
International Organizations and the Creation of Customary International Law

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Abstract

This article argues that international organizations ‘as such’ can contribute directly to the creation of customary international law for three independent reasons. First, the states establishing an international organization may subjectively intend for that organization to be able to contribute to the creation of at least some kinds of customary international law. Second, that capacity may be an implied power of the organization. Third, that capacity may be a byproduct of other features or authorities of the international organization – specifically, the combination of international legal personality and the capacity to operate on the international plane. Affirming international organizations’ direct role in making customary international law will not dramatically change the content of customary international law or the processes by which rules of customary international law are ascertained. But recognizing that role is significant because it will reinforce other conclusions about how international organizations fit into the international legal system, including that customary international law binds international organizations. Such recognition may also shift the way lawyers within international organizations carry out their work by affecting the sources they consult when answering legal questions, the materials they make publicly available and the kinds of expertise that are understood to be necessary to discharge their responsibilities. Finally, affirming international organizations’ role in creating customary international law may make international organizations more willing to comply with those rules.

Given how long international organizations have been around and how important they are, it is surprising how many fundamental questions about their place in the international legal system remain unsettled and controversial. One such question is whether international organizations can contribute directly to the formation of customary international law. Traditionally, customary international law has been understood to be the product of states’ practice and states’ *opinio juris* – that is, states’ views

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about what international law permits, requires or prohibits. International organizations clearly contribute indirectly to customary international law by shaping what states do and what they think.¹ International civil servants, especially those at the apex of their organizational charts, might influence states by endorsing or criticizing their conduct as consistent (or not) with customary law. In addition, international organizations supply forums where states can share information about their actions and stake out positions about the content and status of rules of customary law. Thus, for example, United Nations General Assembly (UNGA) resolutions are sometimes cited as evidence of a customary international law rule.²

But can international organizations contribute directly to customary international law? That is, do the practice and *opinio juris* of international organizations ‘as such’ count separately and apart from the views of their member states?³ To date, very little academic literature addresses this question. In 2018, the International Law Commission (ILC) adopted a set of draft conclusions on the identification of customary international law, including the draft conclusion that while ‘it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law’, ‘[i]n certain cases, the practice of international organizations also contributes’.⁴ The ILC’s work has been criticized for going too far. The USA, for one, rejects a direct role for international organizations.⁵ At the same time, the commission has also been criticized for not going far enough and for failing to take international organizations seriously.⁶

¹ International organizations play an autonomous role in catalyzing the development of customary international law by, among other things, engaging in operational activities that ‘trigger[] bouts of legal argumentation’ and provoking reactions from affected governments, see Johnstone, ‘Law-making through the Operational Activities of International Organizations’, 40 *George Washington International Law Review* (2008) 87.

² See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, at 99–100; *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic*, 17 ILM 1 (1978); see also Fox, Boon and Jenkins, ‘The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law’, 67 *American University Law Review* (2018) 649 (arguing that the United Nations Security Council (UNSC) resolutions likewise ought to be considered evidence of customary international law that is attributable to all United Nations (UN) member states, not only those states that participate in UNSC decision-making).

³ See M. Wood (Special Rapporteur), Third Report on Identification of Customary International Law, UN Doc. A/CN.4/682, 27 March 2015, para. 76 (raising this question).

⁴ International Law Commission (ILC), Report on the Work of Its Seventieth Session (ILC Draft Conclusions), UN Doc. A/73/10 (2018), at 117–156 (Draft Conclusion 4). See also *ibid.* Comment (4) to Draft Conclusion 4 (clarifying that, ‘[w]hile international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them’ – for example, by voting in favour of, or against, the adoption of resolutions by intergovernmental bodies).

⁵ ILC, Comments and Observations Received from Governments, UN Doc. A/CN.4/716, 14 February 2018, at 19–20.

⁶ See, e.g., Blokker, ‘International Organizations and Customary International Law’, 14 *International Organizations Law Review (IOLR)* (2017) 1.

This article argues that international organizations can and do directly contribute to the creation of customary international law. In other words, the ILC is correct, though its conclusions would benefit from a more fully developed account of when and why international organizations can so contribute. This article aims to provide that account. After Part 1 reviews the relevant literature and reactions to the ILC's work, Part 2 argues that there are three independent reasons why international organizations can contribute to the creation of customary international law. First, the states establishing an international organization may subjectively intend for that organization to be able to do so. Second, the capacity to contribute to customary international law may be an implied power of the organization. Third, this capacity may be a byproduct of other features or authorities of the international organization, specifically the combination of international legal personality and the capacity to operate on the international plane. This part treats the question of international organizations' capacity to contribute as a binary question. Part 3 then elaborates on the kinds of customary international law rules to which international organizations may contribute. Part 4 responds to some conceptual and methodological questions that critics have raised about the conclusion that international organizations contribute directly to customary international law. Part 5 addresses the direct and indirect consequences of this conclusion.

At the end of the day, acknowledging international organizations' direct role in the creation of customary international law will not dramatically change the content of customary international law or the processes by which rules of customary international law are ascertained. The circumstances in which international organizations can contribute directly are fairly discrete and limited. That is not to say, however, that international organizations' capacity to contribute directly to making customary international law does not matter. Instead, this conclusion matters primarily because it reinforces other conclusions about how international organizations fit into the international legal system. As a theoretical matter, recognizing that international organizations directly contribute to the formation of customary international law reinforces the conclusions that customary international law binds international organizations and that international organizations incur international responsibility when they violate international law. Both are important components for assuring the accountability of international organizations. As a practical matter, acknowledging that international organizations can contribute to the formation of customary international law may affect how lawyers within international organizations understand and carry out their work, and may also contribute to voluntary compliance with customary international law.

1 Background

To date, the question of whether, when and why international organizations contribute directly to the development of customary international law has garnered relatively little academic attention. Writing in 2005, Jan Klabbers identified a lack of detailed analysis and settled answers to these questions.⁷ Since then, he and some

⁷ Klabbers, 'International Organizations in the Formation of Customary International Law', in E. Cannizzaro and P. Palchetti (eds), *Customary International Law on the Use of Force* (2005) 179.

other scholars have identified several possible rationales for why international organizations – and, in some cases, other non-state actors as well – have the capacity to contribute to customary international law.

One possibility is state consent. That is, just as states can confer rights, obligations and enforcement capacities on non-state actors, so too can states confer the capacity to make treaties and customary international law.⁸ Along similar lines, states have sometimes recognized that certain ‘state-like’ entities have some legal status and capacity in the international legal system.⁹ For example, states have signed peace agreements with armed groups that control territory.¹⁰ Another possibility is that the capacity to make customary international law attaches to those entities that have obligations under that same source of law.¹¹ While it has some intuitive appeal, this rationale remains controversial because it would expand the universe of entities that can contribute to customary international law quite significantly.¹² The range of non-state actors with customary international law obligations is quite broad; in addition to international organizations, it includes individuals, armed opposition groups and perhaps corporations.¹³ Recognizing a role for all of these actors in making customary international law would reflect a dramatic departure from the *status quo*. Anthea Roberts and Sandesh Sivakumaran have endorsed a third possibility. They argue that non-state actors should have the capacity to create international law when and to the extent that doing so advances the ‘needs and interests of the international community as a whole’.¹⁴ On this basis, they support a limited role for armed groups in the norm-creation process.¹⁵

As noted above, the ILC has recently confirmed the capacity of international organizations to contribute to the formation of customary international law in certain cases, albeit without setting out a detailed rationale for why they can so contribute. The commission’s commentary indicates that the practice of international organizations, when accompanied by *opinio juris*, may contribute to rules (i) whose subject matter falls within the mandate of the organizations and/or (ii) that are addressed specifically to them.¹⁶ The commentary also provides some examples. These include when ‘States have transferred exclusive competences to [an] international organization’, as in the case of the European Union (EU).¹⁷ In addition, according to the ILC, international organizations may contribute when states have ‘conferred competences upon [an] international organization

⁸ Roberts and Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’, 37 *Yale Journal of International Law* (2012) 107, at 120.

⁹ *Ibid.*, at 120–121.

¹⁰ *Ibid.*, at 121.

¹¹ Klabbers, ‘Sources of International Organizations’ Law: Reflections on Accountability’, in S. Besson and J. d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (2017) 987, at 998.

¹² See, e.g., A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 28 (arguing non-state actors have international obligations but no role in making international law).

¹³ Roberts and Sivakumaran, *supra* note 8, at 121–123; Ochoa, ‘The Individual and Customary International Law Formation’, 48 *Virginia Journal of International Law* (2007) 119, at 121; Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale Law Journal* (2001) 443.

¹⁴ Roberts and Sivakumaran, *supra* note 8, at 125.

¹⁵ *Ibid.*, at 141.

¹⁶ ILC Draft Conclusions, *supra* note 4, at 131.

¹⁷ *Ibid.*, Comment (5) to Draft Conclusion 4.

that are functionally equivalent to powers exercised by States', citing as examples 'concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territories, or in taking positions on the scope of the privileges and immunities of the organization and its officials'.¹⁸

States had opportunities to react to the ILC's work by submitting comments to the commission and during discussions in the UNGA's Sixth (Legal) Committee. Fewer than 20 states addressed international organizations' capacity to contribute directly to customary international law.¹⁹ Among these states, the views were mixed. The majority endorsed the ILC's approach or affirmed that at least some international organizations can sometimes contribute directly to the formation of customary international law.²⁰ Some states expressed some combination of openness and caution.²¹ Two – Iran and the USA – denied that international organizations can do so.²² The USA addressed the issue at length, arguing that the view that international organizations can so contribute lacks support 'in the practice and *opinio juris* of States' and 'other authoritative sources'.²³ According to the USA, the suggestion that there is a 'direct role for the practice of international organizations as such in the formation of customary international law can only be understood as a proposal by the Commission for the progressive development of international law' – and a problematic one at that.²⁴

Only two international organizations participated in the Sixth Committee discussion. The EU's representative affirmed that the EU could contribute to customary international law without addressing whether other organizations could do likewise.²⁵ By

¹⁸ *Ibid.*, Comment (6) to Draft Conclusion 4.

¹⁹ For a compilation of these comments, see M. Wood (Special Rapporteur), Fifth Report on Identification of Customary International Law, UN Doc. A/CN.4/717, 14 March 2018, paras 36–39.

²⁰ *Ibid.*, at paras 36–37, n. 72. These states include Austria, China, Chile, Germany, the Netherlands, the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), Romania and Vietnam.

