12

Whose International Law is Changing?

The Practice of Fragmented Communities Constructing Legal Change

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1. Introduction: A Trajectory of Change?

In Hindu mythology, Mahabali is a demon-king. At least when the higher castes tell the story. Narrating the same story, the Dalits display Mahabali as a heroic icon of justice.[1] The same practice, storytelling, produces opposing images of the same character in the story. Yet, Brahmans and Dalits have little cause to contest the other group's account of the story. The two characters of Mahabali exist in parallel. Similarly, international law is composed of communities of practice (CoPs) that at times coexist in parallel. Consequently, their evaluation of the same attempt at change can result in solidification of the norm in one CoP, yet in the sidelining of the same norm in another. These divergences do not necessarily lead to contestation. In particular when the change in question is incremental, CoPs may coexist while holding divergent views of what the law is.

Incremental change happens in a recursive dynamic,[2] structured in recurring phases of selection, construction, and reception.[3] As has been elaborated by Nico Krisch and Ezgi Yildiz in this volume, actors take up legal norms in the selection stage, construct legal change in the construction phase, and receive legal change in the reception phase.[4] International legal change is recursive in that it 'involves numerous iterations of law-making and implementation' between a wide range of actors.[5] Susan Block-Lieb and Terence Halliday distinguish between vertical and horizontal levels of recursivity: vertically, local, national, and global levels are

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[1] This was elaborated by the Indian scholar Jotirao Phule in 1873 in his book Gulamgiri. Cited in Gail Omvedt, *Seeking Begumpura—The Social Vision of Anticaste Intellectuals* (Navayana 2008) 166–67.

[2] Susan Block-Lieb and Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (CUP 2017) 26–27.

[3] Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023) 15–17.

[4] ibid.

[5] Block-Lieb and Halliday (n 2) 26.

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linked; horizontally, international actors are involved in 'multiple rounds of interactional engagements in their various claims to law-making authority'.[6] The idea of 'multiple rounds' refers to recurring phases of legal change: actors select certain norms in order to construct a legal change that then has to solidify in order to be successful.[7] For incremental legal change, in particular legal change that is not primarily secured by treaty-making or jurisprudence, this solidification is however a very murky process. Regularly, the degree of solidification of a legal change is unclear. In particular, different communities will have diverging opinions on the degree of solidification of a change. Hence, in order to pin down the extent to which a legal change has been 'successful', it is crucial to look at the practices registering or sidelining legal change. Those practices differ depending on issue-areas or type of actor, but also, and most importantly, within the same issue-area and amongst the same type of actors. In other words, we may find within one issue-area several communities composed of a variety of actors that are linked through common practices. Consequently, actors of the same issue-area may be members of different CoPs, and members of those different CoPs within the same issue-area will account differently for 'successful' legal change. For instance, investment tribunals' statements on 'what investment is' diverge without chronological logic, but by reference to assumptions about the legal basis on which investment arbitration operates.[8]

The identification of legal change in the reception stage of incremental legal change then becomes a heuristic exercise depending on the composition of the issue-area.[9] If one of the parallel communities is more closely linked to the issue-area, a change only being recognized in a specific, possibly very small community may become portrayed as successful for the whole issue-area—and vice versa. Thus, I argue that divergent CoPs may produce divergent accounts of change. And that the reception of legal change within the issue-area may identify legal change in accordance with one community's finding, neglecting the existence of parallel communities' views. If the composition of the community has been considered as 'critical because it makes and shapes the law',[10] I argue it is also critical for the evaluation of the success of legal change—for asking 'whose law is changing'.

Inquiring into the question of 'whose law it is', scholarship has produced insightful analyses on contestation and acceptance. The question is often framed in a manner that presumes that the answer will reflect conflict. For example, Frank Harvey and John Mitton ask whose norm it is when talking about norm

[6] ibid.
[7] Krisch and Yildiz (n 3) 11–12.
[8] See section 3.3.
[9] Krisch and Yildiz (n 3) 12.
[10] Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71 Current Legal Problems 119, 131.

antipreneurs,[11] and Block-Lieb and Halliday ask, 'whose law?' in order to highlight the role of competition and conflict in the process of making international law.[12] In contrast, this chapter looks at instances when different, divergent norms are produced in parallel yet without necessarily being perceived as conflicting. This is in particular due to the fact that divergent understandings of norms are not engaged with.

Different CoPs value and devalue legal change based on different shared premises. Consequently, in order to establish whose law is changing, two points are crucial: the actor and the practice. First, the actors' position in the frame in which the practice has meaning determines to some extent the value the practice has for the CoP in question. As we will see later in the chapter, the International Committee of the Red Cross (ICRC) enjoys a different position within the field of international humanitarian law (IHL) than the Appellate Body (AB) of the World Trade Organization (WTO) in the field of trade law. Secondly, different practices have different effects on the solidification of legal change. Furthermore, the same practice can vary in its effects depending on the broader structure in which it is embedded. Academics and judges may both engage in the practice of interpretation, but their interpretations have different effects on the solidification of legal change.

And yet, some judges and some academics join together in opposing other judges and other academics—all of them engaging in the same practice of interpretation. For instance, different CoPs can start emerging from such coalitions of opposition. As long as those coalitions engage in open conflict, the general solidification of change can be—at least to some extent—determined by evaluating the success of one coalition. However, if the starting point is less explicitly one of disagreement, members of one community may drift apart incrementally, and eventually resolve into two parallel communities coexisting without explicitly contesting the other group—albeit devaluing their propositions.

This argument will be elaborated in two steps. In the first step, I will present the theoretical concept of CoPs and how this concept can be useful for conceptualizing change in international law, and present the theoretical entry point for the second part, elaborating how one can make sense of divergent stages of solidification of legal change within the same issue-area or within the same group of actors. In the second step, I will introduce three examples to demonstrate the relevance of CoPs in international law for the analysis of legal change.

The first two examples look at state practice and its impact on international legal change. An example from the WTO demonstrates how the same legal norm used by different groups of states receives very different reactions. The second example

[11] Frank Harvey and John Mitton, 'Whose Norm Is It Anyways? Mediating Contest Norm-Histories in Iraq (2003) and Syria (2013)' in Alan Bloomfield and Shirley V Scott (eds), *Norm Antipreneurs and the Politics of Resistance to Global Normative Change* (Routledge 2017).

[12] Block-Lieb and Halliday (n 2) 265–321.

looks at how the practice of armed conflict affects the recognition of legal change in IHL. The final example explores the limits of the widely advanced argument that legal change is furthered by practices of interpretation in international litigation. Looking at international investment arbitration, I show that, while change-by-precedent is true for one CoP, a parallel community privileges bilateral investment treaties as the primary source of reference and consequently produces different accounts of legal change.

Ultimately, I demonstrate how CoPs in international law may develop parallel yet diverging understandings on what the law is, and how and when it changes. I will show how those communities might clash in contestations but need not do so. Indeed, they may coexist in 'peaceful' non-recognition of the validity of parallel communities' practices. Furthermore, as I will show, it is also possible that CoPs coexist in parallel without dynamics of conflict or convergence. I conclude this chapter with a critical assessment of the perspective and positionality of researchers investigating legal change.

