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# State-Academic Lawmaking

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*What role does legal scholarship play in the development of international law? How do states advance a preferred international legal position when the formal methods of creating or amending the law are unavailable? As global stagnation and great power competition increasingly preclude access to the formal methods of international lawmaking, those states that seek to drive international agendas to gain or maintain influence are pursuing novel methods to shape international law. This article identifies one such method, what we term "state-academic lawmaking." State-academic lawmaking describes an observable, generative method by which purportedly independent academic articles, authored by an esteemed legal expert(s), and published in a leading law journal, are advanced as an informal means of international lawmaking.*

*By producing purportedly independent academic articles, state-academic lawmaking couples the state's formal lawmaking authority with the value of scholarly neutrality and expertise that is assumed of work that is independently published in a legal journal, but which also makes an explicit lawmaking claim. In this article, we present a series of case studies that document a form of informal lawmaking that has increasingly been used by the United States, China, and other influential states. The case studies that document this burgeoning lawmaking phenomenon describe how these powerful, but diverse, states use legal scholarship to pursue legal agendas in the most contested fields of international law – the use of force, international humanitarian law, and the law of the sea.*

*Through the lens of state-academic lawmaking, we offer a critical and socio-legal account of the microprocesses that drive informal lawmaking. These observations provide important insights into broader questions about international law that challenge existing understandings of how the law develops. They evidence a shift from vertical to horizontal lawmaking that presents a novel conception of the relationship between international law and power, that bears implications for how states from the Global South can amplify their voices within the lawmaking processes from which they have traditionally been excluded, and that complicates understandings about how states on either side of the so-called authoritarian-democratic divide engage with international law.*

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> The Authority of writers, without the Authority of the Commonwealth, maketh not their opinions Law, be they never so true. . . . For though it be naturally reasonable; yet it is by the Soveraigne Power that it is Law.
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> — Thomas Hobbes, *Leviathan*, chapter 26

## Introduction

The dwindling feasibility of formal, multilateral lawmaking has not halted contemporary initiatives to shape international law.[1] But the belief that formal legal processes are foreclosed, at least in those fields where consensus is absent or contracting costs prohibitive, affects how international law is now made. Drawing upon their tenures within the State Department's Office of the Legal Adviser, John Bellinger and Vijay Padmanabhan espoused the benefits of creating new law by reaching informal agreements with like-minded states.[2] This, said Bellinger and Padmanabhan, would advance the process of legal development when the creation of a new legal instrument was unachievable.[3] In the 2010 National Security Strategy of the United States, officials claimed that the post-World War II international architecture was unfit to meet contemporary challenges.[4] International institutions, it continued, no longer constituted the sole means of fostering global cooperation.[5] Instead, aligned states were encouraged to complement old methods with new techniques by cultivating partnerships with what the Strategy described as novel centers of influence.[6] Both accounts build upon a familiar story.

This begins during the era of post-War cooperation when the foundations of the rules-based international order were established. The story reaches its climax in the late twentieth century when formal lawmaking escaped the shackles of bipolarity and reached its apogee. But the following decades would introduce conflict through a decline in multilateral cooperation, a sense that international legal frameworks were unfit to meet contemporary challenges, and the introduction of new, powerful actors into formal lawmaking processes. In this story, globalization is paradoxical. It has both accelerated the challenges that require multilateral solutions and fomented the conditions that render cooperation unlikely. In response, states have expanded the methods through which they advance their international agendas. The narrators of this story tell that informal methods now complement or supplant formal lawmaking techniques as the choice means of advancing international cooperation, singular agendas, or regional initiatives.[7] Chronicled through undertakings like the IN-LAW project of the Hague Institute

1. *See, e.g.*, Andreas M. Kravik, *An Analysis of Stagnation in Multilateral Law-Making – and Why the Law of the Sea Has Transcended the Stagnation Trend*, 34 Leiden J. Int'l L. 935 (2021).

2. *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 Am. J. Int'l L. 201, 205 (2011).

3. *Id.*

4. U.S. Dep't of State, *National Security Strategy*, at 40–41 (May 2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [https://perma.cc/EH9X-HGJF].

5. *Id.*

6. *Id.*

7. *See* Joost Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, *in* Informal International Lawmaking 13, 14 (Joost Pauwelyn et al. eds., 2012).

for the Internationalisation of Law, the Global Administrative Law Project at New York University, and the International Public Authority Project of the Max Planck Institute in Heidelberg, the practice and advancement of international law must now account for facets of international cooperation and behavior beyond familiar recourses to treaties, custom, and general principles.[8]

These initiatives observe that informal processes are frequently employed to advance governance and regulatory objectives.[9] In accordance, they are defined as methods to establish international legal substance in forums other than international organizations, by parties that are not traditional diplomatic actors, and/or by producing output that does not result in a treaty or traditional source of law.[10] Informal lawmaking is, however, a malleable concept. Used synonymously with concepts like soft law, informal lawmaking lacks a formal definition.[11] Within this article, we apply a broad understanding of informal lawmaking that includes any non-binding output that intends to shape international law. The resulting legal outputs extend to both the multilateral and unilateral activities of states and a broad spectrum of non-state actors. These may take the form of a General Assembly Resolution, expert manuals, the reports of influential non-governmental organizations ("NGOs"), the output of a human rights body, the decision of an investor-state dispute mechanism, or even forms of legal scholarship. Such an understanding of informal lawmaking necessarily adopts a broad conception of the sources of international law.[12] Informal lawmaking outlooks may take a forward-orientated approach that intends to establish new rules or engage in post-hoc interpretative practices that seek to impose a legal meaning onto contested legal texts.[13]

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8. *See* Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *An Introduction to Informal International Lawmaking*, *in* INFORMAL INTERNATIONAL LAWMAKING 1, 1–2 (Joost Pauwelyn et al. eds., 2012); *see also* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 15–16 (2005); Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GER. L.J. 1375, 1375 (2008).

9. *See* Ayelet Berman & Ramses A. Wessel, *The International Legal Form and Status of Informal Lawmaking Bodies: Consequences for Accountability*, *in* INFORMAL INTERNATIONAL LAWMAKING 35, 37 (Joost Pauwelyn et al. eds., 2012) (describing informal lawmaking as a "phenomenon. It is defined as 'cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or traditional source of international law (output informality).'").

10. *Id.*

11. *See, e.g.*, Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014).

12. *See, e.g.*, Steven Ratner, *Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources*, *in* THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 912, 913–14 (Samantha Besson & Jean d'Aspremont eds., 2017).

13. *See, e.g.*, Melissa J. Durkee, *Interpretive Entrepreneurs*, 107 VA. L. REV. 431 (2021) (advancing the concept of post hoc lawmaking to describe the interpretative process that occurs after the formal lawmaking moment has concluded).

The diagnosis behind the claim that formal international lawmaking has reached a nadir rests on two conjoined observations. The first is that a diverse set of actors are gaining a voice within lawmaking processes. The introduction of these new actors has diluted the exclusive, formal lawmaking authority of states. The second accepts that informal lawmaking methods allow states to avoid the high contracting costs that accompany formal methods. Mark Pollack and Gregory Schaffer demonstrate that informal agreements can be less burdensome to negotiate, entail lower sovereignty costs, allow greater flexibility, avoid ratification procedures and domestic impediments to implementation, and offer greater participatory potential.[14]

Accordingly, those actors that wish to influence lawmaking processes are now adjusting their tactics. International law is not influenced merely through the delegations of well-trained lawyers that gather in Geneva or at the Sixth Committee in New York. In previous work, we have described methods that certain powerful states now employ to advance their lawmaking objectives.[15] But as informal lawmaking pursuits become increasingly prevalent, spanning various areas of law, there is a need to supplement understandings of the methods that states employ to shape international law.

This article focuses on one such method, what we term "state-academic lawmaking." This is not a reference to an Article 38 source of international law that seeks to extrapolate how the teachings of the most highly-qualified publicists evidence legal meaning. Instead, state-academic lawmaking refers to an observable, generative method by which purportedly independent academic work that was created by scholars with close ties to a state is advanced to support, and then entrench, a preferred legal position. It is academic in that it is presented as a scholarly article, authored by an esteemed legal expert(s), and published in a leading legal journal. And, it is informal lawmaking in that it attempts to circumvent impediments to formal methods of inter-state cooperation and consensus-building to impart a legal meaning that is not reliant upon the creation of a traditional source of international law.[16]

This is not a new phenomenon. When, for example, in the 1960s, John Norton Moore conducted studies about the legality of the Vietnam War through his connections to the War College in Charlottesville, we begin to see how both the lawmaking characteristics and interests of states and aca-

14. Mark A. Pollack & Gregory C. Shaffer, *The Interaction of Formal and Informal International Lawmaking*, *in* Informal International Lawmaking 241, 246 (Joost Pauwelyn et al. eds., 2012).

15. *See* Yahli Shereshevsky, *Back in the Game: International Humanitarian Lawmaking by States*, 37 Berkeley J. Int'l L. 1 (2019) [hereinafter Shereshevsky, *Back in the Game*]; *see also* David Hughes, *How States Persuade: An Account of International Legal Argument upon the Use of Force*, 50 Geo. J. Int'l L. 839 (2019) [hereinafter Hughes, *How States Persuade*].

16. *See* Charles Lipson, *Why are Some International Agreements Informal?*, 45 Int'l Org. 495, 500 (1991) ("Informality is best understood as a device for minimizing the impediments to cooperation.").

demics can converge.[17] But thus far, the informal international lawmaking story has largely focused on the pursuit of global governance objectives by what Bellinger and Padmanabhan described as like-minded states. This is a tale of agreement and progress, albeit one that poses important normative questions.[18] Subsequent considerations of informal lawmaking have emphasized the ways that a more diverse array of actors advances an international legal agenda.[19] This article, however, departs from this narrative to explore the use of an informal lawmaking technique in areas of intense legal contestation. In these spaces, persuasive competition is high, unilateralism is common, and the path to a formal lawmaking output is closed. The following will explore three fields of international law—the use of force, international humanitarian law, and the law of the sea—where interpretative contests occur between states, alliances, and non-state actors that all seek to mold the legal rules that govern international conduct.

Within contested fields, informal lawmaking processes become persuasive contests. Where formal lawmaking procedures prioritize state input, informal exchanges offer a more leveled environment that is less tethered to hierarchy. To gain advantage, actors couple the substance of a particular argument with appeals based upon their lawmaking standing. While states maintain formal status within informal contests, their perceived partiality or unilateralism lessens the persuasive thrust of their informal engagements. Conversely, academic works lack state authority but benefit from perceptions of neutrality and the prestige of subject-matter expertise. State-academic lawmaking therefore offers a means of compensation, buttressing the state's presumed partiality with the approval of scholarly independence.

Based upon this notion of mutual reinforcement, the following account of state-academic lawmaking tells a nuanced story about the relationship between state and non-state actors, about how they both collaborate and compete. Section I of this article describes the concept of state-academic lawmaking. This situates instances of state-academic lawmaking within broader considerations of informal appeals to international law. It presents a series of criteria that collectively constitutes state-academic lawmaking and

17. *See, e.g.*, John Norton Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AM. J. INT'L L. 1 (1967). In this work, Moore argues that third states may lawfully provide military assistance to the Republic of Vietnam because it is a separate international entity from, and under direct attack by, the Democratic Republic of Vietnam. Moore notes that the legal analysis draws upon a larger work, co-authored with James Underwood and Myers McDougal, which further considers the legality of the use of force by the United States in Vietnam. This was distributed to Congress by the American Bar Association and reprinted in the Congressional Record.

18. For further discussion, *see infra* Section III.

19. *See, e.g.*, 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); *see also* Danae Azaria, *'Codification by Interpretation': The International Law Commission as an Interpreter of International Law*, 31 EUR. J. INT'L L. 171, 174 (2020) (demonstrating that the International Law Commission, an actor without formal authority, uses interpretation to shape international law and that these interpretations can become reference points for other lawmaking actors).

differentiates this phenomenon from more common scholarly contributions to lawmaking processes.

Section II documents contemporary instances of state-academic lawmaking. A series of case studies addresses the aforementioned areas of international law. Each case study features examples of lawmaking efforts that were created by scholars with significant ties to states. The first is Daniel Bethlehem's seminal article in the *American Journal of International Law* ("AJIL") addressing the extraterritorial use of force against non-state armed groups.[20] The second is Michael Schmitt and John Merriam's article in the *Pennsylvania Journal of International Law* ("PJIL") about Israel's compliance with international humanitarian law during the 2014 Gaza conflict.[21] And the third includes the lengthy article by the Chinese Society of International Law in the *Chinese Journal of International Law* ("CJIL") and the more recent article by the National Institute for South China Sea Studies ("NISCSS") in the *Asian Yearbook of International Law*.[22] Both present critiques of the South China Sea arbitration award.[23]

Section III builds upon these observations. The section offers descriptive, comparative, and normative comments that further explain informal legal processes. Here, the article considers how recourse to these processes challenges prevailing assumptions about international lawmaking. It is divided into three sub-sections: The first explores the move from vertical to horizontal lawmaking and the resulting relationship between states and non-state actors; the second considers how the increasing move towards informal methods influences conceptions of the relationship between power and international law; and the third, through the lens of what we term "comparative international lawmaking," assesses the informal lawmaking approaches of the respective states featured in the case studies. Section IV concludes.

Simon Chesterman recently wrote that international law academics have always been participants rather than observers in our field.[24] Academic works fill interpretative gaps, identify state practice, present guidelines or draft texts, and serve as subsidiary sources of legal meaning. Yet, notwithstanding the widely acknowledged pluralization of lawmaking processes, state-academic lawmaking differs from the usual modalities of academic par-

20. Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 Am. J. Int'l L. 770 (2012).

21. Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practice in Legal Perspective*, 37 U. Pa. J. Int'l L. 53 (2015) [hereinafter Schmitt & Merriam, *Tyranny of Context*].

22. Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, 17 Chinese J. Int'l L. 207 (2018) [hereinafter Chinese Society of International Law, *A Critical Study*]; *see also* National Institute for South China Sea Studies, *A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration*, 24 Asian Y.B. Int'l L. 151 (2018) [hereinafter National Institute for South China Sea Studies, *Legal Critique*].

23. Chinese Society of International Law, *A Critical Study*, *supra* note 22; National Institute for South China Sea Studies, *Legal Critique*, *supra* note 22.

24. Simon Chesterman, *Herding Schrödinger's Cats: The Limits of the Social Science Approach to International Law*, 22 Chi. J. Int'l L. 49, 51 (2021).

ticipation. In assessing the identified works and their relationship to states and lawmaking, this article offers a twist to the ever-evolving story about the ways that powerful actors engage with international law. This speaks, ultimately, to international law's enduring relevance. Even as states retreat from formal legal processes like a treaty regime or a tribunal proceeding, their absenteeism does not evidence the absence of international law. Instead, it reflects a shift in how international relations are practiced and how law is formed. The following pages document one method that is being used to accelerate this shift and seek to understand its consequences.

## I. Situating, Differentiating, and Defining State-Academic Lawmaking

Lawmaking processes are persuasive contests. Within these contests, states possess considerable power. Much of this stems from the state's traditional status as the exclusive actor within the formal lawmaking sphere.[25] Here, it remains (mostly) the state that signs treaties and whose practice and opinio juris contribute to the formation of custom.[26] However, as international lawmaking increasingly occurs through informal processes, the state's power is diluted. No longer the exclusive actor, within the informal sphere, the state vies for influence with an array of other parties who seek to affect international law's content through lawmaking.[27]

States and non-state actors frequently collaborate, working in tandem to efficiently advance shared agendas.[28] However, in contested legal fields, where self-interest is common and consensus rare, informal lawmaking assumes an oppositional form.[29] States and non-state actors are perceived as

25. *See* Philip Allott, *The True Function of Law in the International Community*, 5 Glob. Legal Stud. J. 391, 404 (describing the horizontal conception of international law in which the subjects of international law are also the makers of international law).

26. *See* Sandesh Sivakumaran, *Making and Shaping the Law of Armed Conflict*, 71 Current Legal Probs. 119, 134 (2018) [hereinafter Sivakumaran, *Making and Shaping the Law*]; *see also* Kathleen Claussen, *Sovereignty's Accommodations: Quasi-States as International Lawmakers*, *in* Changing Actors in International Law 27, 30 (Karen N. Scott et al. eds., 2020) (describing the range of non-state entities that have historically been involved in treaty negotiations).

27. *See* Jean d'Aspremont, *Subjects and Actors in International Lawmaking: The Paradigmatic Divides in the Cognition of International Norm-Generating Processes*, *in* Research Handbook on the Theory and Practice of International Lawmaking 32, 35 (Catherine Brölmann & Yannick Radi eds., 2016) (noting that lawmaking has become "an aggregation of complex procedures involving non-state actors").

28. *See, e.g.*, Mari Takeuchi, *Non-State Actors as Invisible Law Makers?–Domestic Implementation of Financial Action Task Force (FATF) Standards*, *in* Changing Actors in International Law 211, 211 (Karen N. Scott et al. eds., 2020); *see also* Sivakumaran, *Making and Shaping the Law*, *supra* note 26, at 142 (describing the collaborative processes between independent experts, government lawyers, and the International Committee of the Red Cross in developing the San Remo Manual); Roberts & Sivakumaran, *supra* note 19, at 116 (describing the lawmaking role of state-empowered entities).

29. *See, e.g.*, 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 (2007) (in which U.S. officials offer a detailed criticism of the methodology used in the International Committee of the Red Cross's study of customary international humanitarian law while also objecting to describing certain rules as having customary status).

lawmaking competitors.[30] The state that actively participates in lawmaking processes makes expansionist international law claims to advance its self-interest. Non-state actors provide restraint by pursuing a regulatory agenda that curbs state excesses. In practice, such delineation is rarely so neat.[31] Yet, this oppositional dynamic prompted former Australian Attorney General George Brandis to emphasize the importance of state participation within informal processes to ensure that "states maintain control over the development of international law."[32]

The resulting modes of persuasion see both state and non-state actors compete for influence by appealing to their respective strengths. Notwithstanding the merits of a particular legal contention, both groups of lawmakers possess independent characteristics that bolster their lawmaking claims—the state's formal lawmaking capacity, the non-state actor's independence and professional esteem. As various actors compete to shape international law through the interpretation of existing treaty norms, the identification of customary law, and the advancement of soft law initiatives, these actors appeal to their respective normative strengths.