²¹ See, e.g., United Nations General Assembly (UNGA) Sixth Committee, Summary Record of the 21st Meeting, UN Doc. A/C.6/71/SR.21, 16 November 2016, para. 16 (Australia was open to the possibility that the practice of international organizations might contribute to the formation of custom 'in certain cases'); *ibid.*, para. 86 ('The United Kingdom took note of the divergence of views on the practice of international organizations'); UNGA Sixth Committee, Summary Record of the 22nd Meeting, UN Doc. A/C.6/71/SR.22, 22 November 2016, para. 40 (the representative of Singapore 'cited the need for caution in assessing the practice of international organizations').

²² UNGA Sixth Committee, Summary Record of the 23rd Meeting, UN Doc. A/C.6/71/SR.23, 14 November 2016, para. 15 (representative of Iran said that 'only the proven practice of States could be considered as evidence [of customary international law]'); Comments and Observations Received from Governments, UN Doc. A/CN.4/716, 14 February 2018, at 18–19 (comments of the United States that it is an 'inaccurate statement of the current state of the law' to suggest that 'the practice of entities other than States contributes to the formation of customary international law'). Israel initially took the view that international organizations as such could not contribute to customary international law, but acknowledged some exceptions in subsequent comments. Compare Summary Record of the 22nd Meeting, *supra* note 21, para. 39, with Comments and Observations Received from Governments, *ibid.*, at 15–16.

²³ Comments and Observations Received from Governments, *supra* note 22, at 19–20.

²⁴ *Ibid.*, at 20–21.

²⁵ UNGA Sixth Committee, Summary Record of the 20th Meeting, UN Doc. A/C.6/71/SR.20, 11 November 2016, para. 45 ('[a]n organization that participated in a large number of multilateral and bilateral treaties, the European Union expected the Commission's output to reflect its potential to contribute to customary international law, including in areas such as fisheries and trade').

contrast, the representative of the Council of Europe merely affirmed that ‘practice developed within the framework of an international organization could indeed be useful in the identification of customary international law’.²⁶ Other international organizations did not participate or remained silent.

2 Why International Organizations Can Contribute to Customary International Law

A Subjective Intent to Empower International Organizations to Create Customary International Law

As a starting point, there is no doubt that states can – and have – empowered international organizations to make international law by entering into treaties. Indeed, unless international organizations could enter into treaties, there would be no need for the Vienna Convention on the Law of Treaties between States and International Organizations (VCLT-IO).²⁷ The least controversial basis for concluding that an international organization can contribute to customary international law, then, is that the states that established the organization empowered it to create customary international law. Indeed, even the USA concedes that states could so empower international organizations, arguing that states have ‘rarely, if ever’, expressly empowered international organizations to ‘exercise the powers of the member States to generate practice for the purpose of customary international law’ – not that states *cannot* do so.²⁸ This is an important concession because it reflects a rejection of the position that, as a categorical matter, international organizations cannot contribute to customary international law. In other words, it is an acknowledgement that states could establish an international organization with the capacity to contribute to customary international law.

But have states actually done so? The strongest example here is the EU, even though the capacity to create customary international law is not among its express powers. The EU is unusual among international organizations because states have transferred certain competences to the EU: where the EU has stepped in, the EU’s member states have stepped out. The result is that the EU exercises certain authorities to the exclusion of the EU’s member states. As the special rapporteur on customary international law put it, there is a compelling argument that the EU’s member states intended for the EU to be able to make customary international law on at least some topics:

²⁶ UNGA Sixth Committee, Summary Record of the 24th Meeting, UN Doc. A/C.6/71/SR.24, 29 November 2016, para. 20.

²⁷ Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (VCLT-IO) 1986, 25 ILM 543 (1986) (not yet in force).

²⁸ Comments and Observations Received from Governments, *supra* note 22, at 20.

If one were not to equate the practice of such international organizations [like the EU] with that of States, it would in fact mean that, not only would the organization's practice not count for State practice, but its Member States would be deprived or reduced of their ability to contribute to State practice in cases where the Member States have conferred some of their public powers to the organization.²⁹

And, indeed, the EU has repeatedly and emphatically taken the position that it can contribute directly to the formation of customary international law,³⁰ and several of its member states have endorsed this view as well.³¹

B Implied Powers to Create Customary International Law

The capacity to contribute to (at least some) customary international law may also be an implied power of international organizations. It has long been accepted and uncontroversial that international organizations have, in addition to the powers that are expressly set out in their charters, certain implied powers. Specifically, as the International Court of Justice (ICJ) put it in *Reparation for Injuries*, they have 'those powers which ... are conferred upon [them] by necessary implication as being essential to the performance of [their] duties'.³² The implied powers test provides a separate basis for concluding that international organizations may contribute to customary international law because implied powers are not necessarily grounded in the subjective intent of the states establishing an international organization. Instead, the focus of the inquiry is on international organizations' functions and the purposes for which they were created.

On the whole, when faced with arguments about implied powers, the ICJ has taken a rather generous approach to evaluating which powers are conferred 'by necessary implication'. In *Reparation for Injuries*, the ICJ separately considered whether the United Nations (UN) can pursue international claims for two different categories of damages: damages for harm suffered by the organization and damages for harm suffered by individual victims. The Court unanimously concluded that the UN may seek reparation for the first category. As explained in more detail below, the Court did not reach this conclusion based on implied powers. The Court did analyse the second category in terms of implied powers. Applying the test quoted above, a majority of the Court concluded that the UN can pursue international claims on behalf of its agents when those agents are injured as a result of a violation of international law, viewing this capacity as essential to protect the independence

²⁹ Wood, *supra* note 3, para. 44.

³⁰ *Ibid.*, at 53, n.184; M. Wood (Special Rapporteur), Second Report on Identification of Customary International Law, UN Doc. A/CN.4/672, 22 May 2014, at 31 n.135; see also UNGA Sixth Committee, Summary Record of the 20th Meeting, UN Doc. A/C.6/71/SR.20, 11 November 2016, para. 45.

³¹ See, e.g., UNGA Sixth Committee, Summary Record of 21st Meeting, UN Doc. A/C.6/71/SR.21, 16 November 2016, para. 63 (Romania); UNGA Sixth Committee, Summary Record of the 25th Meeting, UN Doc. A/C.6/69/SR.25, 28 November 2014, para. 130 (Nordic countries).

³² *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, at 182.

of the UN's agents and, by extension, the independence of the UN itself.³³ Judge Hackworth, dissenting, argued that, while such an authority may be desirable, it did not satisfy the necessity test because there were other ways to assure the independence of international civil servants and because other actors are authorized to seek reparation for harm suffered by such victims (that is, their states of nationality could pursue claims).

In subsequent decisions, the Court affirmed additional implied powers for the UN – in some cases, over the vociferous objections of some member states. The powers implied include the authority to establish an administrative tribunal for its employees and to create peacekeeping forces.³⁴ To date, the Court has rejected an implied-powers argument only once, holding that the World Health Organization (WHO) lacks the authority to seek an advisory opinion regarding the legality of the use by states of nuclear weapons. The Court's main concern there was that the WHO was stepping on the toes of another international organization – namely, the UN.³⁵

Even if the necessity test is applied generously, it will often be difficult to establish that the capacity to contribute to customary international law rules is essential to the performance of an organization's duties. That said, satisfying the test is not impossible. There is, for example, a strong claim that international financial institutions' express powers to set the terms and conditions of their loans³⁶ is coupled with an implied power to contribute to customary international law regarding lending agreements. Given the centrality of lending to their operations, international financial institutions are concerned not only about the content of individual lending agreements but also about the more general 'secondary' rules that govern the making and breaking of such agreements. For example, by the time the European Bank for Reconstruction and Development (EBRD) opened its doors in 1991, the long-established practice at international financial institutions was to have finance ministers sign such agreements without producing – or being asked to produce – 'full powers' – that is, a formal document confirming the authority of an individual to engage in treaty making on behalf of a state.³⁷ After all, finance ministers typically represented member states on the Boards of Governors of multilateral development banks – the bodies that were vested with 'all the Powers of the Bank'.³⁸ Still, this

³³ *Ibid.*, at 181–184.

³⁴ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954) 47; *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151.

³⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1966) 66, at 80.

³⁶ See, e.g., Agreement Establishing the European Bank for Reconstruction and Development, 29 May 1990, 29 ILM 1077, Art. 14.

³⁷ Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 2(1)(c).

³⁸ Author's email exchange with Gerard Sanders, formerly of the European Bank for Reconstruction and Development, 13 December 2018; see also Agreement Establishing the European Bank for Reconstruction and Development, *supra* note 36, Arts 23–24.

practice was arguably a bit dicey. When full powers are not produced and inspected, the risk of having a lack of authority rests with the party that did not insist upon the production of full powers – here, the EBRD.³⁹ To mitigate this risk, the EBRD laid the groundwork for arguing that different rules applied to agreements between states and international financial institutions.⁴⁰ In 1994, the EBRD drafted a set of standard terms and conditions for its loans, specifying that, in the event of a dispute between borrowers and the EBRD, the law that will apply in the event of a dispute between borrowers and the EBRD:

The law to be applied shall include:

- (A) any relevant treaty obligations that are reciprocally binding on the parties;
- (B) the provisions of any international conventions and treaties (whether or not binding directly as such on the parties) generally recognized as having codified or ripened into binding rules of customary law applicable to states and international financial institutions, as appropriate;
- (C) *other forms of international custom, including the practice of states and international financial institutions of such generality, consistency and duration as to create legal obligations*; and
- (D) applicable general principles of law.⁴¹

In the event that a state soured on an agreement with the EBRD and argued that its finance minister lacked the authority to enter into the agreement, the italicized text would enable the EBRD to argue that international custom as developed between states and international financial institutions established that authority and rendered unnecessary the formal production of full powers. To date, it appears that the EBRD has not used arbitration to resolve any disagreements that have arisen with states. This language may still do some valuable work for the EBRD, however, by clarifying the applicable law and preventing disputes from arising.⁴² In 2016, the Asian Infrastructure Investment Bank (AIIB) adopted general conditions for sovereign-backed loans that included the precise text italicized above and nearly identical language describing the law to be applied.⁴³ While the member states of the EBRD and AIIB did not specifically approve these terms and conditions, those member states did task those banks with setting the terms and conditions of their loans.⁴⁴ In addition, the states that have entered into borrowing agreements with these banks have, by accepting these terms and conditions, implicitly endorsed the view that international financial institutions contribute to customary international law.

³⁹ O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), vol. 1, at 143–144.

⁴⁰ Author's email exchange with Gerard Sanders, *supra* note 38, Art. 14.

⁴¹ Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks', 90 *American Journal of International Law (AJIL)* (1996) 214, at 227 (emphasis added).