2. CoPs Changing International Law

2.1 Definition

I understand CoPs as groups of actors that are held together through performative, patterned acts that rely on shared knowledge. Practices are 'competent performances' in the sense that they are 'socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out and possibly reify background knowledge and discourse in and on the material world'.[13]

Two elements of this definition are particularly relevant for this chapter. First, the use of 'competent' points to 'the fact that groups of individuals tend to interpret [the performance of practices] along similar standards'.[14] Thus, social recognition is crucial.[15] The second element is the role of background knowledge, which necessarily relies on collectivity for its production and implementation.[16] In fact, practices serve as 'structural, discursive and epistemic focal points'.[17] Those practices 'make possible common knowledge and enable actors to play the international game according to […] mutually recognizable rules'.[18]

[13] Emanuel Adler and Vincent Pouliot, 'International Practices' (2011) 3 International Theory 1, 4.
[14] ibid 6.
[15] ibid.
[16] ibid 8, 17–18 and 29; see also Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (CUP 1998) 51–71.
[17] Adler and Pouliot. 'International Practices' (n 13) 21.
[18] Karin Tusting, 'Language and Power in Communities of Practice' in David Barton and Karin Tusting (eds), *Beyond Communities of Practice: Language Power and Social Context* (CUP 2005) 44–45.

This means that they also isolate actors from one another, and this isolation regularly happens more on the level of background knowledge than on the level of cognizant strategic action.[19] As section 3 elaborates, those distinctions do not necessarily correlate with the boundaries of specific fields of international law.

While Emanuel Adler and Vincent Pouliot's analysis of practices focuses on the strategic use of practices,[20] by emphasizing the dynamics of collectivity and background knowledge, this chapter highlights how the recognition of legal change depends on practices incorporating change. This incorporation can be strategic, but it can also be a by-product of other mechanisms.[21] What qualifies articulations or actions as practices is their institutionalization into a framework for meaningful interaction.[22] In that process, background knowledge enables the deciphering of the interactions' meaning and consequently becomes crucial.

In further distinction to Adler and Pouliot, who focus on politics rather than law, my focus is on change of law and not politics, though I understand law and politics to be profoundly intertwined.[23] Closer to my perspective, Silviya Lechner and Mervyn Frost highlight the relevance of rule-following as a fundamental element of practice theory, which provides for an important starting point for recognizing normative dimensions of practices.[24] Practices as relations between persons provide for normative 'stickiness' and durability of a socially meaningful framework—CoPs.[25]

However, such frameworks can be more or less stable, and more or less closed. Lechner and Frost identify the existence of norms through the detection of adverse reactions to norm violation.[26] From that perspective, norms constituting the framework of a CoP may provide for diverging adverse reactions within the same community—to an extent that the boundaries of the community become blurry.[27]

While different communities are constituted through different practices, those differences are secondary for the argument presented here. Whether the practice is at the core of communities' practices affects the particular shape of the communities, but does not determine the stability of the communities per se. It is that difference in stability of CoPs that I want to highlight. Of fundamental importance for

[19] See Pierre Bourdieu, *Esquisse d'une théorie de la pratique* (Librairie Droz 1972) 261 and 265.

[20] Adler and Pouliot, 'International Practices' (n 13) 9–13 and 20.

[21] See eg Davide Nicolini, *Practice Theory, Work, and Organization: An Introduction* (OUP 2013) 195–98.

[22] Silviya Lechner and Mervyn Frost, *Practice Theory and International Relations* (CUP 2018)3 and 18.

[23] See Tanja Aalberts and Thomas Gammeltoft-Hansen, *The Changing Practices of International Law* (CUP 2018) 37.

[24] Lechner and Frost (n 22) 11.

[25] ibid 16.

[26] ibid 15.

[27] In contrast, Bourdieu sees chronologically ordered structures: Pierre Bourdieu, *Esquisse d'une théorie de la pratique: précédé de trois études d'ethnologie Kabyle* (Seuil 2000) 284. This is possible for him because he sidelines the question of normative dimensions, highlighted in Lechner and Frost's perspective (relying on Wittgenstein in contrast to Bourdieu): Lechner and Frost (n 22) ch 3.

the stability of a CoP is the shared background knowledge, an assumption of 'what the law is'.

2.2 CoPs in International Law

2.2.1 Constituting CoPs

Relying on Tanja Aalberts' account of political and legal elements in international practice, I argue that actors interact based on what they consider to be law and, through that interaction, create diverse CoPs.[28] Those communities are based upon a common understanding regarding the signification of those practices. For instance, the recognized practice for settling disputes in the WTO is to conform to the AB's ruling.[29] However, a diversity of actors engaging in practices brings about dynamics of legal change that may lead not only to constitution but also to the opposite: dissolution or fragmentation of CoPs.[30] For instance, actors assessing what law is applicable for the regulation of an armed conflict often rely on the term '*lex specialis*'—and depending on their humanitarian or military background, they understand the term differently.[31]

Most scholarship recognizing a diversity of actors in international law sorts those actors according to issue-areas and/or generalizable characteristics such as private, state, and international institutions.[32] In the process of incremental legal change, these categories are useful for identifying the different capacities of participants.[33] However, these categorizations fall short of being able to theorize the registration of incremental legal change. They do not account for the same types of actors in the same issue-area potentially belonging to groups that recognize law and its change differently; their group identity is constructed through different practices.

To some extent, Anthea Roberts touches on this point when she identifies different ways of practising international law in different geographical settings.[34] However, while her account starts from geographical boundaries, my account

[28] Tanja E Aalberts, *Constructing Sovereignty between Politics and Law* (Routledge 2012) 78, 81 and 87; Margareta Brummer, 'Abandonment, Construction and Denial - The Formation of a Zone' in Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (CUP 2018) 39.

[29] This will be elaborated in detail in section 3.1.

[30] Thus, this goes beyond Adler and Pouliot's assertion that '[n]ew practices emerge out of authoritative definitions of truth and morality as promoted by certain segments of society; but this is hard work of reification and power struggle'. Emanuel Adler and Vincent Pouliot, 'International Practices: Introduction and Framework' in *International Practices* (CUP 2011) 27.

[31] This is elaborated in detail in section 3.2.

[32] See eg Malcolm Nathan Shaw, *International Law* (8th edn, CUP 2018) 155–209, 234–54, 924–32, 991–94.

[33] See eg Sivakumaran (n 10), in particular 128–30.

[34] Anthea Roberts, *Is International Law International?* (OUP 2017).

starts from different practices constituting different communities. Those communities can be based in different geographical spaces or not. What is crucial is that their practice can and does determine what they conceive of as international law, and how and when it changes.

Ingo Venzke supports this point in relation to state representatives, when he holds that distinct actors of specific branches of government may 'align themselves according to sectoral interests in order to act on the international level […] and thus to gain advantage in competition on the domestic level'.[35] Venzke is of course not distinguishing between different phases of legal change, and if one were to categorize his thinking according to those categories, one would find it rather focused on interpretation as 'selection' phase, while the current project aims at delineating the practices relevant for the reception phase.[36] This difference is even more evident when Venzke identifies the authority of international courts or tribunals as 'the ability to establish content-laden reference points that participants cannot escape'.[37] As will be elaborated below, different actors situate themselves differently in their practice of referencing judicial decisions—thereby attributing different degrees of authority to different change attempts.[38]

2.2.2 Identifying communities

Identifying CoPs can be challenging. Tanja Aalberts sees states responding to developing rules and case law of international law and establishing their identity through those practices.[39] However, states are only one of many participants in interactions establishing and changing international law. In this game, I argue, it is the common background knowledge which determines the focal point around which CoPs are established.

Around that focal point, one can identify practices which determine what is inside and what is outside a given community.[40] For instance, enforcingcriteria for membership or mechanisms to settle disputes provide for practices that normalize certain values and behaviour, which ultimately ground background knowledge or assumptions of 'what the law is' and how it changes.[41] Actors not amenable to

[35] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (1st edn, OUP 2012) 67.

