Towards World Legislation? The Exercise of Public Authority by International Institutions

Ramses A. Wessel
Professor of the Law of the European Union and other International Organizations at the Centre for European Studies of the University of Twente, The Netherlands

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1. Introduction

These days there is some agreement on the idea that “law-making is no longer the exclusive preserve of states”.¹ While debates on a world government and world legislation date back to (at least) the beginning of the twentieth century, the development of norm-creating functions of international organizations in particular triggered a new debate on this phenomenon.² Indeed, international organizations and informal international regimes and networks are engaged in normative processes that, de jure or de facto, impact on states and even on individuals and businesses.³ Decisions of international organizations are increasingly considered a source of international law,⁴ and it is quite common to regard them in terms of international regulation or legislation.⁵ In addition, and apart from regular international organizations, an increasing number of other fora and networks have been recognised to play a role in international or transnational normative processes. As José Alvarez notes, more and more technocratic international bodies “appear to be engaging in legislative or regulatory

⁴ See also I.F. Dekker and R.A. Wessel, Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions, in Governance and International Legal Theory 215-236 (Ige F. Dekker & Wouter G. Werner eds., 2004).
⁵ See on the possible difference between ‘regulation’ and ‘legislation’ infra, section 4.
activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making; [t]hey also often engage in law-making by subterfuge.”

This contribution first of all purports to investigate to which extent international institutions are believed to be involved in law-making. Apart from more traditional, formal, law-making activities by international organizations (section 2), we will look at the less visible ‘informal’ international law-making processes (section 3). The main question raised by this contribution, however, is how international law-making (or world legislation) could be conceptualised. How do we recognise international law-making? (section 4).

2. Formal Legislation

As far as regular formal international organizations are concerned, their competence to take binding decisions vis-à-vis their Member States is undisputed. They may even exercise sovereign powers, including executive, legislative and judicial powers.7 Thus, apart from the European Union and the United Nations,8 organizations with such a competence to take legally binding decisions include the World Health Assembly of the World Health Organization (WHO), the Council of the International Civil Aviation Organization (ICAO), the Organization of American States, the Western European Union (WEU), North Atlantic Treaty Organization (NATO), the Organisation for Economic Co-operation and Development (OECD), Universal Postal Union (UPU), World Meteorological Organization (WMO) and the International Monetary Fund (IMF).9 Alvarez’s famous survey includes standard setting by the International Maritime Organization (IMO), the Food and Agriculture Organization (FAO), the ICAO, the International Labour Organization (ILO), the International Atomic Energy Agency (IAEA), United Nations Environmental Programme (UNEP), the World Bank, and the IMF. In addition, many international conventions – including the United Nations Convention on the Law of the Sea (UNCLOS) and a number of World Trade Organization (WTO) agreements – incorporate generally accepted international “rules, standards, regulations, procedures and/or practices.”10 This effectively may transform a number of codes, guidelines and standards created by international organizations and bodies into binding norms. Indeed, irrespective of the fact that

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8 On decisions of the EU, see e.g., Armin von Bogdandy et al., Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis, 23 Y.B. EUR. L. 91 (2004).
10 Alvarez, op.cit, ch. 4.
in most cases standard setting is accomplished through softer modes of regulation (infra section 3), this may leave the subjects of regulation “with as little effective choice as some Security Council enforcement actions.” 11 Nevertheless, most types of law-making by international organizations generally are directed towards the organization’s own members, viz., States, albeit that either de jure or de facto they may become part of the domestic legal order of the Member States and directly or indirectly affect citizens and/or businesses within those States.12

