) addressed through other pathways.

> But, in more exceptional cases such as the ICRC, private authority can also weigh heavily in facilitating a lasting change of established rules.

These paths are ideal-typical, and they are not mutually exclusive—often enough they will run in parallel or crisscross, bolstering or undercutting each other. The interactions between pathways produce a range of effects from solidifying legal change by creating focal points, to giving grounds for (further) legal contestation by providing alternative interpretations. They will also often appear in a sequential way, with some pathways building on others, for example, the judicial on the private authority one.

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 European Court of Human Rights might be such an example, at least within certain bounds. Otherwise, change will typically be the result of an accumulation of statements produced in the same or different pathways, sometimes in quick succession, at other times 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 a long time.

3.3 Stages

Change does not travel along these pathways by itself but is pursued in and through them by political and societal actors. In order to better understand the actors and dynamics relevant to change processes, we can usefully conceptualize pathways as consisting of three stages, each of which is crucial for the process to be successfully completed.

The first is the *selection stage*, where change agents choose and activate a pathway to realize their vision of change. They may sometimes activate more than one pathway contemporaneously to increase their legitimacy claims or to undercut the legitimacy of rival interpretations. Potential change agents include governments, but also individuals, companies, scholars, experts, or other interested parties. Different actors will have different pathways available to them. Private actors will typically have access to a much more limited range than governments (and sometimes depend on the latter to take up their cause). Actors' choices in this respect are likely to be only boundedly rational as they usually are not able to fully assess the benefits and drawbacks of each pathway, and they will often follow established authorities in a field unless they have significant reasons to choose others.[55] Yet,

[55] See Joseph Jupille, Walter Mattli, and Duncan Snidal, *Institutional Choice and Global Commerce* (CUP 2013).

in some cases, actors might even attempt to create new pathways—for example, new bodies within international organizations, or independent groups of experts such as that assembled to produce the Maastricht Principles on Extraterritorial Obligations of States.[56]

The second, central stage is that of *construction.* Here the actors and authorities associated with the particular pathway process the change attempts and generate statements about the status of the norm in question—confirming or refuting the change attempt, finding some middle ground, etc—or avoid expressing their positions. This processing and position-taking may help create a new norm or clarify an existing one and, in some instances, this results in rejecting proposed new definitions and revoking the change attempt altogether. These statements are then used by change agents (as well as their opponents, as the case may be) to build legitimacy and bolster support for their cause. If the selection stage is often dominated by activist modes of engagement with a choice between different fora, the construction stage tends to follow a different logic. On many pathways, actors engage in interpretation rather than law-creation and are thus constrained by expectations of legal continuity rather than change. This is especially true for judicial and quasi-judicial actors, but also for expert bodies within and outside international organizations. In more political contexts, where change agents may be able to pursue change openly, such constraints are lessened. However, in all forms, we often observe attempts at consensus-building—or other forms of legitimacy-enhancing strategies—that are more pronounced than those at the selection stage.

The third is the *reception stage*, where the outcome of the construction stage is appraised by a broader range of actors; it is here that change attempts are accepted, partially accepted, or rejected—or held in suspense when change is recognized as potential yet not complete. The relevant actors typically include especially state representatives—executive, legislative, as well as judicial ones—but also international courts, scholars, and other experts. Who counts as a relevant participant depends on the structure of the field—in some fields, for example human rights law, civil society organizations will play some role, in others less so, and recognition as a relevant actor is bound to be the subject of struggles itself. Actors in the reception stage will assess a proposed change on substance but also on pedigree. If the actors and institutions at the construction stage are recognized as authorities, many actors in the field will defer to them even if they disagree with the result.

These three stages will often be consecutive, but this does not necessarily mean that they are always neatly separated and that every change process follows through them linearly. Feedback from the reception stage may come in while the construction phase is still underway; selection and construction stages may overlap; and

[56] Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084.

change agents may also pursue new paths to build on ongoing construction processes in other fora. The chapter by Jeff Kucik and Sergio Puig provides a good example of feedback effects as they show how the WTO AB adapts its jurisprudence in response to states' non-compliance with earlier decisions.[57] Moreover, the different stages may be repeated multiple times in different pathways in the overall change process. The notion of stages, therefore, should not be understood strictly in the sense of temporal phases but instead as a useful heuristic that helps us capture the different dynamics and actor constellations that are present at different points in the change process.