[36] Venzke however also points to 'recognition of authority' by tribunals as inherent in their practice of referencing: Ingo Venzke, 'Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction' (2013) 14 Theoretical Inquiries in Law 381, 403.

[37] ibid 398.

[38] Inger-Johanne Sand, 'Varieties of Authority in International Law' in Ingo Venzke and Patrick Capps (eds), *Legal Authority beyond the State* (CUP 2018). For the argument advanced here it is sufficient to highlight that different actors attribute authority differently.

[39] Aalberts and Gammeltoft-Hansen (n 23) 29–30.

[40] Ole Jacob Sending and Ivan B Neumann, 'Banking on Power: How Some Practices in an International Organization Anchor Others' in Adler and Pouliot (eds), International Practices (n 30) 232.

[41] Aalberts (n 28) 81–82.

those criteria will be considered as 'outsiders' on the other side of the communities' boundary.[42] Their knowledge and contribution to or assessment of legal change is sidelined or dismissed. However, the boundaries and the practices reiterating them are constantly fluctuating and at times blurry.[43]

Hence, in looking for CoPs, three requirements are fundamental: (1) common background knowledge that builds the centre of the communities' identity and in that sense leads the members to consider certain knowledge as 'given', as 'normal'; (2) practices directed internally that reinforce the normalization of the common knowledge and identity; and (3) practices directed externally that determine the distinction between members and non-members.

2.2.3 The role of law in CoPs

Most of the recent scholarship using practice theory in international law focuses on judicial lawmaking,[44] ignoring the plethora of roles that law plays in CoPs in the international legal landscape. As I note in the following section, the role of judicial lawmaking for driving and registering legal change depends on the specific entanglement with other practices and the specific community it is relating to. In particular, judicial lawmaking is entangled with practices of international bureaucracies, academics, and state representatives.[45] Depending on the setting in which we find this entanglement, the same jurisprudential activity can be registered as legal change or sidelined.[46] This will be illustrated using three examples in section 3.

From this perspective, the distinction between political and legal practice is hard to determine. To some extent, this chapter relies on the idea of interactional establishment of legality to determine to what extent law is part of the practice and change in question. Jutta Brunnée and Stephen Toope base their interactional theory on Lon Fuller's moral philosophy, and in particular on his idea of law having distinct 'criteria of legality'.[47] In Brunnée and Toope's view, the legal character of practices depends on a shared understanding for its effectiveness, obligatory character, and quality as 'law'.[48] This provides a solid starting point for thinking about

[42] ibid 152.

[43] ibid 73–74.

[44] See Jeffrey L Dunoff and Mark A Pollack, 'A Typology of International Judicial Practices' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018); Ingo Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law' in Henrik Palmer Olsen and Patrick Capps (eds), *Legal Authority beyond the State* (CUP 2018).

[45] Nina Reiners provides for a convincing account of such entanglement in the context of human rights: Nina Reiners, *Transnational Lawmaking Coalitions for Human Rights* (CUP 2021) 37–8.

[46] For instance, different investment arbitration tribunals register different developments as solidified legal change. This will be elaborated in detail in section 3.3.

[47] Stephen John Toope and Jutta Brunnée, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010) 26.

[48] ibid 33; see also Nico Krisch, 'Review: Brunée and Toope—Legitimacy and Legality in International Law: An Interactional Account' (2012) 106 American Journal of International Law 203, 203.

the way in which legal could be distinguished from political. However, as we will see below, in the international settings where actors and issue-areas and processes are multifaceted, fragmented, and entangled, more nuance is required: the practices which set up and rely on shared understandings are a lot less uniform than Brunnée and Toope imply.[49] In particular, as I point out in section 3, background assumptions vary considerably.

What is crucial, however, is Brunnée and Toope's fundamental point that legal characteristics are established and reinforced in interaction. Consequently, the qualification of legal change as 'successful' is also interactional. Depending on who interacts, this qualification can vary. In fact, different qualifications of the same change attempt can coexist without explicitly contesting each other. Conflict and contestation are more likely to arise when the change attempt emerges in the vicinity of strong international institutions centralizing the relevant practices. Pulling practices together, such institutions are likely to force diverging positions into direct conflict, and those conflicts are then authoritatively settled by that institution. As will be demonstrated in section 3.1, this used to be the case at the WTO.

3. Three Kinds of Communities

The stability of CoPs varies and is particularly dependent on the institutional setting in which the practices play out. The dynamics of opposition and incremental (dis-)agreement outlined above can have converging, diverging, or isolating effects on the CoPs concerned. Indeed, CoPs do not exist in an isolated and static way. To the contrary, depending on the dynamics provoked through practices, we find three different kinds of CoPs: convergent, divergent, and parallel.[50]

3.1 Convergent Community

For convergent communities, different ideas of 'what is the law' clash through practice and, consequently, the community converges around that practice. This will be illustrated using the example of the interpretation of Article XX(b) of the General Agreement on Tariffs and Trade (GATT), which allows for discrimination between countries with the same circumstances if 'necessary to protect human, animal or plant life or health'. In this example, the core question is how framing facts can push

[49] Toope and Brunnée (n 47) 56–87, 80–81 and 84–86; See also Krisch, 'Review: Legitimacy and Legality in International Law' (n 48) 205–06.

[50] It is important to keep in mind that there is seldom a CoP that is only constituted through one specific practice. The specific practice on which the examples focus are important practices but seldom the only practice constitutive of a specific community. Their role is highlighted in this chapter in order to demonstrate the role of practices for incremental legal change.

members of one community into clashes and how dispute settlement procedures may produce dynamics of convergence out of this.[51]

Very broadly, for WTO-focused trade law, the basic background assumption is that reduction of barriers is desirable, and the main actor is the nation state.[52] Furthermore, the AB is the central authority for the settlement of disputes.[53] These unquestioned assumptions form the centre of the community's identity.

Internal practices that reinforce the normalization of this common knowledge and identity are plentiful, the most important one being trade between actors that are based in two different countries—in other words, export and import. With respect to the differentiation between export and import, recent decades have considerably reshuffled states' positions,[54] leading to significant questioning of existing legal practices. States who were formerly respondents now also feature as claimants and vice versa. The example of legal change analysed here results from this reshuffling and demonstrates how dispute settlement can function as a practice of normalization: diverging opinions clash before the AB, and subsequently the AB's opinion on 'what the law is' becomes the standard for the entire community.

What is crucial here is the way in which facts are framed in order to enter the legal discourse. This practice of framing facts only makes sense in a setting in which clear argumentative structures are pre-given. This is particularly the case in judicial proceedings. The procedural law is assumed to ensure, inter alia, the correct filtering between relevant and irrelevant facts.[55] Practices may vary depending on the situatedness of the actor—as claimant, respondent, or judge—but the procedure fixes their interaction onto one authoritative outcome: the judge's ruling.[56] If practices may make way for diverging communities, the procedure before

[51] 'Framing Facts' is the practice of how facts are presented before a judicial body. This is a crucial practice translating (shifting) political positions into legal reasoning. The interpretive practices of judges depend considerably on these framings: this practice provides much of the form and substance on which the judges will base their interpretation. See Ana Luísa Bernardino, 'The Discursive Construction of Facts in International Adjudication' (2020) 11 Journal of International Dispute Settlement 175, 179–81. The judicial setting situates actors in very succinct positions towards one another. The claimant frames the facts to her advantage, the respondent tries to shift that frame to her advantage, the judge is then supposed to make an impartial decision. In short, 'framing facts' is a crucial legal practice for legal change. Venzke, *How Interpretation Makes International Law* (n 35) 53–54.