As we have observed elsewhere, states are adopting informal lawmaking strategies that make use of methods that are traditionally associated with non-state actors.[33] State-academic lawmaking further complicates the narrative that, in the most contentious legal fields, states and non-state actors remain in conflict. It suggests that states not only rely on the lawmaking methods of non-state actors; they rely on non-state actors themselves to compensate for the persuasive deficit that flows from the perceived self-interest of a state's lawmaking contention. However, before further describing state-academic lawmaking, it is necessary to distinguish it from the more common forms of scholarly contributions to lawmaking processes.

### A. *Differentiating State-Academic Lawmaking*

Hugo Grotius wrote *De Jure Praedae* shortly after the Dutch Admiral Jacob van Hemmskerck seized the *Santa Catarina* in 1603. A section from the complete work, titled *Mare Liberum*, had been contemporaneously published as diplomatic negotiations advanced between the United Provinces of the Netherlands and Spain.[34] Grotius wrote *Mare Liberum*—which affirmed the

30. Sivakumaran, *Making and Shaping the Law*, *supra* note 26, at 155–56 (noting that, generally, in the field of international humanitarian law, non-state actors are assumed to push for a humanitarian interpretation of relevant legal provisions, while states pursue operational freedom).

31. *Id*. at 156 (noting that states can also promote humanitarian interpretations of international humanitarian law that are more commonly associated with the positions of non-state actors such as civil society organizations).

32. George Brandis, *The Right to Self-Defence Against Imminent Armed Attack in International Law*, EJIL: Talk! (May 25, 2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/ [https://perma.cc/HQ4K-6DDP].

33. Shereshevsky, *Back in the Game*, *supra* note 15.

34. Martine Julia Van Ittersum, Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615 (2006), at 4–5.

legitimacy of Dutch privateering and famously presented the freedoms of trade and navigation as natural rights—at the behest of the Dutch East India Company's directors who feared that their interests were being minimized within the ongoing diplomatic process that led to the Twelve Years' Truce.[35] Grotius's work was received as an academic treatise but also served a practical purpose: to determine law that would advance the maritime interests of both the Dutch Empire and its trading company, which prompted the work's publication.

Grotius's career, like careers of so many international lawyers who followed in the tradition he forged, consisted of several roles. He produced international law's most enduring texts, served as a statesman and politician, and was commissioned by powerful parties to provide legal justifications that would advance Dutch colonial interests.[36] In each capacity, Grotius contributed to the creation of international law. It is, however, widely held that the scholar does not directly *make* law.[37] Yet, whether through academic pronouncements or other professional contributions, Gleider Hernández tells that to unduly adhere to the rigid belief that academic discourse cannot make law overstates the validity of legal sources as matters of form while paying no heed to "the normative authority exercised by indirect sources of international law creation."[38] It follows that through various professional capacities, the international law scholar can be understood to assume an informal lawmaking role.[39]

To identify how state-academic lawmaking contributes to these juris-generative processes, it is necessary to distinguish it from the more common collaborative practices that feature formal cooperation between scholars and state officials. These include commissioned works that are produced when a state retains a scholar to write a legal opinion about a particular matter.[40] They extend to a state official or government lawyer who advances a lawmaking claim in an unofficial capacity by publishing an article in a law

35. *Id.* at xxii.

36. Martine Julia Van Ittersum, *The Long Goodbye: Hugo Grotius' Justification of Dutch Expansion Overseas, 1615-1645*, 36 HIST. EUR. IDEAS 386 (2010).

37. Manfred Lachs, *Teachings and Teaching of International Law*, 151 COLLECTED COURSES HAGUE ACAD. INT'L L. 164, 169 (1976) (noting that law teachers are neither legislators nor lawmakers in the formal sense).

38. Gleider Hernández, *The Responsibility of the International Legal Academic: Situating the Grammarian Within the 'Invisible College'*, *in* INTERNATIONAL LAW AS A PROFESSION 160, 175 (Jean d'Aspremont et al. eds., 2017).

39. Anne Peters, *Realizing Utopia as a Scholarly Endeavour*, 24 EUR. J. INT'L L. 533, 538 (2013) (claiming that due to the difficulty of identifying norms, the lawmaking role of the international law scholar is crucial).

40. *See, e.g.*, Statement of Elihu Lauterpacht on *The Right of Self-Determination of the Turkish Cypriots*, on behalf of the Turkish Republic of Northern Cyprus, issued as a document of the U.N. General Assembly and Security Council, A/44/928 and S/21190 (Mar. 14, 1996), http://www.mfa.gov.tr/chapter1.en.mfa [https://perma.cc/NJ5Z-LZTY].

journal or legal blog.[41] Scholars do, of course, benefit professionally if a state or judicial body adopts their legal positions. Frequently, and unsurprisingly, scholars whose substantive positions align with those of states call upon states to more actively express a corresponding legal position.[42] It follows that when Oscar Schacter described the "invisible college of international lawyers," inclusion extended to scholars, judges, government advisors, and activists.[43] These professional appointments may be held simultaneously or independently.[44] The scholar may leave the academy to become an advisor or judge, or may serve in a concurrent expert capacity on a commission or by writing a legal opinion for a state or non-state entity.[45]

Scholars whose command of their field of international law is widely recognized confer authoritative weight. Like Grotius demonstrated in the early seventeenth century, the scholar's capacity to advance a lawmaking agenda reflects their respective expertise and standing. These characteristics can be of value to the state.[46] They are frequently the common and uncontroversial foundation of formal collaborations between scholars and state officials.[47] Often, cooperation and influence occur organically. Academics and government lawyers mingle professionally, exchange ideas at conferences, collaborate formally, and inhabit the same epistemic communities. But with these collaborative practices, the nature of the scholarly contribution is explicit—whether in the form of wholly independent contributions, viewed as subsidiary determinations, that are emphasized by the state to provide normative thrust to its legal claim, or through formal cooperation with the state when serving as an advisor or producing a commissioned work.[48] In each instance, the international lawyer, to cite James Crawford, is wearing a particular hat.[49] At times these roles can also mix and manifest in ways that resemble what we define below as state-academic lawmaking. The state-academic re-

41. *See, e.g.*, Dominic Raab, *'Armed Attack' after the Oil Platforms Case*, 17 Leiden J. Int'l L. 719 (2004) (writing in a personal capacity while serving as Legal Advisor to the British Embassy in The Hague).

42. *See, e.g.*, 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, 191 (2015); *see generally* Shereshevsky, *Back in the Game*, *supra* note 15, at 55 (describing efforts to develop a lawmaking reliance between the state and scholar).

43. Oscar Schacter, *The Invisible College of International Lawyers*, 72 Nw. U. L. Rev. 217 (1977).

44. *See* Jean d'Aspremont et al., *Introduction*, *in* International Law as a Profession 1, 8 (Jean d'Aspremont et al. eds., 2017) (describing the oscillating nature of professional roles).

45. *See* Hernández, *The Responsibility of the International Legal Academic*, *supra* note 38.

46. *See* Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 Int. & Comp. L.Q. 1, 21 (2017) (describing how states and government lawyers rely on scholarly work to support legal appeals).

47. *See* Peters, *supra* note 39, at 539.

48. *See, e.g.*, Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, 57 Neth. Int'l L. Rev. 531 (2010) (the introductory note clearly delineates the nature of the collaboration between the Dutch government and the expert group and presents the resulting output as a policy document, not an independent scholarly work).

49. *See* James Crawford, *International Law as a Discipline and Profession*, 106 ASIL Proc. 471, 480 (2012).

lationship, for example, features in the practice of submitting amicus briefs or third-party interventions to international courts. Proceedings recently commenced at the International Criminal Court ("ICC") about the Situation in the State of Palestine attracted numerous submissions from prominent international legal academics who offered contrasting opinions about whether the ICC has territorial jurisdiction in Palestine.[50] In each instance the intervenor did not have formal ties to either Israel or Palestine, with the exception, in certain cases, of nationality. However, while many of these submissions may have benefited from the perceived esteem and expertise of their authors, they lacked the certitude of purely academic work that is associated with a journal article that has undergone an independent academic review process. Similarly, the appointment of ad hoc judges and arbitrators, who are often renowned legal experts with prestigious academic credentials, to international courts and tribunals is a notable phenomenon. States, intent on advancing their own position through proceedings and despite the requirements of all arbitral tribunals that arbitrators be independent, may appoint academics or practitioners who have taken a particular (favorable) position on a relevant issue.[51] But while such practices may be adjacent to state-academic lawmaking and merit attention as part of broader considerations about how state and non-state actors interact within informal lawmaking spaces, they lack certain constitutive elements, particularly that which rests at the heart of the state-academic lawmaking process—an academic publication.

State-academic lawmaking blurs the distinction between the scholar and the sovereign. In an academic capacity, one may advance what has been termed "normative scholarship" or "committed argument" that attempts to remake the law in conformity with a determined standard of justice.[52] Anne Peters notes, however, that while expertise conveys legitimacy and authority, scholarly contributions that seek to recast law lack the requisite institu-

50. *See, e.g.*, Situation in the State of Palestine, Case No. ICC-01/18 (Mar. 3, 2020) (by Prof. John Quigley), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00794.PDF [https://perma.cc/D5HT-J7M2]; Situation in the State of Palestine, Case No. ICC-01/18 (Mar. 15, 2020) (by Prof. William Schabas), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01010.PDF [https://perma.cc/UC55-JTK7]; Situation in the State of Palestine, Amicus Curiae Observations, Case No. ICC-01/18 (Mar. 15, 2020) (by Prof. Kevin Jon Heller), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01054.PDF [https://perma.cc/M35G-S4YD]; Situation in the State of Palestine, Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103, Case No. ICC-01/18 (Mar. 16, 2020) (by Prof. Malcolm N. Shaw QC), icc-cpi.int/sites/default/files/CourtRecords/CR2020_01017.PDF [https://perma.cc/DB7U-KF9K]; Situation in the State of Palestine, Case No. ICC-01/18 (Mar. 16, 2020) (by Prof. Eyal Benvenisti), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01062.PDF [https://perma.cc/AUP4-WLDZ].

51. *See, e.g.*, Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223 (2013) (an empirical study of investment arbitration that explores, inter alia, alleged biases in favor of the state that appoints the arbitrator).

52. *See* Hernández, *supra* note 38, at 179–80 (describing normative scholarship as "a transformative project that advances accounts of what the law ought to be"); *see also* Owen Fiss, *The Varieties of Positivism*, 90 YALE L.J. 1007, 1009–10 (1981) (describing committed argument as a means of advancing a legal argument which, when legitimated within academic discourse, will, in turn, legitimize the legal claim).

tional and procedural characteristics.[53] Without these legitimizing features that are most often the purview of the state—like representation, participation, publicity, and accountability—scholarly contributions remain informal, their persuasive influence lessened.[54] Traditionally, considerations of scholarly contributions to lawmaking processes emphasize the independent characteristics of the scholar and the formal lawmaker. Both are independent actors whose activities may align but are formally separate. State-academic lawmaking describes a more convoluted, yet purposefully complementary, process.

### *B. Defining State-Academic Lawmaking*

The state-academic dynamic introduces a form of legitimacy into the lawmaking process. The resulting expression of legitimacy is predicated on the ability of both the state contribution and the academic contribution to supplement the other. As described above, the academic contribution to the lawmaking process offers impartiality and esteem but lacks formal lawmaking capacity. The state possesses formal lawmaking capacity but lacks impartiality. To compensate, the state leans upon the impartiality and esteem that is associated with the academic contribution to enhance the persuasive pull of the lawmaking assertion. A state will often evidence its own legal contention by citing external work or commissioning an expert opinion; these contributions are explicit. State-academic lawmaking, by contrast, contains three constitutive elements that differentiate it from more common scholarly offerings like those provided by expert groups or when a state official writes in a personal capacity.[55]

First, it is a generative lawmaking method through which professedly independent academic work is produced, in part, through unofficial consultations with a state or a similarly interested group of states. This produces what is presented as purely academic work that advances a legal interpretation, evidences the existence of custom, or offers a doctrine, set of principles, or draft text that serves a lawmaking objective. Second, the nature of the collaboration is distinctive. It is not quite secret, but neither is it public. This creates a duality in which the lawmaking actors must delicately advance conflicting characteristics: independence and cooperation. And third, the resulting academic output assumes a prominent position within the state's lawmaking diplomacy. Much more than a meager citation in a legal brief or diplomatic note, the academic output is advanced through the discursive exchanges pursued by states and non-state actors. This produces what Jutta Brunnée and Stephen Toope have described as a "curious mutual referencing system amongst a small number of [s]tates, former [s]tate offi-

53. Peters, *supra* note 39, at 539.

54. *Id*.

55. *See* Sivakumaran, *Making and Shaping the Law*, *supra* note 26, at 142–43 (describing the influence of expert groups in shaping international humanitarian law).

cials, and other commentators."[56] Within these persuasive exchanges, the academic output evidences the legality or legitimacy of the state's own closely associated, but formally independent, lawmaking objective.

The state-academic lawmaking process culminates when the academic contention becomes the subject of state action. Having vied for persuasive currency through a series of diplomatic exchanges, the state acts in accordance with the academic output, which is now said to reflect law or, at least, constitute a viable legal opinion.[57] Often recourse to state-academic lawmaking occurs on a spectrum. Engagements range from more to less explicit as the prominence that the academic work assumes within the state's discursive exchanges varies. However, regardless of where a particular appeal is situated, these appeals exhibit the following features that collectively evidence the state-academic lawmaking process:

(i) *Ex-post lawmaking or interpretative character*: The state-academic lawmaking process begins by exhibiting a lawmaking push. The academic output is not merely state apologia or a claim of legal compliance. Instead, state-academic lawmaking advances a particular legal meaning. The (informal) lawmaking character of the contention may be the sole, or a subsidiary, focus of the academic output. But in all instances, it demonstrates a clear effort to establish a lasting legal claim. In areas of legal contention, where judicial or other forms of authoritative resolution are unlikely, ex-post interpretative incrementalism provides opportunities to imbue legal meaning.[58] This, M.J. Durkee explains, has become an opportunity for various actors to influence the development and meaning of legal rules.[59] State-academic lawmaking exhibits an emerging method by which interpretative claims or determinations of custom become authoritative and induce legal change through informal interaction and cooperation.

(ii) *Prestige, form, and independence*: Upon establishing its lawmaking features, the state-academic lawmaking process continues by emphasizing its academic characteristics. Three features contribute to this. First, the author or authors that produce the lawmaking output are significant figures within their respective legal fields. As Alastair Iain Johnston notes, the persuasive process is influenced by the authoritativeness of the messenger.[60] State-academic lawmaking features individuals or institutions that enjoy professional

56. Jutta Brunnée & Stephen J. Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?*, 67 INT'L & COMPAR. L.Q. 263, 266 (2018).

57. Hughes, *How States Persuade*, *supra* note 15, at 879–82 (describing the notion of an acceptable legal argument).

58. Durkee, *supra* note 13, at 442 (noting that most interpretative questions are not submitted for judicial resolution).

59. *Id.* at 484–86.

60. Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487, 509–11 (2001); *see also* CHARLOTTE PEEVERS, THE POLITICS OF JUSTIFYING FORCE: THE SUEZ CRISIS, THE IRAQ WAR, AND INTERNATIONAL LAW 4 (2014) (noting that the "authority to speak law is often determined by the status of the speaker").

esteem and possess notable expertise.[61] The ensuing prestige confers authority on the initiative, as the author's credentials and professional reputation add to the persuasive weight of the lawmaking contention. Second, the lawmaking output assumes the form of an academic article. It is published in a leading legal journal, contains footnotes and other signifiers of academic rigor, and has satisfied the journal's regular review process.[62] While some legal journals may publish official statements, speeches, or policy documents that contribute to lawmaking processes, the state-academic output is presented as a pure academic article.[63] Third, scholarly independence is accentuated. This may be either explicit or implicit. Explicit independence is evidenced when the scholar or the journal's editorial board insists that the lawmaking output was created without state influence, in a wholly independent capacity. Implicit independence is subtle and inferred by a combination of factors. Degrees of separation create distance between the scholar and the interested state. A former senior government official, writing in a personal capacity, will appear closer to the state. However, when the scholar is a non-national of the interested state, claims of separation can appear more plausible than when the lawmaking output is prepared by a national. Suggestions of implicit independence also stem from both the article's placement in an esteemed legal journal—which itself implies a degree of scholarly propriety—and the idealized vision of an academic lawyer who, uninhibited by the external demands of a client or state official, advances knowledge by treating law as an academic discipline.[64]

(iii) *Nexus between author and state*: Despite having emphasized the formal independence of the author, the state-academic lawmaking process exhibits a level of informal cooperation between the academic and the state. This can manifest in several ways. The academic output may be facilitated through access to information or state officials, either of which is generally unavailable to other scholars. The scholar may consult with these officials to understand the views of the states that they represent. Subsequently, these views may be presented through the academic output as possessing some type of legal character or meaning which, in turn, advances the lawmaking claim. This differs from a simple statement of opinio juris, instead positioning the legal assertion within a larger discursive exchange.[65] Notwithstanding the form that the cooperation assumes, the nexus between the author and state

61. *Id*. at 246 (in which Peevers notes how competing actors contest expertise and authority).

62. *See* Shereshevsky, *Back in the Game*, *supra* note 15, at 49–50 (describing the use of quasi-academic approaches in various state lawmaking initiatives).

63. *See, e.g.*, Elizabeth Wilmshurst, *The Chatham House Principles on International Law on the Use of Force in Self-Defence*, 55 Int'l & Compar. L.Q. 963 (2006) (providing a notable example of a lawmaking document that was published in a legal journal but which was not presented as a scholarly article).

64. *See* Allan Beever & Charles Rickett, *Interpretative Legal Theory and the Academic Lawyer*, 68 Mod. L. Rev. 320, 336 (2005) (noting that the primary task of the academic lawyer is to "treat the law as an academic discipline").