⁴² *Ibid.*, at 232.

⁴³ Asian Infrastructure Investment Bank, 'General Conditions for Sovereign-backed Loans', 1 May 2016, available at www.aiib.org/en/policies-strategies/operational-policies/sovereign-backed-loans.html.

⁴⁴ Agreement Establishing the European Bank for Reconstruction and Development, *supra* note 36, Art. 14; Articles of Agreement of the Asian Infrastructure Investment Bank, 29 June 2015, Art. 14, available at www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf.

C A Byproduct of Legal Personality and the Capacity to Operate on the International Plane

As explained above, states might intentionally empower international organizations to create customary international law, or they might task them with functions that require them to be able to contribute to the formation of customary international law. These possibilities do not exhaust international organizations' capacity to contribute to the formation of customary international law. In some cases, I argue, this capacity is a byproduct of international organizations' status as international legal persons, combined with their capacity to act on the international plane by entering into at least some kinds of treaties, incurring responsibility for violations and making claims or terminating treaties when their own rights under international law are breached.⁴⁵ In other words, the combination of this status and these capacities imbues international organizations' conduct with legal significance when it comes to the development of customary international law. The capacity to participate in the creation of customary international law – like the capacity to make international claims or to incur international responsibility – need not be an express or implied power.

Consider first the capacity to bring international claims. The ICJ confirmed that the UN has this capacity in *Reparation for Injuries*, but not because this capacity was an implied power. As noted above, the ICJ applied the implied powers test to consider whether the UN had the capacity to bring an international claim for damages against a state for harm suffered by individual UN agents.⁴⁶ A different rationale undergirds the Court's separate holding that the UN has the capacity to bring an international claim for damages suffered by the organization itself. The Court explained that the capacity to make a claim for this category of damage followed ineluctably from its prior conclusion that the UN has international legal personality:

It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it. The damage ... means exclusively damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian. It is clear that the Organization has the capacity to bring a claim for this damage. As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law, and the Organization is justified in giving its claim the character of an international claim.⁴⁷

As this opinion suggests, there are some capacities that follow directly from the UN's (or any international organization's) legal personality, and the capacity to bring

⁴⁵ Along similar lines, in 1959, the General Counsel of the World Bank articulated the view that international organizations, as international legal persons, had 'the capacity to participate in the creation of customary rights and obligations' – that is, they were 'the kind of entity whose conduct and practice are recognized as relevant in determining whether an international custom exists'. Broches, 'The International Legal Aspects of the World Bank', 98(3) *Recueil des Cours* (1959) 297, at 318.

⁴⁶ See notes 32–33 above and accompanying text.

⁴⁷ *Reparation for Injuries*, *supra* note 32, at 180.

international claims for damages to the organization that result from a breach of international law is such a capacity. International organizations may also have the capacity to bring additional types of international claims as a result of expressly granted or implied powers, but the core is already there.

Significantly in light of the objections articulated by some states to the position that international organizations can contribute directly to customary international law, the ICJ's conclusions about the UN's legal personality and the implications of this personality did not have the unanimous support of UN member states. When the UN Charter was being negotiated, state representatives contemplated including a provision that would expressly confirm the UN's legal personality. Ultimately, they refrained from doing so. The reasons for this decision are not entirely clear. Hersch Lauterpacht suggested that the motivation for this omission was the 'apprehension – for which there was no basis in fact' – that 'the express conferment of "international personality" upon the United Nations [would] be interpreted as creating a super-State'.⁴⁸ The United Kingdom urged the Court not to attach 'too much importance' to the Charter's silence on this question.⁴⁹ And, indeed, the Court's opinion in the *Reparation for Injuries* case is silent on the Charter's negotiating history.

Along similar lines, consider the ICJ's conclusion that the UNGA enjoys the power to terminate South Africa's mandate over Namibia.⁵⁰ The Court's analysis builds on its earlier decisions holding that the UN succeeded to the supervisory powers of the League of Nations with respect to the mandate.⁵¹ That mandate, the Court explained, is 'an international instrument of an institutional character, to which the League of Nations, represented by the Council, was itself a party'.⁵² Therefore, when it came to assessing the authorities of the UN (which had stepped into the shoes of the League), the Court looked to general international law governing treaty termination.⁵³ Just as a state may terminate a treaty in response to a material breach, the Court said, so too may the UNGA exercise 'the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship'.⁵⁴ In other words, the Court held that the UNGA's authorities match those enjoyed by any other entity that could be a party to a treaty. The right to terminate a treaty in response to a breach was automatically part of the package.

⁴⁸ Written Statement Presented by the Government of the United Kingdom under Article 66 of the Statute of the Court and the Order of the Court, 11 December 1948, available at www.icj-cij.org/files/case-related/4/11707.pdf.

⁴⁹ *Ibid.*

⁵⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16.

⁵¹ *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, ICJ Reports (1950) 128, at 136–137; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, 21 December 1962, ICJ Reports (1962) 319.

⁵² *Ibid.*, at 332.

⁵³ *Legal Consequences for States*, *supra* note 50, paras 94–95. Note that this case predates the VCLT-IO.

⁵⁴ *Ibid.*, para. 95.

As yet another example, consider the source of international organizations' capacity to incur responsibility for violations of international law. Although many features of the ILC's Articles on the Responsibility of International Organizations have been criticized on various grounds, the capacity of international organizations to be responsible for such violations was not seriously contested by the time the ILC launched this project.⁵⁵ This capacity was widely accepted – even though the instruments that establish international organizations only rarely address international responsibility expressly. Moreover, it is awkward to describe the capacity to incur international responsibility as an implied power of international organizations – in fact, it is awkward to describe it as a 'power' at all. Rather, the capacity to incur responsibility for violations is better described as a consequence of international organizations' separate legal personalities – the flipside of their capacity to have and enforce rights under international law, as affirmed in the *Reparation for Injuries* opinion.

The ICJ's 1980 advisory opinion in *Interpretation of the 1951 Agreement between the WHO and Egypt* is also instructive: it affirms that interactions between states and international organizations are among the raw materials from which rules of general international law are constructed.⁵⁶ In other words, this opinion affirms that the conduct of international organizations has legal consequences when it comes to assessing the content of customary international law. The advisory opinion concerns a controversial and contested effort to transfer a WHO regional office from Egypt to Jordan. The Court framed its task as articulating the legal principles and obligations that govern such a transfer. Ultimately, the Court concluded that Egypt and the WHO both have obligations to consult, to negotiate and to provide notice in connection with any effort to transfer the office.⁵⁷ The Court explained that these concrete obligations follow from 'the legal relations between the Organization and Egypt under general international law, under the Constitution of the Organization and under the agreements in force between Egypt and the Organization'.⁵⁸

The second and third sources of law under this list are familiar and unexceptional; it is the first – general international law – that merits attention. To ascertain the content of the applicable general international law rules, the ICJ looked to other host agreements concluded between states and international organizations, including the WHO, the UN and the International Labour Organization (ILO). The Court focused on those agreements' provisions regarding revision, termination and denunciation. These provisions were significant, the Court explained, for the following reasons:

In the first place, [these host agreements] confirm the recognition by international organizations and host states of the existence of mutual obligations incumbent upon them to resolve the problems attendant upon a revision, termination or denunciation of a host agreement. But

⁵⁵ Daugirdas, 'Reputation and the Responsibility of International Organizations', 25 *EJIL* (2014) 991, at 994–995.

⁵⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Interpretation of the 1951 Agreement between the WHO and Egypt)*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73.

⁵⁷ *Ibid.*, at 95–96.

⁵⁸ *Ibid.*, at 95.

they do more, since they must be presumed to reflect the views of organizations and host States as to the implications of those obligations in the contexts in which the provisions are intended to apply. In the view of the Court, therefore, they provide certain general indications of what the mutual obligations of organizations and host States to co-operate in good faith may involve in situations such as the one with which the Court is here concerned.⁵⁹

Thus, the advisory opinion in *Interpretation of the 1951 Agreement between the WHO and Egypt* confirms that the legal consequences of host agreements between states and international organizations are not entirely confined to the parties to those agreements: those agreements contribute to shaping general international law rules that bind states and international organizations alike. The ICJ does not explain the source of international organizations' authority to contribute to general international law. This authority cannot be traced to an express power of the WHO, the ILO or the UN. Nor can such an authority be explained on the basis of the subjective intent of these organizations' member states or on the basis of implied powers. Instead, it is best understood as a byproduct of their legal personality and treaty-making powers.

Another area where the conduct of international organizations has contributed to the formation of generally applicable rules concerns employment relationships. International administrative tribunals increasingly rely on the general principles of the law of the international civil service in cases that they decide, even though such principles are not explicitly recognized in the statutes establishing those tribunals.⁶⁰ As Santiago Villalpando has explained, '[s]uch principles play a crucial role in this field, since the administrative issuances of any of the international organizations – despite their number and complexity – will never be able to cover all aspects of the employment relationship and the settlement of possible disputes'.⁶¹ For example, in 2002, the Conference of the Parties (COP) to the Chemical Weapons Convention voted to terminate the appointment of José Bustani, who was then the director-general of the Organization for the Prohibition of Chemical Weapons.⁶² Bustani challenged the COP's capacity to terminate him without cause and without due process. The ILO's administrative tribunal found in Bustani's favour, reasoning that allowing the COP to terminate Bustani for any reason 'would constitute an unacceptable violation of the principles on which international organizations' activities are founded ... by rendering officials vulnerable to pressures and to political change'.⁶³ The tribunal held that Bustani's termination 'violated the terms of his contract of employment and contravened the general principles of the law of the international civil service'.⁶⁴ General principles are a separate category of international law from customary

⁵⁹ *Ibid.*, at 94.

⁶⁰ Villalpando, 'The Law of the International Civil Service', in J. Katz Cogan *et al.* (eds), *The Oxford Handbook of International Organizations* (2016) 1069, at 1082–1083.

⁶¹ *Ibid.*, at 1082.

⁶² Murphy, 'U.S. Initiative to Oust OPCW Director-General', 96 *AJIL* (2002) 711. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, 1974 UNTS 45.

⁶³ ILO Administrative Tribunal, *Bustani v. OPCW*, Judgment no. 2232, para. 16.

⁶⁴ *Ibid.*

international law;⁶⁵ they are comprised in part of legal principles that are common across different national legal systems and that can be validly transposed to the international level.⁶⁶ Nevertheless, the recognized capacity of international organizations to contribute to the formation of such general principles supports the argument that the conduct of international organizations has legal significance for the development of more generally applicable rules of international law and that this feature of international organizations is not grounded in express or implied powers of individual organizations.