Which path actors choose or activate will depend on their awareness of existing options, and on the availability of these options. It is also likely to depend on the change agents' assessment of the degree to which the institutions and actors associated with a given path are receptive to their cause, and on the likely impact that a certain path might have on a successful outcome.[58] For a non-governmental organization (NGO) keen on developing the interpretation of women's rights, an expert body in the field of human rights, and especially one associated with the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), will appear as more receptive than, say, the ILC or an intergovernmental body such as the UN General Assembly. Yet in order to consolidate a given interpretation, a stronger authority might be needed. If initially, a change agent might choose the path of least resistance, it may at a later stage seek to activate a path that promises a greater impact, also beyond the narrow field of human rights practitioners. The result will often be a staged approach in which each step builds on the outcome of a previous one, expanding influence and scope with each iteration if the institutional structure of the respective field so allows, and thus accumulating authority over time.

As they go through their different stages, change processes also vary significantly as to their pace or modes, and one of the objectives of our project is to understand the conditions determining such variation. As mentioned above, many existing accounts focus on punctuated equilibria, with long periods of stability interrupted by sudden and short periods of movement.[59] This picture may be accurate for treaty-making episodes, but it may not be as fitting to describe other modes of change, captured in more gradualist accounts. Gradual change has recently found greater theoretical attention,[60] and we expect it to be the dominant form when change processes centrally involve actors—especially judges or experts—who, as a result of their particular role, cannot openly claim to be engaged in change as such and thus

[57] Kucik and Puig, this volume.
[58] See also Jupille, Mattli, and Snidal (n 55).
[59] Paul F Diehl and Charlotte Ku, *The Dynamics of International Law* (CUP 2010).
[60] James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change' in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power* (CUP 2010).

have to avoid the appearance of taking big steps.[61] Wouter Werner demonstrates how this plays out for expert authorities engaged in change through restatements.[62]

4. Conditions of Change

When is an attempt at changing international law successful? Traditional legal doctrine focuses almost exclusively on state positions and demands near-unanimity of support or acquiescence among states (or treaty parties). In reality, the threshold appears lower—change seems to be accepted in many instances with less support by, or even in the face of objections from, states. Yet which factors condition the success of change processes is not clear. The existing literature focuses especially on two groups of factors—pertaining to state positions and norm properties, much along the lines of rationalist and constructivist approaches. Yet we argue that in addition to these, two further groups of factors, both related to the pathways sketched above, are likely to be important: one related to the institutional structure of the respective context and one concerning discursive openings facilitating legal shifts. The importance of these latter factors is suggested by approaches drawing on historical and discursive institutionalism, both less prominent in international relations but potentially powerful in the context of a field as discursively oriented as international law.

The factors laid out here certainly cannot explain all variation and should, in any event, not be understood in a deterministic fashion. As Ingo Venzke reminds us in his chapter, change processes always contain an element of contingency, of paths not taken even if they could have been, of individual actors shaping developments even if structural constraints make their success unlikely.[63] In this sense, the factors presented here only increase the likelihood of success without in any way determining it. Still, we believe that they go a long way towards explaining the outcomes of informal change processes.

4.1 State Positions

Most observers agree that the success of change in international legal norms depends in large part on how strongly it is supported and opposed by states. Where there is unanimity, or near-unanimity, among states, change is likely to

[61] See eg Ezgi 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; Ezgi Yildiz, *Between Forbearance and Audacity: The European Court of Human Rights and the Norm Against Torture* (CUP 2023).

[62] Werner, this volume.

[63] Venkze, this volume.

occur smoothly and quickly. In the realm of customary law, notions such as 'instant custom' or different forms of 'modern custom' give expression to this fact, downplaying the need for consistency of practice or statements over time.[64]

Yet below this threshold, conditions are less well-defined. More state support certainly means a higher probability of success, but what thresholds must be met remains disputed. The literature on norm change in international politics often focuses on a need for support from a critical mass—sometimes thought to be around one-third—of states to reach a 'tipping point' and declench a norm cascade that brings the rest of states to the table.[65] Others focus on 'broad support', but without a clear specification of what this implies—potentially a majority of states, but in certain circumstances also a smaller number.[66] Yet other thresholds are likely to apply when it comes to legal change, as opposed to norm change in general.

Not all states are equal in these processes, and most accounts emphasize the need for powerful states to support change efforts, or the need for critical states—those particularly active in a domain—to be on board.[67] International law mitigates power differentials to some extent because of its expectations of sovereign equality, and great powers do not always seem to be indispensable for norm change to occur. Examples show successful change processes without great powers—and sometimes against the objections of some of them.[68] Nina Kiderlin's chapter on changes in world trade law despite fervent objections from the US provides an interesting example of such processes while also showing the increasing clout of China at the WTO.[69] Recent literature also shows that great powers do not always effect change through rapidly enforced substantial change proposals. They may effectuate fundamental and yet informal changes through seemingly apolitical moves—by incrementally altering the assumptions around the appropriateness of certain standards or behaviour patterns.[70] They might also intentionally keep norms unstable in order to leave more room for manoeuvre, as Pedro Martínez Esponda finds in his contribution.[71]

Some of the variation in terms of necessary state support might be related to the salience of the norm in question—to the degree to which an attempt at norm

[64] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 The American Journal of International Law 757.