65. *See* Shereshevsky, *Back in the Game*, *supra* note 15, at 50.

demonstrates harmonization between scholarly independence, the state's interests, and its formal lawmaking character.

(iv) *Capacity to spread norms through repetition and lawmaking diplomacy*: The academic output assumes an afterlife. The purportedly independent scholarly contribution features in the associated state's lawmaking diplomacy. This refers to the formal and informal exchanges that occur within interpretative communities.[66] It may encompass broader public outreach through media and other channels that allow the state to assert the legitimacy of an assumed legal position. Or it may include more deliberate engagements in which state officials participate in legal dialogues to both demonstrate a commitment to and advance understandings of particular legal questions. These engagements resemble what Brian Egan, then-State Department Legal Adviser, described as legal diplomacy, a process that "builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State's international obligations or interpretations."[67] The extent to which the state-academic lawmaking output features within these exchanges will vary. It often assumes a central role but can amount to little more than an indirect inference. In either instance, the lawmaking assertion developed through the state-academic output is spread through a process of repetition.[68] The academic work both develops the lawmaking contention and is cited as expert and independent validation to advance the persuasive value of the contention itself.

Uses of state-academic lawmaking are intended to enhance the persuasiveness of claims about international law's content. In areas of law where lawmaking initiatives are fiercely contested, persuasive capacity is reflective of an actor's ability to influence the rules that govern international conduct.[69] The cases documented in the following section present instances in which states have sought persuasive advantage by forwarding purportedly independent academic work that was produced following significant state cooperation. These are not the only instances of state-academic lawmaking. Nor is each example identical. In every case, the form of the lawmaking contention will differ. The proximity between the state and scholar will vary. The prestige of the publication in which the lawmaking output appears will differ. And the form of lawmaking diplomacy will adapt. But regardless of how these initiatives manifest, as formal lawmaking options are increasingly foreclosed, recourse to state-academic lawmaking is becoming more common

66. *See* IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATION 41 (2011).

67. Brian Egan, Speech to the Annual Meeting of the American Society of International Law, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations* (Apr. 1, 2016), *in* 92 INT'L L. STUD. 235, 244 (2016).

68. *See* Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 424–25 (1991) (describing how soft law develops through a process of repetition and cross-referencing).

69. *See* Ingo Venzke, *Is Interpretation in International Law a Game?*, *in* INTERPRETATION IN INTERNATIONAL LAW 352, 359 (Andrea Bianchi et al. eds., 2015).

and more influential. Describing and analyzing such cases provides insight into how state and non-state actors engage in informal lawmaking contests and, in so doing, shape international law's contemporary development.

## II. Documenting State-Academic Lawmaking

Writing in a domestic context, Pierre Bourdieu posits that legal content is the result of a symbolic and unequal struggle between professionals that possess disparate technical skills and social influence.[70] Extrapolating to the international sphere, it appears that in areas of contested legal meaning, informal lawmaking processes reflect a similar dynamic. Interested actors with different capacities and characteristics seek to imbue meaning through interpretation or the identification of custom.[71]

The following case studies provide a nuanced account of informal international lawmaking processes, cooperation, and the evolving role of power within the global sphere. They occur within different areas of international law—the use of force, international humanitarian law, and the law of the sea—and they are undertaken by various states and scholars. These case studies show that (informal) lawmaking processes continue to function notwithstanding international stagnation and fleeting cooperation. And they tell of the methods that states employ to establish authority for policies and practices that depart from conventional legal meaning.[72] These contests occur between those states and actors that seek to direct both the substance of the rules that guide international conduct and the means through which those rules are formed. Observing the microprocesses that shape these persuasive exchanges allows for more complete understandings of the contests, and the means of contestation, that will influence prominent features of the international legal order throughout the twenty-first century.

### A. *The Use of Force: The Bethlehem Principles*

Daniel Bethlehem published the *Principles Relevant to the Scope of a State's Right to Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors* during a prolonged moment of legal rumination.[73] Responses to the events of September 11, 2001 prompted various legal questions. Continuing debates queried the appropriateness of the jus ad bellum, as conventionally understood, to meet the anticipated challenges posed by transnational armed

70. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. 814, 827 (1987).

71. *See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Rev. Int'l Affs. 197, 199 (2004) (noting how actors routinely challenge others by invoking legal rules on which they have projected preferred meanings).

72. *See generally* Monica Hakimi, *What Might (Finally) Kill the Jus ad Bellum?*, 73 Current Legal Probs. 101, 109–10 (2021) (noting that states have a difficult time establishing authority for discrete policies when these policies contravene what institutions have said about international law).

73. Bethlehem, *supra* note 20.

groups and the changing nature of armed conflict, including through the extraterritorial use of force against non-state actors.[74] Many of the accompanying debates continue today and reflect contrasting views about the use of force. Amongst scholars, these generally divide between claims that the current state of the law should align with a limited, plain-text reading of the U.N. Charter and more expansive claims that legal amendments are required to align the law with modern challenges not contemplated by the relevant legal architecture.[75] The ensuing discourses also reflect a schism between powerful states that advocate for an expansive reading of the jus ad bellum and actors that seek to limit the moments in which the use of force is deemed permissible.[76]

The eponymous *Bethlehem Principles* sought to shape these debates. Offered with a prelude but no further commentary, the *Principles* present answers to two frequently discussed but perpetually unsettled legal questions. The first considers what constitutes "imminence" in relation to an armed attack and the requirements of self-defense as detailed within Article 51 of the U.N. Charter. The second asks whether and when the extraterritorial use of force is permitted in self-defense against a non-state actor. While the *Principles* featured various adjacent legal debates, Principle 8, which addresses the imminence requirement, attracted much subsequent attention. It held that imminence shall be assessed with reference to all relevant circumstances and that the lack of evidence about the precise location or nature of an attack "does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent."[77] Many scholars rejected this overly broad formulation.[78] But certain states—those most invested in military campaigns against armed groups in the Middle East and South Asia—have favored, and subsequently endorsed, an expansive jus ad bellum that countenances preemptive armed attack under the self-defense provisions of the U.N. Charter.[79]

74. *See generally* Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905 (2002); Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835 (2001).

75. *See* Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT'L L. 803 (2005); *see also* David Hughes & Yahli Shereshevsky, *Something is Not Always Better than Nothing: Problematizing Emerging Forms of* Jus Ad Bellum *Argument*, 53 VAND. J. TRANSNAT'L L. 1585 (2020).

76. Bethlehem, *supra* note 20, at 773 (acknowledging these debates and noting that they occur between those who favor a restrictive and a facilitative view of the law of self-defense); *see generally* Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT'L L. 257 (2016).

77. Bethlehem, *supra* note 20, at 775–76.

78. *See, e.g.*, Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. INT'L L. 563, 564–66 (2013).

79. *See* THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14–15 (2002), https://2009-2017.state.gov/documents/organization/63562.pdf [https://perma.cc/PL8B-L2GX]; *see also* HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2002–3, ¶ 161, H.C. 196 (asserting that "the notion of 'imminence' should be reconsidered in light of new threats to international peace and security").

Writing in the *American Journal of International Law*, Bethlehem declared that his contribution would bridge the divide between an overly restrictive academy, unappreciative of operational necessity, and the weighty, but too often obscured, discourse between government officials and lawyers who contemplate the legal contours of a state's right to self-defense.[80] In presenting a series of legal claims, the reasoning that motivates the *Bethlehem Principles* aligns with that which moves many informal lawmaking initiatives: the view that formal institutions and processes are incapable of producing desired legal progression.

### 1. *Ex-Post Lawmaking or Interpretative Character*

Bethlehem introduces the *Principles* by identifying a lawmaking moment. The law regarding the scope of a state's right to self-defense against an imminent or actual armed attack is declared unsettled. Features of this debate predate September 11. But, as Bethlehem suggests, the events in New York and Washington infused "operational urgency" into open legal questions that demanded further legal certainty.[81] This provides an opportunity to advance a lawmaking agenda. Much of the introduction situates the *Principles* within an active discourse featuring state appeals to provide further clarity to the contours of Article 51 and the instances in which force may be used in self-defense. Speeches by Obama Administration officials and debates within the U.K. House of Commons Foreign Affairs Committee, both cited by Bethlehem, evidence the open nature of this discourse and the professed desire of those states to provide legal guidance.[82]

Having identified an opportunity to develop international law, structural, doctrinal, and procedural features further evidence the lawmaking intention of the *Bethlehem Principles*. Structurally, the decision to present the instrument as a set of sixteen principles pertaining to the use of force against non-state actors mirrors the composition of a legal document. Like a draft treaty or a soft law proposal, the *Principles* are advanced as a text. They do not purport to be final. Instead, they are offered for further debate and development, being presented as "indicative, rather than exhaustive."[83] This recognizes that lawmaking is not merely a declarative process but instead a discursive exchange.

The resulting exchanges often identify doctrine and use interpretative methods to further develop the law through lawmaking outputs. Like a soft law initiative that produces a quasi-legal instrument that builds upon formally entrenched legal norms, the *Principles* profess to "work with the grain

80. Bethlehem, *supra* note 20, at 770.

81. *Id.* at 770.

82. *Id.* at 772; *see also* HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2003–4, H.C. 441-I, ¶ 429.

83. Bethlehem, *supra* note 20, at 774.

of the U.N. Charter as well as customary international law."[84] They expand upon these formulations, appealing to the law of state responsibility to provide what Bethlehem presents as a more functional conception of self-defense. The desired lawmaking outcome is further pursued through the procedural exchanges that gradually give an interpretative claim legal meaning.[85] Bethlehem notes that the *Principles* are intended to build consensus and, by stimulating further exchanges, achieve a "measure of agreement about the contours of the law relevant to the actual circumstances in which states are faced with an imminent or actual armed attack by nonstate actors."[86]

2. *Prestige, Form, and Independence*

The lawmaking capacity of the *Bethlehem Principles* is enhanced by the professional esteem of their author, the academic clout of their publication venue, and both the implied and asserted allure of scholarly independence. Recalling Alastair Iain Johnston's contention that persuasiveness is influenced by the messenger's authoritativeness, Bethlehem's career in both public service and academia legitimizes the *Principles'* stated objective of bridging academic debate and operational realities.[87] The article in which the *Principles* are presented acknowledges that Bethlehem was the Legal Advisor of the U.K. Foreign and Commonwealth Office.[88] Before serving as his nation's top international lawyer, Bethlehem worked as an external legal advisor to foreign governments and was the director of the Lauterpacht Centre for International Law at the University of Cambridge.[89]

Academic journals regularly list the affiliation and biography of their authors. This is both informative and a signal of expertise. But the prelude to the *Bethlehem Principles* affords a more purposeful role to Bethlehem's qualifications. The rich experience that informs the *Principles*, derived both from their author's academic and governmental priors, enables the stated objective of meeting the challenges that scholarship faces in "shaping the operational thinking of those within governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad."[90] Bethlehem is positioned to bridge this gap and, in so doing, enhance the persuasiveness of the proposed legal formulations.

84. *Id.* at 773.

85. Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 119 (Jeffery L. Dunoff and Mark A. Pollack eds., 2012).

86. Bethlehem, *supra* note 20, at 773.

87. Johnston, *supra* note 60, at 509; *see also* Bethlehem, *supra* note 20, at 773.

88. Bethlehem, *supra* note 20, at 770.

89. Ewen MacAskill, *Israel Adviser Switches to Top FO Job*, THE GUARDIAN (Mar. 6, 2006), https://www.theguardian.com/world/2006/mar/07/israel.foreignpolicy [https://perma.cc/D6DX-Q33N]; LAUTERPACHT CENTRE FOR INTERNATIONAL LAW, https://www.lcil.cam.ac.uk/about-centrehistory/past-directors [https://perma.cc/2GUC-DSCN].

90. Bethlehem, *supra* note 20, at 773.

Trading on Bethlehem's professional esteem, the *Principles'* persuasiveness is further enhanced by their publication venue. The *American Journal of International Law* ("AJIL") is the preeminent periodical in its field. While it has been speculated that the decision to publish the *Principles* in AJIL reflects the belief that they would find greater support in the United States, the journal's prestige contributes to both the initiative's legitimacy and its academic presentation.[91] The *Bethlehem Principles* do, however, depart from the form of a traditional academic article. They are offered without, as Bethlehem acknowledges, "explanatory memorandum or commentary."[92] That they are presented as a set of enumerated principles, and not a lengthy, reasoned article, differentiates them from the format that one expects to encounter in a publication like AJIL.

But the *Principles* are professedly academic. They are advanced as informed scholarship that transcends other contributions by drawing upon often undisclosed state perspectives to reflect the "practical realities of the circumstances" that they address.[93] When Bethlehem notes that several of the principles will attract controversy, he recognizes that this stems from the absence of scholarly consensus, situating his proposals within an active academic discourse.[94] The *Principles'* academic character is bolstered through their publication in the *Notes and Comments* section of a peer-reviewed journal. The text that introduces the *Principles* includes references, provides context, and situates the work within existing literature and debates.

Collectively, these academic signifiers reflect independence. This is derived from the *Principles'* inclusion in a leading scholarly journal. Bethlehem explicitly notes that "the *Principles* do not reflect the settled view of any state. They are published under my responsibility alone." And it is implied through the proximity of Bethlehem and the United States. Though Bethlehem is a former British senior government lawyer and his *Principles* would later be cited by his own government, this is mitigated by the fact that he is a U.K. national advancing an amended jus ad bellum that aligned with the U.S. efforts to remake features of the law governing the use of force.[95] Crucially, to evidence independence, Bethlehem distances the *Principles*, which can fairly be read as an expansive account of the jus ad bellum, from the prospect of state interest. He emphasizes their independence, noting that the

91. *See* Victor Kattan, *Furthering the 'War on Terrorism' Through International Law: How the United States and the United Kingdom Resurrected the Bush Doctrine on Using Preventative Military Force to Combat Terrorism*, 5 J. Use Force & Int'l L. 97, 123 (2018).

92. Bethlehem, *supra* note 20, at 774.

93. *Id.* at 773.

94. *Id.*

95. *See* Kattan, *supra* note 91, at 111 (detailing how the *Principles* were created to reflect the preferred U.S. position, and that they would subsequently be adopted by Australia and the United Kingdom); *see also* Brunnée & Toope, *Self-Defence Against Non-State Actors*, *supra* note 56, at 282 (stating that efforts to expand the right of self-defense against non-state actors were led by the United States and, to a less clear extent, the United Kingdom).

"principles are not intended to be enabling of the use of force."[96] They are instead intended to build legal consensus. The development of such consensus is, however, predicated on state input.

3. *Nexus Between the Author and the State*

The author-state nexus manifests directly. Notwithstanding their professedly independent character, Bethlehem tells readers that the *Principles* were informed "by detailed discussions over recent years with foreign ministry, defense ministry, and military level advisers from a number of states who have operational experience in these matters."[97] The nature of the discussions, and the participants who partook in them, were not revealed by Bethlehem in the introduction to the AJIL article. Victor Kattan, however, traced the *Principles'* drafting process. Kattan asserts that the *Principles* were "a joint endeavour by a group of senior government officials from like-minded states – led by officials from the United States – to develop the *jus ad bellum* to meet 'modern threats.'"[98] The initiative began amidst ongoing ruminations about how new threats and new technologies altered features of the jus ad bellum that include the notion of imminence.[99] Kattan traces a series of leaked documents that catalogue various governmental exchanges. These exchanges are reflected in the text of the *Principles*, which, Kattan contends, were the result of a series of meetings initiated by John Bellinger that began at the West Point Military Academy.[100]

4. *Capacity to Spread Norms Through Repetition and Lawmaking Diplomacy*

The *Bethlehem Principles* are presented as a lawmaking document that can be adopted by interested states. Formulating the proposed provisions as a set of principles provides states with a tangible, legalistic document that can be debated, accepted, and then entrenched. This creates a process of repetition through which pertinent legal principles are disseminated and promoted by interested actors. Bethlehem is forthright about this intended outcome. The *Principles* are offered for further deliberation, he notes.[101] But they are purposefully drafted to attract broad state support for their application when a state uses force against an imminent or actual armed attack by non-state actors.[102] This enhances the lawmaking character of the *Principles*. By being

96. Bethlehem, *supra* note 20, at 773.

97. *Id.* at 773.

98. Kattan, *supra* note 91, at 103.

99. *See id.* at 108 (citing then-National Security Advisor Condoleezza Rice, who argued that new technology requires new thinking about when a threat becomes imminent).

100. *Id.* at 114–23 (detailing the various exchanges between U.S., U.K., and E.U. officials and the discussions at West Point Military Academy between a smaller group of involved states that "notably influenced" the formulation of the *Bethlehem Principles*).

101. Bethlehem, *supra* note 20, at 774.

102. *Id.* at 773.

presented as a document, informed by the positions of powerful states but still subject to negotiation and formalization, the *Principles* are situated for promotion.

The *Bethlehem Principles* advanced accordingly. They have been endorsed, in whole or in part, by several states and have featured within each of these states' broader persuasive efforts to adapt the jus ad bellum to meet perceived exigencies. The *Principles* were first publicly supported by the United States. Addressing the Annual Meeting of the American Society of International Law ("ASIL"), then-State Department Legal Adviser Brian Egan approved of the *Principles* while nodding to their independence and academic characteristics:

> [W]hen considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel Bethlehem in the enumeration he set forth in the American Journal of International Law—ASIL's own in-house publication—in 2012.[103]

The following year, the Attorneys General of the United Kingdom and Australia made similar pronouncements. At the University of Queensland, Attorney General George Brandis announced Australia's endorsement of the *Bethlehem Principles*.[104] He noted that the *Principles* appeared in AJIL, would be familiar to scholars, and had quickly acquired "near to doctrinal status."[105] In a parallel address titled *The Modern Law of Self-Defence*, at the International Institute for Strategic Studies, U.K. Attorney General Jeremy Wright announced—while similarly noting Bethlehem's professional background and the *Principles'* placement in AJIL—that the U.K. Government endorses the proposed factors as "the right factors to consider in asking whether or not an armed attack by non-state actors is imminent . . . ."[106] Attorney General Wright noted that the *Principles* had been endorsed by Brian Egan and that the international legal requirements regarding self-defense and imminence were the subject of a recent meeting between the Attorneys General of the United States, Canada, Australia, New Zealand, and the United Kingdom.[107]

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103. Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 Int'l L. Stud. 235, 239 (2016).