* * *

In short, a range of sources, including decisions of the ICJ and the practice of international organizations and of their member states, supports the view that international organizations' conduct is legally significant and can contribute to the formation of rules of general international law.⁶⁷

3 International Organizations' Direct Role in the Formation of Customary International Law

This part shifts focus from the binary question of whether international organizations can contribute to customary international law to the question of when they can do so. The arguments set out in the previous part support the conclusions that international organizations' practice and *opinio juris* 'count' in two sets of circumstances. The first is customary international law that regulates interactions between states and international organizations as well as among international organizations. The second is when international organizations engage in the kinds of activities that states engage in and run the risk of incurring international responsibility, just like states do. In both of these situations, the conclusion that international organizations can contribute to customary international law accords with the conception of customary law as a set of rules that arises from the practices and usages of a distinctive community.⁶⁸

A number of scholars have endorsed the view that the international community is made up of international organizations as well as states.⁶⁹ Perhaps the better view,

⁶⁵ Statute of the International Court of Justice (ICJ Statute) 1945, 33 UNTS 993, Art. 38 1(c) (instructing the International Court of Justice (ICJ) to apply 'the general principles of law recognized by civilized nations').

⁶⁶ J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 125.

⁶⁷ I use the term 'byproduct' to describe international organizations' capacity to contribute to customary international law in part to distinguish my argument from Finn Seyfersted's conception of international organizations as entities with inherent powers and general competence. See, e.g., Seyfersted, 'Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing Them?', 34 *Nordisk Tidsskrift for International Ret* (1964) 3. The term 'byproduct' also leaves open the question of the extent to which states may limit this capacity when they create international organizations. J. Klabbers, *An Introduction to International Organizations Law* (3rd edn, 2015), at 66 (observing that the term 'inherent' suggests powers that are indefeasible).

⁶⁸ Klabbers, *supra* note 11, at 997; D.J. Bederman, *Custom as a Source of Law* (2010), at iv.

⁶⁹ T.M. Franck, *The Power of Legitimacy among Nations* (1990), at 184; H. Mosler, *The International Society as a Legal Community* (1980), at xv; G.M. Danilenko, *Law-Making in the International Community* (1993),

however, is that there is not just one international community; instead, there are multiple international communities made up of shifting combinations of states and international organizations. Each international community is made up of the states and international organizations that are similarly situated when it comes to engaging in – and governing – a particular activity.⁷⁰ When it comes to developing the rules concerning treaties to which international organizations are parties, concerning the responsibility of international organizations and concerning the immunity of international organizations, the relevant international community is comprised of states and international organizations that together shape the content of those rules. Likewise, when individual international organizations engage in the same type of activity that states engage in, they join the community that shapes the rules that govern that activity.

A Relations between States and International Organizations and among International Organizations

There are several areas of law where the rules that apply to states and the rules that apply to international organizations systematically diverge. These include the law of treaties, immunity and responsibility.⁷¹ The extent to which the rules that govern any of these three topics – international organization treaties (IO treaties), international organization responsibility (IO responsibility) and international organization immunity (IO immunity) – are currently part of customary international law is debatable. At the same time, there is no doubt that customary international law could develop to govern each of these topics. With respect to each of these three topics, the content of the legal rules and the process by which those legal rules are established both buttress the conclusion that international organizations and states are similarly situated members of an international community. And, indeed, there are indications that both states and international organizations have assumed or expected that international organizations would play a role in developing customary international law on these topics. States have not consistently and unanimously supported the idea that international organizations can play a role in making general

at 12–13; Daugirdas, 'How and Why International Law Binds International Organizations', 57 *Harvard International Law Journal (HILJ)* (2016) 325, at 359–365 (setting out foundations for this view).

⁷⁰ Hakimi, 'Constructing an International Community', 111 *AJIL* (2017) 317, at 342 (observing that international law 'consists of a patchwork of regulatory arrangements' and that '[p]articipants in any given arrangement comprise an international community to the extent that they engage together on and act like they are part of a shared governance project').

⁷¹ A fourth is the law of succession. There are a small number of examples of an international organization succeeding to the rights or obligations of another organization or a group of states. See, e.g., *International Status of South-West Africa*, *supra* note 48, at 136–137; Joined Cases 21–24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit* (EU:C:1972:115); Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1, 14 August 2005, para. 4. Because the law of international organization succession remains quite underdeveloped, this article will not address it beyond this footnote.

international law. But, as Part 2 explained, unanimous endorsement is unnecessary to support the conclusion that this capacity is an implied power or a byproduct of international organizations' other capacities and features. In other words, while states certainly could expressly empower international organizations to contribute to customary international law on these three topics, the implied-power and byproduct rationales are more likely to supply the foundation for the conclusion that they can so contribute.

1 *IO Treaties*

Consider the law of IO treaties first. In 1969 – the same year that the Vienna Convention on the Law of Treaties (VCLT) was adopted⁷² – the UNGA recommended that the ILC take up the topic of IO treaties.⁷³ Addressing this topic raised interrelated substantive and procedural questions about international organizations' capacities and status relative to those of states. First, as a substantive matter, should states and international organizations have equal status and equal rights with respect to treaties? On the one hand, treaties by definition seem to require equal treatment, but, on the other hand, perhaps the differences between states and international organizations warrant some deviations from this principle.⁷⁴ Second, as a procedural matter, what is the appropriate role for international organizations in making substantive law on this topic? In early discussions on this question, some states argued that international organizations lacked the competence 'to elaborate general international law relating to treaties'.⁷⁵ As a result, they contended, international organizations should be relegated to observer status when a treaty on this topic was being negotiated.⁷⁶ Third, how would the law of IO treaties become binding on international organizations? Would they have a choice about whether the rules that were ultimately developed would bind them? All three issues were in play once the ILC concluded its draft articles on IO treaties in 1982. At that point, the UNGA's Sixth Committee became the key forum for discussing them and for figuring out next steps.⁷⁷

A number of international organizations participated in these debates before the Sixth Committee. Their early comments focused on the third issue outlined above – whether and how rules on IO treaties might come to bind them. International

⁷² VCLT, *supra* note 37.

⁷³ GA Res. 2501 (XXIV), 12 November 1969, para. 5.

⁷⁴ As the ILC recognized explicitly in the course of producing the draft articles that eventually became the VCLT-IO, '[t]reaties are based essentially on the equality of the contracting parties', but the differences between states and international organizations raises some difficult questions. ILC, Report on the Work of Its 34th Session, UN Doc. A/37/10 (1982), at 13.

⁷⁵ UNGA Sixth Committee, Summary Record of the 38th Meeting, UN Doc. A/C.6/37/SR.38 (1982), para. 8 (France).

⁷⁶ UNGA Sixth Committee, Summary Record of the 50th Meeting, UN Doc. A/C.6/37/SR.50 (1982), para. 31 (Morocco).

⁷⁷ ILC, Report on the Work of Its Thirty-Fourth Session, UN Doc. A/37/10 (1982), at 9–77.

organizations insisted that rules on IO treaties could not bind them without their consent.⁷⁸ These comments reflect a full-throated rejection of the view that international organizations are simply objects to be regulated by general international law rules developed by states. More significantly, some international organizations stated a preference that the rules on IO treaties develop as customary international law instead of being codified as a treaty.⁷⁹ These organizations did not expressly address their role in the development of customary international law. But surely they expected that, if the law of IO treaties was to harden into customary international law, their practice and *opinio juris* would play a role in that evolution. After all, the key point they emphasized in that and subsequent communications was the necessity of organizations' consent for any resulting treaty to bind them. Excluding international organizations from the development of customary international law on IO treaties would likewise deprive them of the opportunity to accept or reject such rules.

During the discussions that followed in the Sixth Committee, no states responded to the international organizations' proposal to allow the law of IO treaties to develop as customary international law, and, therefore, no states directly addressed the capacity of international organizations to make customary international law.⁸⁰ Many states supported codification in a treaty to match the approach taken in the VCLT, and, in December 1982, the UNGA decided to proceed with an international convention based on the draft articles.⁸¹

This decision to move forward with a treaty raised the procedural question identified above: what role would international organizations play in making this treaty? The issue was contentious.⁸² In all previous treaty negotiations, international

⁷⁸ See, e.g., UN Secretariat, Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/C.6/38/4 (1983), para. 11 ('[t]he Legal Advisers [of the UN and the specialized agencies] considered it essential ... that no international organization be bound without its explicit consent by a convention incorporating the draft articles'). For a more detailed discussion, see Daugirdas, *supra* note 69, at 373–377.

⁷⁹ After the ILC had adopted draft articles on international organization treaties but before the decision was made to proceed with a convention, the UN and the specialized agencies noted the possibility that, instead of proceeding with a treaty, 'the General Assembly of the United Nations [could] adopt the articles ... as a standard of reference for action destined to harden into customary law'. A number of organizations expressed a preference for this approach. Note by the Secretariat, Report of the International Law Commission on the Work of Its Thirty-Fourth Session (annexing decision 1982/17 adopted by the Administrative Committee on Coordination, which was made up of the UN Secretary-General and the chief administrative officers of the specialized agencies), UN Doc. A/C.6/37/L.12, 18 November 1982.

⁸⁰ Two states did address one element of that proposal – that the UNGA adopt the draft articles in a declaration without proceeding to a treaty. See, e.g., UNGA Sixth Committee, Summary Record of the 32nd Meeting, UN Doc. A/C.6/38/SR.32, 2 November 1983, at 4 (Jamaica) (expressing a preference for a convention rather than a declaration as proposed in the international organizations' letter because the draft articles on international organization treaties constituted a 'companion instrument to the 1969 Vienna Convention on the Law of Treaties, and deserved parity of treatment with the subject-matter of that Convention'); *ibid.*, at 5 (India) (objecting to the international organizations' proposal that the UNGA endorse the draft articles by declaration because 'such an approach would be needlessly cautious and time-consuming').

⁸¹ GA Res. 37/112, 16 December 1982.