[52] Peter Van den Bossche and Denise Prévost, *Essentials of WTO Law* (2nd edn, CUP 2021) 2.

[53] This centrality is however limited to the field of WTO law and only present in one sequence of the chronological development of trade law. Joost Pauwelyn, 'The Transformation of World Trade' (2005) 104 Michigan Law Review 1, 25–26. Arguably the recent sidelining of the WTO AB originates in participants' questioning of the common background assumptions to the extent that even a central judicial body lacks the sufficient degree of authority to hold the community together. Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22 Journal of International Economic Law 297.

[54] Gilbert R Winham, 'The Evolution of the World Trading System — the Economic and Policy Context' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 25–27.

[55] Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer 2010) 11–12 and 174–88.

[56] In that vein, the Dispute Settlement Understanding, art 11 calls for an 'objective assessment of the facts of the case'. See, for a problematization of that idea of objectivity, Bernardino (n 51) 181–82.

judicial bodies tends to the opposite, to foster reunifications: 'By authoritatively stating what the law is, [judicial decisions] partake in [the law's] creation.'[57] That is, there is convergence.

The strategic use of interpretative practices has gained much attention in theorizations about international legal practices. In particular, the function of precedent in lawmaking practices in international trade law has been explored in great detail.[58] What will be highlighted here is the way in which diverging practices are forced to clash and to be reconciled because of the central position of the judicial body in the WTO system, the AB.[59] So, this example highlights the limits of such strategic interpretive practices, particularly in fields with strong central institutions.

As stated above, Article XX (b) GATT allows exceptions to WTO member states' obligations when those measures are necessary for the protection of human life or health. In the legal argument that has to be made, it is crucial to demonstrate that a 'risk' to health or human life made protective measures necessary.[60] Demonstrating 'risk' is however not primarily concerned with doctrinal questions, but with the establishment of facts. Consequently, these cases are regularly fought on the level of 'facts' rather than 'legal doctrine'.[61] More precisely, the core question at issue between the parties is how to deploy facts into the legal framework. This interpretive practice establishing facts within legal reasoning is particularly interesting with respect to legal change.

In defending its measures in *EC—Asbestos*, the European Community opposed requests to quantify the risk in question with the argument that a risk may be evaluated either in quantitative or in qualitative terms.[62] This practice was then reversed when challenging measures in *Brazil—Retreaded Tyres*. While 'the European Communities contend[ed], the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban',[63] Brazil countered that the assessment of the Panel was correct because 'the [AB] expressly recognized, in *EC – Asbestos*, that "a risk may be evaluated either in quantitative or qualitative terms" '.[64] Indeed,

[57] Venzke, *How Interpretation Makes International Law* (n 35) 26.

[58] See Ingo Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 12 German Law Journal 1111.

[59] See section 2. Legal characteristics are established and reinforced through interaction. Here, the dispute settlement mechanism enforces this interaction. Furthermore, states participating in dispute settlement in front of the AB 'share an understanding of "what they are doing and why" '. Toope and Brunnée (n 47) 26 and 80; Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge 2005) 22.

[60] Steve Charnovitz, 'The WTO's Environmental Progress' (2007) 10 Journal of International Economic Law 685, 697–99.

[61] Gabrielle Marceau and Julian Wyatt, 'Trade and the Environment: The WTO's Effort to Balance Economic and Sustainable Development' in *Liber Amicorum Anne Petitpierre-Sauvain—de la responsabilité sociale et sociétale* (Schulthess 2009) 232.

[62] *EC—Asbestos* (2001) WT/DS135/AB/R, para 167.

[63] *Brazil—Retreaded Tyres* (2007) WT/DS332/AB/R, para 137.

[64] ibid para 138.

in *EC—Asbestos*, the European Union argued the exact opposite of what it advanced in *Brazil—Retreaded Tyres*.[65]

This is hardly surprising for anyone with basic knowledge of legal practices. The interests of the EC when it was defending its measure in *EC—Asbestos* were different from the interests of the EC when it was challenging Brazil's measure as an exporter of retreaded tyres to Brazil. This is simply good lawyering—to argue that a legal norm should be interpreted to the advantage of her clients.[66]

What makes this example striking is the evidence it provides for divergence of CoPs: health protection elements were introduced by the states of the Global North in *EC—Asbestos*. Then, these ideas were taken up by emerging economies for their own purposes in *Brazil—Retreaded Tyres*. This triggered opposition by the original 'inventors', the states of the Global North. Different positions in the structure of interpretive practice made the actors advance different arguments about what the law is. In effect, strands of the WTO community started to diverge into two separate communities.

However, the institutional structure of the field prevented this divergence. The AB provided a centripetal dynamic that pulled the diverging strands back together.[67] At the time, within the WTO system, the AB was the central point at which disputes almost necessarily ended up.[68] Authority for interpretation of WTO law was also quite centralized in the AB.[69] Consequently, interpretations clashed, and were authoritatively settled and reunified by the AB.[70] In that sense, this example is strikingly different from the much more ambiguous legal situation in the following example from the field of IHL or the Laws of Armed Conflict (LoAC).

3.2 Diverging Communities

In divergent communities, different ideas of 'what the law is' are not forced into a clash. But divergent background knowledge and conviction as to 'what the law is' makes actors devalue certain premises. Actors who have those devalued premises at the centre of their constituent practices may engage in reciprocal devaluation. Around those divergent premises, divergent communities may emerge. Divergent communities' identities develop and lead the members to consider different knowledge as 'given', as 'normal'. Legal developments may be discarded as unsuccessful change attempts in one group and at the same time considered as crucial changes

[65] Marceau and Wyatt (n 61) 232–33.
[66] See eg Jeffrey Lipshaw, *Beyond Legal Reasoning: A Critique of Pure Lawyering* (Routledge 2017) 8.
[67] Pauwelyn, 'The Transformation of World Trade' (n 53) 25–26.
[68] Winham (n 54) 28.
[69] Dominique Carreau and Patrick Juillard, *Droit international économique* (3rd edn, Dalloz 2007) para 48.
[70] *Brazil—Retreaded Tyres* (n 63) paras 140 and 146. See section 2.

in the other group. Since there is no central authoritative institution settling the conflict, these diverging accounts on legal change can coexist.

In the area regulating military behaviour in times of armed conflict, this is already evident in the way that body of law is denominated.[71] On the one side, lawyers using the terminology of IHL emphasize human dignity and human rights.[72] On the other side, lawyers using the terminology of Laws of War or LoAC tend to prioritize the principle of military necessity.[73] Despite being rooted in the same regulatory practices, here diverging values lead to diverging CoPs.

However, the two groups of lawyers do not exist in isolation.[74] Even if their evaluation of the success of a change attempt varies, they will still engage in overlapping knowledge and practice. Let me highlight this dynamic in the practice of conferencing.

Conferencing is a practice of assembling a community with similar interests and background in a specifically coordinated social setting.[75] Conferences provide focal points around which CoPs can evolve. Different conferences providing different focal points can, however, split up communities. In fact, within the same field of law, practitioners and academics often have diverging focal points for conferences. Similarly, diverging focal points of different conferences may reinforce diverging background assumptions. Different conference communities may develop diverging ideas about 'what the law is' in coexistence with other conference communities, devaluing divergent communities' standpoints.[76]

While it is recognized that international summits or conferences are a fundamental practice for the international order, providing centres of unity and furthering coherence, there is less consideration of how this same practice splits up the international order. In terms of legal change, the ICRC used to position itself as the principal forum convening states and driving convention-making.[77] Shifting

[71] David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 Leiden Journal of International Law 315, 315.