104. Hon. George Brandis, *The Rights of Self-Defence Against an Imminent Armed Attack in International Law*, EJIL: Talk! (May 25, 2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/ [https://perma.cc/T7MT-CTX4].

105. *Id.*

106. Rt. Hon. Jeremy Wright, Remarks at International Institute for Strategic Studies, *The Modern Law of Self-Defence* 15–16 (Jan. 11, 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech.pdf [https://perma.cc/ZD6U-HSXJ].

107. *Id.*

These exchanges position the *Bethlehem Principles* as an effort to remake the law regarding the use of force. Their advancement is intended to shape the policy of other states, spurring the development of customary international law. The lawmaking objective is realized, Kattan describes, when either a state argues that the *Principles* reflect state practice and opinio juris or if the *Principles* are understood to have been formulated by the most qualified jurists.[108] We suggest that through the dissemination of the lawmaking output, the state-academic approach merges features of *both* lawmaking methods. By being situated between both spheres, the *Principles* draw upon the complementary strength of the state contribution and the academic contribution to enhance the persuasiveness of its lawmaking claim.

### *B. International Humanitarian Law: The 2014 Gaza Conflict and Israeli Targeting Policy*

The 2014 Gaza conflict lasted for fifty-one days. Upon the commencement of hostilities, Israeli officials undertook a diplomatic campaign to advance claims that the Israel Defense Forces' ("IDF") actions conformed with international law.[109] Initially, Israel presented a broad self-defense justification, holding that its military operation, which was dubbed Operation Protective Edge, was a direct response to the ongoing rocket attacks emanating from the Gaza Strip.[110] Israel's appeals to Article 51 of the U.N. Charter were well-received by numerous states.[111] But Israeli reliance upon conventional interpretations of self-defense was soon overtaken by a chorus of condemnation of Israel's conduct throughout the conflict.[112] Criticisms of the IDF's conduct culminated in the June 2015 report of the U.N.-appointed Fact-Finding Commission which held that, inter alia, Israeli airstrikes had targeted residential areas in Gaza, failing to adequately distinguish between combatants and civilians.[113] The report claimed that Israel had failed to demonstrate how the investigated attacks on residential areas constituted legitimate military targets and held that, in the interest of accountability,

108. Kattan, *supra* note 91, at 104.

109. *See* David Hughes, *Investigation as Legitimisation: The Development, Use, and Misuse of Informal Complementarity*, 19 MELB. J. INT'L L. 84, 117–22 (2018).

110. *See, e.g.*, Israel Ministry of Foreign Affairs, *Behind the Headlines: Fighting Hamas Terrorism within the Law* (Aug. 7, 2014), https://embassies.gov.il/MFA/FOREIGNPOLICY/Issues/Pages/Fighting-Hamas-terrorism-within-the-law.aspx [https://perma.cc/W6Z4-Y5R8]; *see also* Israel Ministry of Foreign Affairs, *Operation Protective Edge Questions and Answers* (Aug. 14, 2014), https://embassies.gov.il/MFA/FOREIGNPOLICY/Issues/Pages/Operation-Protective-Edge-QA.aspx [https://perma.cc/V8BV-QKTG].

111. *See* Israel Ministry of Foreign Affairs, *Operation Protective Edge Questions and Answers*, *supra* note 110 (citing supportive statements by U.S. President Barack Obama, British Prime Minister David Cameron, and U.N. Secretary General Ban Ki-moon).

112. *See* SCOR, 69th Sess., 7231st mtg., U.N. Doc. SC/11502 (July 20, 2014) (holding that Israel's conduct was disproportionate and led to unacceptable civilian casualties); *see also* SCOR, 69th Sess. 7232nd mtg., U.N. Doc. SC/11504 (July 31, 2014).

113. Rep. of the Hum. Rts. Council, *Human Rights Situation in Palestine and Other Occupied Arab States: Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, ¶ 226, U.N. Doc. A/HRC/29/CRP.4 (June 22, 2015).

the principle of distinction must receive paramount consideration.[114] As initial endorsements of Israel's actions jus ad bellum gave way to criticisms of its conduct jus in bello, Israeli officials recognized that the most damaging international condemnation "concerned the manner in which the IDF used force in the operation and the application of the laws of warfare . . . ."[115]

The series of recurring conflicts between Israel and Hamas featured a continuous debate about the regulation of key aspects of asymmetric warfare. Accompanying legal exchanges quickly became persuasive contests. These were not simply about the legality of Israeli actions. Instead, they featured efforts to shape the interpretation of international humanitarian law ("IHL")—concerning proportionality, distinction, and precautions in attack—that informs such assessments. Notwithstanding contemporary challenges regarding the regulation of asymmetrical conflicts and the proliferation of new technologies that alter the conduct of warfare, states remain reluctant to create new treaties to (re)address core IHL questions.[116]

The resulting paralysis has prompted states and non-state actors to engage in informal lawmaking initiatives to promote their vision of IHL's application to contemporary conflicts. Many of these post hoc lawmaking initiatives are reflected within academic debates. Here, we focus on one example of state-academic lawmaking that was advanced through the 2015 law review article, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, by Michael N. Schmitt and John J. Merriam in the *Pennsylvania Journal of International Law*.[117]

### 1. *Ex-Post Lawmaking or Interpretative Character*

Much of the Schmitt and Merriam article is descriptive. It illustrates the role of the Israeli Military Advocate General during the 2014 Gaza conflict and engages with various legal issues that arose during and in the wake of the Israeli offensive. Section V of their article, however, assumes a lawmaking character. Here, the authors analyze the legality of controversial IHL positions that Israel had advanced as lawful. In so doing, Schmitt and Merriam present interpretative claims about controversial battlefield practices that are facilitated through a permissible reading of IHL.

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114. *Id.* ¶ 215.

115. Pnina Sharvit Baruch, *Operation Protective Edge: The Legal Angle*, *in* THE LESSONS OF OPERATION PROTECTIVE EDGE 65, 66 (Anat Kurz & Shlomo Brom eds., 2014).

116. Yahli Shereshevsky, *Are All Soldiers Created Equal? – On the Equal Application of the Law to Enhanced Soldiers*, 61 VA. J. INT'L L. 271, 276–77 (2021).

117. Schmitt & Merriam, *Tyranny of Context*, *supra* note 21. Schmitt and Merriam published a second article in 2015, *Israeli Targeting: A Legal Appraisal*. Substantively, both articles were similar but aimed at different audiences. We focus on the first of these articles because, as the authors suggest, it was published in an academic law journal while the second paper was intended for a military policy audience. *See* John J. Merriam & Michael N. Schmitt, *Israeli Targeting: A Legal Assessment*, 68 NAVAL WAR COLL. REV. 15 (2015); *see also* Michael Schmitt & John Merriam, *A Legal and Operational Assessment of Israel's Targeting Practices*, JUST SECURITY (Apr. 24, 2015), https://www.justsecurity.org/22392/legal-operational-assessment-israels-targeting-practices/ [https://perma.cc/V4NB-GLB2].

The article's lawmaking character manifests through a series of substantive discussions about the state of IHL. It advances interpretative claims that draw upon the formal status of IHL treaties to advance purportedly plain-text legal assertions about unsettled legal questions. The most significant intervention concerns an ongoing debate over the targeting of members of non-state armed groups. The existing law that governs this issue is vague and has been the subject of several lawmaking initiatives that each purport to offer conceptual and operational clarity. The International Committee of the Red Cross's ("ICRC") *Interpretative Guidance on the Direct Participation of Hostilities* remains the most relevant lawmaking initiative in this field.[118] Initially, the ICRC project consisted of a diverse group of experts that included Michael Schmitt. However, due to differences between some participants and the ICRC, several of the experts, including Schmitt, requested that their names be removed from the final publication.[119] In response, the ICRC opted to publish the project unilaterally, without the names of any of the external contributors.[120]

The schism between the group of experts and the ICRC concerned, inter alia, a contentious debate between a functional approach to targeting, which limits targeting determinations to those members of a non-state armed group that assume a combat role, and a formal approach, which extends targeting to all members of the group, including the driver, the cook, or the legal advisor, regardless of their combat function.[121] The ICRC's *Interpretative Guidance* assumed a functional approach and became a point of reference and an influential lawmaking tool that shaped associated legal debates.[122] Still, the ICRC's approach attracted significant criticism from the opposing group of experts.[123] In contrast to the conclusion of the *Interpretative Guidance*, Schmitt and Merriam support the formal approach to targeting which they promote through their substantive assessment of Israel's conduct during the 2014 Gaza War.

Schmitt and Merriam suggest that their position is supported by existing law since the ICRC's functional approach to the notion of the continuous combat function is not seen as part of customary international law.[124] The

118. Nils Melzer, Int'l Comm. Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009).

119. *See* Hays W. Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L. & Pol. 769, 783–85 (2010).

120. William H. Boothby, *Detention Operations: Legal Safeguards for Internees*, *in* Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors 78 (2014).

121. *See* Yahli Shereshevsky, *Targeting the Targeted Killings Case - International Lawmaking in Domestic Contexts*, 39 Mich. J. Int'l L. 241, 245 (2018).

122. *See* Ka Lok Yip, *The ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities: Sociological and Democratic Legitimacy in Domestic Legal Orders*, 8 Transnat'l L. Theory 224 (2017); *see also* Dapo Akande, *Clearing the Fog of War - The ICRC's Interpretive Guidance on Direct Participation in Hostilities,* 59 Int'l & Comp. L.Q. 180 (2010).

123. *See, e.g.*, Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U J. Int'l L. & Pol. 697 (2010); *see also* Parks, *supra* note 119.

124. *See* Schmitt & Merriam, *Tyranny of Context*, *supra* note 21, at 113.

suggestion that their position represents existing customary norms while the ICRC approach does not is a persuasive technique that features in such informal lawmaking initiatives. Here, the authors insist that their proffered approach is not a new legal articulation but instead represents the mainstream position.[125] By disguising the lawmaking effort as an uncontroversial articulation of customary law, the persuasive pull of Schmitt and Merriam's lawmaking contention is gained from the formal source rather than from the authoritativeness of the authors themselves. This method of advancing a lawmaking claim mirrors adjacent initiatives like the ICRC's *Study on Customary International Humanitarian Law*, in which inventive lawmaking was presented as the mere identification of custom.[126]

Additional expansive claims were advanced within *The Tyranny of Context*. Schmitt and Merriam assert that if the kidnapping of a soldier constitutes a strategic goal of a non-state armed group due to the unique value of soldiers in a particular society, then value and strategic importance can factor into the proportionality assessment of operations intended to prevent abductions.[127] The authors' position has been the subject of continuous debate since its publication.[128] Similarly, the paper considers the controversial practice of targeting the residential home of a leader of a non-state armed group when the individual is not present. The authors purport that if the home is repeatedly used for a military purpose, it amounts to a military target regardless of whether the armed group's leader is present at the time of the attack.[129] Continuing, the article addresses an array of controversial practices, the legal status of which is subject to ongoing debate, including "roof knocking" as a precaution in attack, the use of human shields, activities that constitute direct participation in hostilities, the customary nature of IHL rules protecting the environment, whether the environment is a civilian object, and perfidy.[130]

These claims align with the interpretative positions that Israel actively promotes through lawmaking. Since the 2014 Gaza War, Israel has adopted the formal approach to targeting, the ability to target (in specified instances) the houses of an armed group's leadership, the practice of roof knocking, and the subjective contextual approach to proportionality.[131] Much of the criti-

125. *Id.* at 112–13.

126. *See* Shereshevsky, *Back in the Game*, *supra* note 15, at 40 (discussing such persuasive technique in the context of the ICRC Customary IHL Study).

127. Schmitt & Merriam, *Tyranny of Context*, *supra* note 21, at 65–66, 128–30.

128. *See* Amichai Cohen & Yuval Shany, *Contextualizing Proportionality Analysis? A Response to Schmitt and Merriam on Israel's Targeting Practices*, JUST SECURITY (May 7, 2015), https://www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam/ [https://perma.cc/LU9G-G5VB].

129. Schmitt & Merriam, *Tyranny of Context*, *supra* note 21, at 122–23.

130. *Id.* at 97–103, 113–19, 135.

131. Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict: Factual and Legal Aspects*, ¶¶ 95, 264, 276-78, 313 (June 14, 2015), https://www.gov.il/en/Departments/General/2014-gaza-conflict-factual-and-legal-aspects [https://perma.cc/2F9M-TA6M] [hereinafter 2014 Gaza Conflict Report].

cism that Israel received following Operation Protective Edge pertained to examples of IDF conduct that were believed to violate conventional IHL understandings of these very issues.[132]

In the *Tyranny of Context*, Schmitt and Merriam endorse nearly all the legal positions that Israel assumes. The authors depart from the Israeli position in only two narrow instances—on whether the environment should be regarded as a civilian object and if an entire residential building loses its protection if one of the units within becomes a military target. But in both instances, these divergences make little substantive difference to corresponding policy debates. When discussing each, the authors note that notwithstanding their views, Israel's preferred interpretation is reasonable. Schmitt and Merriam stress that the practical relevance of the debate is limited because it "will seldom affect the proportionality assessment because it only applies when the attacker is in possession of a precision weapon the effects of which are capable of being limited to a single apartment, floor, etc."[133] These minor disagreements are positioned to signal the academic and independent nature of the article, both of which the authors directly address, in an attempt to enhance the persuasiveness of the principal lawmaking claims.

### 2. *Prestige, Form, and Independence*

The *Pennsylvania Journal of International Law* is a well-respected legal journal.[134] Schmitt and Merriam's article was presented in the regular articles section of the journal, suggesting that it, like any similarly situated article, had passed through the journal's selection criteria and was a regular academic work. The first author, and leading voice of the lawmaking initiative, is Michael Schmitt. Schmitt is widely regarded as amongst the most prominent IHL scholars. He has published extensively on contemporary IHL issues and is frequently cited within the relevant literature.[135] The second author, John Merriam, is part of the Judge Advocate General's Corps of the United States Army. Although Merriam is a state official, he writes in a personal capacity. Significantly, independence is further implied as the subject of the article, Israel's targeting practices, addresses the policies of a different, unaffiliated state with which neither author holds formal ties or nationality.

To establish their authority as experts, singularly situated to advance legal conclusions about complex operational questions, Schmitt and Merriam emphasize both their academic and practice-based credentials, noting "the

132. *See, e.g.*, Rep. of the Hum. Rts. Council, *supra* note 113.

133. Schmitt & Merriam, *Tyranny of Context*, *supra* note 21, at 120.

134. The PJIL is the seventh-ranked international law journal by the 2022 Washington & Lee Law Journal Rankings. Like the vast majority of student-edited law reviews in the United States, it is not peer-reviewed. *See* Washington & Lee Law Journal Rankings, *Subject: International Law*, https://managementtools4.wlu.edu/LawJournals/ [https://perma.cc/9DGB-X4RP].

135. Michael Schmitt, GOOGLE SCHOLAR, https://scholar.google.com/citations?user=0lBQzXAAAAAJ&hl=IW&oi=sra [https://perma.cc/8DP9-C7PQ].

Authors combine extensive academic and operational experience vis-à-vis targeting and therefore were in a unique position to assess the credibility of Israeli assertions."[136] While the publication venue and the reference to their respective credentials imply neutrality, the politically loaded context of the targeting study raised questions of bias. Schmitt and Merriam address these directly in the text by underscoring the pure academic form of their contribution. They state in the introduction that, "although the approach might be perceived as leading to a pro-Israel bias, the sole purpose of the project was to examine Israeli targeting systems, processes, and norms in the abstract; no attempt was made to assess targeting during any particular conflict or the legality of individual attacks."[137] Such an initiative, however, required unfettered access to Israeli officials.

3. *Nexus Between the Author and the State*

The *Tyranny of Context* was written after Schmitt and Merriam visited Israel shortly following the 2014 Gaza conflict. During the visit, the two authors interviewed "senior IDF commanders and key IDF legal advisers."[138] The individuals with whom they met were closely involved in reaching targeting decisions during Operation Protective Edge. Schmitt and Merriam were taken on a tour of the Gaza Strip which included a "staff ride," a visit to an Israeli operations center that oversaw combat functions, and a visit to a Hamas "infiltration tunnel."[139] The level of cooperation that Israeli officials extended to Schmitt and Merriam facilitated their conclusions. While performing interviews or conducting fieldwork are common methodological techniques, Schmitt and Merriam were invited by IDF officials to undertake the study. They describe receiving "unprecedented access" to the IDF.[140] We are unaware of other scholars that received such formal access. Craig Jones, for example, who writes about the role of legal advisors in Israel has described facing significant challenges in trying to arrange meetings with IDF lawyers, ultimately being denied access.[141]

4. *Capacity to Spread Norms Through Repetition and Lawmaking Diplomacy*

State-academic lawmaking need not be understood in a vacuum. The lawmaking diplomacy that was advanced here, in contrast to other examples, is subtle. It should be understood as part of a broader post hoc lawmaking effort that followed the 2014 Gaza conflict. Israel did not explicitly rely on

136. Schmitt & Merriam, *Tyranny of Context*, *supra* note 21, at 56–57.
137. *Id.* at 56.
138. *Id.*
139. *Id.*
140. *Id.*
141. Craig Jones, *Focused Prevention Podcast: Part II,* War—Space Blog (Feb. 23, 2018), https://www.thewarspace.com/blog/2018/2/16/focused-prevention-podcast-part-ii [https://perma.cc/UC7J-5Q4V].

the Schmitt and Merriam article throughout this process, and its formal ties to the paper are limited to the access that the authors received to the IDF. But, despite less direct Israeli engagement with the lawmaking output, it appears that even Schmitt and Merriam recognized that the access they received was purposeful and represents a novel willingness of Israel to take a more active role in contests to influence the direction of the law of contemporary armed conflicts. They note:

> Israel has long resisted publicly revealing its targeting methods and even some of its specific positions on the law of armed conflict ("LOAC"), fearing that doing so would provide an operational advantage to its adversaries and be exploited by often-critical interlocutors amongst states and the international human rights community. This may be changing. Shortly after the conclusion of open hostilities, the IDF invited us to Israel to examine its targeting practices and application of LOAC.[142]

The timing of the article's publication is significant. *The Tyranny of Context* was uploaded to the Social Science Research Network ("SSRN") on April 13, 2015, shortly before the publication of two significant documents that would structure the legal discourse regarding Israel's conduct during the Gaza conflict and associated legal discussions regarding IHL's application in asymmetrical conflicts. The first document, the U.N. Human Rights Council's Commission of Inquiry Report of the 2014 Gaza conflict, would be published two months later.[143] Along with the Report's detailed denunciations of Israel's conduct during the hostilities, and despite the short window between the publication of the Report and the article's uploading, the Commission of Inquiry referred critically to Schmitt and Merriam's position on the contextual elements of proportionality assessments.[144]

The second document is the Israeli publication, *The 2014 Gaza Conflict: Factual and Legal Aspects*.[145] The lengthy report, prepared by officials from the Israel Ministry of Foreign Affairs, the IDF, and the Attorney General's Office, advances a series of factual and legal claims. It presents Israel's legal position on several contentious areas of IHL, including support for the formal approach to targeting members of non-state armed groups.[146] The purported academic neutrality offered by Schmitt and Merriam facilitates Israeli lawmaking. By agreeing with the view of IHL put forth in the Israeli report as a rigorous and reasonable legal analysis of key IHL questions, the state's position is presented not as an apologetic, partial product of an interested

142. Schmitt & Merriam, *A Legal and Operational Assessment*, *supra* note 117, ¶ 1.
143. Rep. of the Hum. Rts. Council, *supra* note 113, ¶ 1.
144. *Id.* ¶ 639.
145. *See* 2014 Gaza Conflict Report, *supra* note 131.
146. *Id.* ¶ 264.

party to a conflict but as legitimate positions endorsed by independent scholars and published in a respected legal journal.