⁸² UNGA Sixth Committee, Summary Record of the 33rd Meeting, UN Doc. A/C.6/39/SR.33, 1 November 1984, paras 31, 33 (Austria and the Soviet Union).

organizations had been relegated to observer status, with only limited rights to participate in discussions and no rights to vote. The UNGA ultimately endorsed procedural rules that granted international organizations a bigger role than they had had in any previous multilateral negotiations.⁸³ International organizations gained rights to participate in both public and private meetings, to submit proposals, to intervene in debates and to make procedural motions to end a debate.⁸⁴ They could not vote, however, nor could international organizations, ‘on their own’, prevent the achievement of general agreement on substantive matters.⁸⁵

Turning from procedure to substance, the rules codified in the VCLT-IO regard states and international organizations as equals. Thus, for example, states and international organizations have the same rights to enter reservations and to withdraw from treaties.⁸⁶ The VCLT-IO confirms that international organizations, like states, can be bound by treaties only with their express consent.⁸⁷ The final clauses of the VCLT-IO accord with this rule and with international organizations’ position that treaties bind them only with their express consent. States and international organizations that choose to become parties can do so by depositing instruments indicating their consent to be bound.⁸⁸

One aspect of the final clauses does not treat states and international organizations as equals: the provision regarding entry into force. Article 85(1) provides that the VCLT-IO will enter into force after it has been ratified by 35 states; ratifications by international organizations have no effect on the VCLT’s entry into force.⁸⁹ (To date, the VCLT-IO has 44 parties, of which 32 are states, so it has not yet entered into force.⁹⁰) That said, there are other examples of entry-into-force clauses that disregard some ratifications unless specified criteria are met. To name just a couple, the UN Charter could not enter into force no matter how many states sought to become members unless and until each of the permanent five members of the UN Security Council did so.⁹¹ The Paris Agreement on Climate Change requires ratifications by at least 55 states and regional economic integration organizations to enter into force – but not any 55 will do because the Paris Agreement also requires that their emissions total at least 55 per cent of global greenhouse gas emissions.⁹² Thus, the basic point stands, notwithstanding the VCLT-IO’s differential treatment of international organizations

⁸³ UNGA Sixth Committee, Summary Record of the 46th Meeting, UN Doc. A/C.6/40/SR.46, 25 November 1985, para. 63.

⁸⁴ GA Res. 40/76, 11 December 1985, Annex I, Rule 60.

⁸⁵ *Ibid.*, Annex I, Rule 60(2)(b); see also Rule 63.

⁸⁶ See VCLT-IO, *supra* note 27, Arts 19–23 (regarding reservations); Arts 54, 56 (regarding withdrawal).

⁸⁷ *Ibid.*, Art. 34.

⁸⁸ *Ibid.*, Art. 83.

⁸⁹ *Ibid.*, Art. 85(1) (‘[t]he present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification *by States or by Namibia*, represented by the United Nations Council for Namibia’).

⁹⁰ United Nations Treaty Collection, ‘Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations’, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en#1.

⁹¹ Charter of the United Nations 1945, 1 UNTS 15, Art. 110(3).

⁹² Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015, Art. 21(1).

with respect to entry into force. The substance of the VCLT-IO and the procedures for developing its content confirm that international organizations do – and ought to – directly shape the rules of international law that bind them, whether the source be treaty law or customary international law.

2 IO Responsibility

Turning to the law of IO responsibility, the same observations and arguments apply with respect to both substance and process. The ILC's Articles on the Responsibility of International Organizations (ARIO) treat states and international organizations as being on a level playing field.⁹³ Many provisions in the ARIO track the corresponding Articles on the Responsibility of States for Internationally Wrongful Acts (ARS), simply substituting 'international organization' for 'state'.⁹⁴ In other cases, the ARIO themselves include parallel provisions for states and international organizations. Thus, for example, the ARIO include two articles that deal with circumvention, one that addresses states circumventing their international obligations by acting through international organizations and another that addresses international organizations circumventing their international obligations by acting through states.⁹⁵

In terms of process, states and international organizations alike have characterized the practice and *opinio juris* of international organizations as critical to the emergence of customary international law rules regarding IO responsibility. To see why, it is helpful first to address the ILC's work on state responsibility. When the ILC adopted the ARS, there was a question about the next steps and, in particular, whether to recommend treaty negotiations based on those articles. There was a risk that such negotiations might result in a convention that garnered only scant ratifications or that they might not even yield an agreed text. Either outcome could have had a 'decodifying effect' – that is, either outcome threatened to undermine the position that the ARS largely reflect existing customary international law.⁹⁶ For this reason, when the ILC concluded its work on the ARS in 2002, it did not recommend treaty negotiations based on the draft articles; instead, the commission recommended that the UNGA take note of the draft articles and defer negotiating a convention.⁹⁷ In this format, the articles have, as anticipated, shaped the practice and *opinio juris* of states, and courts and tribunals have repeatedly turned to the draft articles to identify customary rules related to state responsibility.⁹⁸

⁹³ See generally ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (ARIO), 2(2) *ILC Yearbook* (2011) 46.

⁹⁴ ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' (ARS), 2(2) *ILC Yearbook* (2001) 31; Daugirdas, *supra* note 55, at 996.

⁹⁵ ARIO, *supra* note 93, Arts 17, 61.

⁹⁶ J. Crawford (Special Rapporteur), Fourth Report on State Responsibility, UN Doc. A/CN.4/517 (2001), para. 23; Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *AJIL* (2002) 857, at 866, 868.

⁹⁷ 'Report of the International Law Commission on Its 53rd Session', 2(2) *ILC Yearbook* (2001), 1, at 25.

⁹⁸ See, e.g., Report of the Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies, UN Doc. A/74/83, 23 April 2019; Report of the Secretary-General, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals, and Other Bodies, UN Doc. A/71/80, 21 April 2016.

By contrast, the ARIO were largely an exercise in progressive development. In the commentary appended to these articles, the ILC explained that it was able to draw on only a limited body of practice by international organizations:

One of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice. The main reason for this is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it.⁹⁹

The commission then explained the consequences of this limited body of practice:

The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility.¹⁰⁰

This is the important part: the ILC said that it is the lack of practice by international organizations that deprives the ARIO of the status of existing customary international law. While the commission's statement does not directly address the capacity of international organizations to contribute to customary international law, this explanation of why the ARIO do not (yet) reflect customary international law is built upon the assumption that international organizations participate in the development of such rules of customary international law.

In other words, IO practice – its extensiveness and consistency (or lack thereof) – is relevant for assessing whether any given rule of IO responsibility reflects customary international law. Numerous states have debated and discussed the ARIO in the Sixth Committee of the UNGA. Those comments mainly focus on the (un)desirability of proceeding with a convention based on those articles. Much more significantly for the purposes of this article, however, many states have echoed the commission's comments about how the dearth of practice by international organizations renders the ARIO an exercise in progressive development.¹⁰¹ The implication is that the accumulation of such practice by international organizations would contribute to the formation of customary international law.¹⁰² The Chilean representative made this connection

⁹⁹ ARIO, *supra* note 93, General Comment 5.

¹⁰⁰ *Ibid.*

¹⁰¹ See, e.g., UNGA Sixth Committee, Summary Record of the 19th Meeting, UN Doc. A/C.6/66/SR.19, 22 November 2011, at 2 (Austria), 6 (Greece); UNGA Sixth Committee, Summary Record of the 27th Meeting, UN Doc. A/C.6/66/SR.27, 8 December 2011, at 3 (Sri Lanka); UNGA Sixth Committee, Summary Record of the 18th Meeting, UN Doc. A/C.6/69/SR.18, 13 January 2015, at 8 (Denmark on behalf of the Nordic countries), 10 (United Kingdom), 10–11 (Singapore).

¹⁰² Some of the states that made these comments subsequently endorsed the view that international organizations as such contribute to the formation of customary international law. See note 20 above.

explicit. After describing IO responsibility as '[a]ll[ing] primarily within the realm not of codification, but of progressive development' due to the 'lack of practice', the Chilean representative agreed that the UNGA should take note of the draft articles 'with a view to their consolidation over time, perhaps in the form of an international convention or customary rules reflecting practice generally accepted as law'.¹⁰³

The comments of the Polish delegate likewise reflect the view that international organizations contribute to – at least – the customary international law rules that bind them. Addressing the applicability of the ARIO for violations of *jus cogens* norms, the Polish delegate said:

Although there was not enough practice in that area to constitute customary law within the meaning of article 38 of the Statute of the International Court of Justice, there was an apparent consensus among States and international organizations, amounting to *opinio juris*, that *jus cogens* norms were binding on international organizations.¹⁰⁴

Just as significant is what representatives of states did not say. None suggested that the practice of international organizations is significant only for the purposes of quality control – that is, for the purposes of developing a workable and sensible set of rules on IO responsibility. None said – or even hinted – that exclusively states' practice and *opinio juris* was relevant for the development of customary international law on IO responsibility.

3 IO Immunity

Whether customary international law currently requires states to recognize the immunity of international organizations is contested. Commentators have reached different conclusions, as have national courts.¹⁰⁵ As is the case for IO treaties and IO responsibility, there does not appear to be any doubt that such customary international law rules could emerge if they have not done so already. International organizations are key players when it comes to two of the main categories of evidence of practice and *opinio juris* with respect to IO immunity: treaties and national judicial proceedings.¹⁰⁶

Treaties are, by far, the most common source of international organizations' immunities. In some cases, these treaties are the organizations' constituent instruments.¹⁰⁷ In others, they are separate multilateral conventions.¹⁰⁸ And, in still other cases,

¹⁰³ UNGA Sixth Committee, Summary Record of the 20th Meeting, UN Doc. A/C.6/66/SR.20, 23 November 2011, at 8; see also note 20 above (noting Chile's support for the ILC's draft conclusion regarding international organizations' contribution to customary international law).

¹⁰⁴ Summary Record of the 20th Meeting, *supra* note 103, at 12 (emphasis added).

¹⁰⁵ Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?', 10 *IOLR* (2013) 287, at 317 (reviewing literature and judicial opinions, *inter alia*, before concluding that 'it cannot be said that there is 'a general practice accepted as law' establishing a customary rule of [international organization] immunity').

¹⁰⁶ An important third category of practice is national legislation that accords international organizations immunity. With respect to this category, international organizations may be influential, but their role is indirect rather than direct.

¹⁰⁷ See, e.g., Articles of Agreement of the International Bank for Reconstruction and Development (IBRD) 1944, 2 UNTS 134, Art. VII (according the IBRD's legal status, immunities and privileges).

¹⁰⁸ See, e.g., Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15; Convention on the Privileges and Immunities of the Specialized Agencies 1947, 33 UNTS 261.

they are bilateral host agreements between a state and an international organization regarding the latter's office or operations within the territory of the state.¹⁰⁹ Certainly in this third case, the treaties are the result of negotiations in which both parties defend their interests and participate on a similar footing.¹¹⁰ As a formal legal matter, the two parties to the treaties are equals.¹¹¹ These treaties typically give each party equal recourse to the chosen method for resolving disputes.¹¹² Indeed, in at least some cases, the organization may have the upper hand because its presence in a host state yields significant benefits for that state; some evidence here is the common practice of the host state providing material support to international organizations in conjunction with the opening of headquarters or other offices.¹¹³ Some scholars have cited treaties conferring IO immunity as supplying relevant data points for assessing the existence and content of customary international law rules of IO immunity.¹¹⁴ If that is right, then especially in light of the roles of international organizations in negotiating bilateral agreements with host countries, it follows that international organizations contribute directly to the establishment of customary international law rules of IO immunity.