[72] ibid 328–36.

[73] ibid 322–28. I will use the term 'LoAC/IHL' when addressing the field of law from a perspective that covers both the humanity and the military necessity focused communities. At the same time, as Luban points out, the separation in the use of the terminology is not absolute. Indeed, as it is a divergence and not a separation of communities, we see overlapping use of terminologies, ibid 318.

[74] Sivakumaran (n 10) 132.

[75] Lianne JM Boer and Sofia Stolk (eds), 'Backstage Practices of Transnational Law' in *Backstage Practices of Transnational Law* (Routledge 2019) 1–6.

[76] In this context, the present account of practice theory links to theorizations about epistemic communities or interpretive communities in international law. Those conceptualizations rely, however, on slightly different membership criteria, in particular with regards to the role of background knowledge and the relevant activities. See eg Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont, Sahib Singh, and Andrea Bianchi (eds), *Concepts for International Law—Contributions to Disciplinary Thought* (Edward Elgar 2019); for a compelling account of interpretive debates in IHL, see Abhimanyu George Jain, 'The Implication of Sovereignty in Contemporary Interpretive Debates in IHL' (2018) 4 and 24–25 in particular.

[77] Emily Camins, 'The Past as Prologue: The Development of the "Direct Participation" Exception to Civilian Immunity' (2008) 90 International Review of the Red Cross 853, 872–79.

from state-focused to expert-driven paths of change, the setting has diversified considerably in recent decades. Conferences on the regulation of military conduct may attract more legal experts prioritizing military necessity. Conferences on humanitarian and human rights issues in times of armed conflict may assemble lawyers more interested in the protection of humanitarian values in times of war, and more ready to engage in considerations of human rights.[78]

With this in mind it is unsurprising that, when Seán MacBride sought to introduce human rights considerations into IHL at the 1968 International Conference on Human Rights in Tehran, a conference primarily assembling human rights lawyers, he met with no resistance.[79] Being the Secretary-General of the International Commission of Jurists, a member of the Irish Republican Army, and co-founder of Amnesty International gave him the authority to trigger the 'multilateral path' of the neighbouring field of IHL.[80] This was also possible because human rights conferences did not (and do not) tend to assemble people opposed to the use of human rights. In fact, the topic had not been on the agenda of the conference,[81] and yet discussions resulted in UN General Assembly resolution XXIII on human rights in armed conflicts, which was passed without opposition and only two abstentions.[82] At the same time, the fact that this proposition originated in a human rights conference may have made it all the easier for lawyers most distant from those considerations to discard even established principles of IHL as being overly informed by human rights.

This is illustrated in the use of the International Court of Justice's (ICJ) jurisprudence on the relationship between IHL and international human rights law (IHRL) in the Expert Process convened by the ICRC to define the notion of 'direct participation in hostilities' (DPH). One could argue that the ICJ issued a well-aligned series of judgments pronouncing general rules on the relationship between IHRL and IHL/LoAC. In the 1996 *Nuclear Weapons* case, the ICJ first qualified the relationship between IHRL and IHL/LoAC as governed by the principle of *lex specialis*.[83] The formulation '*lex specialis*' however only appears in the dissenting opinion of Judge Weeramantry:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be

[78] Sivakumaran (n 10) 130–32.

[79] See, for a detailed account of MacBride's role, Amanda Alexander, 'A History of International Humanitarian Law' (2015) 26 European Journal of International Law 109, 118–19.

[80] Krisch and Yildiz (n 3) 10.

[81] Keith Suter, *An International Law of Guerrilla Warfare* (St Martin's Press 1984) 34; Alexander (n 79) 119.

[82] UNGA, 'Respect for Human Rights in Armed Conflicts (19 December 1968) A/RES/2444.

[83] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

> determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.[84]

This formulation encouraged the interpretation that human rights continue to be applicable during war but will be displaced by the specific norms of IHL/LoAC. In 2004, the ICJ issued its *Wall* Advisory Opinion.[85] While the *lex specialis* principle remained part of the argument, the emphasis shifted to the complementarity of IHL/LoAC and IHRL norms.[86] In its 2005 decision in the *Armed Activities* case, the ICJ subscribed to complementarity: citing the *Nuclear Weapons* and *Wall* Opinions—however, and most importantly, without reference to '*lex specialis*'—the Court concluded that 'both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration'.[87] So the ICJ provided for a clear-cut judicial pathway of change.[88] Arguably, a court authoritatively settled the issue.

And yet, in the following years, proponents of the military necessity principle in the Expert Process aimed at defining the notion of 'DPH' (2003–08) vehemently contested the 'introduction' of human rights law into the Guidance, using as the *Nuclear Weapons* case as their principal reference, without addressing the subsequent cases.[89] Rather unusually, the newer ICJ jurisprudence was also barely addressed by the opposing group, the proponents of humanitarian considerations, though it would have supported their position.[90] One hypothetical explanation for this is the discursive contingency in this Expert Process. Opposing values of

[84] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion: Dissenting Opinion of Judge Weeramantry) [1996] ICJ Rep 429, 443.

[85] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[86] ibid 106:

> [T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis international humanitarian law.

[87] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 216.

[88] See, for more detailed elaboration, Dorothea Endres, 'Case Study 8: Direct Participation in Hostilities' in Pedro Martínez Esponda et al (eds), *The Paths of International Law: Case Studies* (2023) 248 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430270>.

[89] See eg Nils Melzer, 'Third Expert Meeting on the Notion of Direct Participation in Hostilities Co-Organized by the ICRC and the TMC Asser Institute—Summary Report' (2005) 51–52; W Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities Study": No Mandate, No Expertise, and Legally Incorrect' (2010) 42 International Law and Politics 769, 798–801.

[90] See Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 NYU Journal of International Law and Politics 831, 898–99.

military necessity and humanitarianism were set to clash, and this clash then happened to revolve around a random quote of a former Vice-President of the ICRC, Jean Pictet, sidelining the question of *lex specialis*.[91] Considered a hero to the humanitarian law community, Pictet's quote was unwelcome to those identifying with the military law community.[92]

From the available documents it seems that all people engaged in the discussion did assume '*lex specialis*' to be a term of art not needing elaboration, let alone proper referencing. And yet, they quite obviously understood different things when referring to '*lex specialis*'.[93] For some, '*lex specialis*' had been applied wrongly because the laws of war were not given clear priority over human rights considerations, and for others, '*lex specialis*' had been applied wrongly because human rights considerations had not been sufficiently taken into account.[94] In sum, both communities interpreted the term relying on their—diverging—background knowledge.

Comparing textbooks and jurisprudence, this difference would never become so evident. Even Yoram Dinstein, who favours military necessity, engages with the *lex specialis* principle in his textbook.[95] However, the majority of lawyers in the military necessity camp are not writing textbooks but instead are engaged in military activities.[96] Some of their constituent practices are fundamentally different from the constituent practices of humanitarian lawyers, of whom a large number are more engaged in assessing military practice than in its exercise.[97] They regularly either work in academia or in humanitarian organizations.[98]

[91] 'If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.' ICRC Interpretive Guidance, at 82 (citing Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 75). For the discussion's focus on that quote, see eg Parks (n 90) 794; Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 European Journal of International Law 819, 820. This transpired down to the level of national implementation: US Department of Defense, Law of War Manual (2023) 9, states the principle of *lex specialis* without acknowledging different interpretations thereof but engages in a critique of the Jean Pictet quote at 57.