[65] Finnemore and Sikkink (n 23).

[66] Wayne Sandholtz, 'International Norm Change' [2017] Oxford Research Encyclopedia of Politics <www.oxfordre.com/abstract/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-588> accessed 10 December 2022.

[67] ibid; Finnemore and Sikkink (n 23) 901.

[68] Toope (n 29); see also Adam Bower, *Norms Without the Great Powers: International Law and Changing Social Standards in World Politics* (OUP 2017).

[69] Kiderlin, this volume.

[70] Alexander E Kentikelenis and Sarah Babb, 'The Making of Neoliberal Globalization: Norm Substitution and the Politics of Clandestine Institutional Change' (2019) 124 American Journal of Sociology 1720, 1722.

[71] Martínez Esponda, this volume.

change attracts attention by high-level policymakers or public opinion. On an issue with relatively limited salience, change may happen more smoothly, and objections by some states may not appear as too consequential (and may not be pursued through an investment of significant diplomatic capital). When it comes to issues with high salience, in contrast, states' engagement is likely to be stronger and they are less likely to stand on the sidelines if change processes concern them. For example, as Mark Pollack skilfully shows, the Trump administration spent a considerable amount of energy in derailing the established rules and institutions of international trade law—an issue-area that was (and is) highly salient.[72] At the same time, such increased salience might also lead to deadlock as compromise is more difficult to achieve, potentially driving change onto other than state-driven paths.

4.2 Norm Properties

A second set of factors often thought to influence the likelihood of change attempts' success are the properties of the norm(s) in question.[73] These concern in the first place the stability of prior understandings: the more settled and uncontested an existing (interpretation of a) norm is, the higher the threshold for change. If, on the other hand, competing interpretations are already in circulation, even if they are not (yet) dominant, change efforts can create linkages with these to further destabilize the existing norm and its interpretation. The proximity of a proposed new norm or interpretation to existing ones is then likely to be a significant factor. This is sometimes captured as 'norm adjacency'[74]—when a new claim can present itself as the development of an existing norm rather than a radically new proposition, it faces a lower hurdle in legal discourses.

This is equally relevant when change efforts draw on competing legal norms. If the change of one norm can be argued for by reference to another existing and widely accepted norm, destabilization as a matter of law can be achieved more easily.[75] For example, the availability of international human rights law helped to undermine state official immunities which were otherwise widely recognized.[76] And the rise of international environmental law gave campaigners a potent tool to challenge and redirect free trade rules that stood in tension with environmental

[72] Pollack, this volume.

[73] eg Miriam Bradley, 'Unintended Consequences of Adjacency Claims: The Function and Dysfunction of Analogies between Refugee Protection and IDP Protection in the Work of UNHCR' (2019) 25 Global Governance: A Review of Multilateralism and International Organizations 620.

[74] Finnemore and Sikkink (n 23).

[75] See Nico Krisch, Francesco Corradini, and Lucy Lu Reimers, 'Order at the Margins: The Legal Construction of Interface Conflicts over Time' (2020) 9 Global Constitutionalism 343.

[76] Pedro José Martínez Esponda, 'Change in International Law Through Informal Means: The Rise of Exceptions to State Official Immunity for International Crimes' (2019) 9 Revista Latinoamericana de Derecho Internacional (LADI) 175, 190.

protection.[77] In the same vein, Seline Trevisanut's chapter demonstrates how human rights law and environmental law helped actors impart new understandings and practices to shape the future of the oceans.[78] We can expect a similar effect, though to a lesser extent, if competing norms are less widely shared (eg if they are part of a treaty ratified by a sub-group of states) or are of a lesser legal pedigree, as in the case of informal norms or soft law.[79]

The stability and rigidity of an existing norm then determine how high the justificatory burden for a change attempt will be. When the burden is low, small shifts in circumstances can trigger norm change. When the burden is higher, change agents need a stronger justification and will often have to take a slower road by first destabilizing existing understandings and then reconsolidating new ones.