While in most States the decisions of international organizations and bodies typically require implementation in the domestic legal order before they become valid legal norms, the density of the global governance web has caused some interplay between the normative processes at various levels. For EU Member States (and their citizens), this can imply that the substantive origin of EU decisions (which usually enjoy direct effect in, and supremacy over, the domestic legal order) is to be found in another international body.13 In many areas, ranging from security to food safety, banking, health issues or the protection of the environment, national rules find their basis in international and/or European decisions. In those cases, decisions may enter the domestic legal orders as part of European law. However, international decisions also may have an independent impact on domestic legal orders. This is not to say that international decisions have a direct effect in the sense we are accustomed to in EU law. From the point of view of international law, while “primacy is a matter of logic as international law can only assume its role of stabilizing a global legal order if it supersedes particular and local rules,” at the same time it “allows for an undefined variety of combinations based either upon the doctrine of monism or the doctrine of dualism.”14 However, the fact that many domestic legal orders do not allow their citizens to directly invoke international norms before national courts does not mean that these norms are devoid of impact.15 As the norms usually are based on international agreements and/or decisions of international organizations, states will simply have to follow the rules of the game in their international dealings. This implies that even domestically they may have to adjust to ensure that the rules are observed by all parts of the administration. The de facto impact of the – often quite technical – norms and the need for

11 Id. at 218.
15 For a survey of the different legal systems in Europe, see A. von Bogdandy et al. (eds), Ius Publicum Europaeum, Band I: Staatliches Verfassungsrecht im Europäischen Rechtsraum [National Constitutional Law in a European Legal Space], 2007.
consistent interpretation may thus set aside more sophisticated notions of the applicability of international norms in the domestic legal order.

3. Informal International Law-Making

The above analysis points to the recognition of norms that while being enacted beyond the state may nevertheless have an impact within the state. Indeed, domestic legal systems—traditionally, by definition, caught in national logic—increasingly recognise the influence of international and transnational regulation and law-making on their development. Legal scholars attempt to cope with the proliferation of international organisations and other entities contributing to extra-national normative processes. Within this broader debate, a relatively new phenomenon emerged: informal international law-making. This type of law-making is ‘informal’ in the sense that it dispenses with certain formalities traditionally linked to international law making. These formalities may have to do with output, process or the actors involved. Pauwelyn defined informal international law-making as:

Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or legally enforceable commitment (output informality).

Informal international law-making is novel in the sense that it goes beyond the ‘law-making by international organizations’ debate by focusing on other public authorities and normative

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16 See id. at 109-10 (discussing the impact of the doctrine of consistent interpretation in relation to the domestic effect of WTO law).


20 Ibid, at p. 4.
outcomes, and differs from the more ‘formal procedure-creating’ approach of Global Administrative Law. At the same time, it shares some notions with the concept of ‘multilevel regulation’ as defined above, both in terms of the actors involved and the effects the normative output may have at different levels (global, regional (EU), domestic).

Interestingly enough, informal international law-making is based on the presumption that the international cooperation, albeit less formal, falls within the remit of international law, on the ground that international law has, even traditionally, been defined with reference to its subjects (e.g. inter-state relations) rather than its object (be it subject matter or the particular form or type of output). In that sense, informal international law-making may manifest “an impact-based conception of international law”.

Two types of international bodies seem to play a role in informal international law-making: transgovernmental networks and international agencies. Transgovernmental networks have been defined by Anne Marie Slaughter as “informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways”. These transgovernmental networks exhibit “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere”. They allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior executives, and feature loosely-structures, peer-to-peer ties developed through frequent interaction. The networks are composed of national government officials, either appointed by elected officials or directly elected themselves, and they may be among judges, legislators or regulators. According to Jayasuriya, these new

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21 Alvarez, op.cit.
23 Ibid, at pp. 4-5.
28 Slaughter, op.cit., p.3-4.
regulatory forms have three main features: (1) they are governed by networks of State agencies acting as independent actors rather than on behalf of the State but; (2) they lay down standards and general regulatory principles instead of strict rules; and (3) they frequently contribute to the emergence of a system of decentralised enforcement or the regulation of self-regulation.\textsuperscript{29} A transgovernmental regulatory network is basically cooperation between regulatory authorities of different countries.

