Who Should Make International Law?

The standard account of international law is of *jus inter gentes*, the law established between governments of states to regulate relations between states as juridical entities. I argue instead for a conception of international law as inter-public: international law is the law between public entities. International law should be theorized as the law between public entities (outside a single state), these public entities being subject to public law and to requirements of publicness. The idea is that international law is shaped by the inter-public nature of the various processes in which states and certain other public entities come together to establish rules and institutions. The intuition is that states, being themselves creatures of public law, and being producers of national rules which have a quality of publicness in their orientation, come together with each other in an international legal rule-making and decision-making normative process that is not identical to a comparable process among unitary rational non-public actors. This intuition runs against standard rational-actor bargaining models of international lawmaking.

In this Memo I build on this general approach, to focus on the question: which are the entities whose practice should count in making international law? My concern is with the generation (and modification) of international law: that is, who makes international law. I do not here propose any different view to the prevailing one on the question of who is or could be regulated by international law: states, corporations, individuals, inter-state organizations, private standard-setting organizations, and so forth.  

Why is this question of jurisgenerative capacity a problem? The practical problem is that a vast amount of normatively-framed regulatory practice does not fit within the standard model of international law as the law between states. An illustration is the work of the International Standards Organization (ISO), which consists of one national standard-setting body (public, private, or hybrid) from each of country. At present, this body does

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1 A shift from a jus inter gentes model to an inter-public model can be expected to have some implications also about the content of international law. But I am not directly addressing these issues of content here. My account of inter-public international law incorporates most of the substance and institutions of the established jus inter gentes: much international law is indeed made by the agreements or the practices of national governments inter se. But I suggest a different view of the reasons for treating that as international law, a broader set of entities responsible for making international law, and a more demanding view of what is needed to make international law.
not fit easily into the sources of international law. Yet it has set over 13,000 standards, including many with important economic, social, and environmental implications, and its insufficiently-studied procedures include some 180 technical committees, 550 sub-committees, and 2000 working groups, which altogether involve over 40,000 people.

I have been led into working on this through work in the emerging field of global administrative law, which raises squarely the problem that much relevant normative practice is being generated by bodies that are not states, and in ways that do not fit within standard sources, making it difficult to evaluate and sift in normative terms. Our concept of global administrative law refers to the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make. It is practiced at multiple sites, with some hierarchy, some inter-site precedent and borrowing of principles, but considerable contextual variation. Thus the World Trade Organization Appellate Body now requires (e.g. in the Shrimp-Turtle case, mentioned below) member states to follow certain administrative procedures before excluding imports, the Basle Committee of central bankers now puts out drafts of its proposals on capital adequacy for wide comment before adopting them, the UN Security Council has adopted a limited review mechanism to make it possible for people listed as terrorist financiers to be delisted, the World Bank operates a notice and comment process before adopting policies and has an Inspection Panel to hear complaints that it has breached its policies, the International Olympic Committee follows an elaborate procedure for athletes suspected of doping and has a review process culminating in arbitration at the International Court of Arbitration for Sport. This body of practice is normative, and cross-referential. It is influenced by treaties and fundamental customary international law rules, but it goes much beyond these sources and in places moves away from them. The kind of problem I seek to address in this Memo is: whose normative practice should count in framing general principles of global administrative law which others are then called upon to follow? For example, what process constraints should be followed by the Forest Stewardship Council, a private entity, in developing detailed sets of criteria for sustainable forest use, and for certification of products from such forests, which are to some extent enforced by NGO monitoring and market pressure? If the FSC does not follow these process standards, should this weaken the significance of its substantive standards? More fundamentally, are there criteria to help decide whether the FSC should or should not be able to contribute to making international law on forestry issues?

My general argument is that the idea that international law is made by entities that are themselves public – operating under their own public law, and oriented toward publicness as a requirement of law – has implications for how we think about international law. Instead of international law simply as agreements between juridical units, it points to the possibility of understanding public international law as law meeting publicness requirements that is made between entities whose public nature qualifies them as having jurisgenerative capacity. This is, in short, the possibility of understanding international law as inter-public law rather than simply as jus inter gentes. The most important of
these public entities are likely to be states. They are accustomed to the operation of the principles of public law (an indicative list of these principles is provided below). They are each equipped with a raft of institutions operating in a public law environment, and which will be involved in the international law process. Associations and citizens’ groups within the state bring similar public values to their participation in international law. However, there is no strong reason to limit the category of public law entities – and of participants in inter-public law – to states. A conceptual shift could be operationalized by specification of criteria for the relevant (types of) public entities, rather than by routine international law specification of publics.

I argue that necessary conditions for an entity to participate in making international law are:

1) that it accept that it is subject to general principles of public law; and
2) that it pursue requirements for publicness in law (this is an aspirational requirement, reflecting the direction of development in international law-making institutions, but not at present general practice).

I will elaborate on these criteria.

1. **Acceptance of General Principles of Public Law as a Condition for Having Jurisgenerative Capacity in International Law**

I argue that a necessary requirement for an entity to have the capacity to generate international law, is that the entity accept that it is subject to general principles of public law. States ordinarily accept that these principles apply to them. Formal inter-state institutions frequently do so. Informal inter-state networks frequently do not, but this is changing, as in the case of the Basel Committee. For-profit corporations ordinarily do not. Non-state organizations trying themselves to set and implement general international standards, such as the Forestry Stewardship Council or the International Standards Organization, increasingly accept such requirements.