[92] This points to another practice, the stylization of heroes for a given community.

[93] Melzer makes this point in 'Keeping the Balance between Military Necessity and Humanity' (n 90) 898–99.

[94] Jean-François Quéguiner, 'First Expert Meeting on the Notion of Direct Participation in Hostilities Co-Organized by the ICRC and the TMC Asser Institute—Summary Report' (2003) 8; Nils Melzer, 'Second Expert Meeting on the Notion of Direct Participation in Hostilities Co-Organized by the ICRC and the TMC Asser Institute—Summary Report' (2004) 18; Nils Melzer, 'Third Expert Meeting—Summary Report' (n 89) 51; Nils Melzer, 'Fourth Expert Meeting on the Notion of Direct Participation in Hostilities Co-Organized by the ICRC and the TMC Asser Institute—Summary Report' (2006) 9 and 78–79; Nils Melzer, 'Fifth Expert Meeting on the Notion of Direct Participation in Hostilities—Summary Report' (2008) 22.

[95] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3rd edn, CUP 2016) 32-5.

[96] Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2006) 39 Israel Law Review 81, 82–83.

[97] See along those lines Luban (n 71) 318–22, 320 in particular.

[98] See Benvenisti (n 96) 82–83.

Thus, in contrast to the WTO, in this development of divergent CoPs, the ICRC's interest is not to escalate confrontations—it lacks capacity comparable to the WTO's AB to settle the conflict.[99] Instead, it attempts to push for legal change by stating authoritatively what the law is—or should be in their view[100] However, though the ICRC may construct an excellent study on customary IHL/LoAC or on DPH, the study's relevance is determined by the reception in CoPs.[101] While the customary IHL study is widely relied upon (even where the norm in the study is quite divergent from prior discourse),[102] the DPH study is only cited in order to mark the point where the divergent CoPs position themselves in relation to the study: at one end, military lawyers will only mark its existence and impracticability,[103] while at the other end, human-rights-favouring lawyers will push the construction much further, criticizing the guidance as insufficient.[104]

In sum, the different institutional structure of this field allows two CoPs to coexist without much explicit confrontation.[105] The ICRC, as a powerful institution of that international field, being necessarily closer to the CoP favouring humanitarian values,[106] is necessarily quite subjective in a conflict between this CoP and the CoP favouring military necessity.[107] At the same time, members of the humanitarian community are more engaged in the assessment than in the practice of military activity. Hence, the military lawyers, focusing on their own practice can also

[99] See along similar lines Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 291.

[100] The ICRC itself, of course, argues that no such attempt to push for change has been made. ICRC and Nils Melzer, *Interpretive Guidance on The Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 6. See Linus Mührel, 'The Authority of the ICRC' (Dissertation, Freie Universität Berlin 2022).

[101] Sivakumaran (n 10) 152; See also Emily Crawford, *Identifying the Enemy* (OUP 2015) 87. Crawford points out how the ICRC's guidance should be considered as a policy statement of the institution, not as a restatement of the law. Thus, the ICRC's authority to induce legal change appears rather limited.

[102] Sivakumaran (n 10) 141. However, even the reception of the ICRC Customary Law Study was not without contestation. See eg the US Department of Defense Law of War Manual (20123 at 181, refuting the ICRC Customary Law Study as well as the DPH Guidance. Even more explicit is the report of David Luban on the British government being 'pushed to issue the UK Military Manual (which had been stalled in the bureaucracy) because the ICRC was about to issue its own study of customary international humanitarian law and "we need to get in our retaliation in advance" ', Luban (n 71) 315–49, fn 9.

[103] See eg the US Department of Defense Law of War Manual (2023) 235. Yoram Dinstein, 'Direct Participation in Hostilities' (2013) 18 Tilburg Law Review 3, 7–8.

[104] Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt' (2013) 24 European Journal of International Law 863, 864.

[105] Scholarship explains this as being enabled through legal indeterminacy. See Luban (n 71) 318–19 and 336–38 in particular; Adil Ahmad Haque, 'Indeterminacy in the Law of Armed Conflict' (2019) 95 International Law Studies 118.

[106] See, for a detailed account thereof, Els Debuf, 'Tools to Do the Job: The ICRC's Legal Status, Privileges and Immunities' (2015) 97 International Review of the Red Cross 319, 320–21 in particular.

[107] Luban notes that this increasing opposition between military and humanitarian lawyers may not always have been that explicit: Luban (n 71) 316–17.

easily discard the humanitarian lawyers' arguments as detached from 'realities of warfare'.[108] Hence, the divergent practices make relative coexistence possible.

This expert-based discourse on the law is entangled with relevant state practice.[109] Thus, 'whose practice is relevant' becomes crucial. We find here a divergent CoP based on states who engage with legal justifications of their military actions and states who do not reference these norms when engaging in violent conflict. In that sense, the common background knowledge diverges on the practice of applying law in times of war.[110] To illustrate, while North Atlantic Treaty Organization states and Israel are most explicit in justifying their military action according to IHL/LoAC standards, the majority of states engaged in armed conflicts tend to be significantly more reluctant to invoke these rules.[111] Consequently, experts, in discussions on 'what the law is', tend to rely on the examples from those states to a greater extent, neglecting the silence of the large majority of states.[112]

Let me demonstrate this problem by zooming in on the change attempt made by the ICRC to detail and thereby change the definition of DPH. The increasing number of multifaceted armed conflicts sidelines the general background assumption of interstate war as the stereotypical case for regulation.[113] In an interstate war, a dichotomy between civilian and soldier seems quite clear, and consequently the legal rule that soldiers can be the direct target of an attack, but not civilians, seems very clear as well.[114] The reluctance of states to qualify members of non-state armed groups as 'combatants' made the situation a little more complicated in conflicts involving non-state armed groups.[115] Since the dichotomy between soldier and civilian remains the core logic, combatants are equated with civilians. Civilians cannot be directly targeted, as long as they do not participate directly in hostilities.[116] Hence, the question of how to determine when and how a civilian can be

[108] See eg Melzer, 'Third Expert Meeting—Summary Report' (n 89) 52; Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance' (2010) NYU Journal of International Law and Politics 641, 662 and 680.

[109] Arguably, this is a case of an expert process intended to fill the gap left by states' reluctance to engage in conventional lawmaking. For Sivakumaran, it is representative of 'the age of the manual', Sivakumaran (n 10) 143. However, as we will see below, this expert-based path of change may actually also increase gaps.

[110] Adler and Pouliot, 'International Practices' (n 13) 17.

[111] This is not to say that Global South states are not participating in the lawmaking at all. See eg Alejandro Rodiles, 'International Humanitarian Law-Making in Latin America: Between the International Community, Humanity, and Extreme Violence' in Heike Krieger and Jonas Pueschmann (eds), *Law-making and Legitimacy in International Humanitarian Law* (Edward Elgar 2021); Balingene Kahombo, 'Sovereign Equality and Law-Making: How Do States from the Global South Shape International Humanitarian Law? An African Perspective' in ibid. Michael Bothe, 'Sovereign Equality and Law-Making: How Do States from the Global South Shape International Humanitarian Law? A Comment to Alejandro Rodiles and Balingene Kahombo' in ibid.

[112] Sivakumaran (n 10) 137.

[113] See eg Quéguiner (n 94) 4.

[114] Marco Sassòli, *International Humanitarian Law—Rules, Controversies, and Solutionas to Problems Arising in Warfare* (Edward Elgar 2019) paras 3.14–3.18. On the discussions during the drafting process regarding the definition of the civilians, see Geoffrey Best, *War and Law Since 1945* (OUP 1994) 115–23.