‘International agencies’ are international bodies that are not based on an international agreement, nor on a bottom-up cooperation between national regulators, but on a decision by an international organization.\textsuperscript{30} According to some observers, these new international entities even outnumber the conventional organisations.\textsuperscript{31} International regulatory co-operation often is conducted between these non-conventional international bodies.\textsuperscript{32} It is not unusual for international agencies to engage in international norm-setting. Here also, the tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other international organizations and agencies, which sometimes leads to the creation of common bodies. International (regulatory) co-operation is often conducted between these non-conventional international bodies.\textsuperscript{33} Whereas traditional international organizations are established by an agreement between states, in which their control over the organization and the division of powers is laid down,\textsuperscript{34} the link between newly created international bodies and the states that established the parent organization is less clear. As one observer holds, this “demonstrates how the entity’s will does not simply express the sum of the member states’ positions, but reformulates them at a higher level of complexity, assigning decision-making power to different subjects, especially to the international institutions that promoted the establishment of the new organization.”\textsuperscript{35}

It is not entirely uncommon for international organizations to establish bodies with public law functions. Since these bodies are usually not based on a treaty, they do not qualify as

\textsuperscript{29} See Jayasuriya, supra, at 453. On the regulation of self-regulation in particular, see generally G. Teubner, \textit{Substantive and Reflexive Elements in Modern Law}, L. & Soc’y 239 (1983). Elements of this development are also addressed by Anne-Marie Slaughter, \textit{op.cit}. Slaughter seems to use the term ‘transgovernmental networks’ to point to what we would call informal international law-making. Slaughter, \textit{op.cit.}, Chapter 6.


\textsuperscript{33} \textit{Ibid}, p. 501.

\textsuperscript{34} On the different dimensions of the relationship between states and international organizations cf. D. Saroooshi, \textit{op.cit}.

international organizations themselves. A first possibility is that these bodies are set up by one organization only, to help attaining the objectives of that organization. The most well-known examples include the institutions established by the UN General Assembly (such as UNCTAD, UNEP, UNIDO, UNCHS, UNFPA and UNDP). These bodies are usually referred to as ‘subsidiary organs’, or as ‘quasi autonomous bodies’ (QABs). Special bodies were also set up by the UN ‘Specialised Agencies’ and other UN-related organizations. A case in point is the Al Qaeda and Taliban Sanctions Committee, a subsidiary organ of the UN Security Council, with its well-known competence to place an individual on the consolidated list of terrorist suspects.

A second group of bodies is created by two or more international organizations in areas where the problems they face transcend their individual competences. While these bodies may be established on the basis of a treaty concluded between international organizations (as was the case with the International Center for the Improvement of Maize and Wheat (CIMMYT), created in 1988 by the World Bank and the UNDP; or the Vienna Institute, created in 1992 by the BIS, EBRD, IBRD, IMF, OECD and – later – the WTO), more frequently they are the result of decisions taken by the respective organizations. It is not even exceptional for the above-mentioned ‘subsidiary organs’ to, in turn, act as a ‘parent organization’ for the newly created bodies (thus leading to what could be termed ‘third-level’ international bodies). Thus, in 1994 UNICEF, UNDP, UNFPA, UNESCO, the WHO and the World Bank instituted UNAIDS (the Joint United Nations Programme on HIV/AIDS) and earlier examples include the World Food Programme (WFP; created by the FAO and the WHO in 1961), the Codex Alimentarius Commission (a 1962 FAO and WHO initiative), the International Trade Centre (WTO and UNCTAD in 1968), the Intergovernmental Panel on Climate Change (WMO and UNEP in 1998), the Joint Group of Experts in the Scientific Aspects of Marine Environmental Protection (GESAMP, created by the IMO, the FAO, UNESCO and the WMO in 1969) and the Global Environmental Facility (GEF, created by the World Bank in 1991 and joined by the UNDP and UNEP). An example is also formed by the World Heritage Convention (WHC), whose parties

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39 Examples include the Commission on Phytosanitary Measures (created by the FAO in 1997) and the Prototype Carbon Fund (instituted by the World Bank in 1997). See Martini, *op.cit.*, at 4-5.