*The Tyranny of Context* should therefore be understood as supplementing Israel's fact-finding report. These complementary efforts facilitated a larger lawmaking agenda that sought to legitimize Israel's conduct during Operation Protective Edge and shape parallel IHL debates in the absence of formal efforts to settle existing questions. The Schmitt and Merriam article received significant academic attention and was favorably received by the Israeli media (in English), pro-Israeli outlets, other articles, and blog posts.[147] However, consistent with their decision not to formally engage or promote the article following its publication, Israeli officials refused to provide an in-depth response to the conclusions reached by Schmitt and Merriam. An IDF spokesperson noted: "Neither the IDF, nor the Justice Ministry nor the Foreign Ministry wished to comment on the report—likely because the report's positive analysis speaks for itself."[148] Unlike the explicit endorsement of the *Bethlehem Principles*, this indirect Israeli (non)response subtly illustrates how this informal lawmaking method blends both state and academic contributions to advance a legal claim while emphasizing the alleged independence of the academic contribution to the lawmaking initiative.

### C. *The Law of the Sea: The South China Sea Arbitration Award*

The South China Sea has long been of strategic interest to bordering states. Since the end of the Second World War, two chains of islands that were unoccupied until 1946—the Paracel and Spratly Islands—have been subject to claims of historical entitlement by China, Brunei, Malaysia, the Philippines, Taiwan, and Vietnam.[149] China then began establishing a presence on several features located in both the Paracel and Spratly Islands. This instigated a series of subsequent claims by China, Taiwan, and the Philippines. Further claims gave way to mounting diplomatic disputes and a prolonged series of lawmaking assertions.[150] Throughout these exchanges, China has maintained that, under the law of the sea, it possesses rights

147. *See, e.g.*, Yonah Jeremy Bob, *Major U.S. Military Law Experts: IDF 'Contentious' Targeting Complies with International Law*, The Jerusalem Post (Apr. 27, 2015), https://www.jpost.com/arab-israeli-conflict/major-us-military-law-experts-idf-contentious-targeting-complies-with-intl-law-399320 [https://perma.cc/6AJR-L9NQ]; *see also* Yishai Schwartz, *How (and How Not) to Investigate an Armed Conflict: Reflections on Three Recently Released Gaza Reports*, Lawfare (May 6, 2015), https://www.lawfareblog.com/how-and-how-not-investigate-armed-conflict-reflections-three-recently-released-gaza-reports [https://perma.cc/D5NH-JLAY]; Evelyn Gordon, *Obama's Double Standard on Civilian Casualties*, Commentary (May 6, 2015), https://www.commentary.org/evelyn-gordon/obamas-double-standard-on-civilian-casualties-gaza-drones/ [https://perma.cc/48XJ-XSWU]; Hadar Sela, *More on the Law of Armed Conflict, Gaza and the BBC*, Camera UK (Apr. 28, 2015), https://camera.uk.org/2015/04/28/more-on-the-law-of-armed-conflict-gaza-and-the-bbc/ [https://perma.cc/6VYL-26VZ].

148. Bob, *supra* note 147.

149. *See* Sean Mirski, *The South China Sea Dispute: A Brief History*, Lawfare (June 8, 2015), https://www.lawfareblog.com/south-china-sea-dispute-brief-history [https://perma.cc/MG2S-HED5].

150. *See* Douglas Guilfoyle, *The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea*, 95 Int'l Affs. 999, 1010–11 (2019) [hereinafter Guilfoyle, *The Rule of Law*].

within the areas of the South China Sea termed the "nine-dash line."[151] This imprecise demarcation runs close to the Philippines coastline and contains a vast area of nautical and economic value.[152]

Fishing disputes with China in the Scarborough Shoal prompted the Philippines to initiate arbitration proceedings under Annex VII of the *United Nations Convention on the Law of the Sea* ("UNCLOS").[153] The Philippines claimed that Chinese assertions that features in the South China Sea constituted islands that created exclusive economic zones ("EEZs") were incorrect.[154] Instead, the Philippines argued that the disputed features amounted to rocks that do not generate legal rights.[155] Chinese officials refused to participate in the arbitration proceedings to adjudicate this disagreement.[156] In a published response, China insisted that the UNCLOS did not provide arbitral jurisdiction over disputes about sovereign entitlement or maritime delimitation.[157]

The Arbitral Tribunal issued two decisions. First, and in contradiction to Chinese assertions, the Arbitral Tribunal decided in October 2015 that it had jurisdiction over the claim.[158] Second, in July 2016, the tribunal decided in favor of the Philippines on the merits, determining that the features at the core of the dispute with China were rocks rather than islands.[159] The Tribunal decision included additional criticism of China's conduct, denouncing its recent efforts to build artificial islands atop fragile coral reefs.[160]

China issued a brief but stern condemnation of the Arbitral Tribunal decisions.[161] This discussed only jurisdictional questions, leaving the Tribunal's substantive reasoning unmentioned. While officials in Beijing continued denouncing the decisions based on procedure, their criticisms were soon supplemented by more substantive refutations from groups of Chinese scholars. The Chinese Society of International Law ("CSIL") led these initiatives, issuing an endorsement of legal positions that favored

151. *Id.*

152. *See* Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98, 99–100 (2013).

153. Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 265, 271–72 (2016) (detailing the Philippines's argument to the Tribunal).

154. *Id.*

155. South China Sea Arbitration (The Philippines v. China), PCA Case Repository, Award ¶¶ 392–93 (Perm. Ct. Arb. 2016).

156. *Id.* ¶¶ 11–13.

157. *Id.* ¶ 446; *see also* Ministry of Foreign Affairs of the People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* ¶ 3 (Dec. 7, 2014), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201412/t20141207_679387.html [https://perma.cc/SA8W-DAWM].

158. South China Sea Arbitration (The Philippines v. China), PCA Case Repository, Award on Jurisdiction and Admissibility ¶ 413 (Perm. Ct. Arb. 2015).

159. South China Sea Arbitration (Award), *supra* note 155, ¶ 646.

160. *Id.* ¶ 983.

161. *See* Chinese Society of International Law, *A Critical Study*, *supra* note 22, at Annex III–IV.

China as well as the more expansive Chinese claims that were published on the Chinese Foreign Ministry's website.[162] These informal collaborations prompted publication of two scholarly articles that shaped the legal narrative around the South China Sea Arbitration and advanced specific lawmaking objectives that China had long sought.

The first article was jointly prepared by seventy-nine scholars but published under the name of the CSIL in the *Chinese Journal of International Law*.[163] Titled, *The South China Sea Arbitration Awards: A Critical Study*, the article totals 542 pages, itself longer than the 500-page Arbitral Tribunal final award decision. The second article was published in the *Asian Yearbook of International Law* by the National Institute for South China Sea Studies ("NISCSS").[164] Titled, *A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration*, the 143-page long article followed a similar argumentative structure to the CSIL article. While both articles were framed as legal critiques of the Arbitral Tribunal decisions, each advanced specific lawmaking claims that would come to feature in China's informal lawmaking appeals concerning the South China Sea.

1. *Ex-Post Lawmaking or Interpretative Character*

The CSIL's *Critical Study* and the NISCSS's *Legal Critique* provide detailed responses to various features of the Tribunal's decisions. Focused on the jurisdictional question that was the subject of the first Arbitral Tribunal decision, and then on substantive law of the sea matters, the articles align with China's official position.[165] Yet, both articles should be understood as more than academic avowals of a state's legal contentions. The *Critical Study* provides an in-depth supplement to the Chinese position. When the Chinese government refused to participate in the Arbitral Tribunal's proceedings, they limited their formal opportunity to advance a legal argument. The *Critical Study* should be understood, at least in part, as an effort to perform the substantive persuasive work that the Chinese government abdicated when it refused to recognize the legitimacy of the arbitration proceedings.

The *Critical Study* made novel legal claims that were intended to advance Chinese preferences regarding the interpretation and application of UNCLOS. Douglas Guilfoyle notes that the CSIL is attempting to remake inter-

162. Embassy of the People's Republic of China in Malaysia, *The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void* (June 10, 2016), http://my.china-embassy.gov.cn/eng/zgxw/201607/t20160726_1713351.htm [https://perma.cc/B4VA-F98C]. For a discussion of the post-arbitration reactions, *see* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 240–41 (2017).

163. Chinese Society of International Law, *A Critical Study*, *supra* note 22, at 748 (listing thirty-nine "drafters," twenty-one "reviewers," and nineteen "other contributors" in acknowledgement section).

164. National Institute for South China Sea Studies, *Legal Critique*, *supra* note 22.

165. *See* Douglas Guilfoyle, *A New Twist in the South China Sea Arbitration: The Chinese Society of International Law's Critical Study*, EJIL: TALK! (May 15, 2018), https://www.ejiltalk.org/a-new-twist-in-the-south-china-sea-arbitration-the-chinese-society-of-international-laws-critical-study/ [https://perma.cc/F37H-KNP9] [hereinafter Guilfoyle, *A New Twist*].

national law when it contends that an "outlying archipelago" (including several areas disputed in the South China Sea) generates substantial maritime zones even if not part of a state comprised entirely of islands.[166] This claim is based on an alleged customary norm, existing alongside the UNCLOS regime, which rejects similar territorial claims by continental states that, like China, are not solely composed of islands.[167] These arguments revive the position that Chinese officials attempted to advance, but subsequently abandoned, following negotiations at the Third United Nations Conference on the Laws of the Sea.[168] Guilfoyle and others observe that the CSIL's legal contentions position the Society as a norm entrepreneur, advancing creative interpretations to remake the law of the sea.[169]

Such intentions are made explicit by the CSIL. The CSIL described the objectives of the *Critical Study* as beyond responding to the dispute with the Arbitral Tribunal. The authors noted that they intend to advance interpretations that "promote the international rule of law."[170] Similarly, the NISCSS offered detailed considerations about the law of the sea. The *Legal Critique* did not address questions of jurisdiction in the same level of detail as the *Critical Study*. Instead, it focused on the merits of the award, actively promoting interpretations in favor of China's positions, including the suggestion that customary norms that preceded UNCLOS continue to apply simultaneously with an emphasis on the notion of historic rights.[171]

### 2. *Prestige, Form, and Independence*

Both articles were published in international law journals and were purportedly subject to regular peer-review processes. Unlike traditional academic articles, the *Critical Study* and the *Legal Critique* are authored by institutions. This is intended to imply legal consensus among the diversity of independent experts that gathered to shape the lawmaking outputs. In the article, the CSIL described the research and drafting processes that resulted in the *Critical Study*:

> To this end, a research group of the Society worked for more than one year (from September 2016 to December 2017) to produce this critical study on the awards. More than 60 experts in the

166. *Id.*

167. Chinese Society of International Law, *A Critical Study*, *supra* note 22, at 479–82.

168. Guilfoyle, *The Rule of Law*, *supra* note 150, at 1008–09; *see also* Yurika Ishii, *A Critique Against the Concept of Mid-Ocean Archipelago*, *in* IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 133, 144–45 (Dai Tamada & Keyuan Zou eds., 2021) (discussing earlier scholarship by Chinese scholars that offered similar arguments but received less attention than the *Critical Study*).

169. Guilfoyle, *The Rule of Law, supra* note 150, at 1015; *see also* Marta Hermez, *Global Commons and the Law of the Sea: China's Lawfare Strategy in the South China Sea*, 22 INT'L COMM. L. REV. 559, 562 (2020).

170. Chinese Society of International Law, *A Critical Study*, *supra* note 22, at 218.

171. National Institute for South China Sea Studies, *Legal Critique*, *supra* note 22, at 159.

> fields of law, international relations, history, geography, etc., participated in this project. The Society also invited more than 20 experts of recognized competence from China, including Taiwan, Hong Kong and Macao, as well as other countries to provide guidance and review drafts of specific questions. This Study, completed at the beginning of December 2017, is the outcome of these collective efforts and represents the position of the Chinese academia of international law on the awards.[172]

The CSIL briefly alluded to the input of foreign nationals who purportedly guided and reviewed parts of the *Critical Study*. While this is intended to demonstrate a further degree of independence, it does not exhibit the same distance between scholar and state as observed in the previous examples. Instead, the collective effort that produced the *Critical Study* is said to be motivated solely by academic objectives. In the article's introduction, the CSIL explained that it had been closely following the arbitration proceedings and was now engaging with the Arbitral Tribunal's decisions in a scholarly capacity because, from their perspective "as a national learned society," these raised "complicated and significant legal issues" that demanded consideration.[173]

These appeals did not assuage the commentators who doubted the academic value of the *Critical Study* and questioned its inclusion in a purportedly independent academic journal.[174] This prompted a rare reply from Sienho Yee, CJIL's editor-in-chief. In a published comment titled *Attention to the Chinese Society's Critical Study and Our Standing Invitation to Respond*, Yee defended the article's academic qualities, the CSIL's autonomy, and the journal's editorial processes.[175] Yee's editorial repeatedly emphasized that both the CSIL and the CJIL are independently operated, free from government control or interference. Responding to criticisms, Yee asserted:

> Some comments also drew attention to the description of the Society in its Charter. The language of the Charter really defies proper rendition in English because it is so uniquely Chinese; it states to th[at] effect that the Society is under the general leadership or general guidance of the Chinese Foreign Ministry. Those who are familiar with the situation in China will know a national society

172. Chinese Society of International Law, *A Critical Study*, *supra* note 22, at 218.

173. *Id.* at 217–18.

174. *See, e.g.*, Guilfoyle, *A New Twist*, *supra* note 165 (stating that "the Critical Study is also bound to reinforce the view that, in contrast to Western states, there is a distinct lack of diversity in Chinese scholarly opinion about the legal merits of the case and perhaps an unwillingness to depart from a party line"); Maritime Security Research Group, Workshop Report*:* Strategy and Law in the South China Sea Disputes, UNSW Canberra Aus. Def. Force Acad., (Oct. 14–15, 2019), at 16, https://www.unsw.adfa.edu.au/sites/default/files/documents/South-China-Sea-Workshop-Report.pdf [https://perma.cc/8FJH-FXML].

175. *See* Sienho Yee, *Attention to the Chinese Society's Critical Study and Our Standing Invitation to Respond*, 17 Chinese J. Int'l L. 757 (2018).

> is usually required to have a corresponding government agency in its substantive field of inquiry for general leadership and guidance, but this does not mean that this agency controls every aspect of the national society; the national society is a juridical person and makes its own decisions.[176]

Continuing, Yee reinforced the prestige and academic nature of the journal by describing the integrity of CJIL's editorial process. Yee explains that:

> What is important to us as an academic journal of international law is whether we follow [sic] the generally accepted review standards when the Critical Study was accepted for publication. In this regard, we can report that we have followed them to our best [sic]. As a general policy, the Journal has prided itself on its rigorous and strictly anonymous peer review (with the normal safeguards against conflicts of interest) of all submissions, including submission by invitation, without any distinction based on the status of the authors, as mentioned earlier. This policy no doubt has contributed to its success so far as a solid general journal in international law. With respect to the Critical Study, we applied the same standard.[177]

This asserts legitimacy. It suggests that, following a rigorous academic inquiry by an array of leading experts, a consensus was reached. Yee's response implies that it is merely happenstance, or perhaps, the inevitable result of two expert processes that both produced the correct finding, that the legal claims advanced within the *Critical Study* align with Chinese policy.

The NISCSS's *Legal Critique* shares similar features with, and has been advanced in a parallel manner to, the *Critical Study*. Like the *Critical Study*, the *Legal Critique* is published in an academic journal. The *Asian Yearbook of International Law* is peer-reviewed and published by Brill "under the auspices of the Foundation for the Development of International Law."[178] The NISCSS trades on their standing as an academic think-tank that specializes in issues relating to the South China Sea to demonstrate its independence and expertise.[179] The NISCSS describes how experts from beyond China contributed to the *Legal Critique*. This, again, accentuates both the prestige and implied independence of the work product. The article's first footnote, per-

176. *Id.* at 758; *see also* Guilfoyle, *A New Twist*, *supra* note 165 (in which Yee offers an additional rebuttal in the comments to Guilfoyle's questioning of the CJIL/CSIL's independence, focusing on the academic nature of the project including the journal's review process).

