

Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law

SANDESH SIVAKUMARAN*

Traditionally, the actors in the international legal system are divided into States and non-state actors; and States are considered to be the ones that make and shape international law. By contrast, this Article argues that there is a third category of actors, namely state-empowered entities, which have been empowered by States to make and shape international law. These entities are not States, but due to their empowerment by States, they are also not non-state actors. Accordingly, they constitute a category in and of themselves. Entities of this type include the International Law Commission, the United Nations Human Rights Committee, and the International Committee of the Red Cross. The making and shaping of international law includes the interpretation, application, and development of the law. States continue to play a role in the making and shaping of international law, for example, through establishing the mandate of the state-empowered entity, feeding their views into the work product of the entity, and assessing the final output of the entity. However, in practice, States rarely engage with the work-product of state-empowered entities and, in failing so to engage, have ceded some of their influence in lawmaking. This silence on the part of States has been treated as acquiescence to the work-product of state-empowered entities and the gap

* Professor of Public International Law, University of Nottingham. I am grateful to Professors Mary Footer, Françoise Hampson, Marko Milanović, Anthea Roberts, Sangeeta Shah, Antonios Tzanakopoulos, and Fuad Zarbiyev for comments on earlier drafts of this Article. I am also grateful to the Editors of the *Columbia Journal of Transnational Law* for their work on this Article, in particular, to Kate Saba and Anjali Parrin for their helpful comments.

left by the lack of engagement has been filled by other members of the community of international lawyers. The day-to-day making and shaping of international law is thus being done less by States and more by state-empowered entities.

INTRODUCTION	345
I. STATE-EMPOWERED ENTITIES AND THE MAKING AND SHAPING OF INTERNATIONAL LAW	350
A. State-Empowered Entities.....	350
1. Establishment	353
2. Composition	354
3. Mandate	356
B. Lawmaking by State-Empowered Entities	357
1. Conventional International Law	358
2. Customary International Law	360
3. Soft Law	360
4. Development of the Law	361
5. Interpretation and Application of the Law	362
6. Multiple Functions.....	362
C. The Role of States in Lawmaking by State-Empowered Entities.....	363
II. AUTHORITY OF THE OUTPUTS OF STATE-EMPOWERED ENTITIES	365
A. The Link With States	367
B. The Authority of the Entity.....	369
C. Features of the Output.....	370
D. Reception by the Community of International Lawyers.....	371
1. Reception by States	373
a. Acceptance.....	373
b. Rejection	375
2. The Battle for Lawmaking Power	378
3. Lack of Reaction and Its Consequences	381
a. Explaining the Lack of Reaction	382
b. Consequences of the Lack of Reaction.....	384

4. Reception by Other Actors Within the Community of International Lawyers.....	386
a. Acceptance	387
b. Rejection	389
c. Mixed Reactions	390
CONCLUSION	391

INTRODUCTION

International lawyers generally recognize two categories of actors in the international legal system: States and non-state actors.¹ Indeed, the very term *non-state* actor implies the existence of a dichotomy and includes all actors that are not States.² Orthodox positivist accounts of international law elaborate upon this dichotomy and note that it is States that make the law. For example, James Crawford observes that “international law works on the basis that the general consent or acceptance of states can create rules of general application.”³ Likewise, Louis Henkin notes that “State consent is the foundation of international law.”⁴ States also stress that they have the primary role in lawmaking.⁵

1. See, e.g., MALCOLM SHAW, *INTERNATIONAL LAW* 47 (6th ed. 2008) (noting that “while states remain the primary subject of international law, they are now joined by other non-state entities, whose importance is likely to grow even further in the future”).

2. See, e.g., INT’L LAW ASS’N COMM. ON NON-STATE ACTORS, *PRELIMINARY ISSUES FOR THE ILA CONFERENCE IN RIO DE JANEIRO IN AUGUST 2008*, at 2 (2008) [hereinafter *RIO DE JANEIRO REPORT*]. But see INT’L LAW ASS’N COMM. ON NON-STATE ACTORS, *FINAL REPORT FOR THE JOHANNESBURG CONFERENCE* ¶ 19 (2016) [hereinafter *JOHANNESBURG REPORT*] (setting out a working definition of non-state actor).

3. JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 20 (8th ed. 2012).

4. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW* 46 (1989).

5. See, e.g., Int’l Conf. of the Red Cross and Red Crescent, *Resolutions of the 31st International Conference of the Red Cross and Red Crescent* 26 (Nov. 28–Dec. 1, 2011), <https://www.icrc.org/eng/assets/files/publications/icrc-002-1130.pdf> (“emphasizing the primary role of States in the development of international humanitarian law” in Resolution 1 of the International Conference); see also U.S. DEP’T OF STATE, *OBSERVATIONS OF THE UNITED STATES OF AMERICA ON THE HUMAN RIGHTS COMMITTEE’S GENERAL COMMENT 33: THE OBLIGATIONS OF STATES PARTIES UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* ¶ 4 (Dec. 22, 2008), [hereinafter *OBSERVATIONS OF THE UNITED STATES*] <http://www.state.gov/documents/organization/>

By contrast, this Article contends that, in spite of this entrenched dichotomy, there is a third category of actors, namely state-empowered entities, which lies between States and non-state actors. State-empowered entities are entities that States have empowered to carry out particular functions. They include a range of entities, such as the International Law Commission (“ILC”), the U.N. Human Rights Committee, and the International Committee of the Red Cross (“ICRC”). Because States have empowered them, these entities are not truly *non-state* in character. They are categorically different from actors such as multinational corporations, indigenous peoples, and terrorist groups. At the same time, they are not States and, given their independence and autonomy from States, they are not simply vessels through which States act. Instead, they fall somewhere between States and non-state actors and constitute a category in their own right.

Section I.A explores the notion of state-empowered entities. These exist in a variety of forms, differing with regards to their mode of creation, composition, goals, and ability to make and shape international law. For example, while some state-empowered entities already exist at the time States empower them to perform a particular function, others are created at the point at which States empower them.⁶ Moreover, the composition of state-empowered entities varies. For example, some state-empowered entities are comprised of appointed individuals, whereas others are comprised of elected individuals.⁷ The capacity in which members of the entity serve also vary, with some individuals acting as experts and others acting as state representatives.⁸ Finally, States provide each state-empowered entity with a unique mandate.

Section I.B argues further that it is state-empowered entities that undertake a large part of the making and shaping of international law. States have empowered a range of entities to develop, interpret, and apply international law. States have provided international courts and tribunals, such as the International Court of Justice (“ICJ”) and the International Tribunal for the Law of the Sea (“ITLOS”), with a mandate to interpret and apply international law or branches thereof.⁹ States have given entities such as the Executive Board of

138852.pdf (contending that, unless States Parties to a treaty have agreed to submit a dispute to an international body for an authoritative interpretation or decision, it is the States Parties that are the authoritative interpreters of the instrument).

6. See *infra* Section I.A.3.

7. See *infra* Section I.A.2.

8. See *infra* Section I.A.2.

9. See, e.g., Convention for the Prevention and Punishment of the Crime of Genocide

the International Monetary Fund (“IMF”) an interpretive function.¹⁰ The role of interpretation in the making and shaping of international law is significant, as the law develops incrementally through interpretation,¹¹ and the line between development through interpretation and creation of new law is a fine one. States have expressly tasked other state-empowered entities with development of the law. For example, the ILC has a mandate to progressively develop and codify international law.¹² The U.N. High Commissioner for Refugees has the competence to propose amendments to international conventions for the protection of refugees.¹³ And the ICRC has a mandate to “prepare any development” of international humanitarian law.¹⁴ Additionally, States have requested that other entities, such as special rapporteurs of the U.N. human rights system, draw up soft law.¹⁵ Thus, States have expressly tasked numerous entities with lawmaking and

art. IX, Dec. 9, 1948, 78 U.N.T.S. 277 (“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”); Statute of the International Tribunal for the Law of the Sea art. 22, Dec. 10, 1982, 1833 U.N.T.S. 561 (“If all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.”).

10. Articles of Agreement of the International Monetary Fund art. XXIX(a), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39.

11. See generally INGO VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS* (2012).

12. G.A. Res. 174 (II), art. 1(1), Statute of the International Law Commission (Nov. 21, 1947).

13. G.A. Res. 428 (V), art. 8(a), Statute of the Office of the U.N. High Commissioner for Refugees (Dec. 14, 1950) (requiring the High Commissioner to “provide for the protection of refugees . . . by . . . [p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”). On the role of U.N. High Commission for Refugees (“UNHCR”), see Volker Türk, *The Role of UNHCR in the Development of International Refugee Law, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES* 153 (Frances Nicholson & Patrick Twomey eds., 1999).

14. Int’l Red Cross & Red Crescent Movement, *Statutes of the International Red Cross and Red Crescent Movement* art. 5(2)(g) (2006), <https://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf>.

15. See, e.g., U.N. Subcommission on the Prevention of Discrimination & Prot. of Minorities, Rep. on the Work of Its Forty-First Session, U.N. Doc. E/CN.4/1990/2, at 3 (Aug. 31, 1989) (entrusting the Special Rapporteur with the preparation of a study “with a view to exploring the possibility of developing some basic principles and guidelines”); Commission on Human Rights Res. 1990/35 (Mar. 2, 1990); Economic and Social Council Res. 1990/36 (May 25, 1990).

law-shaping functions.

Section I.C contends that, through this empowerment, the lawmaking and law-shaping activities of state-empowered entities can be traced back to States. Additionally, States retain a role in the state-empowered entities' actual lawmaking process by suggesting topics for the entity to pursue, submitting pleadings, and commenting on drafts of the entity's work.¹⁶

Part II analyzes the outputs¹⁷ of state-empowered entities. These outputs, such as draft articles, general comments, and interpretive statements, can be greatly influential simply by reason of their existence.¹⁸ If a judge or a legal advisor requires an answer to a particular issue, the work of a respected body is helpful by virtue of its existence. Some actors might not have the time or the resources to research a complicated issue in depth; others might not have the subject matter expertise to do so. Accordingly, the output will often form the starting point for—and sometimes also the end point of—any analysis. For example, in 2005, the ICRC published its Study on Customary International Humanitarian Law (“ICRC Customary Study”), in which it set out what were, in its view, 161 rules of customary international humanitarian law.¹⁹ The ICRC Customary Study involved some 150 experts from around the world, and took some ten years to complete.²⁰ No State, court, or other body is in a position to analyze state practice and *opinio juris* in the way in which the ICRC did—to come up with its own assessment of customary international humanitarian law. Accordingly, despite the fact that the Study was not met with unanimous agreement,²¹ in practice, the

16. See, e.g., G.A. Res. 174 (II), *supra* note 12, arts. 16(h)–(i), 21(2), 22 (requiring the ILC to request governments submit comments on its work and further requiring the ILC to reconsider its work in light of the comments received); see also *id.* art. 17 (requiring the ILC to consider proposals of U.N. Member States).

17. The term “output” is used in this Article as it is a neutral one. It covers the work-product that emanates from state-empowered entities, including, but not limited to, draft articles, general comments, and interpretive statements.

18. See David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 866 (2002).

19. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES (2005).

20. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175 (2005); Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT'L REV. RED CROSS 473 (2007).

21. See John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 444 (2007).

ICRC Customary Study serves as the starting point for determining whether a customary rule exists.²²

More generally, the authority of the output of a state-empowered entity—meaning its weight or persuasive value—is affected by a number of factors. These include the output's link to States, the authority of the entity that issued it, and its form and content. This is the subject of Sections II.A through II.C. In Section II.D, this Article argues that scholars often overlook the importance of the reception of the output by the community of international lawyers. Yet the manner in which the output is received is of particular importance in determining the authority of the output.

Because States remain the principal lawmakers, and have empowered entities to make and shape the law, States' responses to state-empowered entities' outputs are particularly influential. If States accept the finished product, for example, by using it in their practice, it will be considered influential and can lead to profound transformations in the law.²³ Conversely, if States reject the output, for example, by disagreeing with the reasoning or claims made therein, this can halt potential changes to the law.²⁴ States' rejection of the output might also constitute a challenge to the broader authority of the entity, or an argument that the entity has overstepped its mandate.²⁵ What seems at first sight to be a difference of opinion between States and a state-empowered entity about the content of a norm is sometimes, upon closer inspection, a far deeper battle about whether States or the state-empowered entity has the power to make and shape the law in that particular instance.

Despite the importance of State reactions, in practice, States do not tend to submit comments on the draft work of state-empowered entities and frequently do not react to the finished product. Relatively few States, for example, submit comments on Draft Articles of the ILC, or Draft General Comments of the Human Rights Committee.²⁶ Likewise, there are relatively few interventions by States in cases involving other States.²⁷ By not commenting on drafts

22. See, e.g., Prosecutor v. Popović, Case No. IT-05-88-A, Judgment, ¶ 615 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 39, 2015) (using the ICRC Customary Study as authority for the proposition that a particular rule reflects customary international law).