41 See Martini, *op.cit.*, for a more extensive analysis. Most examples used in this section are drawn from her survey. See on the interesting example of the GEF also L. Boisson de Chazournes, ‘The
are the UNESCO member states that have ratified the convention itself, while states and intergovernmental or non-governmental organizations that are not UNESCO members may accede to the WHC, either as participants or as advisors.

This would lead to a large number of potential fora involved in informal international law-making. First of all, what has been set out above already indicates that governance, and by the same token regulation, has become a multi-actor game; apart from intergovernmental organisations, non-governmental and transnational actors are playing an increasing role in global governance. In some issue areas, there is intense co-operation between State and non-State actors. One could point to the Codex Alimentarius Commission, or to ICANN (Internet Corporation for Assigned Names and Numbers), which governs the internet. In some areas, States even have even ceased to play a role in governance, and transnational actors have taken over. A prime example is the International Standardization Organization (ISO), which by now has produced some 13,000 rules on the standardisation of products and processes. These rules often are adopted by regular international organisations, such as the WTO, which allows them to indirectly affect national legal orders. A similar situation arises in relation to the norms set by the World Anti-Doping Agency. It is clear that individuals or companies may be confronted by rules that were adopted without any direct influence by their national legislature or that simply have to be adopted at the national level in order to be able to participate in international co-operation.

Thus, something like global law without the State does exist, and in some areas, States do not play any role in global regulation or they are represented by non-governmental or less traditional representatives. What one witnesses is a transnational co-operation that already has led to a complete set of rules on the use of the internet: the *lex digitalis*, comparable to the *lex mercatoria* related to transnational trade. Other well-known examples include the Basel Committee, in which the central bank directors of a limited number of countries

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42 Anne-Marie Slaughter regards these networks as a better way of world governance than the traditional state-centric approach. See Anne-Marie Slaughter, *op.cit.*


harmonise their policies in such a way as to result in a *de facto* regulation of the capital market, and the International Organization of Securities Commissions (IOSCO), which deals with the transnationalisation of securities markets and attempts to provide a regulatory framework for them. National agencies thus participate in global (or regional) regulatory networks as largely independent, autonomous actors and are, in turn, often required to implement international regulations or agreements adopted in the context of these networks at the national level. As early as a decade ago, Slaughter termed this phenomenon the “nationalization of international law.”

### 4. The Concept of World Legislation

The emerging question is to what extent these different forms of international norm-setting can be seen as ‘legislation’. ‘Legislative power’ has been said to have three characteristics: (1) a written articulation of rules that (2) have legally binding effect as such and (3) have been promulgated by a process to which express authority has been delegated *a priori* to make binding rules without affirmative *a posteriori* assent to those rules by those bound. An even more distinguishing element, perhaps, is that such rules imply future application to an indeterminate number of cases and situations.

Many of the norms referred to above seem to fulfil these criteria, but at the same time they are not always perceived as ‘legislation’ by both their creators and their addressees. In most cases the term ‘legislation’ or ‘law’ is not at all used to indicate the nature of the international norms. Over the past decade we have seen a frequent use of the term ‘regulation’. While a limited notion of regulation would merely relate to the monitoring of already established norms, the term is also used to refer to norm-setting procedure or instruments. ‘Regulation’ then refers to the setting of rules, standards or principles that govern conduct by public and/or private actors. Whereas ‘rules’ are the most constraining and rigid, ‘standards’ leave a greater

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50 See Jayasuriya, supra, at 449.