177. Yee, *supra* note 175, at 759.

178. The Foundation for Development of International Law – Korea, *The Asian Yearbook of International Law (Asian YBIL)*, DILA-Korea (2019), http://www.dila-korea.org/dila/publications.html [https://perma.cc/6MDG-76AM].

179. National Institute for South China Sea Studies, *NISCSS Profile*, NISCSS, http://en.nanhai.org.cn/index/survey/index.html [https://perma.cc/NC84-3L9Q].

haps anticipating similar critiques to those leveled against the *Critical Study*, explicitly reiterated its independence and the separation between contributors and China, noting that:

> This is an independent article and is published for public dissemination. A research team was formed in this regard under the direction of Dr. Shicun Wu, President of the NISCSS and was composed of international law scholars, lawyers, historians and technical experts from the United Kingdom, the Netherlands, the United States and China.[180]

Despite the professed independence of each article, their traditional academic features, and the collection of geographically and disciplinarily diverse experts, the *Critical Study* and the *Legal Critique* nevertheless exhibit coordination between the state and the scholar.

3. *Nexus Between the Author and the State*

Both articles deny any direct connection to the state. Nevertheless, two indications within the *Critical Study* evince the nature of the relationship between the Chinese government and the study. The first is promotional. The article's first footnote states that in addition to publication in CJIL, the article was simultaneously published in English and Chinese by the Foreign Languages Press of China.[181] The Foreign Languages Press is controlled and owned by the Chinese Communist Party and the simultaneous publication of the article demonstrates its importance to China. The second is informational. The *Critical Study* includes several annexes that present the Chinese government's official policies in relation to the arbitration. While such primary sources may otherwise be included in a scholarly article to substantiate a legal claim, the *Critical Study* only presents documents that present China's positions.

Several scholars that work on issues relating to China but have no ties to the state have criticized the academic neutrality and purported independence of the *Critical Study*. In a pair of blog posts on *EJIL: Talk!*, Guilfoyle questioned the article's academic value.[182] In both posts and through a lively exchange in the comments sections of each, Guilfoyle insisted that the *Critical Study* lacked any semblance of academic neutrality, noting its unique authorship, form, and substance.[183] Even more directly, Guilfoyle stated that the *Critical Study* amounted to a "government-orchestrated project produced

180. National Institute for South China Sea Studies, *Legal Critique*, *supra* note 22, at 151.

181. Chinese Society of International Law, *A Critical Study*, *supra* note 22, at 207.

182. *See* Guilfoyle, *A New Twist*, *supra* note 165; *see also* Douglas Guilfoyle, *Taking the Party Line on the South China Sea Arbitration*, EJIL: TALK! (May 28, 2018), https://www.ejiltalk.org/taking-the-party-line-on-the-south-china-sea-arbitration/ [https://perma.cc/URN2-83SL] [hereinafter Guilfoyle, *Taking the Party Line*].

183. *See* Guilfoyle, *Taking the Party Line*, *supra* note 182; *see also* Guilfoyle, *A New Twist*, *supra* note 165.

in the name of a learned society."[184] Guilfoyle's observations, informed by Bing Ling from the University of Sydney, confirmed that the CSIL's work report acknowledged that in producing the *Critical Study*, the Society had operated "under the supervision and leadership of the [Chinese] Foreign Ministry."[185] Similar concerns were forwarded by Simon Chesterman, who noted that the *Critical Study's* open-access was rare and that it appeared no source of funding had been disclosed, thus hinting at potential governmental assistance in the article's promotion.[186]

These debates between scholars about the extent and appropriateness of China's involvement in the creation of the two supportive studies have not produced a clear consensus. It has been widely acknowledged that China funds academic studies on the South China Sea to advance its regional objectives.[187] Yet the precise extent to which the Chinese government was involved before the publication of the *Critical Study* and the *Legal Critique* remains uncertain. It does, however, appear that both articles have been directly influenced through the government's "non-participatory participation" model.[188] Such levels of indirect or informal influence reflect Anthea Roberts's observation about differing international legal cultures and, specifically, the tendency of China's international lawyers—through CSIL and CJIL—to affirm state positions.[189]

### 4. *Capacity to Spread Norms Through Repetition and Lawmaking Diplomacy*

Both works allowed China to indirectly engage in the lawmaking and persuasive contests that followed the implementation of UNCLOS and the arbitration. China's "non-participatory participation" approach facilitated these efforts. It allowed China to refuse to cooperate with formal international proceedings—in this instance, the Arbitral Tribunal's proceedings—while simultaneously advancing its agenda through independent legal argu-

184. *See* Guilfoyle, *Taking the Party Line*, *supra* note 182.

185. Bing Ling, *China's Attitude to the International Legal Order in the Xi Era: The Case of the South China Sea*, JAPAN INST. INT'L AFFS., https://www2.jiia.or.jp/en/article_page_pr.php?id=7 [https://perma.cc/S6WZ-7KN7]. Ling translated the Working Report of the Council of CSIL (2013–18) from Chinese, available at https://mp.weixin.qq.com/s/Xv8Kij_bDuqMETULvUfMqg [https://perma.cc/R92P-XJYF].

186. *See* Simon Chesterman, *Can International Law Survive a Rising China?*, 31 EUR. J. INT'L L. 1507, 1510–11 (2020).

187. *See* Anthea Roberts, *China's Strategic Use of Research Funding on International Law*, LAWFARE (Nov. 8, 2017), https://www.lawfareblog.com/chinas-strategic-use-research-funding-international-law [https://perma.cc/XPR2-6V68].

188. Wim Muller, *A Return to the Rule of Law in the South China Sea?*, CHATHAM HOUSE (Nov. 11, 2015), https://www.chathamhouse.org/2015/11/return-rule-law-south-china-sea [https://perma.cc/UPF7-YCZ3] (noting how China sought to engage with and influence the Tribunal proceedings without formally participating in the proceedings).

189. ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL?, *supra* note 162, at 242, 250–54 (noting that, in confidence, Chinese scholars have confirmed it is nearly impossible to express views contrary to the government's position).

ment.[190] These efforts to both neglect and influence are bolstered by state-academic lawmaking engagements which provide "third-party" substantive accounts that align with, and then advance, the state's lawmaking objectives.

The *Critical Study* became the point of reference for efforts to advance China's lawmaking agenda in relation to the South China Sea.[191] The claim that continental states may assert archipelagic status under customary international law has been advanced by both Chinese scholars and state officials at various lawmaking junctures. In the 2018 report by the International Law Association's Committee on Baselines under the International Law of the Sea, committee member Yee (who also served as CJIL's editor-in-chief and authored the editorial note defending the independence and integrity of the *Critical Study*) objected to the report's reliance on the arbitration awards without considering the *Critical Study*.[192] Yee argued that the *Critical Study* offered sufficient evidence to demonstrate the existence of a customary norm under which continental states may claim rights in an outlying archipelago.[193]

Both domestically and internationally, efforts to enhance the persuasiveness of China's legal claims in the South China Sea were bolstered through the *Critical Study*. The article's visibility, and the accompanying policy papers included in its annexes, were amplified by the Foreign Languages Press of China. Favorable reports followed. State-controlled media platforms, including China Daily and Xinhua, promoted the report in notably similar terms.[194] Official state websites such as *China Military* published similar stories.[195]

These patterns of affirmation and repetition continued following the 2020 publication of the *Legal Critique*. Various state-controlled media platforms, including the *Global Times* and *China-U.S. Focus*, provided favorable

190. Muller, *supra* note 188.

191. *See, e.g.*, Jinyuan Su, *The Unity Status of Continental States' Outlying Archipelagos*, 35 Int'l J. Marine & Coastal L. 801, 802 (2020); *see also* Hua Zhang, *The Application of Straight Baselines to Mid-Ocean Archipelagos Belonging to Continental States: A Chinese Lawyer's Perspective*, *in* Implementation of the United Nations Convention on the Law of the Sea 115 (Dai Tamada & Keyuan Zou eds., 2021).

192. *See* Int'l L. Ass'n, Baselines Under the International Law of the Sea 66 (Coalter G. Lathrop, J. Ashley Roach & Donald R. Rothwell eds., 2018); *see also* Liu Chenhong, *The Development of the Law of the Sea Convention: The Role of International Courts and Tribunals*, 20 Chinese J. Int'l L. 201, 203–04 (2021) (book review) (advancing a similar claim to Yee, that the authors of the ILA Study should have considered the *Critical Study*).

193. Int'l L. Ass'n, *supra* note 192, at 125.

194. *See Study on South China Sea Arbitration Awards Published*, China Daily (May 14, 2018), http://www.chinadaily.com.cn/a/201805/14/WS5af94ec3a3103f6866ee842a.html [https://perma.cc/5NKS-G6ZB]; *see also Study on South China Sea Arbitration Awards Published*, XinhuaNet (May 14, 2018), http://www.xinhuanet.com/english/2018-05/14/c_137178087.htm [https://perma.cc/H89M-ZJYL].

195. *Study on South China Sea Arbitration Awards Published*, China Military (May 14, 2018), http://eng.chinamil.com.cn/view/2018-05/14/content_8031571.htm [https://perma.cc/E8KZ-DDVT].

coverage, enhancing the article's visibility and findings.[196] The Chinese Armed Forces announced the report on its official website.[197] These reports mimicked the now familiar avowals that accompanied the publication of both articles and that served to enhance their persuasive reach. The *Legal Critique* was described as "an objective, fair and neutral third-party perspective that employs rigorous juristic analysis."[198] It was said to present "a comprehensive and systematic refutation of many fallacies and flaws in the award made by the Arbitral Tribunal in the Matter of the South China Sea Arbitration . . . in terms of legal interpretation and application, evidence admissibility and fact-finding."[199]

These efforts to use repetition to promote the findings of the *Critical Study* and the *Legal Critique* are purposeful. The outreach that followed the *Legal Critique*'s publication was explicitly intended to ensure that "the official release of the third-party critique in Western countries [helps] the international community to further perceive the truth, comprehend the political manipulations and legal defects of the South China Sea Arbitration, and understand from the perspective of international law the necessity and legitimacy of China's position in that China does not accept or participate in [the arbitration], and does not recognize the so-called 'award.'"[200] The *Legal Critique* was further promoted on Twitter by Lijan Zhao, the Spokesperson for the Chinese Foreign Ministry.[201] It also provided a seminal point of reference for H.E. Huang Xilan, China's Ambassador to the Philippines.[202]

The *Legal Critique* is, however, a more recent publication. While it exhibits all the features of a state-academic lawmaking initiative, not all state-academic lawmaking outputs enjoy similar visibility or impact. It remains to be seen whether, or to what extent, the *Legal Critique* will become a strategic point of reference, like the *Critical Study*, in subsequent lawmaking discussions regarding the law of the sea both generally and as a means of advancing China's strategic objectives in the South China Sea.

196. *See* Wu Shicun, *Give Burial at Sea to South China Sea Arbitration Ruling*, GLOBAL TIMES (Dec. 10, 2020), https://www.globaltimes.cn/content/1209567.shtml [https://perma.cc/2MPY-JFM8]; *see also* Wu Shicun, *Legal Experts' Refutation of South China Sea Arbitration Ruling*, CHINA-US FOCUS (Dec. 15, 2020), https://www.chinausfocus.com/peace-security/legal-experts-refutation-of-south-china-sea-arbitration-ruling [perma.cc/5USL-B5ZF].

197. *Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration*, CHINA MILITARY (Dec. 11, 2020), http://eng.chinamil.com.cn/OPINIONS_209196/Opinions_209197/9951180.html [https://perma.cc/5Z7X-BQRW].

198. *Id.*

199. *Id.*

200. *Id.*

201. @zlj517, Twitter (Dec. 7, 2020, 3:12 PM), https://twitter.com/zlj517/status/1335935207111675909 [https://perma.cc/C9DQ-P3F8].

202. H.E. Huang Xilan, *Truth is Truth to the End of Reckoning* (Dec. 8, 2020), http://ph.china-embassy.org/eng/sgdt/t1838518.htm [https://perma.cc/P2JD-KW9J].

## III. Understanding International Law Through State-Academic Lawmaking

The case studies demonstrate the spectrum of state-academic lawmaking in terms of the scholar(s) that write the article, the journals in which it appears, the form that the lawmaking output assumes, and the nature of the relationship between the scholar and state. There may be variations in the prestige of the respective journals or the professional esteem of the author. The spectrum of state-academic lawmaking also demonstrates that the resulting initiatives feature a complex combination of persuasive techniques. The case studies exhibit different forms of legal argumentation. The Schmitt and Merriam article and the *Critical Study* advance a post hoc lawmaking approach through the interpretation of existing norms and the identification of custom, whereas the *Bethlehem Principles* are a forward-looking initiative that aspires to proactively develop a particular field of law. Further, the proximity between the state and scholar and the transparency of this relationship differs amongst instances of state-academic lawmaking.

A lawmaking initiative's placement on this spectrum may influence its effectiveness.[203] It is reasonable to expect that a state-academic lawmaking initiative authored by an eminent scholar and that appears in a leading journal will generate greater attention, strengthening its persuasive pull. While such assessments of effectiveness can tell us much about the formation of law, our current intention has been to introduce the notion of state-academic lawmaking, identify the factors that drive this phenomenon, and understand how legal argument contributes to legal change.

Accordingly, this project is one of thick description. It is not our intention to present a comprehensive theory of informal lawmaking. Instead, we wish to tease out observations from the case studies that complicate understandings about how international law is made in an increasingly fraught world where, so often, competition usurps cooperation. By observing the microprocesses of state-academic lawmaking, we advance three observations about contemporary lawmaking practices that blend descriptive, comparative, and normative insights: (i) that the move from a vertical to a horizontal lawmaking approach evidences both the heightened role of persuasion and, as a result, a new dynamic between state and non-state actors in informal lawmaking processes; (ii) that a shift from behavior-driven efforts to alter international law to persuasion-focused attempts have implications for how power is understood within international law and relations, which, in turn, should inform normative considerations of informal lawmaking and has implications for the pluralization of lawmaking processes; and (iii) through the lens of what we term "comparative international lawmaking," those states

203. *See* Hughes, *How States Persuade*, *supra* note 15, at 904–07, 922–24, 942–44 (discussing the various factors that contribute to the effectiveness of international legal argument).

invested in informal lawmaking contests exhibit significant procedural similarities in how they advance international law. These similarities emphasize the importance of informal lawmaking despite the rhetorical emphasis of state-centric lawmaking by actors identified with both the democratic and authoritarian approaches to international law.

### *A. Persuasion and the Evolving Relationship Between State and Non-State Actors*

By observing the state-academic lawmaking process, we develop understandings of how international actors employ informal methods to create legal meaning. Often, recourse to informal lawmaking is viewed as a sociological phenomenon that has developed in response to collective action problems.[204] Such an understanding informs Kenneth Abbott and Duncan Snidal's finding that informal lawmaking reduces the high contracting costs associated with formal lawmaking initiatives.[205] The resulting assessments of informal lawmaking examine its structural and substantive desirability. They ask whether informal lawmaking incurs a democratic deficit, is sufficiently transparent, or if a particular legal claim—like a purported norm permitting the preemptive use of force or an outlying archipelago's generation of expansive economic zones—is legally sound.

But the importance of these assessments should not shroud ancillary insights about the contemporary function of international law itself. These are gained by observing the often-neglected argumentative *processes* that drive informal lawmaking. The case studies detailed above present accounts that confound prominent narratives about shifts from vertical to horizontal and formal to informal lawmaking preferences. Particularly, they demonstrate that within the informal lawmaking sphere (i) formal authority is insufficient and states must engage in persuasive exchanges to effectively advance their lawmaking objectives and (ii) the resulting non-state lawmaking initiatives should also be viewed as sometimes cooperating with, and not only as functioning in opposition to, those states most invested in creating international law.

By exploring areas where formal lawmaking is unlikely, this analysis begins where formal lawmaking ends. Each state featured in the case studies is a powerful actor. All have directed their power to shape international law in ways that align with their own interests.[206] Within informal settings, these

204. *See, e.g.*, Lilianna Andonova & Manfred Elsig, *Informal International Lawmaking: A Conceptual View from International Relations*, *in* INTERPRETATION IN INTERNATIONAL LAW 63, 65 (Andrea Bianchi et al., 2015); *see also* Pollack & Schaffer, *supra* note 14, at 246.

205. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434 (2000); *see also* Andrea Bianchi, *Reflexive Butterfly Catching: Insights from a Situated Catcher*, *in* INTERPRETATION IN INTERNATIONAL LAW 200 (Andrea Bianchi et al., 2015) (applying an empirical method to reach a similar conclusion).

206. *See generally* Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873 (2003) (describing that there need not be a detailed analysis of a legal situation for a hegemonic power to

efforts have traditionally advanced through behavior or conduct.[207] State actions—similar to what Monica Hakimi terms unfriendly unilateralism—can generate law by creating new norms, reinforcing existing ones, or advancing a particular legal objective.[208] However, the participatory dynamics of informal lawmaking have empowered non-state lawmaking contributions. Sometimes, these contributions become the focal point of normative debates that drive legal change. The loss of control exemplified through an initiative like the ICRC *Study on Customary IHL* prompted states to realize that as lawmaking initiatives shifted to informal spaces, that states, too, must participate in informal lawmaking to persuasively shape international law.[209]

But as lawmaking initiatives increasingly migrate towards these informal spaces, successful lawmaking becomes contingent on additional characteristics.[210] Within the formal sphere, the state remains the central actor. Though non-state actors like NGOs significantly inform these processes, state formality matters. Within the informal sphere, however, the state's formal authority maintains some persuasive power but, importantly, can also be a detriment.[211] The powerful state that wields its authority to craft informal law is viewed skeptically, as disrupting a more harmonious international law in pursuit of self-interest.[212] While informal lawmaking may still be preferred because of its ability to lessen transaction costs and provide output where formal processes are unavailable, circumventing formal processes inevitably entails legitimacy deficits.[213] This is because features like the need to build state consensus through lengthy deliberative processes create the inefficiencies that informal lawmaking seeks to bypass but are also what give international law legitimacy.