23. See *infra* Section II.D.1.a.

24. See *infra* Section II.D.1.b.

25. See *infra* Section II.D.2.

26. See *infra* notes 182–88 and accompanying text.

27. See Christine Chinkin, *Article 62*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1529 (Andreas Zimmermann et al. eds., 2d ed. 2012); Christine Chinkin, *Article 63*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A

and not reacting to the final output, States fail to exercise the influence that they could otherwise exert in the making and shaping of international law. Contrary to the actual intent of many States, States' silence is construed as acquiescence to the finished product.²⁸ Additionally, States' failure to respond leaves a void, which the responses of other actors within the community of international lawyers fill. Given the relative silence of States, the manner in which actors other than States receive a state-empowered entity's output significantly influences the authority of that output. When state-empowered entities endorse the outputs of other state-empowered entities, the endorsement imbues the output with additional authority. In this way, state-empowered entities have additional opportunities to influence the making and shaping of international law.

This Article proceeds in two substantive parts. Part I explores the notion of state-empowered entities and their role in the making and shaping of international law. Part II analyzes the authority of the state-empowered entities' outputs, and focuses in particular on the manner in which the community of international lawyers receives them. This Article applies an inductive approach to the study of this subject, and draws examples from all areas of international law, thus demonstrating the prevalence and importance of lawmaking by state-empowered entities.

I. STATE-EMPOWERED ENTITIES AND THE MAKING AND SHAPING OF INTERNATIONAL LAW

A. State-Empowered Entities

International lawyers generally recognize two categories of actors in the international legal system: States and non-state actors.²⁹ As the term *non-state* actor suggests, the category includes all actors that do not fall within the category of States.³⁰ It includes a broad

COMMENTARY, *supra*, at 1573.

28. See *infra* Section II.D.3.b.

29. See, e.g., SHAW, *supra* note 1, at 47 (noting that “while states remain the primary subject of international law, they are now joined by other non-state entities, whose importance is likely to grow even further in the future”); Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 4 (Philip Alston ed., 2005) (noting that “anything that is not a state, whether it be me, IBM, the IMF, Shell, Sendero Luminoso, or Amnesty International, is conceptualized as a ‘not-a-state’”).

30. See, e.g., RIO DE JANEIRO REPORT, *supra* note 2, at 2; Alston, *supra* note 29, at 4. But see JOHANNESBURG REPORT, *supra* note 2, ¶ 19 (2016) (setting out a working definition

range of entities, from terrorist groups to international organizations. There are States and there are “the rest.”³¹ The term non-state actor “reinforce[s] the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve.”³²

Building on work by Professors Roberts and Sivakumaran,³³ this Article argues that, despite the seeming dichotomy between States and non-state actors, there is, in fact, a third category of actors, namely state-empowered entities. A state-empowered entity is essentially an entity that States have empowered to carry out particular functions. A state-empowered entity is usually created and empowered on the international plane “by two or more states and granted authority to make decisions or take actions.”³⁴ However, on occasion, States empower an entity that is already in existence to carry out particular functions. Thus, it is the States’ decision to empower rather than to create that is the key.³⁵

of non-state actor).

31. Alston, *supra* note 29, at 19.

32. *Id.* at 3.

33. Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 *YALE J. INT’L L.* 107 (2012).

34. *Id.* at 116.

35. The notion of empowerment is similar to, but different from, the notion of delegation in the international relations (“IR”) literature. It is different from IR notions of delegation as it does not operate on the basis that States are the “principals” and state-empowered entities the “agents.” Unlike the principal/agent relationship, where the former controls the latter, and the latter acts on behalf of the former, as will be seen, the relationship between States and state-empowered entities is more nuanced. For example, state-empowered entities tend to be made up of independent experts and have considerable autonomy. It is entirely normal for these entities to take on a life of their own; indeed, they have “implied powers” that are essential for the performance of their duties. This is a normal part of lawmaking and does not amount to “slippage,” nor is it something that is in need of correction. Likewise, States’ rejection of the output of a state-empowered entity does not render the work without value. On the contrary, it can still prove influential, suggesting that state-empowered entities are not simply “agents” of States. Indeed, in complex state-empowered entities, it can be difficult even to establish the identity of the principal. Equally, empowerment differs from the principal/trustee relationship, which has been posited as an alternative to the principal/agent model. Unlike the principal/trustee model, the individuals constituting the state-empowered entity are not necessarily chosen because of their expertise or personal reputation. The term “empowerment” also has a different focus to that of “delegation,” with the perspective being that of the state-empowered entity rather than the State.

For discussion on delegation and the principal/agent model, see *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* (D.G. Hawkins et al. eds., 2006); Curtis A.

Broadly speaking, state-empowered entities exist as intergovernmental organizations, such as the U.N. and the African Union; international and regional courts and tribunals, such as the ITLOS and the Inter-American Court of Human Rights; bodies, such as the ILC; treaty bodies, such as the U.N. human rights treaty bodies and the Committee for Environmental Protection; actors, such as the ICRC; and individuals, such as the U.N. High Commissioner for Refugees.

Thus, the category of state-empowered entities is not a homogenous one; rather, state-empowered entities exist along a spectrum. Arguably, then, the category of state-empowered entities suffers from some of the same deficiencies as that of non-state actors. It too is defined by reference to States; and it too includes quite disparate actors. The category can be broken down into distinct classes of bodies, by type of actor, such as international organizations, international courts and tribunals, codification bodies, and so on, or by legal personality. However, from a lawmaking perspective, state-empowered entities share certain common features that warrant treating them as a category in and of themselves.³⁶

State-empowered entities thus fall between the categories of States and non-state actors. They are self-evidently not States nor are they merely vessels through which States act. At the same time, because States empower these entities, they are not truly non-state in their nature. Accordingly, they are categorically different from non-state actors, such as non-governmental organizations, multinational corporations, and armed opposition groups. Despite the traditional binary State/non-state actor division, a tripartite classification of States, state-empowered entities, and non-state actors better reflects

Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1 (2008). For discussion on the principal/trustee model, see Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33 (2008). For some of the limitations of the delegation model, see Ian Johnstone, *Law-Making by International Organizations: Perspectives from IL/IR Theory*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 266 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

36. To treat the various state-empowered entities as a category in their own right is not to overlook the important differences between them, such as those that are made up of State representatives and those that comprise independent experts. Likewise, it is important to acknowledge the differences between the different types of lawmaking that these entities carry out, such as interpretation of the law and the development of soft law. Despite these differences, this Article considers the category of state-empowered entities generally, and the category of lawmaking in full, in order to establish the framework as a whole and set out the big picture. Only in this way does it become apparent that States have empowered a wide range of entities to carry out all manner of lawmaking and law-shaping activities, across all areas of international law.

the existing state of affairs,³⁷ especially in relation to the making and shaping of international law.

1. Establishment

States either directly or indirectly empower state-empowered entities. As already indicated, these entities exist at a number of levels. First-level state-empowered entities are created directly by States. For example, the principal international human rights treaties provide for the establishment of treaty bodies, which have a mandate to monitor States Parties' compliance with the relevant treaties.³⁸ Thus, it is States that created the human rights treaty bodies through the creation of human rights treaties. Likewise, multilateral environmental agreements often provide for the establishment of treaty bodies, be they conferences of parties ("COP"), meetings of parties ("MOP"), or expert groups.³⁹

States indirectly create second-level state-empowered entities through means other than treaties; for example, through resolutions of international organizations. States directly empower international organizations, a type of first-level state-empowered entity. If the international organization creates a subsidiary body, for example through a resolution, that body is also a state-empowered entity, albeit one that is created indirectly by States through empowerment of the organization.⁴⁰ Thus, the ILC, UNHCR, and the International Criminal Tribunal for Rwanda ("ICTR") are all state-empowered entities, because the U.N., a first-level state-empowered entity, established them.⁴¹

State-empowered entities can also be created through multi-level instances of empowerment. For example, States established the U.N. The U.N., through its General Assembly, established the Human Rights Council,⁴² making the Council a second-level state-empowered entity. The Human Rights Council appoints special pro-

37. See Roberts & Sivakumaran, *supra* note 33, at 115.

38. See, e.g., International Covenant on Civil and Political Rights arts. 28–45, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

39. See *infra* Section I.B.1.

40. Bradley & Kelley, *supra* note 35, at 5; Roberts & Sivakumaran, *supra* note 33, at 116 n.40.

41. G.A. Res. 319 (IV) (Dec. 3, 1949) (establishing UNHCR); G.A. Res. 174 (II), *supra* note 12 (establishing the ILC); S.C. Res. 955 (Nov. 8, 1994) (establishing the ICTR).

42. G.A. Res. 60/251 (Mar. 15, 2006).

cedures such as country or thematic special rapporteurs.⁴³ Accordingly, special rapporteurs are state-empowered entities, as they can trace their creation back to States.

State-empowered entities can also emerge in a hybrid manner, through States and state-empowered entities acting together. An example is the Special Court for Sierra Leone, which was created pursuant to an agreement concluded between the U.N. and Sierra Leone.⁴⁴

State-empowered entities can be created on a permanent basis, such as the U.N.; for a fixed period of time, such as country special rapporteurs of the U.N. Human Rights Council;⁴⁵ or to deal with a specific situation, such as a Commission of Inquiry looking into certain human rights violations.⁴⁶

2. Composition

State-empowered entities exist in a variety of forms. As discussed above, they include international organizations, international courts and tribunals, treaty bodies, certain expert bodies, and even some individuals.

State-empowered entities generally consist of representatives of States or of experts. Insofar as States are concerned, some state-empowered entities, like the U.N., are comprised of representatives from all (or nearly all) States; whereas others, like the African Union, are comprised of representatives from only some States. With respect to experts, state-empowered entities can consist of groups of individuals, such as the judges of the International Criminal Court (“ICC”); or single individuals, such as the U.N. High Commissioner for Refugees.⁴⁷ Less frequently, the composition of a state-

43. *E.g.*, Human Rights Council Res. 7/22, U.N. Doc. A/HRC/RES/7/22 (Mar. 28, 2008) (establishing the position of Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation).

44. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137.

45. *E.g.*, Human Rights Council Res. 24/34, U.N. Doc. A/HRC/RES/24/34, ¶ 13 (Oct. 9, 2013) (establishing the position of Independent Expert on the situation of human rights in the Central African Republic “for a period of one year”).

46. *E.g.*, Human Rights Council Res. S-17/1, U.N. Doc. A/HRC/RES/S-17/1, ¶ 13 (Aug. 22–23, 2011) (deciding “to dispatch urgently an international commission of inquiry . . . to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic”).

47. Roberts & Sivakumaran, *supra* note 33, at 116.

empowered entity includes other state-empowered entities;⁴⁸ or a mixture of representatives of States and other actors.⁴⁹

States, or other state-empowered entities, usually have a role to play in the determination of the composition of the state-empowered entity, whether through appointing or electing individuals or States to the entity, or through delegating the power to appoint or elect. For example, States Parties to UNCLOS *elect* individuals to serve on the ITLOS.⁵⁰ In contrast, States parties to a dispute *appoint* individuals to serve on arbitral tribunals.⁵¹ Additionally, States also *delegate* the power to appoint individuals to other positions. For example, the U.N. Secretary-General is responsible for appointing the President of the Residual Mechanism for International Criminal Tribunals.⁵² There are also *mixed* models of appointment. For example, the U.N. High Commissioner for Refugees is “elected by the General Assembly on the nomination of the Secretary-General.”⁵³ And judges of the European Court of Human Rights are nominated by States and elected by the Parliamentary Assembly of the Council of Europe.⁵⁴ The composition of state-empowered entities thus tends to be determined by States or other state-empowered entities.

48. For example, the EU is a member of the World Trade Organization (“WTO”). See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

49. The General Conference of Representatives of the Members of the International Labour Organization (“ILO”) comprises four representatives of each of the members. Two are government representatives, one is a representative of employers and the other a representative of workers. Constitution of the International Labour Organisation art. 3(1), Apr. 1, 1919, 49 Stat. 2712; see also Treaty of Versailles art. 389, June 28, 1919, 2 Bevans 43.

50. United Nations Convention on the Law of the Sea, annex VI, art. 4(1), Dec. 10, 1982, 1833 U.N.T.S. 397.

51. The precise procedure for the appointment of arbitrators differs according to the rules under which the arbitral tribunal is established. Compare, e.g., PERMANENT COURT OF ARBITRATION, ARBITRATION RULES 2012, art. 9, with United Nations Convention on the Law of the Sea, *supra* note 50, annex VII, art. 3.