General principles of public law combine formal qualities with normative commitments in the enterprise of channeling, managing, shaping and constraining political power. The kinds of principles I have in mind are:

(i) **The Principle of Legality.** One major function of public law is the channeling and organizing of power. This is accomplished in part through a principle of legality – actors within the power system are constrained to act in accordance with the rules of the system. This principle of legality enables rule-makers to control rule-administrators. The agent is constrained to adhere to the terms of the delegation made by the principal. In a complex system of delegation, it is often preferable to empower third parties to control the agent in accordance with criteria set by the principal, creating the basis for a third-party rights dynamic even in this principal-agent model. In the case of inter-state institutions, the states establishing the institution often style themselves as principals (severally or collectively), with the institution as agent, but their direct control of the agent may be attenuated, a problem they typically mitigate both by legal controls and by limiting the
operational capacity of the agent. Thus international institutions usually depend on individual states to act as agents in operational implementation.

(ii) The Principle of Rationality. The culture of justification has been accompanied by pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions, and to produce a factual record supporting the decision where necessary. This is part of both political and legal culture. In both contexts it leads those institutions with review power into continuous debates about whether and on what standard to review the substantive rationality of the decision: manifestly unreasonable, incorrect, etc.

(iii) The Principle of Proportionality. The requirement of a relationship of proportionality between means and ends has become a powerful procedural tool in European public law, and increasingly in international public law

(iv) Rule of Law. The demand for rule of law can mean many things. The dominant approach is proceduralist, meaning a general acceptance among officials (and in the society) of particular deliberative and decisional procedures. An alternative ‘rights conception’ of the rule of law focuses on what Ronnald Dworkin calls ‘the ideal of rule by an accurate public conception of individual rights.’

(v) Human Rights. I mean here the basic rights the protection of which by the legal system is almost intrinsic (or natural) to a modern public legal system. This category overlaps a lot with the previous four categories, but I list it separately to leave scope for arguments that some human rights (perhaps of bodily integrity, privacy, personality) are likely to be protected by public law as an intrinsic matter (without textual authority), yet without being subsumed into ‘rule of law’.

2. **Pursuing Conditions of Publicness in Law as an Aspirational Condition for Having Jurisgenerative Capacity in International Law**

Law – especially public law -- has in many national societies a distinct normative quality of publicness, which refers to the claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups. I argue that this quality is increasingly part of the concept of international law, and that this quality is having a transformative effect on the sources of international law, reducing the significance of voluntarism, bilaterality and opposability, and increasing the significance of generality, solidarity, and the integration of international law into a conception of world public order.

An aspiration to meet requirements of publicness in making law – that is, an aspiration for law to stand in the name of the whole society and to speak to that whole society – is increasingly a requirement of jurisgenerative capacity in international law, although practice is far from uniform. Almost every intergovernmental institution currently faces demands to increase the openness of its decision processes: the Basel Committee of central bankers now publishes drafts of its proposals to receive comments from interested private sector groups before adoption, NAFTA arbitral tribunals now accept amicus briefs from third parties, and so on. This political commitment to publicity as an element going to the legitimacy of governance is often expressed as a requirement that legal rules and decisions be made publicly accessible if they are to qualify as law. This claim has not completely dominated the field, but it has had the effect of raising doubts about the
law—quality of much secret or unpublicized state practice which a century ago would probably have satisfied the sources test for international law pedigree. Many inter-state agreements and understandings on security matters and intelligence are kept secret, but much of this practice – e.g. the silent transfers of suspects without extradition processes, or promises to share intelligence information – is not generally analyzed as making international law or generating international legal obligation, in the way that other state practice is thought to do. The IMF keeps not only the deliberations of its own Board secret, but also many pieces of ‘advice’ to, and understandings with, borrowing countries. It seems to accept that doing this means these materials can not easily be jurisgenerative. The WTO Appellate Body, which wants its decisions to be jurisgenerative, seeks in different ways to break out of the ‘club model’ of WTO dispute settlement which compromises its compliance with requirements of publicness. For instance, it has battled with the WTO member states over its wish to accept amicu curiae briefs from non-state actors, its desire to hold hearings in public (they are ordinarily closed), its desire to make many documents publicly available earlier.

International legal bodies are also seeking to impose requirements of publicness back onto states. The WTO Appellate Body decision in the Shrimp-Turtle case provides an example. The US prohibited import of shrimp from India, asserting that Indian shrimp vessels did not meet US statutory requirements concerning protection of turtles. The WTO Appellate Body did not hold that the US acted contrary to GATT in refusing to treat Indian shrimp in the same way as identical shrimp from elsewhere, even though the text of GATT seemed to call for this. The Appellate Body deferred to a US public law decision that demand from US markets for shrimp was not going to be permitted to more grievously threaten turtles. But the Appellate Body held that the way in which the US authorities took their legal decision was arbitrary or unjustifiable, in so far as the US did not provide India with proper notice of its plans to find Indian vessels non-compliant, an opportunity to contest these proposed findings in advance, or a reasoned written decision it could challenge. In effect, the US process did not meet some of the requirements for publicness in law, as these requirements were not limited to a public comprised of US citizens, but included affected Indian interests as well.

If the case can successfully be made for jurisgenerative capacity in international law being attributed to public entities in this way, the next problems include:

1) normative criteria for weighting jurisgenerative influence among public entities:
   - states should continue to have normative primacy
   - other entities should have greater or lesser weight as jurisgenerators, within their areas of competence, depending on the degree to which they already incorporate the conflicting interest in a field, and follow public-law type procedures (including principles of representation and accountability) in crafting their positions

2) whether international constitutional principles should set other restrictions on jurisgenerative impact or weight
- for example, how to treat public entities with comprehensive views incompatible with maintenance of this international legal system.

Comments very welcome!