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affect international law); *see generally* Delev F. Vagts, *Hegemonic International Law*, 95 Am. J. Int'l L. 843 (2001).

207. *See, e.g.*, Yotam Feldman & Uri Blau, *Consent and Advise*, Haaretz (Jan. 29, 2009), http://www.haaretz.com/consent-and-advise-1.269127 [https://perma.cc/2DNT-JATN] (quoting Daniel Reisner, the former head of the Israel Defense Force's International Law Division, who stated that "if you do something for long enough, the world will accept it").

208. Monica Hakimi, *Unfriendly Unilateralism*, 55 Harv. Int'l L. J. 105, 107 (2014).

209. *See, e.g.*, Shereshevsky, *Back in the Game*, *supra* note 15, at 36–37 (describing the shift from behavior-driven IHL lawmaking to informal lawmaking); *see also* Heike Krieger & Jonas Püschmann, *Law-making and Legitimacy in International Humanitarian Law*, *in* Law-Making and Legitimacy in International Humanitarian Law 2–3 (Heike Krieger & Jonas Püschmann eds., 2021) (describing how this led states to "reclaim" their role in the lawmaking process).

210. *See* Pollack & Schaffer, *supra* note 14, at 242 (suggesting that formal and informal lawmaking can work in tandem but states prefer one approach or the other on the basis of distributive conflict).

211. *See* Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law*, 55 Colum. J. Transnat'l L. 343, 369 (2016).

212. Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, *in* United States Hegemony and the Foundations of International Law 135, 174 (Michael Byers & Georg Nolte eds., 2003) (arguing that efficiency does not justify moving beyond a state equality approach to lawmaking).

213. Hakimi, *supra* note 208, at 108 (arguing that informal, unilateral, lawmaking initiatives can be a net good for international law); *see also* Andrew T. Guzman, *Against Consent*, 52 Va. J. Int'l L. 747 (2012) (arguing that non-consensual lawmaking is necessary to overcome legal stagnation).

Within informal lawmaking environments where an inherent legitimacy deficit exists, persuasion assumes heightened importance. State-academic lawmaking demonstrates how even the most powerful states pursue persuasive processes when simple appeals to state formality are insufficient to drive lawmaking agendas. This is because, as Eyal Benvenisti notes, mere power does not translate easily into law.[214] Accordingly, the microprocesses of informal lawmaking become techniques to increase a legal claim's persuasiveness in ways that do not simply rely on the state's power or formal authority. State-academic lawmaking blends the state's authority with academic objectivity. Legitimacy, lacking from unilateral lawmaking, is therefore discerned from the state's status *and* the professed neutrality of the scholar that advanced the claim and the journal in which it appears.

This challenges understandings of the role that non-state actors assume within informal lawmaking processes. Independent experts, like NGOs, have long been recognized as important actors that contribute to lawmaking initiatives.[215] Such contributions have been acknowledged at least since former Canadian Foreign Minister Lloyd Axworthy heralded state-NGO partnerships as a "new multilateralism."[216] Axworthy was describing the Ottawa Process that led to the 1997 Mine Ban Treaty which was advanced by a highly coordinated state-NGO coalition.[217] Accordingly, non-state lawmaking contributions are assumed as oppositional to powerful state interests.[218] Middle power states and influential non-state actors form coalitions that are strong enough to create international law even when resisted by powerful states. The resulting coalitions pursue formal law. Informal lawmaking may facilitate this purpose but is not typically viewed as an end in itself.

State-academic lawmaking challenges the narrative of the non-state actor as a check on powerful state activity. At once we assume that within lawmaking spaces, non-state actors oppose the state's unilateral pursuit of power and that powerful states resist the lawmaking contributions of non-

214. Eyal Benvenisti, *"Coalitions of the Willing" and the Evolution of Informal International Law*, *in* COALITIONS OF THE WILLING: AVANTGARDE OR THREAT? (Christian Calliess et al. eds., 2007).

215. *See* Jean d'Aspremont, *From a Pluralization of International Norm-making Processes to a Pluralization of the Concept of International Law*, *in* INFORMAL INTERNATIONAL LAWMAKING 185 (Joost Pauwelyn et al. eds., 2012); *see also* Kal Raustiala, *NGOs in International Treaty-Making*, *in* THE OXFORD GUIDE TO TREATIES 173 (Duncan B. Hollis ed., 2012).

216. Lloyd Axworthy, *Towards a New Multilateralism*, *in* TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES 452 (Maxwell Cameron et al. eds., 1998).

217. *See* Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000); *see also* Krieger & Püschmann, *supra* note 209, at 4 (describing the role of non-state actors in various lawmaking initiatives).

218. *See* Pollack & Schaffer, *supra* note 14, at 242 (finding high levels of distributive conflict between strong states and weak states and private actors with the latter using informal procedures to undermine the formal rules established by the powerful states).

state actors.[219] Recall the words of former Australian Attorney General George Brandis who lamented the loss of state control over lawmaking processes or the 2016 International Law Association report which cited the problematic rise of non-state actors in the lawmaking sphere.[220] Instances of state-academic lawmaking confound the roles we attribute to lawmaking actors. They show that even the most powerful states, those entities with hegemonic design, rising global ambitions, or those that are enmeshed in regional conflict, can become reliant upon, and thus also cooperate with, non-state actors to advance informal lawmaking objectives. State-academic lawmaking is therefore built upon an inherent irony—those powerful states that have long repudiated the lawmaking capacity of non-state actors are now reliant upon those same actors to maintain their lawmaking power.

Within the informal lawmaking sphere, lawmaking authority is fluid. By seeking external validation, states lessen their authority and, consequently, bolster the lawmaking value of the academic contribution. As Duncan Hollis notes, "[E]xpanding the range of those with interpretative authority does not just reconstruct what international law 'is' but also who makes it."[221] This, in turn, complicates assumptions about how states pursue and exercise power within the international sphere.

### *B. A Varying Conception of Power*

Power has long assumed a central role in the study of international relations. Realists, like Hans Morgenthau and John Mearsheimer, believe that power conditions state behavior.[222] For Morgenthau, power and objective are inextricably linked. The former provides the means to achieve the latter.[223] The use of power to secure an objective need not manifest through the use or threat of force. Morgenthau's account separates the exercise of political and military power but within international politics, traditional realist accounts understand armed strength as "the most important material factor making for the political power of a nation."[224] Liberal and constructivist approaches also place power at the center of their respective discourses. Their views of power differ from the realist. Though liberals reject the inevitability of power politics and constructivists link the exercise of power to norm creation, each acknowledges that power, as they conceive it, assumes a determin-

219. *See, e.g.*, Michael Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris*, 50 Tex. Int'l L.J. 189, 209 (disparaging the increasing role that non-state actors play within IHL lawmaking).

220. International Law Association, *Non-State Actors*, Final Report, Johannesburg Conference 16 (2016).

221. Duncan B. Hollis, *Sources in Interpretation Theories: An Interdependent Relationship*, *in* The Oxford Handbook of the Sources of International Law 422, 440 (Samantha Besson & Jean d'Aspremont eds., 2017).

222. Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (1979); *see also* John Mearsheimer, The Tragedy of Great Power Politics (2001).

223. Morgenthau, *supra* note 222, at 31.

224. *Id.* at 33.

ing role within the international sphere.[225] Whether understood as a brute exercise or through diverse expressions, these competing conceptions reliably prioritize power's coercive nature.

Yet, conceptualizations of how power manifests and is exercised by states remain thin.[226] Such under-conceptualization is pronounced in relation to international law, long subject to contrasting projections about its relationship to power, the imagination of which is blunted by a rigid reading of the state equality doctrine.[227] Traditionally, paradoxical views about international law's relationship to power affected understandings of international law's purpose. International law was either rendered ineffective by the state's unabridged pursuit of power or it was positioned as a bulwark against the state's unbridled application of that same power.[228] As Martti Koskenniemi observes, both visions share the belief that international law and power are distinct.[229] But, separation would give way to dependency. A range of scholars, representing an array of perspectives, came to view power as an indispensable factor in law.[230] International law—whether through its links to state behavior or in the service of state interests—became inseparable from state power.[231]

Regardless of one's theoretical priors, considerations of power provide important subtexts to much ontological thinking about international law.[232] But these accounts often fixate on the normative desirability of how power is expressed through law, preferencing outcome above process.[233] State-academic lawmaking offers insight into how power is practiced within the lawmaking sphere. The above case studies each document legal engagements by powerful states whose commitment to international legal processes is often questioned.[234] Frequently, critics assume that these entities, with hegemonic or militaristic designs, either pursue expansionist international law or work to weaken international institutions through coercion.[235] Michael Byers

225. *See, e.g.*, ROBERT O. KEOHANE & JOSEPH S. NYE, JR., POWER AND INDEPENDENCE (4th ed. 2011); *see also* STEFANO GUZZINI, POWER, REALISM AND CONSTRUCTIVISM (2011).

226. Tuomas Forsberg, *Power in International Relations: An Interdisciplinary Perspective*, *in* INTERNATIONAL STUDIES: INTERDISCIPLINARY APPROACHES 207, 208–09 (Pami Aalto et al. eds., 2011).

227. *See* Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 113 (1995).

228. *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 370–72 (describing various conceptions of the relationship between international law and power).

229. Koskenniemi, *supra* note 71, at 98 (2004).

230. *See* W. Michael Reisman, *A Theory about Law from the Policy Perspective*, *in* LAW AND POLICY 75 (D.N. Weisstub ed., 1976).

231. *See* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 4 (1994) (stating that law is the "interlocking of authority with power").

232. *See* Reisman, *supra* note 230, at 86.

233. The New Haven School offers an important exception.

234. *See, e.g.*, Koskenniemi, *supra* note 71, at 198 (describing a transatlantic divide that saw the United States turn away from international institutions in favor of unilateralism).

235. *See, e.g.*, Krisch, *supra* note 228, at 379 (noting that dominant states oscillate between the instrumentalization of and withdrawal from international law).

notes that while all states are equally entitled to participate in lawmaking processes, powerful states are advantaged.[236] Beyond their well-financed diplomatic corps, Byers notes that the powerful state possesses unmatched military, economic, or political strength that can be applied to thwart undesired outcomes or pursue a preferred international end.[237]

The case studies do document such occurrences. But by observing the informal lawmaking process, we see a vision of power that is distinct from traditional views about how law is created.[238] In each instance, the powerful state does not simply attempt to shape international law self-referentially. They do not rely on coercion or allude to their own strength to impose a hegemonic legal vision through state behavior (*e.g.*, the law is what we do) or formality (*e.g.*, states are the sole lawmaking actor). This sentiment is most directly captured in the *Bethlehem Principles*, which state that "an essential element of any legal principle is that it must be capable of objective application and must not be seen as self-serving—that is, in the interests of one state, or a small group of states, alone."[239] The powerful state is no longer only that which possesses military capacity or economic clout. It is also the state that dedicates resources to and exhibits a mastery of making and applying purportedly neutral rules that structure the international community.

This more encompassing notion of power should inform how we assess state-academic lawmaking and, more generally, the value of informal lawmaking. Often, normative evaluations of informal lawmaking consider questions of democratic accountability.[240] They balance the benefits of informality with the legitimacy of formality by pondering whether international law should relinquish the bright-line certainty of formalism to embrace a more efficient lawmaking technique.[241] Yet, these considerations are almost exclusively focused on the actions of, mostly powerful, *states*.[242] If we expect that these powerful states will merely pursue initiatives designed to reshape the international legal order to align with their interests, state-academic lawmaking may be dismissed as mere window-dressing, an academic

236. Byers, *supra* note 227, at 115; *see also* B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT'L L. 1, 12 (2004).

237. Byers, *supra* note 227, at 115.

238. *See, e.g.*, Michael J. Glennon, *Law, Power, and Principles*, 107 AM. J. INT'L L. 378, 380 (contrasting an explicitly coercion-based system run by powerful states and a consent-based system run by weaker states).

239. Bethlehem, *supra* note 20, at 774.

240. *See, e.g.*, Pauwelyn, *Framing the Concept*, *supra* note 7, at 22; *see also* Amtenbrink Fabian, *Toward an Index of Accountability for Informal International Lawmakers?*, *in* INFORMAL INTERNATIONAL LAWMAKING 337 (Joost Pauwelyn et al. eds., 2012); Eyal Benvenisti, *Toward a Typology of Informal International Lawmaking Mechanisms and their Distinct Accountability Gaps*, *in* INFORMAL INTERNATIONAL LAWMAKING 297 (Joost Pauwelyn et al. eds., 2012).

241. *See* Joost Pauwelyn, *Is It International Law or Not, and Does it Even Matter?*, *in* INFORMAL INTERNATIONAL LAWMAKING 125, 151 (Joost Pauwelyn et al. eds., 2012).

242. *See* Benvenisti, *Coalitions of the Willing*, *supra* note 214, at 299 (noting that considerations of informal lawmaking focus solely on the activities of government officials).

sleight-of-hand intended to cloak the state's naked self-interest in purportedly neutral garb.

State-academic lawmaking, however, represents an informal lawmaking technique that demands that we look beyond the state. As previously discussed, it elevates the role of non-state actors. If we understand international law as more than a means to facilitate self-interest, if we view it as a discursive medium that structures how arguments are advanced, then the informal techniques described here offer broader explanatory potential. Existing assessments of whether informal lawmaking's value compensates for reduced accountability should further consider whether it can also pluralize lawmaking processes by diversifying the voices that participate in these discursive exchanges.

Assessments of this potential must, however, begin by acknowledging that we remain distant from the political realization of substantive state equality. All states do not possess a similar ability to shape international law. It is thus reasonable to assume that the advantages that powerful states enjoy within formal lawmaking processes translate to the informal lawmaking sphere. Such informal advantage follows from the capacity of states to invest what the social psychologists John French and Bertram Raven described as "information power" in informal lawmaking initiatives.[243] But while the power to invest resources in informal lawmaking may favor powerful states, it is not exclusive to them. Lawmaking initiatives led by non-state actors, like the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* or its 2011 *Guide to Practice on Reservations to Treaties*, can become as influential as state-led processes.[244]

While resulting assessments of state-academic lawmaking may begin by recognizing that the participants in the case studies are powerful actors that possess ample resources to invest in lawmaking processes, they should consider that this may extend to provide a more inclusive lawmaking technique. It remains to be seen whether those states with less resources and small foreign ministries are willing or able to consistently invest in such processes by, for example, galvanizing academic contributions to pursue a lawmaking objective. But soft or informal lawmaking initiatives have long held such an appeal to subaltern actors seeking social transformation.[245] B.S. Chimni describes efforts to elevate voices, interpretations, and legal strategies that enhance the welfare of subaltern classes. The resulting projects can bolster the

243. John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power* 259, 267, *in* STUDIES OF SOCIAL POWER (D. Cartwright ed., 1960); *see also* Bertram H. Raven, *Social Influence and Power*, *in* CURRENT STUDIES IN SOCIAL PSYCHOLOGY 371 (I.D. Steiner & M. Fishbein eds., 1965).

244. *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002); *see also* Int'l L. Comm'n, *Guide to Practice on Reservations to Treaties*, U.N. Doc. A/66/10/Add.1 (2011); Danae Azaria, *'Codification by Interpretation': The International Law Commission as an Interpreter of International Law*, 31 EUR. J. INT'L L. 171 (2020) (discussing the influential role of the ILC in advancing informal lawmaking initiatives).

245. Chimni, *supra* note 236, at 4.

inclusion of lawmaking "outsiders" which is essential, as Chimni notes, because often and in many ways, "international law is what international lawyers say it is."[246] We are beginning to see evidence of informal lawmaking's accessibility, for example, through the observation that states from the Global South have expended significant resources to articulate their legal positions in debates concerning the regulation of autonomous weapons.[247]

Thus far, however, by observing instances of state-academic lawmaking, we see that it remains mostly powerful states that play the informal lawmaking game. No longer tied to an era of pure unilateralism or suggestions that the actions or practice of the most effected (powerful) state should bestow lawmaking capacity, these states now pursue an often expansionist and professedly objective vision of international law through argument and persuasion. But, even amongst the powerful states that feature here, we assume divergent approaches to the ways that these states engage with international law. State-academic lawmaking complicates this narrative, too.

### C. *Comparative International Lawmaking*

If power is a commonality between each of the featured states, ideology is often presented as a difference. A democratic-authoritarian divide is applied to describe states whose international legal engagements are informed by their broader political orientation.[248] This schism—between states that purportedly favor norms and institutions that balance sovereignty and rights and states that emphasize legal rules to ensure regime survival—frames understandings about how powerful states seek to develop international law and, as a result, predict how international law will be affected by contemporary challenges to the post-War liberal order.[249] If we apply a comparative international law lens to further understand the resulting legal engagements, one will presumably find that those states invested in shaping international law pursue their ends through divergent means. Comparativists, like Anthea Roberts, have convincingly documented how states like the United States and China embrace conflicting understandings about the role and purpose of international law.[250]

But, by observing the microprocesses of *how* states are advancing their respective lawmaking agendas through informal processes, we see that not-

246. *Id.*

247. *See, e.g.*, Ingvild Bode, *Norm-Making and the Global South: Attempts to Regulate Lethal Autonomous Weapons Systems*, 10 Global Pol'y 359 (2019).

248. *See, e.g.*, Tom Ginsburg, Democracies and International Law (2021); *see also* Tom Ginsburg, *Authoritarian International Law?*, 114 Am. J. Int'l L. 221 (2020).

249. Ginsburg, *Authoritarian International Law*, *supra* note 248, at 223; *see also* Tom Ginsburg, *How Authoritarians Use International Law*, 31 J. Democ. 44 (2020); Gleider Hernández, *E Pluribus Unum? A Divisible College?: Reflections on the International Legal Profession*, 29 Eur. J. Int'l L. 1003, 1016 (2018).