Another important dimension that has not received much attention from the literature concerns the purpose and direction of a new norm or understanding as *more permissive or more constraining* than an existing one. For change proposals that seek to open a broader scope for action—such as widening self-defence against non-state actors or expanding port state jurisdiction over vessels engaged in illegal, unreported, and unregulated (IUU) fishing[80]—relatively limited support and positive appraisal may often be sufficient for actors. Destabilizing current understandings, especially in areas of international law that are relatively under- (or un-) institutionalized, might be enough to create the possibility for action. Pursuing change by means of destabilization can be attractive, as Pedro Martínez Esponda shows in his contribution. Yet it also appears to be an option primarily for powerful actors who can bear the costs of (international or domestic) contestation which will often be significant as long as a new meaning has not been re-stabilized. BS Chimni draws our attention to this very fact and emphasizes how power asymmetries can explain the variations in the way change attempts are pursued.[81]

On the other hand, introducing new constraints on or requirements for state action—such as those that limit trade in endangered species or those that require states to prevent domestic violence[82]—often seems to call for a higher threshold, with more buy-in from a critical number of actors and a higher degree of consensus necessary to shift accepted understandings. Change agents then often need to re-stabilize the new norm, often by securing supportive statements from focal institutions or from the accumulation of more dispersed authorities, making this process longer and more burdensome than the one described for permissive norms.

[77] Lucy Lu Reimers, 'International Trade Law: Legal Entanglement on the WTO's Own Terms' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (CUP 2021).

[78] Trevisanut, this volume.

[79] Gregory Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706.

[80] Pedro Martínez Esponda, Dorothea Endres, and Ezgi Yildiz (eds), *Paths of Change in International Law: Case Studies* (2023).

[81] Chimni, this volume.

[82] Martínez Esponda, Endres, and Yildiz (n 80).

4.3 Institutional Support

A third set of factors has found less attention in the literature on international norm change, but is, we conjecture, at least equally important: the existence, shape, and accessibility of institutions and authorities. This might seem obvious for those who study change through the lens of historical sociology or historical institutionalism. For them, existing processes and institutions are central to understanding how new change processes unfold and what shape they take.[83] Elements of path dependence and institutional constraints are less prominent in other theoretical approaches, but constructivists, too, have long been attentive to the power of institutions in making and implementing norms,[84] and the positive influence of institutional statements' on norms' strength.[85] Likewise, rational-choice-oriented scholars have come to emphasize the ways in which existing institutional arrangements shape the choices of actors, especially under circumstances of bounded rationality.[86]

In our context, institutional factors are likely to have significant consequences for a number of elements in the change processes. They will, first, condition whether a change attempt evolves into a change process at all. For non-state norm entrepreneurs, in particular, access to certain pathways of change is crucial. Where they can directly engage an international court or expert body, they can more easily generate visibility and potentially gain authority for their cause. Where this is not the case—for example, because an existing court is only accessible for states, or because the only available pathways in a certain area are intergovernmental in character—they face a much higher threshold for getting a change attempt off the ground. However, they can creatively overcome this hurdle by forming coalitions with alternative authorities, as Nina Reiners explains in her chapter in this volume. Likewise, even for states, institutions in some areas are more receptive than in others—compare only the UN Security Council with the more inclusive institutions in international environmental governance. And there are areas with no, or weak, dedicated institutions; this may apply to many questions of general international law, especially where the jurisdiction of the International Court of Justice depends on (scattered) individual acceptance by states. In such areas, states may seek to bring their change proposals to receptive fields or institutions.

[83] See Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (OUP 2005); Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 International Organization 367.

[84] Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 International Organization 699.

[85] Beth A Simmons and Hyeran Jo, 'Measuring Norms and Normative Contestation: The Case of International Criminal Law' (2019) 4 Journal of Global Security Studies 18; Michal Ben-Josef Hirsch and Jennifer M Dixon, 'Conceptualizing and Assessing Norm Strength in International Relations' [2020] European Journal of International Relations 18.

[86] Jupille, Mattli, and Snidal (n 55).

Institutional factors can be expected to condition all three stages of a change process. They define the selection stage in that the existence of available institutions will channel most of the action by change agents, especially so if there is one widely accepted focal institution through which change usually occurs.[87] In the construction stage, the orientation and composition of an institution very much determine whether a certain cause will be taken up or not. And in the reception stage, much depends on the social position of the authority involved in the construction—whether it is regarded as a central authority or merely a marginal voice. In this sense, it usually matters decisively whether support for a change attempt comes from a broad majority in the UN General Assembly or from a privately assembled group of experts on a given issue. Without clear institutional authority in favour of a change proposal, we surmise that it is unlikely that a new understanding becomes consolidated.

The relevance of institutional factors becomes particularly visible when we consider their effects in calibrating the other factors mentioned above. Both as regards state positions and norm properties we have observed significant variation, and this variation may, to an extent, be driven by the institutional context in which a given change process takes place. In an area with a strong focal institution—for example, a court—the required support from states is likely to be lower than in a context in which—as in traditional customary law development—change occurs through the unstructured interaction of states. Likewise, we can expect certain norm properties to matter more in some institutional contexts. The norm adjacency mentioned above is important for gathering political support for a new norm or a new understanding of it. But it will be of particular importance in contexts defined by a preponderance of legal skills—especially courts or expert bodies, and generally all those in which actors draw their authority from legal expertise rather than other sources. Such actors need to stay within the bounds of legal interpretation, and the plausibility of their positions will depend on their adjacency claims to existing norms, judicial findings, and the legal discourse more generally.