53 See B. Oxman, *The International Commons, the International Public Interest and New Modes of International Lawmaking*, in Delbrück, supra note 4, at 28-30. Cf. T. Stein, Comment in Delbrück, supra note 4, at 212-13; C. Schreuder Comment, in Delbrück, supra note 4, at 213-15 (pointing to the establishment by the Security Council of criminal tribunals as a sign of international legislation).

range of choice or discretion, while ‘principles’ are still more flexible, leaving scope to balance a number of (policy) considerations.\textsuperscript{56}

To what extent could all of this be seen as ‘world legislation’? A good starting point may be to take the nature of the ‘legislative’ action into consideration. In that respect the question whether ‘public authority’ seems relevant. This notion was recently studied in the framework of a Max Planck project on the ‘Exercise of International Public Authority’.\textsuperscript{57} Indeed, from the viewpoint of ‘legislation’ we may in particular be interested whenever ‘public authority’ is exercised. Large parts of international cooperation (including some of the forms mentioned above) could be considered as merely affecting the private legal relationships between actors. We would argue that the ‘public’ dimension is essential whenever we wish to see international norm-setting as ‘legislation’; irrespective perhaps of the process, the actors or the instruments used. Von Bogdandy, Dann and Goldman define the ‘exercise of international public authority’ in the following terms: “any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority if it determines individuals, private associations, enterprises, states, or other public institutions”.\textsuperscript{58} ‘Authority’ is defined as “the legal capacity to determine others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation”.\textsuperscript{59} Also important is the fact that the determination may or may be not legally binding: “It is binding if an act modifies the legal situation of a different legal subject without its consent. A modification takes place if a subsequent action which contravenes that act is illegal.”\textsuperscript{60} The authors believe that this concept enables the identification of all those governance phenomena which public lawyers should study. Irrespective of its focus on ‘governance activity by international institutions’, we feel that this definition may also be applied to the informal fora addressed in the present contribution.

Whereas the authors convincingly argue that that the capacity to determine another legal subject can also occur through a non-binding act, which only conditions another legal subject, we would limit the concept of ‘world legislation’ to acts that indeed do modify the legal situation of a different legal subject (compare the criteria of Oxman referred to above). At the same time we wish to rule out private authority exercised by transnational or international bodies (as well as companies). The ‘publicness’ of the international act therefore seems

\textsuperscript{56} Wessel and Wouters, op.cit.
\textsuperscript{59} Ibid., at 11.
\textsuperscript{60} Ibid., at 11-12.
important and may be the most difficult element to establish. After all – as also noted by Von Bogdandy, Dann and Goldmann – it would be too easy to relate the ‘publicness’ of a legal act to an existing legal basis for the authority. The above analyses underlined that we cannot exclude that (de facto) public authority is exercised by non-governmental or hybrid international institutions, which may only be indirectly based on a state’s ‘consent to be bound’.

This would lead to the following tentative definition of ‘world legislation’: any exercise of public authority by an international body that results in a modification of the legal situation of other actors or addressees.

The concept would thus cover not only (many, but not all) decisions by formal international organizations, but also forms of law-making that because of the nature of the body, the process or the instrument may be more informal.

However, it does not tell us anything about the practical relevance of being able to denote something as ‘legislation’. Obviously, the possibility of ‘going to court’ is only partially relevant. Not only would this depend on the specific domestic legal order allowing courts to take international legislation into account, but more in general there are few possibilities only to question international decisions before international courts or tribunal. What seems important, however, is that – once qualified as ‘international legislation’ – international decisions form part of the international legal order, in which capacity they cannot be ignored when confronted with other (possibly) conflicting international legal norms. In that sense the term ‘world legislation’ not only helps in defining what belongs to ‘international law’, but also reveals that we have moved beyond public international law as the counterpart of domestic private law (primarily based on contractual relations) and face the emergence of a true international public law, in which international public authority is exercised over the various participants in a global society.

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