52. S.C. Res. 1966, annex I, art. 11(1) (Dec. 22, 2010) (establishing that the Secretary-General does so from amongst the judges of the Mechanism and following “consultation with the President of the Security Council”).

53. G.A. Res 428(V), annex, Statute of the Office of the United Nations High Commissioner for Refugees, ch. 3, ¶ 13 (Dec. 14, 1950).

54. Convention for the Protection of Human Rights and Fundamental Freedoms art. 22, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

3. Mandate

The actors that create or empower an entity set the entity's mandate. In most cases, the mandate will be found in the instrument that establishes the entity, for example the constituent instrument of the international organization or the treaty that establishes the treaty body. Alternatively, but less commonly, States might empower an entity that is already in existence to carry out a particular function. Examples of such entities include the ICRC, which a group of individuals rather than States created,⁵⁵ but which States later empowered to perform certain tasks.⁵⁶ Likewise, States empowered the U.N. Committee on the Rights of the Child to receive individual communications by States Parties to the Optional Protocol to the Convention on the Rights of the Child some years after the Committee's inception.⁵⁷

It is the mandate from States, in particular, that distinguishes state-empowered entities from non-state actors. A non-state actor might carry out the same functions as a state-empowered entity, for example, the promotion of human rights. However, in the absence of a mandate from States to do so, it lacks the empowerment of States and is thus of a different category than state-empowered entities.⁵⁸ Likewise, the mandate distinguishes state-empowered entities from mere *fora* for discussion, such as a diplomatic conference or the G8.⁵⁹

Depending on the nature of the entity, the mandate might be singular or multifaceted. As discussed above, the focus of this Article is on state-empowered entities that have been given a lawmaking or law-shaping role. This is the subject of the next Section.

55. See PIERRE BOISSIER, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 48–49 (1985).

56. See *infra* Section I.B.6.

57. G.A. Res. 66/138, arts. 1(1), 5(1), Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Dec. 19, 2011).

58. See Bradley & Kelley, *supra* note 35, at 3 (noting that “[a] grant of authority is what distinguishes a delegation from other exercises of authority. A nongovernmental organization, for example, may take actions that are similar to those taken by an international organization created by states, but unless the actions of the nongovernmental organization stem from a grant of authority from states, the actions do not involve an international delegation”).

59. See *id.* at 4 (noting that “despite their potential importance, the annual ‘Group of Seven’ or ‘Group of Eight’ summits involve at most a minimal delegation. Leaders from the member countries meet annually to discuss and potentially reach agreements on economic and political issues, but they have not granted any authority to the collective in advance”) (citation omitted).

B. Lawmaking by State-Empowered Entities

Confirming the central role that is played by States, traditional positivist accounts of lawmaking observe that it is States that make international law. For example, Professor Vaughan Lowe notes that “international law consists of that body of rules that States have decided are binding.”⁶⁰ Similarly, Professor Clive Parry remarks that, while it is to States that “the law is given, they are the lawgivers.”⁶¹ Professor Jean d’Aspremont is even more categorical, noting that, “states remain the exclusive international lawmakers.”⁶² The concept of sovereignty helps to illustrate the role of States in lawmaking: “Since states are considered to be sovereign, it follows that there is no authority above them; and if there is no authority above them, it follows that law can only be made with their consent.”⁶³ This is reflected in the famous dictum in the *Lotus* case, in which the Permanent Court of International Justice recalled that “[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will.”⁶⁴

At the same time, there is increasing recognition of the law-making and law-shaping role of actors other than States. The contribution of the International Law Commission to the development of international law has long been a subject of study.⁶⁵ There is a rich literature on the role of courts and tribunals in the making and shaping of international law,⁶⁶ and scholars have discussed the extent to which international organizations contribute to lawmaking.⁶⁷

60. VAUGHAN LOWE, *INTERNATIONAL LAW* 27 (2007); see also HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 10 (2014).

61. CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 8 (1965); see also THIRLWAY, *supra* note 60, at 16–17.

62. Jean d’Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?*, in *NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS* 171, 178 (Math Noortmann & Cedric Ryngaert eds., 2010).

63. JAN KLABBERS, *INTERNATIONAL LAW* 21 (2013).

64. S.S. “*Lotus*” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

65. See, e.g., Herbert W. Briggs, *Reflections on the Codification of International Law by the International Law Commission and by Other Agencies*, in 126 *RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 233 (1969); B.G. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION: ITS APPROACH TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW* (1977).

66. See, e.g., HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958); SHANE DARCY, *JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW* (2014).

67. See, e.g., JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*

To date, international lawyers have considered the lawmaking role of individual entities. By contrast, this Article contends that, because States have empowered different entities to make and shape international law, these entities are all part of the category of state-empowered entities. They are thus categorically different from non-state actors, such as non-governmental organizations, the International Law Association, or the *Institut de Droit International*, all of which also play a role in lawmaking.

State-empowered entities often have the authority to both make and shape international law. This is evident from an analysis of the mandates and constituent instruments of entities, activities with which States task these entities, as well as by necessary implication in order for the entities to carry out their mandates and tasks. The precise lawmaking and law-shaping role of state-empowered entities varies and includes, *inter alia*, creating, developing, interpreting, applying, and proposing changes to the law.⁶⁸ State-empowered entities shape hard law, through actions like the development and interpretation of treaties or the identification of custom, and also shape soft law, through actions like the creation of principles or guidelines. Indeed, the notions of “law-making” and “law-shaping” should be seen as two points on a spectrum rather than two separate categories. It can be difficult to determine where shaping stops and making begins.

The lawmaking that state-empowered entities have undertaken has had a profound effect on the shape and content of international law. Large parts of international law would not look the way in which they do without the work of state-empowered entities. Indeed, these entities have developed some of the touchstone instruments in the field, including the ILC Articles on State Responsibility, the ICRC Customary Study, and the Guiding Principles on Internal Displacement.

1. Conventional International Law

Some state-empowered entities have a mandate to interpret, amend, and develop treaties. Treaty bodies in international environmental law, such as COPs and MOPs, have mandates that authorize them, *inter alia*, to interpret treaties, to amend treaties, to amend an-

(2006).

68. Roberts & Sivakumar, *supra* note 33, at 116. For an explanation of the breadth of lawmaking, see *supra* note 36. For different but similarly broad typologies of lawmaking, see Bradley & Kelley, *supra* note 35, at 10–17; Johnstone, *supra* note 35, at 269–76.

nexes to treaties, and to adopt protocols to treaties.⁶⁹ In certain cases, the COP/MOP acts “merely [as] the forum in which the parties elaborate and adopt the protocol or amendment,”⁷⁰ whereas in other cases, the COP/MOP itself develops the law. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer authorizes the MOP to make adjustments to ozone depleting potentials specified in certain annexes.⁷¹ These adjustments are to be made by consensus of the Parties; however, if consensus cannot be reached, adjustments can be made by a two-thirds majority vote.⁷² The decision is binding on all Parties, even those voting against the adjustment.⁷³ Although such an approach is unusual, other multilateral environmental agreements provide that amendments that are adopted by a two-thirds majority are binding on all States Parties, including those voting against the amendment, except those that notify the depositary that they are entering “a reservation with respect to the amendment.”⁷⁴ Some state-empowered entities take a similar approach in fields other than international environmental law.⁷⁵

State-empowered entities are also responsible for the interpretation of treaty texts. For example, the Articles of Agreement of the International Monetary Fund vest the power to interpret provisions of the IMF Agreement in the IMF Executive Board.⁷⁶ The power to in-

69. See, e.g., Convention on Wetlands of International Importance Especially as Waterfowl Habitat art. 10*bis*, Feb. 2, 1971, 996 U.N.T.S. 245 (amendments to the Convention); Convention on International Trade in Endangered Species of Wild Fauna and Flora art. XI(3)(b), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (adopt amendments to appendices); Montreal Protocol on Substances that Deplete the Ozone Layer art. 11(4), Sept. 16, 1987, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol] (add substances to or remove them from Annexes; decide on adjustments or reductions to ozone depleting potentials specified in Annexes; adopt amendments to Protocol or Annexes; adopt new Annex); United Nations Framework Convention on Climate Change art. 17(1), June 4, 1992, 1771 U.N.T.S. 107 (adoption of Protocols); see generally Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1 (2002); Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

70. Brunnée, *supra* note 69, at 18.

71. Montreal Protocol, *supra* note 69, art. 2(9)(a).

72. *Id.* art. 2(9)(c).

73. *Id.* art. 2(9)(d).

74. Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 69, art. XV(3).

75. See, e.g., Statute of the International Atomic Energy Agency art. XVIII, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (concerning amendment of the Statute).

76. Articles of Agreement of the International Monetary Fund, *supra* note 10, art.

interpret texts can be influential, as it is *inter alia* through interpretation that the law is shaped.⁷⁷ As actors can interpret a text in different ways, the opportunity to select a particular interpretation is an opportunity to make the law, even if only at the micro level.⁷⁸

2. Customary International Law

State-empowered entities also have a role shaping and making law beyond treaties. Although traditionally State practice and *opinio juris* together comprise customary international law, state-empowered entities often identify the existence of customary norms. The ICRC's Customary Study is a case in point.⁷⁹ Indeed, it is relatively rare for a State to identify the existence of a customary norm outside its pleadings in a particular case. In contrast, it is far more common for an international court, tribunal, or the ILC to determine the existence of a customary norm.⁸⁰ Thus, although the practices and beliefs of States, and potentially other actors, *form* custom, it is state-empowered entities that *identify* custom. The importance of the identification of custom cannot be overstated, as it is through this identification that the law is frequently developed. As Judge Hersch Lauterpacht noted, "Many an act of judicial legislation may in fact be accomplished under the guise of the ascertainment of customary international law."⁸¹

3. Soft Law

State-empowered entities also develop soft law. For example, the then-Commission on Human Rights tasked the Representative of the U.N. Secretary-General on Internally Displaced Persons with "develop[ing] an appropriate framework . . . for the protection of in-

XXIX(a).

77. See generally VENZKE, *supra* note 11.

78. Antonios Tzanakopoulos, *Domestic Judicial Lawmaking*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW-MAKING 222, 223 (Catherine Brölmann & Yannick Radi eds., 2016).

79. For a discussion on the ICRC as a state-empowered entity, see *infra* Section I.B.6.

80. See, e.g., Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3); Int'l Law Comm'n, Draft Articles on Diplomatic Protection with Commentaries (2006), reprinted in [2006] 2 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/567.

81. LAUTERPACHT, *supra* note 66, at 368.

ternally displaced persons.”⁸² This led to the Guiding Principles on Internal Displacement (“Guiding Principles”),⁸³ which is soft in form but contains a mix of hard and soft norms in substance. Although a state-empowered entity developed the Guiding Principles, they have become the leading statement on the subject.⁸⁴ This is not an isolated instance. Tasking state-empowered entities with the development of soft law is commonplace in certain fields, such as international human rights law.⁸⁵

4. Development of the Law

States have specifically tasked certain state-empowered entities with *developing* international law. For example, the mandate of the ILC is to codify and progressively develop international law.⁸⁶ The ILC has indicated that “[t]he distinction between codification and progressive development is difficult if not impossible to draw in practice,” and it therefore tends to “proceed on the basis of a composite idea of codification and progressive development.”⁸⁷ Many of the ILC’s Draft Articles are thus a combination of progressive development and codification, and the ILC does not always indicate which provision is of which sort. Over time, the progressive development aspect of Draft Articles often morphs into customary international law.⁸⁸

82. Commission on Human Rights Res. 1996/52, U.N. Doc. E/CN.4/RES/1996/52 (Apr. 19, 1996) (discussing internally displaced persons).

83. Francis M. Deng (Representative of the Sec’y-Gen.), *Addendum: Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (submitted pursuant to Commission resolution 1997/39).

84. G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 132 (Sept. 16, 2005) (describing the guiding principles as an “important international framework for the protection of internally displaced persons”).

85. *See, e.g.*, G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005); Commission on Human Rights Res. 1996/52, U.N. Doc. E/CN.4/RES/1996/52, ¶ 9 (Apr. 19, 1996) (calling upon the representative of the Secretary-General to develop “an appropriate framework . . . for the protection of internally displaced persons”); Human Rights Council Res. 20/16, U.N. Doc. A/HRC/RES/20/16 (July 17, 2012) (requesting that the Working Group on Arbitrary Detention “prepare draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty”).