In all these respects, the institutional landscape in a given context is likely to influence how smoothly and quickly a change process unfolds and whether it is successful. It will also influence to what extent actors will choose or create other avenues than formally *legal* ones to pursue their agendas. Where existing pathways of change in international law prove too rigid, actors may shift to other fora. This is very visible in the business and human rights context—after attempts at establishing human rights obligations for transnational corporations were frustrated in the UN in the early 2000s, activists continued to pursue their agenda primarily through non-binding norms as well as in domestic fora. As in other

[87] Whether such focalization occurs depends on certain circumstance. See Ezgi Yildiz and Umut Yüksel, 'The Defocalizing Effect of International Courts: Evidence from Maritime Delimitation Practices' (2022) 23 German Law Journal 413

contexts, traditional international law here was displaced by other normativities, or at least pushed to the side through a process of layering, in the language of historical institutionalists.[88] In a similar vein, Jaye Ellis's chapter shows how actors in international environmental governance turned from norms and rules to performance-oriented metrics as the main driver of change, and how these metrics began to operate alongside (and in interaction with) legal norms.[89]

4.4 Discursive Openings

A fourth set of potential factors pertains to the relation of legal norms with their ideational environment. When this gap grows, and especially when it grows suddenly or over a short time span, pressure towards an adaptation of the law rises. In such circumstances, we would expect international legal change to occur more easily than otherwise.

This expectation aligns with the role critical junctures play in historical institutionalism. A distinct feature of such junctures is thought to be 'the loosening of the constraints of structure to allow for agency or contingency to shape divergence from the past, or divergence across cases'.[90] In our context, this should affect the more structural constraints on change deriving from institutional rules and norm stability, and consequently the scope of necessary state support. During a critical juncture—for example, the end of World War II, the outrage over the Bosnian genocide, or the attacks of 9/11—international legal change is likely to occur even if previous norms are stable and state support is relatively weak. This might also imply that change can occur through other paths than those typically considered central in a field, or that a new path can be created more easily. The sudden establishment of individual criminal responsibility in internal armed conflicts by the newly created International Criminal Tribunal for the former Yugoslavia after the Bosnian war might be an example of such a facilitated shift.[91] More generally, scholars have observed the particular movement of international law in times of crisis, and they have even portrayed international law as a 'discipline of crisis'.[92]

[88] Streeck and Thelen (n 83) 18–30.

[89] Ellis, this volume.

[90] Hillel David Soifer, 'The Causal Logic of Critical Junctures' (2012) 45 Comparative Political Studies 1572, 1573; Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press 2004); Giovanni Capoccia and R Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341.

[91] Martínez Esponda, Endres, and Yildiz (n 80).

[92] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 The Modern Law Review 377; see also W Michael Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law' in W Michael Reisman and Andrew R Willard (eds), *International Incidents: The Law That Counts in World Politics* (Princeton University Press 2014); Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2010).

True critical junctures are few and far between, but the effects of discursive openings should be observable also in less extreme cases. Shifts in discourses have been found to foster institutional change in general, and they can also reshape international law—which is, after all, a particularly discursive institution itself and one that requires constant justification through broader normative argument.[93] As Tonya Putnam explains, the reformulation of atrocity prevention under the Genocide Convention without any amendment to the treaty text benefited from such discursive shifts.[94] Whenever new ideas—cognitive or moral—are widely held and contrast with existing legal norms or understandings, they create an opportunity space for actors to pursue legal change.[95] This facilitates such change—even though the likelihood will be significantly higher if the new ideas can be linked to some pre-existing norms and if they meet receptive institutions, as discussed in the previous subsections. The newly arisen sense that the moral implications of automated weapons systems require an adaptation of the laws of war creates urgency for such a change, but the change process still needs to find institutional support and will benefit from a linkage with existing rules.[96] Likewise, the increasing salience of the climate change discourse has created pressure for change in other areas of the law, for example, refugee protection. Yet, the full realization of this change needed receptive institutions—such as the UN Human Rights Committee and the UN General Assembly—to lend claims to the reinterpretation by an authority with significant weight.[97]

4.5 Combined Effects

These four groups of potential factors behind successful change are not independent from one another. There might be minimum thresholds—for state support especially, and perhaps also for institutional availability without which it might be difficult to consolidate a new norm in some contexts. But beyond that, what is required in one group appears to depend on the presence or absence of factors from another group. Norm adjacency is likely to be more important in certain

[93] Vivien A Schmidt, 'The State and Political Economic Change: Beyond Rational Choice and Historical Institutionalism to Discursive Institutionalism' in Mario Telò (ed), *State, Globalization and Multilateralism: The Challenges of Institutionalizing Regionalism* (Springer Netherlands 2012).