[115] Crawford (n 101) 18–20.

[116] Common art 3 of the Geneva Conventions.

considered to be participating directly in hostilities is at the core of the contemporary military practice of some states. Domestic legal and political interventions in the USA, UK, Germany, and Israel have pushed the evaluation of the legality of targeting practices to the forefront of debates on the military interventions of their countries.[117]

And yet, this leaves the majority of participants in contemporary armed conflicts outside the lawmaking picture. In effect, regarding the debate as to the relevance of other states' practices for the construction of LoAC/IHL, there seems little debate as long as the Global North has no interest in intervening. The ICRC-led Expert Process on the 'definition of DPH' was very narrowly focused on the state practice of USA, UK, Germany, and Israel.[118] Conversely, for instance, the practice of Cameroun, Nigeria, and Chad in their conflict with Boko Haram do not appear to ever have been on the table. In fact, sometimes it seemed as if the Taliban was the only non-state actor relevant for the definition of DPH, arguably because of the ongoing large-scale intervention of the Global North in the region where Taliban activity takes place.[119] Given the anonymization of documents on the Expert Process, there is no evidence to what extent representatives of other parts of the world were involved.[120] Thus, two alternative or complementary explications remain possible: that 'experts' were mainly from the Global North and/or expert knowledge focused on US military hegemony.

Interestingly, states whose practice is regularly ignored do not engage in open contestation. Even powerful states like India or China will not openly oppose change attempts in IHL/LoAC. They regularly resolve not to apply this body of law at all.[121] Qualifying internal conflicts as not amounting to the level of violence necessary for the applicability of IHL/LoAC to kick in, they aim at keeping their military practice outside the realm of IHL/LoAC. Given that 'IHL/LoAC experts' focus on the practice of the Global North, this practice can peacefully coexist with

[117] See, for the US, Naz K Modirazeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance' (2014) 5 Harvard National Security Journal 225.

[118] See eg Melzer, 'Fifth Expert Meeting' (n 94) 14, 15, 24, 27; This is in contrast to the very exhaustive nature of the ICRC Customary Law Study: Sivakumaran (n 10) 135.

[119] In fact, there was a gradual shift from a focus at the beginning on private military companies, cyberwarfare, and the war on terror to an almost exclusive zooming into combatants in asymmetrical warfare. Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harvard National Security Journal 5, 10.

[120] Arguably, that anonymization is itself evidence of a tension between military and humanitarian lawyers in the Expert Process. Given that a considerable number of experts are said to have withdrawn their name from the final draft because it was giving too little weight to the principle of military necessity, the guidance now only represents the ICRC's view, and the Expert Process was anonymized. See ibid 6.

[121] See eg the conflict of the Indian government with the Communist (Maoist) party, classified as armed conflict by the Geneva Academy's database: <www.rulac.org/browse/conflicts/non-international-armed-conflict-in-india> accessed 9 November 2022. However, the Indian government treats this conflict as entirely outside the realm of IHL/LoAC: <www.mha.gov.in/sites/default/files/2023-04/FAQs_LWE_27042023.pdf> accessed 9 November 2022.

IHL/LoAC. The few states actively engaged in the application of IHL determine its change, and the states in armed conflict without reference to IHL/LoAC continue to follow their own set of rules. For the identification of 'successful change' in IHL/LoAC the consequence is striking: as long as the states of the Global North engaged in military conflict align, change in IHL/LoAC will seem extremely successful, and conversely, the contestation of one subgroup of the Global North obstructs change attempts in IHL/LoAC.

3.3 Parallel Communities

For parallel communities we see different ideas of 'what the law is' that ignore one another. If practices do not force those ideas to engage, parallel CoPs may coexist. This will be illustrated using the example of defining 'investment' in arbitration that is based on the Convention of the International Centre for Settlement of Investment Disputes (ICSID). In this example, the core question is how the practice of framing law can lead to the existence of parallel communities. One of the most basic elements of interpretive practice in law is the substantiation of the argument with the correct legal basis.[122] In order to provide sound legal reasoning, the argument has to be based on authoritative sources of law. Opinions can, however, vary regarding the location of the authoritative source of law.[123] Consequently, framing law is a practice that can produce divergence—or even parallel coexistence—of communities.

Let us consider the example of the Salini test for defining investment in ICSID-based investment arbitration to identify CoPs.[124] This test defines the elements of 'investment'.[125] The practice is similar to the WTO example above in that it translates 'facts' into the realm of legal reasoning. However, the practice has developed in different directions. In fact, there are probably as many versions of the Salini test as there are arbitrators, perhaps even more. And yet, each award relying on the test

[122] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 33.

[123] Parameters for interaction may be clear so, in Toopes and Brunnée's conceptualization, conditions for a uniform CoP are given. However, the centre of authority is dispersed to an extent that opposing views are not forced into interaction. Thus, no uniform understanding of 'what the law is' emerges: Toope and Brunnée (n 47) 42 and 70–71.

[124] *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (Decision on Jurisdiction) (16 July 2001) ICSID Case No ARB/00/4, para 52. Going beyond this paper's scope, let me nevertheless highlight the contingency of this change attempt's selection phase. The reason for the Salini test being the 'Salini test' and not the 'Gaillard test' is possibly the fact that the original argument, made by Gaillard, is basically only accessible in French university libraries.

[125] Dorothea Endres, 'Case Study 23: Legal Change of the Definition of "Investment" Within the Icsid Framework' in Pedro Martinez Esponda and others (eds), *The Paths of International Law. Case Studies* (SSRN 2023), 732–82.

references it as a somewhat 'stable' reference point. This stability is obtained by selective referencing of previous decisions and legal authorities.[126]

For this reference point, common background assumptions differ as to the understanding of 'what the law is' to the extent that parallel centres of the communities' identity emerge and in that sense lead the members to consider different knowledge as 'given' and 'normal'.[127] While it is barely debated that investment arbitration is based on a network of bilateral treaties, actors have different background assumptions as to how those bilateral treaties sit within the broader setting, for instance when they relate to ICSID.[128] Some actors consider bilateral treaties as establishing a multiverse of independent communities, while other actors consider ICSID as an additional element, and yet another group sees in ICSID the source of an overarching, constitution-like frame.[129]

The boundaries of these communities are fluid, but constantly recreated through the appointment of arbitrators and choice of legal representation before the tribunal.[130] Furthermore, the state being considered only as a defendant limits state agency considerably.[131] Those practices are common to all three identified communities. And yet, different background assumptions lead to different outcomes of these practices within the respective communities. In fact, the CoPs are different to the extent that they cite case law in line with their own argumentation without engagement with opposing views.[132]

When tracing the practice of framing of law, one can see confrontations between different opinions on 'what that law is' as engaged in semantic struggles 'with the decided interest of finding acceptance for their claims about the meaning of legal expressions and thus seek[ing] to influence what is considered (il)legal'.[133] However, those struggles often do not necessitate a confrontation with or changing of adversary opinions: framing what is perceived as an authoritative source of law and thereby sidelining other opinions can create coexisting CoPs within the same field of law. In this process, the practice of referencing becomes crucial. Regularly, in international law fields in which rules of precedent developed in a curious mishmash between legal cultures, the referencing of only judgments that support one's own position on 'what the law is' becomes established practice.[134]

[126] Thus, tribunals have the authority to establish reference points. However, those reference points are not sufficiently authoritative to make it impossible for participants to escape. See section 2.2.1.