86. G.A. Res. 174 (II), *supra* note 12, art. 1(1).

87. Int’l Law Comm’n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, ¶ 147(a) (2012).

88. Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority*

5. Interpretation and Application of the Law

States have charged certain state-empowered entities with the task of interpreting and applying international law. For example, the ICJ frequently resolves disputes relating to the interpretation or application of a particular convention.⁸⁹ States have also charged interstate arbitral tribunals with the task of deciding on particular claims.⁹⁰ In deciding disputes, courts and tribunals regularly develop the law.⁹¹ Referring to the ICJ, Judge Shahabuddeen has indicated that “[i]t does not accord with reality to suggest that the Court may develop the law only in the limited sense of bringing out the true meaning of existing law in relation to particular facts.”⁹² Judicial legislation, on the other hand, is frowned upon, and the ICJ itself has indicated that “[i]t is clear that the Court cannot legislate.”⁹³ However, it is not at all clear where development through application or interpretation ends and making new law begins.

6. Multiple Functions

Still other entities combine a number of lawmaking and law-shaping functions. For example, the ICRC’s mandate stems from its Statutes and the 1949 Geneva Conventions.⁹⁴ The International Con-

of Codification Conventions and ILC Draft Articles in International Law, 63 INT’L & COMP. L.Q. 535, 556 (2014).

89. See, e.g., Convention for the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”).

90. See, e.g., Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri., art. 5(1), Dec. 12, 2000, 2138 U.N.T.S. 94 (providing that the mandate of the Commission was, *inter alia*, to decide on claims “result[ing] from violations of international humanitarian law, including the 1949 Geneva Conventions [and] other violations of international law”).

91. See, e.g., DARCY, *supra* note 66, at 10–11; LAUTERPACHT, *supra* note 66, at 5.

92. MOHAMMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 68 (1997); see also R.Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT’L & COMP. L.Q. 1, 3 (1996).

93. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 18 (July 8).

94. Int’l Red Cross & Red Crescent Movement, *supra* note 14; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition

ference of the Red Cross and Red Crescent, which includes States Parties to the Geneva Conventions, adopted the ICRC's Statutes.⁹⁵ These statutes provide that the role of the ICRC is, *inter alia*, "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof,"⁹⁶ though preparing the development of the law is not the same as developing it. The International Conference has also tasked the ICRC with specific lawmaking and law-shaping projects.⁹⁷

States have empowered entities to make and shape international law to such an extent that it is difficult to imagine whole fields of international law without the contributions of these state-empowered entities. The work of regional courts, treaty bodies, and special procedures has been crucial to the development of human rights law. The reports of Panels and the Appellate Body of the WTO have been important for the development of international trade law. International criminal law largely exists because of the work of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the ICTR, and the ICC. International humanitarian law would look considerably different without the ICRC, and general international law would be all the poorer without the jurisprudence of the ICJ and the work of the ILC. Much of the making and shaping of international law that takes place today is thus carried out by state-empowered entities.

C. The Role of States in Lawmaking by State-Empowered Entities

The empowerment of entities to make and shape international

of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

95. The Statutes of the International Red Cross and Red Crescent Movement were adopted by the 25th International Conference of the Red Cross in 1986. Article 9(1) of the Statutes provide that "[t]he members of the International Conference shall be the delegations from the National Societies, from the International Committee, from the Federation and from the States Parties to the Geneva Conventions." Int'l Red Cross & Red Crescent Movement, *supra* note 14, art. 9(1).

96. *Id.* art. 5(2)(g) (emphasis added).

97. For example, the International Conference requested that the ICRC prepare a report on customary international humanitarian law. See Int'l Conf. of the Red Cross and Red Crescent, *Resolutions of the 26th International Conference of the Red Cross and Red Crescent* (Dec. 7, 1995), <https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-1-1995.htm> (Resolution 1 from the conference).

law does not mean that States have given up their lawmaking role, even insofar as the work of the entities is concerned. States play a crucial role at the outset—in establishing the entity, in determining its composition, and in deciding on its mandate.⁹⁸ The involvement of States in the work of state-empowered entities does not exist solely at the stage of the creation of the entity. States, or state-empowered entities comprised of States, interact with state-empowered entities throughout the course of their work. This interaction takes different forms depending on the nature of the entity in question.

Of particular importance for present purposes is the interaction between States and state-empowered entities on the outputs of the latter. States sometimes make suggestions to state-empowered entities regarding the topics that the entity ought to pursue. For example, individual States can refer proposals to the ILC.⁹⁹ The International Conference of the Red Cross and Red Crescent, of which States Parties to the Geneva Conventions are a part, can request that the ICRC undertake various lawmaking and law-shaping activities.¹⁰⁰

States also play a role in the drafting of an output. For example, States can make submissions to an international court or tribunal by virtue of them being a party to a case, through the submission of amicus briefs, or through requests to intervene.¹⁰¹ Other state-empowered entities invite States and other relevant constituencies to comment on drafts of their work. Oftentimes, state-empowered entities circulate draft outputs to interested actors for their comments and, following the receipt of comments, the entities revise and adopt the drafts. For example, the ILC's Statute requires it to submit drafts of its work to States for their comments and is further required to reconsider its drafts in light of States' comments.¹⁰² These comments can be extremely influential, and can lead to deletion of draft articles or changes in approach.¹⁰³ This collaborative approach is also the

98. See *supra* Section I.A.

99. G.A. Res. 174 (II), *supra* note 12, arts. 16(h), 16(i), 21(2), 22.

100. Int'l Conf. of the Red Cross and Red Crescent, *supra* note 5, at 27.

101. See, e.g., Whaling in the Antarctic (Austl. v. Japan), Declaration of Intervention of New Zealand Order, 2013 I.C.J. Rep. 3 (Feb. 6); Prosecutor v. Tadić, Case No. IT-94-1-I, Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic* (Int'l Crim. Trib. for the Former Yugoslavia July 17, 1995), <https://www.state.gov/documents/organization/65825.pdf>.

102. G.A. Res. 174 (II), *supra* note 12, arts. 16(h), 16(i), 21(2), 22.

103. See Stephen C. McCaffrey, *The 1997 UN Watercourses Convention: Retrospect and Prospect*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 165, 166 (2008).

standard working process of other entities. The U.N. Human Rights Committee, for instance, publishes drafts of its general comments for observations by States and other interested actors. The States' comments have significantly changed the Committee's position on certain matters.¹⁰⁴ Other entities operate in different ways, but still frequently adopt States' views.¹⁰⁵

In addition, States have a potentially important role to play after the output has been finalized. In reacting to the finished product, States can influence the authority of the output.¹⁰⁶ The authority of outputs is the subject of the next Part.

II. AUTHORITY OF THE OUTPUTS OF STATE-EMPOWERED ENTITIES

Like state-empowered entities themselves, the outputs they produce are also of different sorts and exist in the form of judgments, draft articles, guidelines, general comments, interpretive statements, and so on. In instances in which States have empowered an entity to issue binding outputs, such as a judicial decision, the output will necessarily be binding on relevant actors.¹⁰⁷ In other instances, the constituent instrument of the entity does not specify the precise authority of the output. Even with regards to binding outputs, the issue of the broader authority of the output, beyond those actors it binds, arises.¹⁰⁸ It is the authority of the outputs of state-empowered entities, in the sense of their weight or persuasive value, that is the subject of this Part.

As the category of state-empowered entity is a broad one, the precise authority of an output will depend, *inter alia*, on the nature of the entity. For example, the authority of an output will depend on: whether the state-empowered entity is a court; the identity of the par-

104. See *infra* notes 155–57 and accompanying text.

105. For example, the ICRC not infrequently convenes groups of experts, some with links to States and others without, as part of the process of producing its outputs. See, e.g., NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

106. See *infra* Section II.D.1.

107. See, e.g., Statute of the International Court of Justice art. 59, Oct. 24, 1945, 59 Stat. 1031, T.S. 993; North American Free Trade Agreement, Can.-Mex.-U.S., art. 1131(2), Dec. 17, 1992, 32 I.L.M. 289 (1993).

108. For example, the Statute of the International Court of Justice provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” Statute of the International Court of Justice, *supra* note 107, art. 59. Yet, decisions of the Court have considerable influence beyond solely the parties to the case.

particular entity; and on the particular output at issue, for example, a judgment. Nonetheless, one can identify certain general factors, which are applicable to all outputs of state-empowered entities. These are: the link between the output and States; the authority of the particular entity that issued the output; certain features of the output itself; and the way in which the community of international lawyers receives the output. Although considered separately below, the factors operate together. Still other factors might also prove influential, such as the moment in time in which an output is adopted.¹⁰⁹

The manner in which the community of international lawyers receives the output is of particular importance. Acceptance of the output on the part of the community can imbue it with considerable weight; rejection can lead it to being cast aside. Given the role of States in international law, acceptance or rejection of an output by States is particularly important in determining the output's authority. However, in practice, although there are certainly instances of States accepting or rejecting an output, the predominant tendency is for States to remain silent following the issuance of an output and to remain silent even when invited to comment on draft outputs.¹¹⁰ While there may be understandable, practical reasons for this silence, other members of the community of international lawyers have treated the silence as acquiescence to the output.¹¹¹ And the reactions of other actors within the community of international lawyers, particularly other state-empowered entities, have filled the void this silence has left. Given the sheer number of other members of the community, their views have had an even more pronounced influence on the authority of outputs. Accordingly, in practice, it is the responses of these actors, rather than the responses of States, that affect the weight of outputs of state-empowered entities.¹¹² In this way, the role of state-empowered entities in the making and shaping of international law has increased considerably and the role of States has declined.

This Part considers the factors affecting the authority of an output, focusing in particular on how the community of international lawyers receives the outputs.

109. Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 220 (Michael Byers ed., 2000) (referring to the "spirit of the age"). For a considerably broader range of factors in the context of supranational adjudication, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Supranational Adjudication*, 107 *YALE L.J.* 273 (1997).

110. See *infra* Section II.D.

111. See *infra* Section II.D.3.b.

112. See *infra* Section II.D.4.

A. The Link With States

Because States empower state-empowered entities, outputs of these entities can be traced back to States. As discussed above in Part I, it is States that empowered entities to make and shape international law and to issue the various outputs. Accordingly, the authority of an output stems, in part, from the fact that States empowered an entity to issue it.¹¹³ Along these lines, Sir Michael Wood has noted:

The product of the ILC has a particular standing, given its position as a subsidiary organ of the UN General Assembly, its special relationship with governments and the United Nations Sixth Committee, and the fact that its product is not infrequently adopted as a convention or otherwise endorsed by the General Assembly.¹¹⁴

Indeed, it is the ILC's relationship with States and the U.N. that differentiates its work from that of other eminent bodies such as the *Institut de Droit International*.

Despite the close relationship between States and state-empowered entities, it can prove artificial to always trace an output back to States. Not all States empower entities to make and shape the law. For example, a number of States have not submitted an optional clause declaration accepting the jurisdiction of the ICJ.¹¹⁵ Yet, there tends to be a trickle-down effect, whereby outputs of state-empowered entities influence States, including those that have not accepted the jurisdiction of a state-empowered entity like the ICJ. For example, even States not party to a particular case will treat the jurisprudence of the ICJ as authoritative; and arbitral tribunals will often cite the jurisprudence of other arbitral tribunals, even though it does not constitute binding precedent.¹¹⁶ Likewise, war crimes are essentially serious violations of international humanitarian law that

113. Cf. Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 L. & CONTEMP. PROBS. 1, 3 (2016); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 436 (2008) (observing that the entity has a certain authority due to the empowerment by States).

114. Michael Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1480>.

115. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> (last visited Feb. 9, 2017).

116. See Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 333–43 (2008).

give rise to individual criminal responsibility.¹¹⁷ Thus, the jurisprudence of the ICC on war crimes influences States' understandings of international humanitarian law, including the understandings of those States that are not parties to the Rome Statute of the International Criminal Court.¹¹⁸

Thus, the work of state-empowered entities is of importance to States generally, and not just those States that have empowered a particular entity. States occasionally recognize this importance. Responding to General Comment 33 of the Human Rights Committee concerning the Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, the United States observed that, although it was not a party to the Optional Protocol, "it nevertheless has a substantial interest in General Comment 33," as the General Comment "contains reasoning and conclusions that directly affect all States Parties to the Covenant, irrespective of whether they have joined the Optional Protocol."¹¹⁹

Furthermore, as discussed above, some state-empowered entities are second- or third-level entities, which are created through multi-level instances of empowerment. The more numerous the levels of empowerment, the more artificial it becomes to trace an output back to States.¹²⁰ For example, the development of soft law by one of the special procedures of the Human Rights Council can be traced to States by linking the development to the Human Rights Council—which established the mandate of the special procedure—and to the U.N., the General Assembly of which established the Council.¹²¹ In reality, although States might subsequently approve the development by welcoming the report of the rapporteur in which the norms are set out, it is not States that developed the norms but the special rapporteur.