[94] Putnam, this volume.

[95] See also Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (CUP 2018).

[96] eg R Charli Carpenter, 'Vetting the Advocacy Agenda: Network Centrality and the Paradox of Weapons Norms' (2011) 65 International Organization 69; Ingvild Bode and Hendrik Huelss, 'Autonomous Weapons Systems and Changing Norms in International Relations' (2018) 44 Review of International Studies 393.

[97] See eg UN Human Rights Committee, Views of 24 October 2019, No 2728/2016, *Teitiota v New Zealand*; UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (26 July 2022) 76th session (A/76/L.75).

institutional contexts (eg in courts) but less so in the presence of significant discursive opening and probably also when there is widespread state support for change. On the other hand, widespread state support might be less important if a strong focal institution exists, when permissive norm change is sought, or when there is a critical juncture facilitating change. In this vein, the inability of states to collectively agree on norm adaptation in the political bodies of the WTO may not have frustrated change attempts but reoriented them towards the organization's dispute settlement system which had already gained significant authority.[98] The different factors are thus interdependent—mutually reinforcing, but in certain circumstances also potential substitutes for one another.

5. The Structure of the Volume

Change processes are manifold, and the way they transpire will depend on the specific set of circumstances, some of which we discuss in the previous section. These include but are not limited to the configuration of actor and interest constellations, the socio-political context, the characteristics of the sites of change, as well as the timing and the ambition of change proposals—ie their form, scope, reach, and potential impact. The present volume is organized around four themes, each exploring different dynamics present in many paths of change in international law. In particular, we take a closer look at *strategies*, *forms*, and *forces* of change, and we then reflect on how to *situate* these change processes and their varied implications in international law and politics.

5.1 Strategies of Change

Strategy is an essential part of the toolkit for change processes, and it is often tailored to the means and ends of change attempts, argues Mark Pollack in his analysis of the Trump administration and its lasting legacy in Chapter 2. Pollack distinguishes between traditional and hostile change agents—while the former seeks to influence the content of the law by resorting to means such as negotiation, interpretation, and adjudication, the latter employs more aggressive means with the ultimate purpose of circumventing and undermining international rules. On the basis of this distinction, Pollack examines the practices of the Trump administration in relation to four international trade-related episodes. He finds that while the evidence is mixed, overall, the Trump administration appears to be a 'genuinely disruptive or hostile change agent' whose objective is to weaken the international

[98] See Nicolas Lamp, 'Discord, Deference, Opportunism, and Pragmatism: How WTO Members Became Bystanders in the Development of WTO Law', manuscript on file with the authors.

rule of law rather than simply to reshape the content of specific norms. Moreover, the destructive legacies left by the Trump administration are, in Pollack's assessment, long-lasting and often difficult to reverse.

Strategies also come in different shades, and actors might resort to tactics other than advocating for or against a given change attempt, as we see in Chapter 3 by Pedro Martínez Esponda on the right to self-defence against non-state actors—a norm left in the twilight zone. The norm's unstable status is actively cultivated by actors that favour wide room for manoeuvre instead of clearly constraining rules. The norm-instability, in this case, has been intentional and sustained by at least four different strategies of destabilization: multilateral ambiguity, selective protest, compromised support, and cryptic precedent. Martínez Esponda argues that while the law on the use of force is particularly prone to such destabilization, norm instability is a widely present phenomenon across different fields of international law.

In Chapter 4, Nina Reiners highlights the role of expert bodies, working in close collaboration with civil society actors, in shaping international law through interpretation. Calling this symbiotic relationship 'transnational lawmaking coalitions' (TLC), Reiners explains how TLCs come together and what strategies they employ to generate change. She relies on interviews and primary and secondary sources to trace the involvement of TLCs in the interpretation of the right to decent working conditions by the Committee on Economic, Social and Cultural Rights, and the creation of a right to abortion, on the basis of the right to life, by the UN Human Rights Committee. Reiners argues that when formed around personal relationships that spread across different epistemic communities or professional or advocacy networks, TLCs can generate and propel change attempts without the involvement of state actors. Reiners' study shows that with their informal origins and collaborative spirit geared towards achieving like-minded goals, TLCs have the agility that other change agents such as states or intergovernmental institutions often lack.