[127] See also Endres (n 125) s 6.

[128] In that sense, practices setting up and relying on shared understandings are not uniform: different legalities emerge. See section 2.

[129] Jean Ho, 'The Meaning of "Investment" in ICSID Arbitrations' (2010) 26 Arbitration International 633, 644–46.

[130] See M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 409.

[131] Pierre-Marie Dupuy, *Droit International Public* (14th edn, Dalloz 2018) para 632.

[132] See, for a more detailed analysis, Endres (n 125) para 6 747–48.

[133] Venzke, *How Interpretation Makes International Law* (n 35) 40.

[134] Niccolò Ridi, 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 Journal of International Dispute Settlement 200.

Without a centripetal judicial body, those practices can develop and coexist in parallel. Depending on what one cites, one joins a different community, and is recognized by and in that community.

The existence of parallel CoPs can be found in investment arbitration, with arbitrators relying on the idea of precedent, on the one hand, and arbitrators relying on the idea of case-specific application of convention and/or bilateral investment treaties (BITs), on the other hand. As in the previous example of LoAC versus IHL, the way in which the applicable law is identified divides the field into two groups that identify legal change in different ways.

This can be illustrated by the use of the Salini test. Indeed, the Salini test is simultaneously qualified as 'changed', 'outdated', or 'common' practice. Each of those qualifications relies to some extent on the practice of precedent, and yet confirms strikingly different 'legal change'.

In *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, relying on the preamble of the ICSID, the arbitrators see the definition as common practice.[135] And yet, in *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, relying on the parties' agreements, the arbitrators identify a change in the definition.[136] Conversely, in *RSM Production Corporation v Central African Republic*, relying on jurisprudence, the arbitrators set out a modification of the definition.[137]

What determines those different outcomes is a diverging background assumption about 'what the law is'. In fact, in the field of investment arbitration, we can group a community favouring the ICSID Convention as an authoritative focal point, a community giving preference to the individual bilateral investment treaties, and a community emphasizing some idea of precedent.

Those quite contradictory ideas of 'what the law is' can coexist in the same field of international law without taking much notice of one another. In investment arbitration this is particularly easy, because it is first and foremost composed of a network of bilateral treaties and case-specific tribunals.[138] An institution with centripetal powers comparable to the WTO AB is lacking, and hence contradictory views on legal change are not forced to clash and can coexist in parallel without any need for explicit and formal reconciliation. Furthermore, actor-positions in this field are significantly more cemented: states are always in the position of the defendant.[139] It is non-state actors, the investors, who will initiate the procedure and hence frame the claim. A situation in which the EC (or now the EU) could find itself in the reversed position akin to our first WTO example is a very unlikely scenario in the field of investment arbitration.

[135] ICSID Case No ARB/03/29 (Decision on Jurisdiction) (14 November 2005) para 137.
[136] ICSID Case No ARB/05/22 (Award) (24 July 2008) para 317.
[137] ICSID Case No ARB/07/2 (Decision on Jurisdiction and Liability) (7 December 2010) para 56.
[138] Ho (n 129) 644–46.
[139] Dupuy (n 131) para 632.

4. Conclusion: How to Determine Whose International Law is Changing?

A practice requires a certain level of repetition and reproduction in order to be recognized as a community's practice.[140] The elaborated examples have demonstrated how stability and change are intermingled in reproduced practices. Depending on the positionality of actors in that practice's framework, the legal change occurs and is accounted for differently.[141]

If we see coexisting CoPs registering legal change in divergent ways, understanding legal change as 'successful' when received in 'the issue-area' becomes challenging: where and how can we pin down the degree of success of legal change? If IHL is practised only by a handful of states, is the non-practice of all other states really irrelevant? If many arbitrators see the field of investment arbitration as a field interconnected through precedent, while others insist on the prevalence of states' agreement, where is the 'real' legal change?

The reception stage of legal change then becomes a somewhat heuristic exercise depending on the composition of the issue-area in which we are looking for the identification of legal change. As we have seen in the examples, if one of the parallel or diverging communities is more closely linked to the issue-area in question, change that is actually only recognized in a very small community may become portrayed as successful—and vice versa.[142] So, the challenge becomes how to identify the relevant community for the reception of legal change.

At this point the situatedness of the researcher becomes the crux.[143] Lechner and Frost highlight that the crucial question is not what practices exist, but 'what is the procedure that an observer must use for understanding them properly'.[144] Indeed, they argue that practices, as 'object[s] of intersubjective understandings of agents' are 'concrete social forms', which have to be described 'in concrete terms, by transcending categories that are abstract and invariant'.[145] Assumptions about the hegemonic power of some states or the belief in the authoritative power of courts and tribunals make researchers regularly follow one path over the other. The call for acknowledgement of those beliefs is hardly a new one, but the argument presented herein underlines the call's continuing importance.

This chapter has demonstrated the role of CoPs in international law and their impact on the construction and recognition of change in international law. First, the

[140] Christian Bueger and Frank Gadinger, 'The Play of International Practice' (2015) 59 International Studies Quarterly 449, 455–56.

[141] Along similar lines: Nico Krisch, 'Framing Entangled Legalities beyond the State' in Nico Krisch (ed), *Entangled Legalities Beyond the State* (CUP 2021) 15.

[142] See also section 3.1 and 3.3.

[143] Bourdieu, *Esquisse d'une théorie de la pratique* (n 27) 225–34; See also Lechner and Frost (n 22) 5–6 and 63.

[144] Lechner and Frost (n 22) 5.

[145] ibid 6.

chapter showed how an actor-centred approach highlights that the way in which incremental legal change happens depends fundamentally on the situatedness and background knowledge of the actors in question. Using the examples of practices playing out in the international order, I highlighted how different practices in different fields develop dynamics that can lead to diverging CoPs within the same issue-area. First, in the practice of interpretation, translating 'risk' into legal reasoning at the WTO, we could see how actors shift their practice according to their position. The centripetal power of the WTO solved emerging divergences by authoritatively settling the dispute. A second similar practice, the interpretative practice defining 'investment' in ICSID-based arbitrations, did not have a focal point akin to the WTO. This can allow for diverging communities to coexist without having to engage much with each other. This is further nuanced with respect to the community of states not engaging in the IHL/LoAC, which can coexist with the parallel community, sidelining IHL/LoAC as long as their actions do not clash. Lastly, the third practice of assembling members with the same interests in conferences or expert meetings can develop much dynamic for change—but the extent to which that change is recognized by parallel communities varies greatly.

The position of the interacting actors thereby constrains the degree of possible divergence. To the extent that practices develop dynamics that fragment communities, those fragmentations do not necessarily occur within or along issue-areas but may very well be entangled in between. One possible explanation for those divergences is recognition of change: expectations of consistency[146] are informed by different background assumptions and reinforced within different CoPs.

However, peaceful coexistence is a mere possibility only to the extent that the relevant communities' spheres do not clash. Recall the divergent depiction of Mahabali in Hindu mythology. In fact, Mahabali's depiction as a positive character faces considerable contestation by other castes. In Kerala in 2017, the Hindu Aikya Vedi (Hindu United Front) filed a lawsuit against the setting up of a Mahabali Memorial at a temple, forcing the two depictions into confrontation.[147]

[146] See Venzke, 'Understanding the Authority of International Courts and Tribunals' (n 36) 400–01.

[147] PK Yasser Arafat, 'Onam, Mahabali and the Narrow Imaginations of the Right' *The Wire* (4 September 2017) <https://thewire.in/politics/onam-mahabali-hindutva-right> accessed 9 November 2022.