The conduct of international organizations in connection with national judicial proceedings can also contribute directly to the formulation of customary international law rules of IO immunity. This conduct tracks that of states when they assert foreign sovereign immunity. In that context, the ICJ cited 'claims to immunity advanced by States before foreign courts' as one example of 'practice of particular significance'; likewise, assertions by states that 'international law accords them a right to such immunity' is evidence of *opinio juris*.¹¹⁵ The same goes for international organizations' claims to immunity. This is true even though, when it comes to the immunity, an asymmetry between states and international organizations persists. International organizations are always in the position of requesting national courts to recognize their immunity. States, on the other hand, are sometimes requesting and other times deciding whether to grant immunity through legislation or judicial decisions. Because of this asymmetry, international organizations do not contribute to customary international law in all of the ways that states do. But they still contribute.

¹⁰⁹ See, e.g., Headquarters Agreement between the International Criminal Court and the Host State (ICC Headquarters Agreement), Doc. ICC-BD/04-01-08, 1 March 2008, available at www.icc-cpi.int/NR/rdonlyres/99A82721-ED93-4088-B84D-7B8ADA4DD062/280775/ICCBD040108ENG1.pdf; Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti 2004, 2271 UNTS 235.

¹¹⁰ For one example, see the ICJ's account of the negotiations between the World Health Organization and Egypt. *Interpretation of the 1951 Agreement between the WHO and Egypt*, *supra* note 56, paras 16–27.

¹¹¹ See notes 86–88 above and accompanying text.

¹¹² See, e.g., ICC Headquarters Agreement, *supra* note 109, Art. 55.

¹¹³ H.G. Schermers and N.M. Blokker, *International Institutional Law* (6th rev. edn, 2018), at 701.

¹¹⁴ See, e.g., Wood, *supra* note 105, at 297.

¹¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 55.

B International Organizations as Functional Equivalents of States

International organizations may also contribute directly to customary international law when they engage in the same kinds of activities that states engage in, and, like states, they run the risk of incurring international responsibility if they violate international law in the course of doing so. Unlike in the examples described above, in these situations, international organizations are contributing to customary international law rules that apply to states and international organizations alike. These examples differ from those described in subpart 3.A in another way. All international organizations are in a position – at least potentially – to contribute to the customary rules on IO treaties, IO responsibility and IO immunity. Here, by contrast, the capacity of any individual organization to contribute will depend on that particular organization's activities and the customary international law rule at issue. While the conclusion that an international organization may contribute to customary international law as the functional equivalent of a state may follow from any of the three arguments laid out in Part 2, the examples that follow are best explained by the 'byproduct' rationale set out in subpart 2.C.

The first example involves UN policies and practices related to peacekeeping: the UN has engaged in practice and articulated *opinio juris* that ought to count for the purposes of ascertaining customary international humanitarian law. The UN is not a party to any of the Geneva Conventions – in fact, accession is open only to states.¹¹⁶ Since the early days of peacekeeping, the UN has taken steps to ensure that UN peacekeepers who operate under UN command comply with international humanitarian law.¹¹⁷ In 1999, Secretary-General Kofi Annan issued a bulletin that set out, in greater detail, applicable principles and rules of international humanitarian law.¹¹⁸ The bulletin applies to 'United Nations forces conducting operations under United Nations command and control'.¹¹⁹ Just like military manuals produced by national governments, the secretary-general's bulletin can supply evidence of both practice and of *opinio juris*.¹²⁰ The bulletin supplies evidence of practice because it shapes the way that UN peacekeepers operate on the ground.¹²¹ And the bulletin supplies evidence of

¹¹⁶ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

¹¹⁷ Letter from U Thant, UN Secretary-General, to Leopold Boissier, President of the International Committee of the Red Cross (undated), reprinted in 2 *International Review of the Red Cross* (1962) 29 (describing issued regulations requiring peacekeepers 'to respect the principles and the spirit of the general international Conventions relative to the conduct of military personnel').

¹¹⁸ 'Observance by United Nations Forces of International Humanitarian Law', *Secretary-General's Bulletin*, UN Doc. ST/SGB/1999/13, 6 August 1999.

¹¹⁹ *Ibid.*, at 1.

¹²⁰ Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 87 *International Review of the Red Cross* (2005) 175.

¹²¹ Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nation Peacekeepers', 51 *HILJ* (2010) 113, at 142–151 (describing both the theory and practice of 'UN command and control').

opinio juris because it is the result of careful and independent study of international humanitarian law. As UN Assistant Secretary-General Stephen Mathias explained:

The bulletin was the result of thorough legal research into the status of CIL [customary international law], as evidenced in the major conventions in the field, most notably the Geneva Conventions. ... Particular care was taken in ensuring that the principles included in the bulletin would not be objected to by States, particularly the members of the Security Council, and, for this purpose, bilateral consultations were held to provide Governments with the opportunity to comment on the text. On the other hand, it was also apparent from those consultations that positions among Member States were very far apart and that consensus on the text could not have been achieved. The bulletin, therefore, was issued under the sole authority of the Secretary-General, and here we may safely say that the 'spectator' thus became a true 'actor' in the formation of CIL: this bulletin unequivocally expresses an autonomous *opinio juris* (which does not necessarily mirror that of member States) and has allowed the development of a corresponding practice in operations under United Nations command and control.¹²²

Some requirements in the bulletin exceeded what customary international law clearly required at the moment that it was published. For example, the bulletin includes a prohibition on the methods of warfare intended to cause widespread, long-term and severe damage to the natural environment that is codified in Additional Protocol I to the Geneva Conventions.¹²³ In 1977, when Additional Protocol I was adopted, this obligation was a conventional one.¹²⁴ By the mid-1990s, some states viewed this obligation as a part of customary international law, though others disagreed.¹²⁵ Any assessment of the customary status of this prohibition today should take account of the 1999 bulletin as well as any subsequent practice and expressions of *opinio juris* by the UN.¹²⁶

A second example is treaty depositary practice. Since the establishment of the UN and other multilateral organizations in the wake of World War II, it has become increasingly common for international organizations to serve as treaty depositaries.¹²⁷ When

¹²² Mathias, 'The Work of the International Law Commission on Identification of Customary International Law: A View from the Perspective of the Office of Legal Affairs', 15 *Chinese Journal of International Law* (2016) 17, at 31.

¹²³ 'Observance by United Nations Forces', *supra* note 118, at 2; Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', 94 *AJIL* (2000) 406, at 408; Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Arts 35(3), 55.

¹²⁴ International Committee of the Red Cross (ICRC), *Customary IHL Database*, Rule 45, Causing Serious Damage to the Natural Environment, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45#Fn_B1EF7B7E_00021.

¹²⁵ *Ibid.*

¹²⁶ The ICRC references the bulletin without making clear whether it treats the bulletin as evidence of relevant practice or *opinio juris*. See *ibid.*

¹²⁷ For example, as of 1993, the UN secretary-general served as the depositary for 436 multilateral agreements. This figure does not include treaties initially deposited with the League of Nations, which the UN secretary-general also administers. Treaty Section of the UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (UN Treaty Practice), UN Doc. ST/LEG/7/Rev.1 (1994).

international organizations serve as treaty depositaries, they are engaged in the same activities as states are when states serve as treaty depositaries. The job of the treaty depositary is the same whether the depositary is a state or an international organization. Both the VCLT and the VCLT-IO instruct treaty depositaries to act ‘impartially’ and confine depositaries to ministerial tasks.¹²⁸ Unless a treaty provides otherwise, these tasks include: ‘keeping custody of the original text’; ‘preparing certified copies of the original text’; informing parties to the treaty of various notifications related to the treaty; and examining whether signatures, ratifications or other communications relating to a treaty are ‘in due and proper form’.¹²⁹ By design, the tasks assigned to depositaries are administrative and non-controversial.¹³⁰ Nevertheless, the VCLT and the VCLT-IO provisions on depositaries are not comprehensive, and difficult questions sometimes arise, such as how to handle instruments of accession from entities whose statehood is contested or reservations or withdrawals that are not clearly permitted by the treaty text or by the VCLT and the VCLT-IO.¹³¹

Just like states, international organizations can contribute to the customary international law of treaty depositaries in two ways. First, should there be any doubt that the provisions of the VCLT and the VCLT-IO relating to treaty depositaries reflect customary international law, the practice and *opinio juris* of international organizations that serve as treaty depositaries ought to be taken into account. Second, because the VCLT and the VCLT-IO leave open some questions about how treaty depositaries ought to discharge their responsibilities, there is room for evolution and further development of that body of customary international law. For example, in 2011, the ILC adopted a Guide to Practice on Reservations to Treaties, which includes several provisions that address how depositaries ought to handle reservations.¹³² These specifications could become customary international law. And international organizations that serve as treaty depositaries can contribute to that further development, just as states that serve as treaty depositaries can.

A third example concerns the UN’s role when it is engaged in territorial administration, as it was in East Timor and in Kosovo. In both places, for a time, the UN exercised all aspects of governmental authority.¹³³ When the UN (or any other international

¹²⁸ VCLT, *supra* note 37, Art. 76(2); VCLT-IO, *supra* note 27, Art. 77(2).

¹²⁹ VCLT, *supra* note 37, Art. 77(1); VCLT-IO, *supra* note 27, Art. 78(1). As the ILC explained in the commentaries to the draft articles that formed the basis for the VCLT, the ILC ‘gave particular attention to’ the treaty depositary practice of the UN secretary-general. ‘Report of the International Law Commission on the Work of Its Eighteenth Session’, 2 *ILC Yearbook* (1966) 172, at 269.

¹³⁰ Ouguergouz *et al.*, ‘1969 Vienna Convention, Article 77: Functions of Depositaries’, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 1715, at 1736.

¹³¹ UN Treaty Practice, *supra* note 127, at 22–23 (questionable accessions), 47–48 (withdrawals), 49–65 (reservations).

¹³² ILC, ‘Guide to Practice on Reservations to Treaties’, 2(2) *ILC Yearbook* (2011) 26. For example, the guide suggests that the functions of depositaries ought to include determining whether reservations to treaties are in due and proper form. The guide also prescribes the steps that ought to be taken in the event of a difference relating to the handling of reservations emerges between a state or international organization, on the one hand, and a depositary, on the other. *Ibid.*, at 28.