250. *See, e.g.*, Anthea Roberts et al., *Conceptualizing Comparative International Law*, *in* Comparative International Law 3–4 (Roberts et al. eds., 2018); *see also* Roberts, Is International Law International, *supra* note 162, at 209; Martti Koskenniemi, *The Case for Comparative International Law*, 20 Finnish Y.B. Int'l L. 1 (2009).

withstanding rhetorical differences, methodological similarities exist. The described instances of state-academic lawmaking evidence the comparable use of persuasive tactics by states whose strategic approach to international law may otherwise appear distinct. While international legal comparativists have considered lawmaking approaches, these assessments view lawmaking as a formal pursuit that is not distinguished from the state's broader legal engagements.[251] This led Tom Ginsburg to conclude that when contrasting democratic and authoritarian approaches, democracies are "more likely than autocracies to conclude treaties, to litigate cases before international tribunals, and to engage in international lawmaking bodies."[252] While this may well be true, such formal legal engagements only tell part of the story about how states—democratic, authoritarian, or otherwise aligned—engage with international law and what these engagements mean.

A comparative understanding of international lawmaking that emphasizes informal legal engagements supplements existing narratives. Rather than assessing the substance of legal norms, a comparative international lawmaking approach emphasizes how law is developed by states, with divergent ideological perspectives, that seek to control international legal content. From this perspective, we advance two claims that are intended to complicate understandings of the supposed authoritarian-democratic divide and how this affects prospects for legal change during an era of dwindling international cooperation. First, the methodological similarities evidenced in the state-academic lawmaking case studies are more significant than traditional comparative assessments of how states engage with international law may suggest. This demonstrates that within the informal lawmaking sphere, state and non-state actors alike accept that legal argument and persuasion are required to induce legal change. Second, there is reason to question the exclusivity of the state in the vision of international law that is often associated with, or endorsed by, authoritarian states like China and Russia. By observing the microprocesses of state-academic lawmaking, we see the prevalence of a pluralistic approach to lawmaking that, at least, moderates the likeliness of a return to a so-called Westphalian international law.

### 1. *Understanding Similarities Through Difference*

The described instances of state-academic lawmaking all feature notable differences. Yet overemphasizing the substantive significance of such difference risks obscuring important methodological similarities. From a comparative perspective, China's international legal engagements receive heightened attention. This attention is spurred by China's rising geopolitical status and its position as the most influential disrupter of the tradition-

251. *See, e.g.*, Andreas Motzfeldt Kravik, *An Analysis of Stagnation in Multilateral Law-Making – And Why the Law of the Sea has Transcended the Stagnation Trend*, 34 LEIDEN J. INT'L L. 935, 952 (2021).

252. Ginsburg, *Authoritarian International Law*, *supra* note 248, at 227.

ally Western-dominated international legal order.[253] Such attention, however, also reflects the belief that China's engagements with international law are fundamentally different. It is frequently suggested that Chinese international lawyers, including scholars, offer uniform support for their government's positions.[254] This has informed assessments of the *Critical Study* which featured prominently within China's informal lawmaking efforts in the South China Sea. Marko Milanovic has suggested that the *Critical Study* is qualitatively different from other international law scholarship, the authors of which often assume oppositional approaches to their state's positions.[255] Similarly, but with further nuance, Douglas Guilfoyle differentiates the *Critical Study* from other scholarship by noting that it was authored by a national scholarly society.[256] When understood as contributing to informal lawmaking efforts, these observations imply that the Chinese approach should be distinguished from that of other jurisdictions.

There are, of course, notable differences between the *Critical Study* and more general academic articles that typically appear in English-language journals, including the works featured in the other case studies. First, the form of the *Critical Study* is atypical. It is over 500 pages in length and, as Guilfoyle notes, collectively authored by the CSIL. This is discernable from a traditional academic article that is of more modest length and features named authors. Second, the *Critical Study* contains aggressive rhetoric. The authors harshly condemn the Arbitral Tribunal and fail to provide the more balanced assessments often found in other academic writing.[257] The rhetorical thrust of the *Critical Study* contrasts, for example, with the Schmitt and Merriam article which while generally endorsing Israel's positions, does acknowledge areas of controversy and divergence.[258] Third, while the *Bethlehem Principles* and the Schmitt and Merriam articles stress their formal independence, they also acknowledge how their respective outputs were informed by

253. Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 Am. Soc'y Int'l L. Proc. 267 (2000) (describing how China has become more assertive in shaping international legal rules).

254. *See* Anthea Roberts, *Crimea and the South China Sea: Connection and Disconnects Among Chinese, Russian, and Western International Lawyers*, *in* Comparative International Law 111, 121 (Roberts et. al. eds., 2018) (describing near unanimous support by Chinese international lawyers for the Chinese government's view that the Arbitral Tribunal lacked jurisdiction); *see also* Mathew Erie, *China and Comparative International Law: Between Social Science and Critique*, 22 Chi. J. Int'l L. 59 (2021); Chesterman, *supra* note 186, at 1510–11; Hernández, *E Pluribus Unum, supra* note 249, at 1017–18.

255. Guilfoyle, *Taking the Party Line*, *supra* note 182 (in which Milanovic comments that "it is definitely NOT the normal way elsewhere for international law academics to be arguing for the national interests of their country").

256. Guilfoyle, *A New Twist*, *supra* note 165.

257. *See, e.g.*, CSIL, *Critical Study*, *supra* note 22, at 218 (stating that the Awards "have complicated the related issues. They have impaired the integrity and authority of the Convention, threaten to undermine the international maritime legal order, run counter to the basic requirements of the international rule of law, and also imperiled the interests of the whole international community").

258. Schmitt & Merriam, *Tyranny of Context*, *supra* note 21, at 98, 120–21 (diverging from Israel's view that the environment is not a civilian object, and partly objecting to the Israel view that a residential building loses protection if one apartment becomes a military target).

state contributions. The *Critical Study*, however, lacks any reference to its, or the CSIL's, ties to China. And fourth, as suggested above, when Chinese scholarship is assessed through the comparative international law literature, the findings note that Chinese scholars tend to conform to the party line.[259] Such conformity between scholar and state may indeed be pronounced in China and is certainly not assumed, prima facie, to exist in the jurisdictions in which the other case studies situate.

But if we turn our comparative gaze from scholarship to informal lawmaking, we see few qualitative differences in how the respective states have advanced purportedly independent academic work to impose legal meaning. The form of an informal lawmaking initiative may, however, affect its reception. Comments about how the style of the *Critical Study* distinguishes it from legal scholarship found in English-language law journals may influence the initiative's persuasiveness. But we are not currently focused on assessments of effectiveness. However, the general tendency of legal academics in a particular jurisdiction to either support or resist state policy should have no bearing on assessments of whether, in a specific case, academic work is strategically advanced in service of such policy. Comparative assessments of the informal lawmaking strategy advanced by both the *Bethlehem Principles* and the *Critical Study* should not, for example, be swayed by the insistence that otherwise British legal scholars "are often the most vocal critics" of their government's conduct.[260]

But instead of focusing on assessments of effectiveness, the observations gained from the case studies are intended to facilitate understandings of how international law functions through informal lawmaking processes. From a strategic or process-orientated perspective, the similarities between the three case studies provide greater comparative fodder. As documented in Section II, such substantive similarities are observed through: (i) *Presentation*: each article appears in a leading legal journal and accentuates its scholarly form to indicate the independence of the respective legal claims; (ii) *Persuasiveness*: building upon the independence implied by the publication venue and academic form, each article references the expertise of its author(s) to bolster the authority of the specific legal analysis; (iii) *Facilitation*: each article provides greater explanatory legal reasoning that aligns with the adjoining state(s) desired legal outcome in relation to a contested area of international law; and (iv) *Functionality*: each article can be understood, and is subsequently presented by state officials, as part of a broader, state-driven, lawmaking project.

These commonalities illustrate how each article serves an identical end. They are presented to mitigate the relative weakness of the associated state(s)'s informal efforts to shape international law. These lawmaking efforts

259. *See* ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL, *supra* note 162, at 254; *see also* Erie, *supra* note 254, at 59, 62–64 (describing the relationship between the Chinese academy and the state).

260. Guilfoyle, *Taking the Party Line*, *supra* note 182.

all appeal to the legitimacy and perceived independence of the academic publication to supplement the state's formal authority within the lawmaking sphere. Put simply, despite differences in form, each article amounts to an instance of state-academic lawmaking that employs similar tactics to enhance the persuasiveness of an informal legal claim.

Significantly, assumptions about how state and non-state actors engage with international law are complicated by these procedural similarities. We observe that disparate actors are incentivized to learn from one another, to liberally borrow lawmaking techniques and persuasive strategies notwithstanding their ideological orientation or formal lawmaking status. This evidences a belief amongst lawmaking actors that the audience of their legal appeals—the international legal community—is influenced by particular persuasive techniques. And it tells that in contrast to formal lawmaking where states hold an inherent, status-based advantage, in the informal lawmaking sphere, even powerful states must pursue persuasive practices just like those that are assumed of non-state actors. Collectively, this affirms that, separate from legal substance, legal argument matters.

### 2. *State-Centrality and the Future of International Law*

Lawmaking imposes legal change. If within the international sphere, formal lawmaking enacts change through state consent, informal lawmaking occurs without the rigid rules that traditionally guide the state's lawmaking contributions. Alterations in the international order coupled with the ability of emerging powers to articulate an alternative international legal vision that departs in important ways from the post-War order has led to countless prognostications about the future of international law.[261] Often, the resulting assessments are presented as challenges to the existing legal order.[262] As alluded to, these accounts frame such challenges as a contest between democratic states that wish to preserve the post-War status quo and authoritarian states that seek a state-centric or Westphalian vision of international law.[263]

The resulting assessments tell us much about how global shifts will affect the purpose and practice of international law. However, any assessment of legal change must account for the methods through which such change is pursued. The form of lawmaking most associated with authoritarian states is grounded in consent, reflecting sovereignty's centrality within the vision of

261. *See, e.g.*, Shirley V. Scott, *The Decline of International Law as a Normative Ideal*, 49 VIC. U. WELL. L. REV. 627 (2018); *see also* Karen J. Alter, *The Future of International Law*, *in* THE NEW GLOBAL AGENDA 25 (Diana Ayton-Shenker ed., 2018); HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW (2019); John B. Bellinger III, *The Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse?*, 51 CASE W. RES. J. INT'L L. 7 (2019).

262. *See, e.g.*, ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL, *supra* note 162, at 279 (describing how Russia and China challenge certain Western approaches to international law).

263. *See, e.g.*, Ginsburg, *Authoritarian International Law*, *supra* note 248; *see also* Katerina Linos, *Introduction to the Symposium on Authoritarian International Law: Is Authoritarian International Law Inevitable?*, 114 AJIL UNBOUND (2020).

international law that these states publicly endorse.[264] It is informed by documents like the *Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, which holds that "the principle of sovereign equality is crucial for the stability of international relations" and, accordingly, that "states have the right to participate in the making of, interpreting and applying international law on equal footing . . . ."[265] And it leads to the conclusion that "much of what authoritarians are doing is returning us to a world of Westphalian international law."[266]

But when viewed through the lens of state-academic lawmaking, there is cause to question the absoluteness of the state that frequently features within, and is attributed to, an authoritarian vision of international law. This state-centric vision encourages assumptions that the result of state-centrality is the decline of the non-state actor. Ginsburg suggests as much when he concludes his account of authoritarian international law by noting that "global civil society may matter less than ever" in an authoritarian-dominated world that brings back the state.[267] When extended to the informal lawmaking sphere, one could reasonably assume that those states whose international legal engagements are understood as reinforcing Westphalian notions of sovereignty would eschew informal processes in favor of an exclusively statist approach to lawmaking. However, now we see that even China, the state most associated with the authoritarian vision of international law, willingly engages in a pluralistic form of informal lawmaking that relies upon both the methods and status of non-state actors to promote its international legal interests.

While binaries like the authoritarian-democratic divide facilitate a straightforward understanding of how powerful states approach international law, calls for state-centric lawmaking are not only advanced by authoritarian states. States that have been described as leading the "democratic approach" to international law have at times expressed unwillingness to move beyond what has been described as the "billiard ball" model of the state in international law.[268] Yet despite such rhetoric, despite retrograde calls to return international law to states, observing the informal sphere shows that the dictates of reality are often stronger than avowed principles and that there is a gap between how states approach the law and how they

264. ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL, *supra* note 162, at 291–92.

265. *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, RUSSIAN FED'N MINISTRY FOREIGN AFFS. (June 25, 2016), https://docenti.unimc.it/andrea.caligiuri/teaching/2019/19859/files/natura-e-sviluppo-dellordinamento-internazionale-documenti/declaration-of-the-russian-federation-and-the-peoples-republic-of-china-on-the-promotion-of-international-law-2016 [https://perma.cc/J8UN-GGGJ].

266. Ginsburg, *Authoritarian International Law*, *supra* note 249, at 228 (Ginsburg adds that this is "primarily as a defensive measure").

267. *Id.* at 259.

268. *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L. L. 503, 507 (1995); *see also* Bellinger & Haynes, *supra* note 29 (U.S. response to the ICRC which emphasizes the exclusive lawmaking authority of the state).

approach the process of lawmaking. Thereby, while promoting their substantive positions in contested fields of law, the most powerful states can no longer act unilaterally to advance lawmaking agendas. Instead, they are participants in this current reality where the state does not enjoy absolute power and must avail itself of various informal techniques that are reliant on the contributions of non-state actors. Within this reality, legal change, and perhaps even legal progress, escapes the traditional hierarchical nature of international lawmaking and shifts towards a more horizontal relationship between states, including democratic and authoritarian regimes, and non-state actors.

## IV. Conclusion

It is rare to have an opportunity to write about writing, to focus on the main product of our academic lives—articles that appear in legal journals. From the pages of these journals, seemingly commonplace articles veil a more strategic purpose. While all legal academics can influence the law's trajectory—by describing something unseen, by offering a novel interpretation, identifying a hidden purpose, or through an irresistible normative claim—the articles described here are part of a broader lawmaking process that features state involvement. State-academic lawmaking is both a standalone phenomenon and a cipher. It evidences a purposeful form of lawmaking that relies on cooperation between state and non-state actors, coupling the formality of the former with the supposed independence of the latter. And it provides a lens to observe and further understand the processes and purposes of informal lawmaking.

Discussions about lawmaking often present binary choices: formal versus informal, hard or soft law. These contributions assume that the lawmaker opts for one approach and then describes the considerations that inform that choice. This allows us to understand why a lawmaking actor prefers one lawmaking path instead of another. But by observing the microprocesses that drive state-academic lawmaking, we see that lawmakers possess a plurality of lawmaking possibilities. When advancing a lawmaking initiative, the lawmaker may first choose whether to pursue a formal or an informal approach. While formal approaches are often guided by rules and conventions that direct the lawmaking strategy, opting for an informal method means that the lawmaking actor then faces several choices about the preferred persuasive strategy. This subsequent choice, about the means of persuasion, is as significant as the choice between a formal or informal approach to the development of international law.

This article has sought to better understand these choices by describing when they have been made and how they have been applied. It has, however, only begun to engage with the normative questions that flow from these choices. While many of these questions exceed our current scope, they

should nevertheless inform conversations about the role international law scholars and journals assume within lawmaking processes. One feature of these discussions concerns the appropriateness of the collaborative state-scholar relationship that drives the lawmaking initiatives described throughout. While existing legal literature ponders the positionality of the international law scholar, this rarely considers the role of the journals that provide the venue from which lawmaking initiatives are advanced.[269] Such questions are inescapable.

So, too, are assessments of the empirical validity of the identified lawmaking strategies. While state-academic lawmaking aims to enhance the persuasive power of the participating actors, it is also possible that it will undermine the resulting legal claim's effectiveness. If a non-transparent state-academic collaboration is branded as biased, as being driven by state-interest, or undermined due to the nature of the scholar-state relationship, it may impair the perceptions of prestige and independence that the state-academic lawmaking method intends to enhance. Legal scholarship and academic journals have long faced claims of state bias.[270] Adverse perceptions of state-academic lawmaking may further center these. One can read the letter from the editor-in-chief of the CJIL, which defended the independence of their peer-review process, as an attempt to mitigate the potential adverse effects of state-academic lawmaking. The factors that make a state-academic lawmaking claim effective and the potential, perhaps unintended, consequences of this lawmaking process remain open questions.

We are amid the empirical turn in international law.[271] Applying such methods to informal lawmaking outputs can bolster understandings of the factors that make a particular lawmaking appeal effective. This can also inform whether such informal paths are desirable. In this sense, this article concludes with a call for further research about the microprocesses and argumentative forms that push legal evolution. If the perceived appeal of state-academic lawmaking is vested, as we suggest, in its ability to accentuate the respective attributes of the state and the non-state actor within the lawmaking sphere, it is necessary to understand when and why iterations of this appeal work.

We now see that states are willing to direct resources towards informal lawmaking, that they believe these efforts can persuasively form new laws to

269. For important but adjacent discussions, *see* James Thuo Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 CHI. J. INT'L L. 71 (2021); NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2019 – YEARBOOKS IN INTERNATIONAL LAW: HISTORY, FUNCTION AND FUTURE (2021); Ignacio de la Rasilla, *A Very Short History of International Law Journals (1869–2018)*, 29 EUR. J. INT'L L. 137 (2018).

270. *See* Gathii, *supra* note 269, at 102–03; *see also* Lori Damrosch, *The "American" and the "International" in the American Journal of International Law*, 100 AM. J. INT'L L. 2 (2006).

271. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012); Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 CHI. J. INT'L L. 83 (2017); Yahli Shereshevsky & Tom Noah, *Does Exposure to Preparatory Work Affect Treaty Interpretation? – An Experimental Study on International Law Students and Experts,* 28 EUR. J. INT'L L. 1287 (2017).

legitimize actions that range from the use of force to territorial claims. The purpose of this article has been to describe the methods used to achieve these legal outputs. Regardless of how one assesses the validity of the respective legal outputs themselves, such assessments should also accept that informal lawmaking, and the methods described here, need not be the exclusive recourse of the powerful state. They may themselves offer a means of resisting undesired outputs and of developing international law progressively. As informal lawmaking initiatives are increasingly embraced, effective lawyering demands an appreciation of the tactics that drive these processes and that form the rules, norms, and argumentative practices that international lawyers ply. International law is constantly evolving, and understandings of legal change begin by understanding the means that drive such change.