In addition, many state-empowered entities are made up of

117. Prosecutor v Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

118. See, for example, the use of ICC jurisprudence in the OFFICE OF GEN. COUNSEL DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 12 n.29 (June 2015).

119. OBSERVATIONS OF THE UNITED STATES, *supra* note 5, ¶ 1.

120. See Johnstone, *supra* note 35, at 269 (discussing this issue from the perspective of delegation).

121. See, e.g., Commission on Human Rights Res. 1991/42, U.N. Doc. E/CN.4/RES/1991/42 (Mar. 5, 1991) (establishing the Working Group on Arbitrary Detention); Human Rights Council Res. 20/16, U.N. Doc. A/HRC/RES/20/16 (July 17, 2012) (requesting the Working Group to prepare draft basic principles and guidelines); G.A. Res. 60/251 (Mar. 15, 2016) (establishing the Human Rights Council).

independent experts. Given the independence of those concerned, and the autonomy of the entities themselves, it can prove rather artificial to trace their outputs back to States. State-empowered entities are not the puppets of States and they do not always follow the wishes of the States that empowered them.¹²² Once created, they can and do take on a life of their own.¹²³

In sum, the link to States is important as States are the central actors in the international legal system and the primary lawmakers. Thus, the link to States impacts the weight of the output and the underlying authority of the state-empowered entity. However, while it may be appropriate to link certain outputs to States, it may prove artificial to trace other outputs back to States. For example, it would be appropriate to link outputs to States that authorized the entity to create the output as well as to States that accepted the state-empowered entity's work. However, even this determination is context dependent. Whether the output can properly be linked to States will depend upon the degree to which States were truly involved in the creation and acceptance of both the state-empowered entity itself and that entity's output.

B. The Authority of the Entity

The authority of the particular state-empowered entity that issued the output also affects the authority of the output. As the UK noted with respect to General Comments of the Human Rights Committee, they “command great respect, given the eminence of the Committee and the status of the ICCPR.”¹²⁴ A number of factors go to the authority of an entity, including its expertise, composition, reputation, and working method.

An entity that is made up of impartial experts will likely be considered more authoritative than an entity that does not consist of experts or which consists of experts who do not act in an impartial manner. And many state-empowered entities that have a lawmaking and law-shaping function are composed of experts.¹²⁵ Furthermore,

122. See, e.g., Cogan, *supra* note 113, at 420 (referring to judges).

123. For a discussion with respect to international organizations, see Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999 (2013).

124. GOV'T OF THE U.K., OBSERVATIONS BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON DRAFT GENERAL COMMENT 35 ON ARTICLE 9 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)—LIBERTY AND SECURITY OF PERSON ¶ 2, http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/Submissions/UK_GC35.doc (last visited Feb. 14, 2017).

125. See, e.g., ICCPR, *supra* note 38, art. 28(2) (providing that members of the Human

the constituent instrument of the entity usually sets out the qualifications that are required of members of the entity—for example, specifying “recognized competence” in the relevant field.¹²⁶ Likewise, representation can prove important.¹²⁷ Where the composition of an entity takes into account geographical distribution and the principal legal systems of the world, it is likely to be considered more representative and thus more influential than a common law entity or an entity from the Global North, at least to a certain subset of States. The reputation of an entity also affects its authority. If an entity has a reputation for producing outputs that are well-reasoned and generally accepted, the community of international lawyers will read that particular output with the entity’s reputation in mind.¹²⁸ Conversely, the community of international lawyers will treat the outputs of a newly created entity or one that does not have a good record as less authoritative. Also influential is the working method of the entity—in particular, whether relevant actors or interested constituencies are involved in the creation of the output.

C. Features of the Output

Certain features of the output, including its underlying reasoning, form, and accessibility, also affect the output’s authority.¹²⁹

The extent to which reasoning is an important factor will depend on the nature of the output. In many cases, international lawyers will likely afford greater weight to a reasoned output than an output that is merely conclusory in nature or poorly reasoned. In this way, readers can judge for themselves whether the conclusion reached is correct. Indeed, it tends to be outputs that contain little reasoning that are subject to disagreement.¹³⁰ However, the correla-

Rights Committee are to have “recognized competence in the field of human rights”).

126. See, e.g., *id.*; G.A. Res. 174 (II), *supra* note 12, art. 2(1).

127. NILS JANSEN, THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATION IN HISTORICAL AND COMPARATIVE PERSPECTIVE 100–01 (2010).

128. A number of factors affect an entity’s reputation, including the composition of the body and the quality of its work.

129. For various indicia in different contexts, see THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990) (referring to determinacy, symbolic validation, coherence, and adherence); JANSEN, *supra* note 127, at 99–135; Lusa Bordin, *supra* note 88, at 549–58; Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865, 1884–90 (2008).

130. 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 32 (1957).

tion is not an exact one and, over time, international lawyers have accepted certain outputs that are relatively unreasoned.¹³¹

Also important is the form of the output. The coherence and structure of the text coupled with the accessibility of the rules will inform the authority of an output: “Convenience and clarity are the main formal qualities of legal texts and they significantly contribute to their use and authority in legal practice.”¹³² Outputs that contain clear rules and which separate the rules from commentaries can be influential due to their accessibility. This is true, for example, of ILC Draft Articles and the ICRC’s Customary Study. Those who seek to apply the relevant rules or Articles can do so without difficulty by distinguishing the rule component from the commentary component. Likewise, outputs that “look and feel” like a treaty,¹³³ which use authoritative rather than tentative language, or which use the language of obligation rather than recommendation will likely have a greater normative effect.

Accessibility, in the sense of ease of access to the output, is also important. If an output is not physically accessible, like an unpublished arbitral award, there will be limited to no recourse to it and thus its influence will be limited.

D. Reception by the Community of International Lawyers

Of particular importance for the authority of an output—but frequently overlooked—is how the community of international lawyers receives the output.¹³⁴ State-empowered entities do not exist in a vacuum. They are actors in a more general discourse; the authority

131. Christian J. Tams, *The ICJ as a “Law-Formative Agency”*: Summary and Synthesis, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 377, 391 (Christian J. Tams & James Sloane eds., 2013).

132. JANSEN, *supra* note 127, at 109; see also Santiago Villalpando, *Codification Light: A New Trend in the Codification of International Law at the United Nations*, ANUARIO BRASILEIRO DE DIREITO INTERNACIONAL, July 2013, at 117, 121 (2013).

133. Caron, *supra* note 18, at 862.

134. The concept of “the community of international lawyers” is related to, but differs from, the concept of the interpretive community as it goes beyond matters of interpretation. See Michael Waibel, *Interpretive Communities in International Law*, in *INTERPRETATION IN INTERNATIONAL LAW* 147 (Andrea Bianchi et al. eds., 2015). Likewise, it is related to, but differs from the concept of the epistemic community as there is no need for a shared episteme. See Andrea Bianchi, *Epistemic Communities*, in *FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW* (Jean d’Aspremont & Sahib Singh eds., forthcoming). It is perhaps closest to Oscar Schachter, *The Invisible College of International Lawyers*, 72 *NW. U. L. REV.* 217 (1977).

of their work depends, in part, on how the community of international lawyers receives that work. This point is occasionally made,¹³⁵ but rarely explored. By contrast, there is a rich literature on dialogue between courts,¹³⁶ and the role of this dialogue in the creation of international law.¹³⁷ This Section applies insights from that literature and argues that the dialogue is not limited to courts, but extends to all actors in the community of international lawyers. Furthermore, it argues that the dialogue has a considerable impact on the authority of an output.

The community of international lawyers is comprised of all those who have expertise in the relevant issue. The precise composition of the community thus varies depending on the subject matter at hand. On a matter of international human rights law, for example, the community would include States, regional human rights courts, U.N. human rights treaty bodies, special procedures mandate-holders, human rights non-governmental organizations, and human rights academics.¹³⁸ Depending on the specific issue at hand, the community might also include other actors such as general public international lawyers, trade lawyers, or military lawyers. Accordingly, there are in fact multiple communities of international lawyers rather than a single community,¹³⁹ and the communities intersect with one another. The way in which the community of international lawyers receives an output of a state-empowered entity can greatly affect its authority. The community of international lawyers thus plays an important role beyond its role in interpreting norms.¹⁴⁰

135. See Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979, 987, 991 (2011) (in the context of courts); Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. L.A. INT'L & COMP. L. REV. 133, 159, 163–68 (2011).

136. See, e.g., Helfer & Slaughter, *supra* note 109; Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

137. See, e.g., Antonios Tzanakopoulos, *Judicial Dialogue as a Means of Interpretation*, in *THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE* 72 (Helmut Philipp Aust & Georg Nolte eds., 2016); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

138. See John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 8–10 (2010).

139. Waibel, *supra* note 134, at 152–60.

140. On the interpretive community, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371 (1991); Ian Johnstone, *The Power of Interpretive Communities*, in *POWER IN GLOBAL GOVERNANCE*

1. Reception by States

After a state-empowered entity issues an output, such as a judicial decision, principles, or guidelines, members of the community of international lawyers engage in a dialogue regarding that output. As States are the primary actors in the international legal system, the primary lawmakers, and have empowered entities to make and shape international law, how States receive the relevant output is of particular importance.¹⁴¹ Their reaction is all the more important given that States play a role in the working-process of many state-empowered entities.

Reactions to outputs can generally be categorized into acceptance and rejection, although there are levels within each category. Lack of reaction is considered in Section III.D.3.

a. Acceptance

States' acceptance of a state-empowered entity's output can significantly enhance the authority of that output. States' acceptance indicates that the primary lawmakers accept the output, thus imbuing it with greater weight.

An explicit statement of acceptance of a particular output is uncommon, although there are examples of this. For instance, a State, in the Sixth (Legal) Committee of the General Assembly, might expressly indicate that it accepts a particular ILC Draft Article as reflecting international law.¹⁴² More common is a State's implicit acceptance of an output through later use of that output.¹⁴³ A State

185 (Michael Barnett & Raymond Duvall eds., 2005); Waibel, *supra* note 134.

141. See Tzanakopoulos, *supra* note 135, at 159, 163–68 (discussing the importance of the reactions of States); see also Tobin, *supra* note 138, at 11 (noting that States “remain the central actor to be persuaded by the interpretive exercise, as they hold the primary legal responsibility for the implementation of obligations under international treaties”).

142. See, e.g., U.N. GAOR, 66th Sess., 21st mtg. ¶¶ 58–60, U.N. Doc. A/C.6/66/SR.21 (Dec. 2, 2011) (statement by Finland, speaking on behalf of the Nordic countries, welcoming various draft articles of the ILC on the Protection of Persons in the Event of Disasters).

143. See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Memorial of Georgia, vol. 1, ¶¶ 1.9, 8.11, 9.7 (Sept. 2, 2009), <http://www.icj-cij.org/docket/files/140/16097.pdf> (utilizing, for example: (1) ICJ case law, such as *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 34 (Dec. 19); (2) Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); and (3) Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/48/18 (Sept. 15, 1993)).

might refer to an output such as a court judgment at a later point in time, for example, in pleadings before another court, in official papers, or at a diplomatic conference. An example of the latter is the Rome Conference that adopted the Statute of the International Criminal Court. During the drafting of the Statute, it became clear that States largely accepted the idea that the customary law of non-international armed conflict was significantly more developed than was previously thought to be the case, violation of which gave rise to individual criminal responsibility.¹⁴⁴ This was principally due to the ICTY Appeal Chamber's influential 1995 decision on jurisdiction in *Tadić*.¹⁴⁵ In that case, the ICTY found that a significant body of customary international humanitarian law existed, that customary law regulated situations of non-international armed conflict, and that serious violations of the law of non-international armed conflict constituted war crimes.¹⁴⁶ This was a departure from the orthodox view that existed up until that time,¹⁴⁷ and revolutionized the law of non-international armed conflict. Accordingly, States could have dismissed the ICTY's holding as an instance of a court overreaching. States could have stymied the development of the law; instead, they accepted it. States' acceptance of *Tadić* was thus just as important as the decision in *Tadić* itself.

Likewise, States use outputs as a basis for creating new rules. For example, the rules relating to reservations to treaties that are found in the Vienna Convention on the Law of Treaties ("VCLT") stemmed from the ICJ's advisory opinion on *Reservations to the Genocide Convention*.¹⁴⁸ Prior to that opinion, in the absence of a provision on reservations in a treaty, a State that sought to become a party to that treaty could enter a valid reservation only if all States Parties to the treaty accepted that reservation.¹⁴⁹ The ICJ took a dif-

144. See ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 281 (2005).

145. See *id.*

146. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

147. See, e.g., Secretary-General, Letter Dated May 27, 1994, from the Secretary-General to the President of the Security Council, annex, ¶ 52, U.N. Doc. S/1994/674 (May 27, 1994).

148. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28); see also MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 264–66 (2009).

149. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. Rep. at 21.

ferent approach with respect to reservations to the Genocide Convention, holding that a State that had entered a reservation, to which a State Party had objected, could nonetheless be regarded as a party, provided the reservation was compatible with the object and purpose of the Convention.¹⁵⁰ This was thus a sea-change in approach, albeit the ICJ's approach was reflected in the practice of Pan-American States.¹⁵¹ Accordingly, States could have challenged the position of the ICJ; instead, States accepted it.¹⁵² The General Assembly recommended to States that they be "guided" in regard to the Genocide Convention by the ICJ's advisory opinion,¹⁵³ and States at the Diplomatic Conference (which led to the adoption of the VCLT) opted for the ICJ's approach.¹⁵⁴ Therefore, States' acceptance of the approach set out in the advisory opinion was crucial.

b. Rejection

Reactions of States to an output of a state-empowered entity are by no means uniformly positive. Reactions can also take the form of rejection, and rejections are equally as important as affirmations in determining the authority of a particular output. A State's rejection of an output serves to weaken the authority of that output. Following the rejection, the authority of the output is rendered uncertain and will turn on other reactions.

The greater the number of rejections, the more likely it is that the output will not be followed. It might also induce the state-empowered entity to change its position. For example, a draft of General Comment 33 of the U.N. Human Rights Committee, which the Committee circulated to States for their comment, indicated that the "Views" of the Human Rights Committee, which are issued by the Committee following the examination of an individual communication, are legally binding,¹⁵⁵ and that they, or the acquiescence of

150. *Id.* at 24.

151. See Alain Pellet, *Article 19, in* 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 405–11 (Olivier Corten & Pierre Klein eds., 2011).

152. Acceptance was not without debate. See, e.g., U.N. GAOR, Sixth Committee, 6th Sess., 264th mtg., U.N. Doc. A/C.6/SR.264 through U.N. GAOR, Sixth Committee, 6th Sess., 278th mtg., U.N. Doc. A/C.6/SR.278; see also Int'l Law Comm'n, Rep. on the Work of Its Third Session, U.N. Doc. A/CN.4/48 + Corr. 1 & 2 (1952) (reporting the initial position of the ILC following the delivery of the advisory opinion).

153. G.A. Res. 598 (VI), ¶ 5 (Jan. 12, 1952).

154. See Vienna Convention on the Law of Treaties art. 19, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

155. Human Rights Comm., Draft General Comment No. 33: Obligations of States

States Parties to them, constitute subsequent practice in the sense of Article 31(3)(b) of the VCLT.¹⁵⁶ Many States Parties submitted comments on the draft, which largely rejected both points, and the Committee ultimately omitted both points from the final text of the General Comment.¹⁵⁷ States' responses to the draft General Committee thus influenced the final position of the Human Rights Committee.

The *strength* of States' reactions will also affect the authority of the output. The stronger the disagreement, the more likely it is that a court, tribunal, or other actor will give the output little weight. For example, in the *Kupreškić* trial judgment, the ICTY held that customary international law prohibited attacks on civilians, even as a matter of belligerent reprisals.¹⁵⁸ This holding was controversial and leading commentators heavily criticized it.¹⁵⁹ Notably, in its military manual, the UK explicitly rejected the holding using uncharacteristically strong language. It argued that "the court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment."¹⁶⁰ The ICTY later

Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 34, U.N. Doc. CCPR/C/GC/33/CRP.3 (Aug. 25, 2008) [hereinafter General Comment No. 33] ("The Committee is therefore of the opinion that, on a correct interpretation of the Covenant and the Optional Protocol, the Views expressed by it in relation to individual communications are not merely recommendatory but constitute an essential element of the undertaking by States parties under article 2, paragraph 3 of the Covenant to afford an effective remedy to persons whose rights have been violated.").

156. *Id.* ¶ 18.

157. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 187 (Helen Keller & Geir Ulfstein eds., 2012); *see also id.* at 172–73 (noting that this demonstrates that "if there is sufficient outcry from states parties regarding a first draft, the Committee will consider toning down its approach to preserve the perceived legitimacy of a General Comment and the Committee generally").

158. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 534 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

159. *E.g.*, Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 539 (Horst Fischer et al. eds., 2001); Frits Kalshoven, *Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal*, in MAN'S INHUMANITY TO MAN: ESSAYS IN HONOUR OF ANTONIO CASSESE 481 (Lal Chand Vohrah et al. eds., 2003).

160. U.K. MINISTRY OF DEF., JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 423 n.62 (2004), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

changed its approach to the issue.¹⁶¹

By contrast, the United States issued a more ambivalent reaction to the ICRC Customary Study.¹⁶² Following publication of the Study, the United States released a response which sought:

to make clear—both to the ICRC and to the greater international community—that, based upon the U.S. review thus far, the United States is concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study’s conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.¹⁶³

The language of the U.S. response was much more tempered than the UK reaction to *Kupreškić*. The United States did not purport to reject the Study as a whole; rather, it sought to express concerns about the methodology and noted that “it is not in a position to accept [the Study] without further analysis.”¹⁶⁴ To avoid any confusion, it went on to note that its response was:

not intended to suggest that each of the U.S. methodological concerns applies to each of the Study’s rules, or that the United States disagrees with every single rule contained in the study—particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict.¹⁶⁵

And it only commented on four rules, although it indicated that further comments would be forthcoming.¹⁶⁶ The nature of the U.S. response suggests that it served both as a placeholder—reserving its position until such time as it was able to analyze the study further—and as a foundation for any later objection to the study. Indeed, the

161. See Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 464–68 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007) (noting that belligerent reprisals are lawful, subject to strict conditions).

162. HENCKAERTS & DOSWALD-BECK, *supra* note 19.

163. Bellinger & Haynes, *supra* note 21, at 444.

164. *Id.*

165. *Id.*

166. *Id.* Indeed, it has been suggested that “the letter lacks the thoroughness and heft expected of a response to such a significant and influential work.” Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEX. INT’L L.J. 189, 197 (2015).

United States viewed its response as its contribution to a dialogue amongst relevant actors on the identification of customary rules of IHL, and expressed its hope that “the discussion in [its response], as well as the responses to the Study by other governments and by scholars, will foster a constructive, in-depth dialogue with the ICRC and others on the subject.”¹⁶⁷ This meant that its response did not significantly affect the weight afforded to the Study.

2. The Battle for Lawmaking Power

Some of the substantive content of the U.S. critique also goes to the battle as to where the power to make and shape international humanitarian law lies. The United States argued that some of the rules of customary international humanitarian law that the ICRC Customary Study identified were based on insufficient State practice; that insufficient emphasis was placed on “actual operational practice by States during armed conflict”; that “undue weight” was given to statements by non-governmental organizations and by the ICRC; and that the Study “often fails to pay due regard to the practice of specially affected States.”¹⁶⁸ The thrust behind much of the methodological critique was thus that the rules identified in the study were insufficiently based on *State* practice. On this view, the ICRC should have given greater weight in the formation of customary rules to the actual practice of States, particularly the practice of those States, such as the United States, that had a history of participation in armed conflicts.

The battle for lawmaking power manifests itself in different ways. States sometimes reject an output because, in their view, the entity overstepped its mandate. At other times, challenges to the content of an output are actually disguised challenges about who makes international law.

An informative illustration of this struggle for lawmaking power is the U.N. Human Rights Committee’s General Comment 24 on reservations to treaties. In that General Comment, the Committee opined on certain substantive matters relating to reservations to human rights treaties.¹⁶⁹ It also addressed the issue of “which body has the legal authority to make determinations as to whether specific res-

167. Bellinger & Haynes, *supra* note 21, at 471.

168. *Id.* at 444–45.

169. Human Rights Comm., General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant on the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

ervations are compatible with the object and purpose of the Covenant.”¹⁷⁰ The Committee found that it was the body that had this competence, as human rights treaties “are not a web of inter-State exchanges of mutual obligations,” and that, in practice, States tend not to assess the reservations of other States.¹⁷¹ The Committee held that it had the competence “necessarily . . . because it is a task that the Committee cannot avoid in the performance of its functions.”¹⁷²

The General Comment received a negative response from three States Parties to the ICCPR, both on substantive matters and, with some differences, on the role of the Committee. On the role of the Committee, France took the view that:

[T]he Committee, like any other treaty body or similar body established by agreement, owes its existence exclusively to the treaty and has no powers other than those conferred on it by the States parties; it is therefore for the latter, and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty.¹⁷³

The United States considered the Committee’s statement on its role to be “of considerable concern” and “contrary to the Covenant scheme and international law.”¹⁷⁴ The UK took a more ambiguous position, not expressing “a final view on the matter,” but noting that, even if the general law on reservations was inappropriate, this would not necessarily give the Committee the competence to adjudge reservations.¹⁷⁵ There was thus a difference of opinion between the Human Rights Committee and three States Parties to the ICCPR on the competence of the Committee. The difference of opinion concerned not only the substance of the law relating to reservations, but also the broader role of the Human Rights Committee and States Parties to the ICCPR.

Following the responses of France, the UK, and the United States to the General Comment, the “correct” position relating to reservations to human rights treaties was unclear. There were simply

170. *Id.* ¶ 16.

171. *Id.* ¶ 17.

172. *Id.* ¶ 18.

173. Human Rights Comm., Rep. on the Work of Its Fifty-First Session, annex VI, ¶ 14, U.N. Doc. A/51/40 (1997) (observations by France on General Comment No. 24).

174. Human Rights Comm., Rep. on the Work of Its Fiftieth Session, U.N. Doc. A/50/40, at 126–27 (1996).

175. *Id.* at 130.

alternative views—the view of the Human Rights Committee and the view of each of the three States, which, while similar, were not entirely uniform. Had those States not submitted observations on the General Comment, the community of international lawyers would have likely treated the General Comment as an authoritative statement on the law of reservations to human rights treaties.¹⁷⁶ Some years later, the ILC added its voice to the debate, and advocated for a position that is somewhere in between the approach of the Human Rights Committee and that of the three States.¹⁷⁷ There are now multiple views on the subject.

A second aspect of the battle for lawmaking power concerns the authority of a particular output of a state-empowered entity. A case in point is the status of “Views” of the U.N. Human Rights Committee. In General Comment 33—a draft of which this Article has already discussed¹⁷⁸—the Committee observed that:

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.¹⁷⁹

The United States challenged this characterization of the views of the Human Rights Committee. The United States took the view that, contrary to the position of the Human Rights Committee, “the Committee does not have the authority to issue views that are ‘authoritative,’ ‘determinative,’ or ‘judicial’ in character.”¹⁸⁰ Indeed, it described this as an “extraordinary assertion of authority.”¹⁸¹ The United States argued that the Committee was non-judicial in nature and that only States Parties to the treaties, not the treaty body itself, could issue authoritative interpretations of the ICCPR. Perhaps un-

176. The outputs of state-empowered entities do seem to have a comparative advantage over the responses of States as the latter can prove difficult to locate. The General Comment, for example, is far easier to access than the responses of the three States. This, in turn, can affect the weight to be given the General Comment.

177. Int’l Law Comm., Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10/Add.1, at 524–42 (2011) (text and commentary of Guideline 4.5.3 from the Guide to Practice on Reservations to Treaties).

178. See *supra* notes 155–57 and accompanying text.

179. General Comment No. 33, *supra* note 155, ¶ 13.

180. OBSERVATIONS OF THE UNITED STATES, *supra* note 5, ¶ 4.

181. *Id.* ¶ 11.

surprisingly, the position of the Committee was that its views were “authoritative,” whereas the position of the United States was that States Parties’ interpretations of the treaty were authoritative.

The relationship between States and state-empowered entities is thus a delicate one. A state-empowered entity’s desire to broaden its competence or enhance the weight of its outputs might lead States to push back. An entity will often have some room for extending its competence and increasing the authority of its outputs. However, if it extends its competence or seeks to increase its authority too far, other actors might push back. This has the potential not only to weaken the entity’s position on the particular issue in question, but also to call into question the entity’s authority more generally. A delicate balance thus exists, but changes over time. Indeed, on occasion, only by going too far will the outer limits of the balance become apparent.

3. Lack of Reaction and Its Consequences

Reactions of States to outputs of state-empowered entities can affect the authority of the output considerably. Reactions can confirm the statement of law issued by the entity; or they can reveal that the entity overreached in the particular instance. Reactions of States also frame the debate. Instead of standing alone, any inquiry into the law must consider the output of the relevant entity together with the responses of States thereto. Seen in this light, the role of the state-empowered entity is to initiate development of the law, with the ultimate decision being left for States. However, notwithstanding the examples of acceptance and rejection that were discussed in the previous section, more often than not, issuance of an output and circulation of a draft output is met with silence on the part of some, or all, States.