5.2 Forms of Change

The form of change matters not only for calibrating the ambition of change attempts but also for creating hurdles or opportunities for the successful pursuit of change. In particular, as several contributions show, interpretive change construed incrementally over time will often provoke more limited contestation and have higher chances of success. Tonya Putnam's Chapter 5 traces common dynamics behind such incremental change processes in the revised understanding of the obligation to prevent in the 1948 Genocide Convention. The reconceptualization of atrocity prevention without a formal amendment to the treaty text was possible through the work of many hands such as governments, international organizations, and non-state actors. It did not come as a response to a single event or as a

result of a single strategy, but rather through the winding paths of multiple agendas that came together in a non-linear fashion, and through discursive openings that were created by 'actions and glaring inactions'. Yet the impact of norm adjustment was significant since it fundamentally changed the meaning of genocide prevention, shifting the emphasis from non-interference to positive obligations to protect vulnerable populations in countries whose governments are unwilling or unable to do so.

In Chapter 6, Wouter Werner explores the dynamics behind restatements and codifications of existing law through his study of the International Law Commission (ILC) draft conclusions on the identification of customary law. Werner argues that change in this mode, often effectuated by experts with the authority to restate, is governed by the dialectics of repetition; the restated transforms into something new and different. This exercise is highly political, especially because it entails the delineation of relevant materials from irrelevant ones. Yet such restatements cannot appear as new creations, solely as the results of recursive exercises—they simply restate what is already out there. Repetition breeds change but also conceals the political dynamics driving it, Werner maintains.

Jaye Ellis takes us in Chapter 7 into the world of metrics, a form of governance that deviates from and sidelines the typical modalities of change in international law. As Ellis shows, the turn to metrics, which culminated in the adoption of the Sustainable Development Goals and the Paris Agreement in 2015, was in part a response to frustrated multilateral rulemaking. Once performance-oriented metrics became the main propellers of dynamism in environmental governance, bureaucrats, technocrats, and experts moved change processes outside of the law's normative realm. However, the logics of metrics and of legal normativity need not be mutually exclusive, argues Ellis, drawing our attention to the fact that they often operate in parallel, for example within the architecture of the Paris Agreement.

5.3 Forces of Change

Broader forces that drive change—shifts in power, ideas, or actor configurations—stand at the centre of the three next chapters. In Chapter 8, Wayne Sandholtz focuses on the impact of the rising authoritarian challenge to human rights law. Emphasizing that international legal change does not always need to be progressive or liberal, Sandholtz analyses non-liberal forces of change. He observes that authoritarian regimes attempt to hollow out international human rights institutions and tarnish their credibility. Their effect on the national level is more forceful, affirms Sandholtz. Authoritarians aim at curtailing domestic accountability mechanisms and suppressing related norms such as court independence and freedom of expression, press, and association. Sandholtz maintains that as the number and the strength of authoritarian regimes increase, so does their adverse impact on human

rights norms and institutions. While cautioning against the challenges posed by the authoritarian resurgence, Sandholtz also points to countervailing dynamics, including the resilience of international human rights courts in the face of backlash or domestic mobilization against authoritarian regimes.

The broader effects of the rise of human rights and environmentalism are the subject of Chapter 9. Seline Trevisanut traces here how the law of the sea transformed in its interaction with both trends. After the adoption of the UN Convention of the Law of the Sea four decades ago, the law of the sea may have appeared as relatively static, but as Trevisanut shows, change has been driven through adjacent fields of international law, especially through the activation of multilateral, bureaucratic, and private authority pathways which channel signals of change from human rights and environmental law. Facilitating this transformation is, in her account, the involvement of several alternative authorities such as international organizations, expert authorities pushing for renewed understandings in guidelines and handbooks, and private actors (eg the oil and gas sector and professional associations).

Nina Kiderlin's Chapter 10 focuses on the effects of major power shifts in what appears as an arcane example only at first sight—the definition of 'public body' in the WTO rules on subsidies. This definition was important to China because of the prominence of state-owned enterprises and banks in its economic system, but it realized soon after its accession to the WTO that the negotiation-driven multilateral path was unlikely to lead to a significant change in its favour. It therefore actively shifted its efforts to the judicial pathway, the WTO dispute settlement system. Kiderlin explains that this required a long-term strategy, involving in particular investments in strong legal expertise. In the subsidies case, this led to a shift in China's direction on the part of the WTO AB, very much against the wishes of the US which, however, was unable to prevent the change. Yet, the episode contributed to growing US frustration, eventually resulting in the blockade of the AB (and a certain realignment of the public body jurisprudence once institutional risks had become clear). For some time, despite increased great-power rivalry, change had continued on the judicial pathway, only to be cut off by backlash when tensions became too strong.