¹³³ SC Res. 1272 (1999), para. 1; United Nations Transitional Administration in East Timor (UNTAET), On the Authority of the Transitional Administration in East Timor, Regulation no. 1999/1, s. 1, available

organization) serves in this role, it can contribute directly to a wide range of customary international law norms. One especially salient area is human rights. In both East Timor and Kosovo, the UN adopted regulations that required observance of specified international human rights norms.¹³⁴

By contrast, when international organization officials evaluate the conduct of states and criticize that conduct where it falls short, the international organization will – in most cases – contribute to customary international law only indirectly. Consider a specific example. The former UN high commissioner for human rights, Zeid Ra’ad Al Hussein, has repeatedly excoriated the government of Myanmar for gross violations of the human rights of the minority Rohingya Muslim population.¹³⁵ Such condemnations are certainly important and – one hopes – quite influential. And they may be relevant for ascertaining the existence or content of a customary international law rule. But, unlike the other examples considered above, such condemnations are only indirectly relevant. Like the decisions of international courts or tribunals, the views of the UN high commissioner are a subsidiary means for identifying customary international law rules.¹³⁶ The reasons for according weight to judicial decisions apply to the UN high commissioner. Judgments of international tribunals merit consideration because the judges have significant expertise in international law, support their judgments with considerable evidence, are specifically tasked with adjudicating international law disputes and are selected through a process that makes it less likely that their views reflect a particular national perspective.¹³⁷ Likewise, the UN high commissioner has significant authority to promote respect for human rights,¹³⁸ has relevant expertise and an international perspective¹³⁹ and has at his or her disposal various tools to gather information about individual states’ implementation of their human rights obligations.¹⁴⁰

at <https://peacekeeping.un.org/en/mission/past/etimor/untaetR/etreg1.htm>; SC Res. 1244 (1999), paras 10–11; United Nations Interim Administration Mission in Kosovo (UNMIK), On the Authority of the Interim Administration in Kosovo, Regulation no. 1999/1, 25 July 1999, s. 1, available at https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm.

¹³⁴ UNMIK, On the Law Applicable in Kosovo, Regulation no. 1999/24, 12 December 1999, available at https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_24.htm; (requiring ‘all persons undertaking public duties or holding public office in East Timor’ to ‘observe internationally recognized human rights standards’ as reflected in the Universal Declaration on Human Rights and a number of treaties); UNTAET, Regulation no. 1999/1, s. 2.

¹³⁵ Statement by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein, Special Session of the Human Rights Council on the Human Rights Situation of the Minority Rohingya Muslim Population and Other Minorities in the Rakhine State of Myanmar, 5 December 2017, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22487&LangID=E.

¹³⁶ ICJ Statute, *supra* note 65, Art. 38(1)(d).

¹³⁷ ILC Draft Conclusions, *supra* note 4, at 110, Comments 4 and 7 to ILC Draft Conclusion 13; see also Alter, ‘Agents or Trustees? International Courts in their Political Context’, 14 *European Journal of International Relations* (2008) 33.

¹³⁸ GA Res. 48/141 (1993).

¹³⁹ *Ibid.*, para. 2(a) (the high commissioner shall ‘[b]e a person of high moral standing and personal integrity and shall possess expertise, including in the field of human rights, and the general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance of the duties of the High Commissioner’).

¹⁴⁰ For example, in the statement quoted in note 135 above, the former high commissioner explained: ‘These patterns of human rights violations against the Rohingya have been documented by successive Special Rapporteurs since 1992, as well as by my Office.’

One possible objection here is that it is widely accepted that one state's criticism of another state's conduct can supply evidence of a customary international law norm.¹⁴¹ For example, in 2017, Bangladesh's foreign minister accused Myanmar of committing genocide against the Rohingya.¹⁴² Why does the foreign minister's protest count, while the UN high commissioner's does not? It is because Bangladesh and Myanmar are similarly situated in a way that the UN and Myanmar are not. The governments of Bangladesh and Myanmar are engaged in governing territories. In doing so, they must confront the difficult choices and trade-offs that governance requires and may incur international responsibility for violations of international law. In other words, they are engaging in – or refraining from engaging in – human rights violations in a similar context. The UN high commissioner for human rights, by contrast, is not engaged in a functionally equivalent activity; instead, the high commissioner is collecting information and evaluating state practice.

The point, then, is not that protests by international organization officials can only supply indirect evidence of customary international law. It is that protests by international organization officials can supply direct evidence only when international organizations and states are engaged in similar conduct. Distinguishing these situations will not always be easy. Questions may arise about the level of generality at which that conduct is described, for example, or how closely connected the conduct must be to the protest, both in terms of time and in terms of which officials or parts of the organization are involved in the protest and the underlying conduct. (I would argue, for example, that the UN's past role in territorial administration in Kosovo and East Timor does not change the analysis of the UN high commissioner's statements regarding the Rohingya.) As with many aspects of customary international law, case-by-case analysis is necessary, and some controversy and disagreements are sure to emerge.

More generally, these examples illustrate that, to support the claim that the practice of an international organization contributes directly to customary international law, it is not enough to establish that the organization was acting within the scope of its powers and purposes. There is no doubt that, in the example above, the former UN high commissioner was acting within his powers and purposes or that he was acting as a UN official within the UN's powers and purposes. But this fact alone is insufficient to establish that such conduct contributes directly to the creation of customary international law.

4 Conceptual and Methodological Questions

Now that the circumstances in which international organizations can directly contribute to the formation of customary international law have been delineated, this

¹⁴¹ ILC Draft Conclusions, *supra* note 4, at 91, Conclusion 6, Comment 2 ('it is now generally accepted that verbal conduct (whether written or oral) may count as practice; action may at times consist solely in statements, for example a protest by one State addressed to another').

¹⁴² Safi, 'Myanmar Treatment of Rohingya Looks Like "Textbook Ethnic Cleansing," Says UN', *The Guardian* (11 September 2017) (quoting foreign minister of Bangladesh AH Mahmood Ali as saying: 'The international community is saying it is a genocide. We also say it is a genocide').

part addresses some conceptual and methodological questions about the implications of these conclusions. First, one might object that recognizing international organizations' capacity to contribute to customary international law is inconsistent with the rule of *pacta tertiis*, which provides that treaties cannot create rights or obligations for third states without their consent.¹⁴³ Second, if international organizations can contribute to customary international law, is it necessary to survey not only the practice of all states but also the practice of all international organizations before concluding that a 'general and consistent practice' exists?¹⁴⁴ According to some, the answer to this second question cannot possibly be affirmative because it would make the identification of customary international law an unmanageable task in a world with 'hundreds if not thousands' of international organizations and because this description does not track the way that states actually identify customary international law rules.¹⁴⁵

The *pacta tertiis* rule reflects and reinforces the positivist view that consent plays an essential role in the creation of international legal obligations. If states cannot create obligations for other states without their consent, how can the practice of international organizations – many of which have limited membership – contribute to customary international law? To start, this objection rests on an overly broad interpretation of the *pacta tertiis* rule. The *pacta tertiis* rule has never meant that a state must consent to every instance of practice that contributes to a customary international law rule that binds – or that may come to bind – that state. Thus, for example, it has long been the case that bilateral or plurilateral treaties can constitute practice that is relevant to ascertaining the content of customary international law. Non-party states can respond to that practice in a variety of ways that will likewise be relevant to any resulting rule of customary international law. For example, they might engage in a contrary practice themselves or articulate the view that a treaty does (or does not) conform to existing customary international law rules. But non-party states have never had the ability to preclude other states from engaging in conduct that contributes to customary international law. For that reason, *pacta tertiis* does not pose an obstacle to international organizations' contributions to customary international law.

Separately, this objection is unavailing because the international legal system has long accepted the possibility that at least some international organizations can affect the legal obligations of non-member states notwithstanding the *pacta tertiis* rule. The

¹⁴³ VCLT, *supra* note 37, Art. 34.

¹⁴⁴ Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission', 109 *AJIL* (2013) 822, at 830–831 ('[p]resumably, it cannot mean that to establish a general practice accepted as law, it is necessary to establish that the practice is "sufficiently widespread and representative" ... among both states and all of the thousands of international organizations, since no one approaches customary international law in that way'); see also Brian J. Egan, Legal Adviser, US Department of State, Remarks at the 71st Session of the General Assembly Sixth Committee on Agenda Item 78, New York, 24 October 2016, available at <https://2009-2017-usun.state.gov/remarks/7560> ('we believe that such language [in Draft Conclusion 4] unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze the practice of hundreds if not thousands of international organizations with widely varying competences and mandates').

¹⁴⁵ Egan, *supra* note 144; Murphy, *supra* note 144.

ICJ had to confront this possibility in its *Reparation for Injuries* opinion, which asked specifically whether the UN could pursue an international claim against a non-member state. The Court concluded that the UN could do so because it had objective legal personality.¹⁴⁶ If an organization has objective legal personality, then its establishment has legal consequences for non-member states; specifically, the organization's establishment triggers the application of obligations under general international law.¹⁴⁷ This conclusion is in some tension with the *pacta tertiis* rule, but it is uncontroversial, at a minimum, with respect to the UN. Commentators have debated the extent to which other international organizations also enjoy objective legal personality. Some commentators have argued that the Court's reasoning is limited to the UN,¹⁴⁸ while others have argued that it extends only to other international organizations with open membership.¹⁴⁹ Chittharanjan Amerasinghe makes a strong case for the view that most, if not all, international organizations have objective legal personality.¹⁵⁰ While scholars continue to debate exactly which international organizations have objective legal personality, states seem to have acquiesced to the concept.¹⁵¹ The bottom line is that it has long been clear that the establishment of international organizations can affect the legal obligations of non-member states; the debate is about how often, not whether, they do so. Indeed, the existence of international organizations with objective personality is but one of a number of departures from strict legal positivism that have come to characterize the international legal system.¹⁵²

The second objection reflects the concern that the methodological implications of international organizations' direct role in the creation of customary international law are impossibly daunting. Closer examination reveals, however, that this concern is overstated. In many cases, there will not be any need to review the practice of international organizations at all. To see where consideration of international organization practice is necessary, it is helpful to work separately through the circumstances addressed in subparts 3.A and 3.B. It turns out that a comprehensive survey of all available international organization practice and *opinio juris* is necessary for only a small fraction of customary international law rules: those rules described in subpart 3.A

¹⁴⁶ *Reparation for Injuries*, *supra* note 32, at 185.

¹⁴⁷ The Court assumed, but did not decide, that non-member states have obligations to protect the agents of international organizations that parallel states' customary international law obligations to protect foreign nationals and especially foreign government officials. *Ibid.*, at 177.