This is true even of major outputs. Only some twenty-one States submitted comments on the ILC’s Draft Articles on State Responsibility, of which only a few did so with any regularity; and even the comments that the ILC did receive tended to “address more basic issues [rather] than entering into specific details.”¹⁸² Likewise, interventions of States at the Sixth Committee are frequently not particularly meaningful. Yet, the ILC’s Articles were a significant output

182. INT’L LAW ASS’N, FIRST REPORT OF THE INTERNATIONAL LAW ASSOCIATION STUDY GROUP ON LAW OF STATE RESPONSIBILITY ¶ 10 (2000), http://www.google.com/url?q=http%3A%2F%2Fwww.ilahq.org%2Fdownload.cfm%2Fdocid%2F512330C1-3D89-4DF3-AA41E69B3CE9D164&sa=D&sntz=1&usg=AFQjCNGQr8mmT8VYkXmt_WI7H2jqOZ2qgg; Caron, *supra* note 18, at 865 n.46.

from an influential body on an issue of major relevance to all States. Other work of the ILC has received even fewer responses.¹⁸³ This general failure to respond is not unique to the ILC. The Working Group on Arbitrary Detention, a special procedure of the Human Rights Council, received comments on its preliminary draft basic principles and guidelines from only four States,¹⁸⁴ and comments on its draft basic principles and guidelines from thirteen States.¹⁸⁵ By contrast, the responses of other stakeholders were more numerous.¹⁸⁶ However, many more States did respond to the Working Group's questionnaire.¹⁸⁷ Human rights treaty bodies also tend to receive responses from a small number of States.¹⁸⁸

a. Explaining the Lack of Reaction

There are a number of reasons that explain the relative lack of response on the part of States. States might be unaware of the output, or they might have plenty of other matters to occupy their time. International lawmaking and law-shaping bodies and processes have proliferated to such an extent that if State officials sought to respond to each and every output a state-empowered entity issued, they might have to spend all day, every day on this task. There might be only a handful of legal advisors in a State's foreign ministry, and as a result, they are unable to comment on all the international legal issues that

183. For example, the Draft Articles on the Expulsion of Aliens, adopted on first reading, received comments from fifteen States, although a number of States had previously provided information on their national legislation. *See* Int'l Law Comm'n, Expulsion of Aliens: Comments and Observations Received from Governments: Addendum, U.N. Doc. A/CN.4/669/Add.1 (Oct. 1, 2014); Int'l Law Comm'n, Expulsion of Aliens: Comments and Observations Received from Governments, U.N. Doc. A/CN.4/669 (Mar. 21, 2014); Int'l Law Comm'n, Expulsion of Aliens: Comments and Information Received from Governments, U.N. Doc. A/CN.4/628 (Apr. 26, 2010); Int'l Law Comm'n, Expulsion of Aliens: Comments and Information Received from Governments, U.N. Doc. A/CN.4/604 (Aug. 26, 2008).

184. Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court, U.N. OFF. HIGH COMMISSIONER HUM. RTS., <http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx> (last visited Feb. 15, 2017) (under heading "Stakeholder Statements and Submissions").

185. *Id.* (under heading "Contributions received following the Call for Input made in February 2015").

186. *Id.*

187. *Id.* (under heading "Responses to WGAD Questionnaire").

188. For example, Draft General Comment 32 of the Human Rights Committee received responses from fifteen States and nine bodies. *See* Keller & Grover, *supra* note 157, at 186.

arise.¹⁸⁹ A State with a single legal advisor at its mission in Geneva would have the nearly impossible task of covering developments at the WTO, the Human Rights Council, the human rights treaty bodies, UNHCR, the ICRC, the ILO, and so on. Indeed, there might not even be a legal advisor at a State's mission in Geneva or in a State's delegation at fora such as the Sixth Committee of the General Assembly.

Alternatively, or in addition, States might not consider the output to affect their interests sufficiently to warrant a reaction. They might wish to keep their options open in terms of later acceptance or rejection and thus seek not to tie their hands. States tend not to want to formulate their position on an issue in the abstract; rather, they prefer to wait for situations in which they have to set out their position, for example, in pleadings before a court. Indeed, the manner in which an issue arises can affect which body within the State takes the lead in responding.¹⁹⁰ States might also have competing policies that lead them not to respond.¹⁹¹ Or they might not wish to give prominence to an issue by responding to it, and instead, prefer that the issue dies a natural death.

Furthermore, in order to issue a response, a State might have to agree on a position internally. It might prove difficult, if not impossible, to reach agreement in an inter-departmental process, involving, for example, the Department of Defense, the Department of State, and the Department of Justice. It might prove particularly difficult to reach agreement in a federal State where the matter at issue is within the competence of both the federal government and state governments. Indeed, the drafting of a State Party report to a U.N. human rights treaty body is a complex affair involving a number of ministries and other actors within a State. The Office of the High Commissioner for Human Rights has had to provide assistance to States in the preparation of reports.¹⁹² If States find it difficult to comply with a treaty obligation, they are even less likely to respond to calls for consultation in a voluntary process or respond to the finished product.

Some States might wish to respond, but fear that other actors

189. Cogan, *supra* note 113, at 429.

190. See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 365 (2013).

191. Cogan, *supra* note 113, at 430.

192. See NAVANETHEM PILLAY, STRENGTHENING THE UNITED NATIONS HUMAN RIGHTS TREATY BODY SYSTEM: A REPORT BY THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS § 2.3.4 (June 2012), <http://www2.ohchr.org/english/bodies/HRTD/docs/HCTReportTBStrengthening.pdf>.

might misperceive the nature of their responses. For example, the losing party to a case might wish to respond to a matter of treaty interpretation in their capacity as a party to the treaty. However, other actors might perceive this response as the State's reaction in its capacity as the losing party.¹⁹³ The same is true of a State that is the subject of a report, for example of a Commission of Inquiry. A State might wish to challenge certain interpretations of the law that are contained in the report of the Commission. However, the response might be viewed as a defense or a rebuttal—which it might also be. Indeed, there is a relationship between the degree of the State's interest in the matter and the manner in which members of the international legal community perceive the State's response. If the legal issue arising in the output of the state-empowered entity is not of particular concern to the State, there are often a multitude of other matters that will take precedence over a State's response to the output. If the matter does acutely affect a State's interest, the response might be viewed as self-interested or partial. Accordingly, the optimal situation that will lead to a State's response is where the matter is acute but not too acute.

A domestic court might respond to the output, for example, by accepting it or rejecting it as part of its reasoning in a particular case.¹⁹⁴ However, domestic courts play a dual role. They are part of the State for the purposes of State practice but they are also neutral lawmakers in the sense that their judgments constitute a subsidiary means for determining the law.¹⁹⁵ Accordingly, when they react to outputs of state-empowered entities, it can be difficult to discern the capacity in which they are reacting.¹⁹⁶

b. Consequences of the Lack of Reaction

The general lack of response of States to draft and final outputs of state-empowered entities has had two consequences, both of

193. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 180–81 (2010).

194. *See* *Sepet (FC) v. Sec'y of State for the Home Dep't* [2003] UKHL 15, [12] (appeal taken from Eng.) (referring to the UNHCR Handbook as “an important source of guidance on matters to which it relates”).

195. *See* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 59 (2011).

196. For example, on certain matters, domestic courts will consider the executive certificate to be conclusive. *See, e.g., Duff Dev. Co. v. Gov't of Kelantan* [1924] AC 797 (HL) 824 (appeal taken from Eng.) (“[W]here such a statement [from the executive] is forthcoming, no other evidence is admissible or needed.”).

which have downgraded the role of States in the making and shaping of international law. First, members of the community of international lawyers have regarded silence on the part of States as acquiescence to outputs of state-empowered entities. Second, other members of the community of international lawyers, notably other state-empowered entities, have filled the void left by the lack of response on the part of States. Whereas state-empowered entities should have been initiators of changes to the law, the relative silence on the part of States has rendered their role even more important, and sometimes transformed state-empowered entities into the finalizers of change.¹⁹⁷

Given that many state-empowered entities have a mandate to make and shape international law, coupled with the general utility of their outputs, members of the community of international lawyers treat the lack of response on the part of States as acquiescence to the output. This can have significant consequences. The Special Tribunal for Lebanon has observed that “[t]he combination of a string of decisions [of international courts and tribunals] . . . coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved.”¹⁹⁸ Although this observation is not an orthodox account of how international lawyers identify customary international law, it does seem to reflect existing practice.

States, too, have recognized that members of the community of international lawyers might treat their silence as acquiescence. For example, in issuing its response to General Comment 33 of the Human Rights Committee, the United States indicated that it was doing so in order to, “preclude any claim that the assertions made in General Comment 33 regarding the Committee’s legal authorities represent an international consensus of any kind.”¹⁹⁹ Likewise, Canada, in providing comments on draft General Comment 35 of the Human Rights Committee, noted that “silence in respect of other areas [of the draft that were not commented upon] does not constitute acquiescence in the Committee’s interpretation of States’ obligations.”²⁰⁰ In so stating, both Canada and the United States recognize

197. Jacob Katz Cogan, *The Changing Form of the International Law Commission’s Work*, in *EVOLUTIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS* 275, 284 (Roberto Virzo & Ivan Ingravallo eds., 2015).

198. Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing, ¶ 47 (Spec. Trib. for Leb., Nov. 10, 2010).

199. OBSERVATIONS OF THE UNITED STATES, *supra* note 5, ¶ 2.

200. DRAFT GENERAL COMMENT 35, ARTICLE 9: LIBERTY AND SECURITY OF PERSON, COMMENTS BY THE GOV’T OF CAN. ¶ 3 (Oct. 6, 2014), <https://www.justsecurity.org/wp->

that a failure to respond to outputs and draft outputs—even parts of them—could lead to tacit acceptance of them. In practice, if not in theory, that recognition is likely correct.

4. Reception by Other Actors Within the Community of International Lawyers

It is not just the reaction of States that affects the weight of a particular output. The reactions of other members of the community of international lawyers are also important and have taken on particular significance in light of the relative lack of reaction on the part of States.

Indeed, the reactions of other state-empowered entities have filled, in large part, the void the States' silence has left. This is sometimes a consequence of deliberate decisions on the part of States. For example, States decided to defer the decision on the final form of the ILC Articles on State Responsibility.²⁰¹ Some States preferred such an approach precisely because it would allow the Articles to become embedded in the jurisprudence of courts and tribunals,²⁰² thus providing for a more influential role for courts and tribunals. At the same time, though, deferral allowed the Articles to become embedded in the pleadings of States before these courts and tribunals.

If other actors within the community of international lawyers accept the output, this acceptance imbues the output with the additional imprimatur of those members of the community.²⁰³ Conversely, if other actors within the community of international lawyers reject the output, this rejection reduces the authority of the output. Rejection casts the output as a product of the state-empowered entity alone and, moreover, a product that does not have the acceptance of the broader community. Through acceptance or rejection, the broader community influences the authority of outputs. This means that, effectively, the output of a state-empowered entity must “find ac-

content/uploads/2015/01/Canada-UN-HRC-GC-35.pdf.

201. See G.A. Res. 56/83, ¶ 3, Responsibility of States for Intentionally Wrongful Acts (Jan. 28, 2002) (taking note of the Articles and commending them “to the attention of Governments without prejudice to the question of their future adoption or other appropriate action”).

202. See James Crawford & Simon Olleson, Shorter Article, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT'L & COMP. L.Q. 959, 964 (2005).

203. As with State reactions, acceptance by a state-empowered entity rarely takes the form of an explicit statement to this effect; rather, it is evident through citation or use in its own output.

ceptance within a relevant community in order to succeed.”²⁰⁴

Members of the community will not always be able to respond to an output, even if they wish to do so. They will only be able to react if the matter falls within their competence. Moreover, even if the matter is within their competence, members of the community may not be able to respond until some years following adoption of the output, if at all. Opportunity to respond, or lack thereof, is thus another factor to be considered in determining the weight of an output.²⁰⁵ Even when there is an opportunity, there might be constraints on the response, such as reacting not at their own initiative but on the initiative of the parties before them.²⁰⁶

Where members of the community do respond, the responses again fall into the general categories of acceptance and rejection.

a. Acceptance

If other members of the community of international lawyers receive the output favorably, the authority of the output will be reinforced. It will carry the weight not only of the entity that issued it, but also of the other actors that have endorsed it. This will be particularly influential in situations in which another actor uses a non-binding output in a binding output. An interpretation in an output that started out as non-binding might later become binding as a result of another actor.