5.4 Situating Change

The contributions to this volume give us a rich picture of the paths along which change travels in international law and the factors and dynamics behind change processes. This last section takes a step back to reflect more broadly on those processes, their doctrinal reconstruction, their sociological frame, and their political context. This begins, in Chapter 11, with a focus on the institutions involved in international legal change. Jeff Kucik and Sergio Puig's analysis focuses on the

way in which the WTO AB operates and effectuates change, and in particular on the AB's treatment of 'precedent' in response to political challenges. While the AB generally has a strong tendency to follow its previous jurisprudence, Kucik and Puig ask whether this picture changes when its previous decisions resulted in non-compliance by states. Based on a broad quantitative analysis of the AB record, they conclude that the AB is indeed far more likely to adjust its jurisprudence in the face of such challenges—a very significant finding that sheds light on the political dynamics of the judicial pathway on which states are no longer in the driver's seat but still exert significant influence. Responsive institutions are thus able to calibrate change in a far more flexible way than traditional, state-driven processes of legal change.

In Chapter 12, Dorothea Endres explores the sociological frames through which change in international law is constructed. Endres observes that appraising incremental change is particularly challenging when it is processed in different communities of practice, which might come to diverging conclusions on whether change has occurred and who has the authority to identify it. In the absence of a focal authority that can bring about a convergence of understandings, different positions might persist, reducing the chances of straightforward consolidation, as Endres argues. 'Change' then often lies in the eye of the beholder, conditioned by the specific community of practice they are situated in.

Fuad Zarbiyev's Chapter 13 presents a process-oriented analysis of changing interpretive authority in international law. Zarbiyev skilfully traces how the ILC called into question the state's ultimate authority in treaty interpretation through its draft conclusions on subsequent practice. He argues that although that state authority did not have a formal or jurisprudential grounding, it has been an obvious point of reference for a long time. This began to change, cautiously, with the creation of an official treaty interpretation regime as well as the proliferation of alternative interpretative authorities and treaties with third-party beneficiaries. Yet the ILC has taken this further—surprisingly without challenge from states themselves—to hold that the joint interpretation of a treaty by its parties is not necessarily determinative of its meaning. As the 'conclusions' are likely to have serious implications in practice, Zarbiyev suggests that, even as a matter of doctrine, the central role of states in (interpretive) change in international law is relativized.

The penultimate Chapter 14 by Ingo Venzke continues on this theme and explores whether legal change can exist independently of the changes in its surrounding context. He argues that reducing law to its context denies its relative autonomy and overlooks the internal reasons for change. Venzke asks, if we were to control for the changes in external circumstances, which alternative pathways of change would we observe? The answers to this question reveal the law's contingency, 'the field of possibility, bordering on necessity on one side and chance on the other'. It is through such lenses that we can situate change processes and

understand why the law changed in the way it did—which requires investigating also the paths 'not taken'—argues Venzke.

In his epilogue (Chapter 15), BS Chimni reflects on the insights gained in the volume and on the promise and limitations of its frame. For Chimni, the focus on gradual and informal change is important as it has become the dominant form of change due to prevailing treaty saturation. The relative autonomy of the legal order and its decentralized nature create a wide space for gradual or informal change processes. Yet Chimni calls for more attention to the directionality and cumulative impact of such change. Although incremental change may not be revolutionary, it still often amounts to meaningful transformations—though all too often in the interests of powerful states and non-state actors. For Chimni, the pathways of gradual change potentially also open up space for counter-hegemonic movements and ideals, but only a better understanding of the politics of those pathways will enable their use for emancipatory purposes.

6. Conclusion

How, why, and under what conditions change attempts in international law are successful is so far not well understood. This chapter seeks to take us closer to such an understanding by presenting an instrumentarium to help study informal legal change, and by offering a set of conjectures about the factors that explain the success of a given change attempt. To capture the dynamics of change in international law, we argue, we need to focus primarily on the 'paths' along which such change can travel, and which condition the modes, speed, and ease of change in a given field.

Our conjectures point to a picture of international legal change in which states continue to play an important role—but one in which other factors can outweigh a lack of state support for a given change attempt. The picture is a more 'social' one than others that have been advanced in that it seeks to take seriously the practices and authority structures as they exist in different fields and institutional contexts of international law. It is through such practices—which tend to involve state representatives, but also other actors—that the many pathways of change are charted out. The 'secondary rules' of international law, often portrayed as uniform throughout the international legal order, are produced through such practices and appear in fact to vary heavily across time and issue-areas.

This chapter presents a frame, what factors can determine the relevant pathways and account for the speed and success of change attempts in international law is first and foremost an empirical question. We cannot provide conclusive answers to this question here, but the different chapters in this volume present rich material to take us closer to a fuller account, and they provide many entry points for refining (and sometimes challenging) the picture we have presented here. They also urge