¹⁴⁸ P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th edn, 2009), at 479.

¹⁴⁹ H.G. Schermers and N.M. Blokker, *International Institutional Law* (6th edn, 2018), at 1031.

¹⁵⁰ As he points out, it is hard to see why organizations with broad and open membership should be analysed differently from organizations with more limited membership. From the perspective of a non-member state, the situation does not depend on the size of the organization's membership or whether it is open or closed; the key point is that the non-member state did not participate in, or consent to, the organization's establishment. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005), at 90.

¹⁵¹ Subsequent practice among states does not reveal any refusals to recognize international organizations' objective legal personality. *Ibid.*, at 87.

¹⁵² Others include recognition of *jus cogens* norms and the widely accepted view that customary international law binds new states.

that govern interactions between states and international organizations and among international organizations. Some of the sources that would need to be consulted are readily available, such as headquarters agreements between states and international organizations, court documents filed by international organizations or descriptions of practice and the justifications for it published in the *UN Juridical Yearbook*. In some cases, relevant practice (or evidence of *opinio juris*) may be harder to unearth. For example, the ILC's special rapporteur on the responsibility of international organizations complained that international organizations have declined to share relevant practice.¹⁵³ But hidden or secret practice – to the extent that it exists – does not pose a methodological problem because it is irrelevant to ascertaining customary international law. As the ILC has affirmed, only practice that is 'publicly available or at least known' can contribute to customary international law.¹⁵⁴

When it comes to the category addressed in subpart 3.B – where international organizations engage in the same kinds of activities that states engage in – the universe of international organizations whose practice and *opinio juris* needs to be considered will vary by the customary international law rule at issue. Two 'filters' come into play. First, only those international organizations that actually engage in the conduct regulated by a given rule need to be considered. This requirement cuts down the number of potentially relevant international organizations quite substantially. Second, as noted above, information about that conduct must be publicly available to contribute to the formation of customary international law.

A related methodological concern arises where the practice of both states and international organizations contributes directly to the formation of customary international law and the practice of states systematically diverges from the practice of international organizations. Does the (inconsistent) practice or *opinio juris* of international organizations preclude the emergence of a customary international law rule that binds states?¹⁵⁵ Not necessarily. One possibility that would need to be considered is the emergence of a rule of particular customary international law that applies to international organizations but not to states. The ILC uses the term 'particular customary international law' to describe rules of customary international law that bind only a subset of states.¹⁵⁶ The most familiar examples of such rules bind a limited number of states in close geographical proximity.¹⁵⁷ The commission has also observed that 'there

¹⁵³ See note 99 above.

¹⁵⁴ ILC Draft Conclusions, *supra* note 4, at 91, Comment (5) to Draft Conclusion 5 ('[p]ractice must be publicly available or at least known to other States in order to contribute to the formation and identification of rules of customary international law. Indeed, it is difficult to see how confidential conduct by a State [or, by extension, an international organization] could serve such a purpose unless and until it is revealed').

¹⁵⁵ Murphy, *supra* note 144, at 831; see also Comments and Observations Received from Governments, *supra* note 22, at 21 (expressing doubt that the practice of international organizations could tip the balance in favour or against the conclusion that a rule of customary international law exists).

¹⁵⁶ ILC Draft Conclusions, *supra* note 4, at 114, Draft Conclusion 16(1) ('[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States').

¹⁵⁷ *Ibid.*, at 115, Comment (1) to Draft Conclusion 16 (describing a rule or rules of customary international law 'particular to the Inter-American Legal system', 'limited in its impact to the African continent', 'a local custom' and 'of a regional nature').

is no reason in principle why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise'.¹⁵⁸ The commission does not specifically refer to the possibility that particular customary international law might bind international organizations and not states, but nothing about the concept excludes this possibility. Indeed, the fit is perfect.

Consider a concrete example.¹⁵⁹ Both the state and the IO responsibility articles provide that a state or international organization that incurs international responsibility has, *inter alia*, an obligation to make full reparation.¹⁶⁰ Both sets of articles also indicate that forms of reparation include restitution, compensation and satisfaction, singly or in combination, and they rank the three forms of reparation, with restitution at the top of the list and satisfaction at the bottom.¹⁶¹ Imagine that, in the coming decades, state practice conformed to the ARS provisions regarding reparations, while the practice of international organizations diverged so that, among international organizations, satisfaction became the most prevalent form of reparation. Such a divergence would not necessarily undermine the conclusion that the ARS on reparations reflect customary international law. Instead, if a principled basis could be articulated for it, such a divergence might indicate the existence of a particular customary international rule applying to international organizations but not to states.

Furthermore, there may also be particular customary international law rules that apply only to subsets of international organizations. Recall, for example, the AIIB's and EBRD's dispute settlement provisions described above, which suggest the existence of particular customary international law rules that arise from, and apply specifically to, agreements between states and international financial institutions.¹⁶² One could imagine the emergence of particular customary international law rules that govern treaties between states and international financial institutions. As the VCLT-IO was being worked out, some international financial institutions expressed concern that the rules being developed would be problematic for agreements related to these organizations' large-scale, long-term lending operations,¹⁶³ and, to date, no

¹⁵⁸ *Ibid.*, at 116, Comment (5) to Draft Conclusion 16.

¹⁵⁹ For another example, see Daugirdas and Schuricht, 'Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies', 3 *Asian Infrastructure Investment Bank Yearbook of International Law* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539178 (explaining why international organizations' obligations to afford effective remedies may have a broader scope than states' obligations).

¹⁶⁰ ARS, *supra* note 94, Art. 38(1); ARIO, *supra* note 93, Art. 31(1).

¹⁶¹ Restitution is the preferred form of reparation, followed by compensation and then satisfaction. See ARIO, *supra* note 93, Arts 35–37; ARS, *supra* note 94, Arts 35–37.

¹⁶² See notes 37–43 above and accompanying text; see also L. Boisson de Chazournes, 'Partnerships, Emulation, and Cooperation: Toward the Emergence of a Droit Commun in the Field of Development Finance', 3 *World Bank Law Review* (2011) 173.

¹⁶³ Note by the Secretariat, Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/C.6/38/4, 27 October 1983, para. 17 (annexing statement adopted by the Administrative Committee on Co-ordination).

international financial institutions have acceded to the VCLT-IO.¹⁶⁴ Particular customary international law could fill any resulting gap.

5 Conclusion

Having concluded that international organizations can contribute directly to the creation of customary international law in certain circumstances, this part takes stock of the consequences of this conclusion. As a first cut, the practical consequences for the corpus of customary international law may appear rather limited. International organizations as a group are significant players in shaping a confined set of rules: those that govern relations between states and international organizations and among international organizations. These rules are important, especially for international organizations, but they constitute only a tiny slice of the universe of customary international law. When it comes to other rules of customary international law that regulate the activities of states and international organizations alike, the number of international organizations in a position to contribute shrinks dramatically, and states remain the overwhelmingly dominant actors.

The indirect consequences of affirming international organizations' capacity to contribute to the formation of customary international law are at least as significant as the direct consequences. Affirming this capacity fortifies international organizations' status in the international legal system as entities whose actions (and omissions) are legally significant. In the decades since the *Reparation for Injuries* advisory opinion unanimously confirmed the UN's international legal personality, international organizations' rights, duties and capacities on the international plane have become incrementally clearer. The ILC has played a central role in these developments. The elaboration of the draft articles that eventually became the VCLT-IO is one significant milestone. The adoption of the ARIIO is another. These draft articles have been the target of significant criticism; nevertheless, the basic message of the IO responsibility articles – that international organizations can violate international law and incur international responsibility when they do so – is surely correct.

The most important indirect consequence of affirming international organizations' role in creating customary international law is that it bolsters the conclusion that customary international law binds international organizations.¹⁶⁵ International organizations are certainly bound by the customary international law rules that they help to create. This conclusion follows from the very definition of customary international law, which requires practice to be coupled with *opinio juris* – the subjective belief that customary international law requires that practice. International organizations could never have *opinio juris* that is relevant to the formation of customary international law unless they understood those rules as binding them.

¹⁶⁴ See *supra* note 90.

¹⁶⁵ See Daugirdas, *supra* note 69.

Within international organizations, affirming this law-making role may shift international organizations' internal orientation and attitude towards customary international law in subtle but consequential ways. It may change the way that lawyers within international organizations understand and carry out their jobs day to day. In particular, it may affect the sources that they consult when answering legal questions and the kinds of expertise that are understood to be necessary to discharge their responsibilities. In particular, proficiency in public international law may become more important.¹⁶⁶ As practice accumulates on topics like IO responsibility, customary international law is likely to grow in importance as a source of applicable rules for international organizations, and the practice and views of other international organizations will be of greater interest. In part for that reason, international organizations may start sharing more information about their practice and the legal rationales for that practice. In addition, international organizations may become more willing to publicly engage on questions of general international law. To date, international organizations have been reticent to do so.¹⁶⁷

Finally, a role in making customary international law may make international organizations more willing to comply with those rules.¹⁶⁸ Anthea Roberts and Sandesh Sivakumaran, for example, argue that one of the strongest reasons to involve armed groups in the creation of customary international humanitarian law is to increase their recognition of, and compliance with, those rules.¹⁶⁹ They point to research suggesting that involvement in the development of norms promotes a sense of ownership over those norms.¹⁷⁰ In light of the dearth of dispute settlement mechanisms for resolving claims that international organizations have violated international law, voluntary compliance with customary international law norms is especially important.

Thus, at the end of the day, even if international organizations' substantive contributions to customary international law are limited, the practical consequences of recognizing those contributions are significant and positive. The ILC was right to affirm that international organizations can so contribute in order to hasten and reinforce these effects.

¹⁶⁶ See, e.g., G.A. Sarfaty, *Values in Translation* (2012), at 100–101 (observing that transactional specialists dominate the legal department at the World Bank).

¹⁶⁷ The discussion above about how international organizations might come to be bound by international law rules governing international organization treaties is one exception. Another noteworthy exception is the Asian Infrastructure Investment Bank, which announces on its website: '[T]he AIIB is both constituted, and governed, by public international law, the sources of which include applicable international conventions, customary international law, general principles of law and subsidiary means for the determination of rules of law.' Asian Infrastructure Investment Bank, *The Role of Law at AIIB*, available at www.aiib.org/law.

¹⁶⁸ Blokker, *supra* note 6, at 10 ('[w]hy should [international organizations] fully comply with rules of customary international law without being able to fully participate in its development?').

¹⁶⁹ Roberts and Sivakumaran, *supra* note 8, at 126.

¹⁷⁰ *Ibid.*, at 127.