The influence of members of the community on the authority of an output can be seen most clearly in the ICJ’s use of the ILC’s Draft Articles. The ICJ often cites the work of the ILC, even if the ILC has not concluded that work at the time the ICJ cites it.²⁰⁷ The relationship between the two entities is particularly evident in the area of State responsibility, but is by no means limited to that subject matter.²⁰⁸ For example, in the *Gabčíkovo-Nagymaros* case, the ICJ cited with approval the ILC’s Draft Article on necessity as sole sup-

204. VENZKE, *supra* note 11, at 5; *see also* IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* 40 (2011).

205. *See* Tams, *supra* note 131, at 392–93 (discussing this factor with respect to the ICJ).

206. Tzanakopoulos, *supra* note 137, at 74–75.

207. *See* Santiago Villalpando, *On the International Court of Justice and the Determination of Rules of Law*, 26 *LEIDEN J. INT’L L.* 243, 245–51 (2013).

208. *See, e.g.*, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Dem. Rep. Cong.), Judgment, 2010 I.C.J. Rep. 639 (Nov. 30) (on diplomatic protection); Villalpando, *supra* note 132, at 113.

port for its view that necessity was a circumstance precluding wrongfulness in customary international law, even though the ILC had adopted that Article only on first reading.²⁰⁹ The ILC later used that citation as authority for its position.²¹⁰ Furthermore, the ICJ again cited the ILC's—by then adopted—Article in the *Wall* advisory opinion,²¹¹ and arbitral tribunals have also cited the Article.²¹² The authority of the ILC's Draft Article on necessity as a circumstance precluding wrongfulness was thus reinforced when the ICJ and arbitral tribunals used the Article.

This relationship between the ILC and the ICJ has been described as “institutional circularity” and to some it is “troubling.”²¹³ State-empowered entities can sometimes uncritically adopt the outputs of other state-empowered entities.²¹⁴ For example, a state-empowered entity can adopt a particular output almost out of habit. It becomes an unavoidable reference—whenever the entity considers the relevant issue, it references the output.²¹⁵ The output then takes on a life of its own. Indeed, it has been remarked that “the factual recognition of a text as legal authority may become a normative reason for treating it as such.”²¹⁶ However, for good or for bad, the relationship between the ICJ and the ILC illustrates the interaction that tends to take place between different entities making and shaping the law.

The particular actors that refer to an output, the number of

209. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶¶ 50–53 (Sept. 25).

210. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, art. 25 cmt. ¶ 11 (2001).

211. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 140 (July 9).

212. See, e.g., CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007).

213. Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 453 (2012).

214. See Michael Wood, “Weighing” the Articles on Responsibility of International Organizations, in *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE* 55, 65 (Maurizio Ragazzi ed., 2013) (discussing application to the ILC).

215. It would be unusual, for instance, to see a matter of State responsibility being discussed without reference to the ILC Articles on the subject.

216. JANSEN, *supra* note 127, at 9; see also Villalpando, *supra* note 132, at 121.

them that do so, the number of times they do so, and how they do so, all affect the authority of an output. Over time, what started out as an output of an individual entity might become the shared view of the broader community of international lawyers, thus making it difficult to challenge. The more established the output becomes, the greater the difficulty in departing from it. It becomes far more onerous for an actor to argue that the output of a state-empowered entity does not reflect the law if other members of the community of international lawyers have accepted that output. Multiple actors help to cultivate a shared view of the law.

b. Rejection

As with States, other members of the community of international lawyers do not always accept outputs of state-empowered entities. When state-empowered entities reject the position taken by other state-empowered entities, they tend to do so respectfully, for example, after noting that they gave “careful consideration” to the position of the other entity.²¹⁷ In *Mucić*, the ICTY Appeals Chamber addressed this issue in general terms, noting that, “[a]lthough the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.”²¹⁸ Other actors within the community, such as academic writers, can be more critical.²¹⁹

Unlike States, state-empowered entities will only rarely question whether an output falls within the mandate of another entity. In the *Nicaragua* case, the ICJ held that breaches of international humanitarian law committed by the *Contras* may be attributed to the United States if it “had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”²²⁰ In *Tadić*, in the process of setting out the test for the internationalization of an armed conflict, the ICTY cast doubt on the ICJ’s test for attribution.²²¹ The ICTY argued that there should be a

217. See, e.g., Prosecutor v Mucić, Case No. IT-96-21-A, Judgment, ¶ 24 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001).

218. *Id.* (discussing the I.C.J. Judgment in *Nicaragua*).

219. See, e.g., Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637 (2010) (discussing the critical writings on the ICRC’s Interpretive Guidance on Direct Participation in Hostilities).

220. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27).

221. Prosecutor v Tadić, Case No IT-94-1-A, Judgment, ¶¶ 115–45 (Int’l Crim. Trib. for

single test for internationalizing a non-international armed conflict as well as for attributing the acts of an individual to the State for the purposes of State responsibility, and that the test was one of “overall control.”²²² When the ICJ considered the matter again in the *Bosnia Genocide* case, the ICJ called into question the ICTY’s interpretation, as an overstepping of the ICTY’s mandate. The ICJ observed:

[T]he ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.²²³

The Court went on to note that while it “attaches the utmost importance” to the findings of the ICTY and takes “fullest account” of its judgments, “[t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.”²²⁴ One can explain the rarity of state-empowered entity challenges to the mandates of other state-empowered entities by reference to the discussion above regarding the idea that critiques to content of an output are sometimes also critiques on the lawmaking power of an entity. State-empowered entities rarely challenge the authority of other entities to make and shape the law, as there tends not to be a battle for lawmaking power between different state-empowered entities. A difference in view over the interpretation of a norm is more common. Accordingly, disagreements are set out in different terms.

When members of the community reject outputs of state-empowered entities, the rejections render the authority of the output uncertain. As with rejections by States, only the acceptances or rejections of others will clarify the output’s authority.

c. Mixed Reactions

Given the fact that the international system is decentralized,

the former Yugoslavia July 15, 1999).

222. *Id.* ¶¶ 103–35, 145.

223. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 403 (Feb. 26).

224. *Id.*

the reactions—whether affirmations or rejections—to a state-empowered entity’s issuance of an output will not always be consistent. Mixed reactions might also be forthcoming. In such a case, only time and the accompanying emergence of additional reactions will tell which of the various positions is correct. In the interim, there will be a period of flux, during which time the authority of the output is unclear.

CONCLUSION

This Article has made two principal contributions to our understanding of how international law is made. First, building on work by Professors Roberts and Sivakumaran, it has demonstrated that in addition to States and non-state actors, there is a third category of actor, namely state-empowered entities. States have empowered these entities to carry out certain tasks, and in doing so have rendered these entities neither States nor truly non-state actors. They form a category in their own right which is somewhere between States and non-state actors. In particular, States have empowered numerous entities to make and shape international law. States still establish the framework of international law by concluding multilateral treaties and bilateral agreements. Their practice and *opinio juris* also constitute the elements of customary international law. However, state-empowered entities carry out a large part of the making and shaping of international law, such as the interpretation, application, and development of international law. It is these entities that identify customary international law, conclude soft law, and interpret conventional law.

Second, this Article has also shown that the authority of the outputs of state-empowered entities, meaning the output’s weight or persuasiveness, is influenced by a number of factors, including the link between States and the output, the authority of the entity that issued it, and certain features of the output itself. Of particular importance is how the community of international lawyers receives the output.

Running throughout this Article are a number of themes, three of which are particularly important. First, there has been a turn to “softer” processes of lawmaking and an increase in the use of experts, primarily, though not exclusively, through the work of state-empowered entities.²²⁵ This is apparent at all levels and in all areas

225. For discussion on informality of actors, process, and outputs, see *INFORMAL INTERNATIONAL LAWMAKING* (Joost Pauwelyn et al. eds., 2012).

of international law, from courts and tribunals, to environmental treaty bodies, to human rights special rapporteurs. Softer processes are becoming increasingly important for the making and shaping of international law. It is experts that tend to prepare initial drafts of treaties, identify custom, and monitor compliance; this is done in expert groups, meetings of parties, and through the submission of reports. The latter is particularly important, though often overlooked, as reports and recommendations often serve as the foundation for future regulation.²²⁶

States empower experts, and entities generally, to make and shape international law for a number of reasons, including increasing coordination and cooperation, facilitating collective decision-making, and enhancing credibility.²²⁷ One of the key advantages of empowering experts to make and shape the law, rather than leaving that power to States alone, relates to the benefits of specialization: “Specialization allows others to provide services that states are unable or unwilling to provide unilaterally.”²²⁸ For example, an entity that States have empowered to make the law might possess the expertise that an individual State or a group of States does not have. This will be particularly true of specialized and technical areas of the law. Empowerment can also prove quicker and more efficient. A small group of experts is far more likely to reach an agreement on an issue than 190-plus States. When there are splits amongst States, it might also prove difficult, if not impossible, to conclude a multilateral agreement in particular areas of the law. It would also be unwieldy, and nigh impossible, for all States to convene formally every time a legal issue arises. As international law grows, it becomes less and less possible for States to be the sole makers and shapers, particularly insofar as the “day-to-day” making and shaping of the law is concerned.

Second, international lawmaking is interactional in nature.²²⁹ The sources of international law themselves illustrate this point. Treaties may become custom; custom may be codified in a treaty; and a judicial decision may identify a customary rule or interpret a

226. Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 305, 331 (Curtis A. Bradley ed., 2015).

227. Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS*, *supra* note 35, at 3, 13–20; *see also* Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 *L. & CONTEMP. PROBS.* 115, 140–48 (2008).

228. Hawkins et al., *supra* note 227, at 14.

229. *See, e.g.*, JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

treaty provision. The actors involved in the making and shaping of international law must also engage in a highly interactional collaboration. For example, the Human Rights Committee is integrally linked with States Parties to the ICCPR, the conduct of which the Committee monitors and which comment on its work in turn; with the General Assembly to which it reports; and with the U.N. generally, which provides it funding.²³⁰ The Committee is also linked to other human rights mechanisms—regional courts, fellow treaty bodies, and special procedures of the Human Rights Council—all of which refer to the Committee's work and to which the Committee also refers. States, state-empowered entities, and other actors are all part of the community of international lawyers. A state-empowered entity's publication of an output is thus by no means the final word on a particular issue. Rather, it is the start of an interactive dialogue amongst various actors within the community of international lawyers, a dialogue that can greatly affect an output's authority.

Third, States continue to play a crucial role in the making and shaping of international law. States empower entities to make the law, decide on their mandates, and determine their compositions. States also have an important role to play insofar as the outputs of the entities are concerned. As States are the principal lawmakers, their views matter considerably. Indeed, the lawmaking processes of a number of state-empowered entities are designed specifically to include the views of States. However, in practice, States frequently remain silent, with reactions to outputs proving to be few and far between. This has a number of consequences. Members of the community of international lawyers interpret silence as acquiescence. And the responses of other actors within the community, particularly other state-empowered entities, serve to fill the void States' failures to respond leave. In this way, the role of States in the making and shaping of international law has lessened and the role of state-empowered entities has become even more influential.

The relative silence of States has also enhanced the weight of certain voices. The growth in the number of state-empowered entities with lawmaking functions, together with the different *fora* in which international law is made, make it more difficult for a State, indeed any interested actor, to keep up to date with developments. Only States with abundant resources and large numbers of legal advisors in their state departments and foreign offices are able to keep up with developments and comment on outputs. In turn, it is these States that are able to exert a disproportionate influence on lawmaking. This is not to suggest that more powerful States can unilaterally

230. ICCPR, *supra* note 38, arts. 36, 40, 45.

dictate the terms of the debate: “If new arguments and interpretations reach too far beyond the parameters of accepted discourse, they are not likely to be persuasive, and no amount of material power is going to change that.”²³¹ It does, however, reveal the importance of reactions in the process that is international lawmaking.

As reactions to an output are important in determining the output’s authority, what seems to be disagreement on the substance of an output is not infrequently a disguised battle about authority and who has the power to make and shape the law. The dialogue between States and the Human Rights Committee, or between the United States and the ICRC, are prime examples of this disguised battle.

Ultimately, the creation of international law is a dynamic process involving the community of international lawyers. The relationship between these actors is not static but is in a constant state of flux with expansions and contractions of the mandate, ebbs and flows, and pushes and pulls. It is through this interactional relationship that international law is made. This community includes not only the traditional categories of States and non-state actors, but also state-empowered entities, which constitute a category in their own right. The work of state-empowered entities is particularly important. It is they that carry out a large part of the making and shaping of international law. And, in light of the relative silence of States, it is their voices that have bolstered or cast doubt on the authority of particular outputs. International law would be far the poorer without them.

231. JOHNSTONE, *supra* note 204, at 52.