

What's Wrong with International Law?

Liber Amicorum A.H.A. Soons

Edited by

Cedric Ryngaert
Erik J. Molenaar
Sarah M.H. Nouwen



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Revealing the Publicness of International Law

Ramses A. Wessel

Introduction

Most introductory lectures on international law emphasize the differences between international and domestic legal systems. Where the latter are usually explained from the perspective of a legislator (preferably democratically chosen and controlled) as part of an institutionalized legal system, the narrative in relation to international law is different. Rather than departing from an institutionalized setting, the traditional focus is on the contractual freedom of states. Hence, following the well-known first question raised by Akehurst, namely, whether “International law is really law,”¹ textbooks teach us that “[T]he relations between States comprising the International Community remain largely *horizontal*. No *vertical* structure has as yet crystallized, as is instead the rule with domestic systems of States,”² “the international legal community is so far mainly structured horizontally,”³ or “[I]nternational law is sometimes called public international law to distinguish it from private international law, though [...] even the latter term can lead to misunderstandings. [I]t is clearly distinguished by the fact that it is not the product of any one national system, but of States.”⁴ This approach of international law as “rules emanating from the free will of states”⁵ (in a way using the interpretative framework of domestic civil law rather than public law) increasingly blurs our view of another dimension of international law. The question raised in the present essay is *what is wrong with the classic narrative?*

Where the origin of *international* law may be found in agreements between nation-states (underlying the (in)famous non-hierarchical or “flat” structure of

1 P. Malanczuk, *Akehurst's Modern Introduction to International Law* 8th (Routledge, London/New York: 2012).

2 A. Cassese, *International Law* 2nd (Oxford University Press, Oxford: 2005) 5.

3 N.J. Schrijver, *Internationaal publiekrecht als wereldrecht* (Boom Juridische Uitgevers, The Hague: 2011) 29 (translation RAW).

4 A. Aust, *Handbook of International Law* (Cambridge University Press, Cambridge: 2010) 2.

5 As famously argued in *Lotus (France v. Turkey)*, PCIJ, judgment of 7 September 1928, judgment no. 9, series A, no. 10, ICGJ 248.

the international legal order), the creation of international organizations (and above all their further development) seems to highlight the “public” or “vertical” dimension of the international legal order. The proliferation and law-making functions of many international organizations made us aware of the existence of – perhaps not the emergence of a world government⁶ – but at least of global governance “beyond the state” in what is sometimes normatively framed as a “world community.”⁷

Over the past years many scholars pointed to the emergence of new actors and the law-making functions of international organizations, and the question may rightfully be posed as what could possibly be added to the vast amount of literature in this field. The aim of the present short essay, therefore, is necessarily modest. It merely aims to point to a consequence of the mentioned changes in the international legal order that is at best noticed only at the background: the development of the “publicness” of international law as a result of an emerging system of global institutional governance; or – as phrased by Kadelbach – the development “from Public International Law to International Public Law.” The emergence of an “institutional global normative web”⁸ has partly changed the nature of international law through the creation of a level of governance where the interests of nation-states are still visible and effective, but where these interests are more frequently embedded in and restrained by an interconnectivity of norms set by different formal and informal international institutions.

Some textbooks do take this dimension into account in explaining the structure of international law. Thus, Klabbers points to the fact that “many of the rules are shaped not just between states but also involve representatives of international organizations (such as the United Nations (UN)), or civil society organizations (such as Greenpeace)”. Brownlie acknowledges the idea that “international law underwent a profound process of expansion [...] *inter alia* including the creation of international organizations of universal

6 Yet, see recently: J.P. Trachtman, *The Future of International Law: Global Government* (Cambridge University Press, Cambridge: 2013) Trachtman's arguments are further addressed below.

7 But see M. Koskeniemi, “The Subjective Dangers of Projects of World Community” in A. Cassese (ed) *Realizing Utopia: The Future of International Law* (Oxford University Press, Oxford: 2012) 3–13; as well as the other contributions in Part 1 of this volume under the heading “Can the World become a Global Community?”

8 R.A. Wessel, “Institutional Law-Making: The Development of a Global Normative Web” in C. Bröllman and Y. Radi (eds), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar Publishing, Cheltenham/Northampton: 2015) (forthcoming).

membership [...].⁹ Moreover, these days, the study of “international law-making” expressly includes law-making by international organizations and other bodies.¹⁰ This chapter will further highlight this dimension and point to the development of international organizations as influential actors together forming a system of global governance. Their new functions relate to a number of “state-like” functions that have been taken up by international organizations – such as law-making and territorial administration – which has resulted in varying “international decisions.”¹¹ In turn, the increasing number of competences that are transferred to – or created at the level of – international organizations coupled with the fact that international decisions are no longer merely directed towards states, but also affect individuals and companies, has triggered a debate on their accountability and international responsibility. This is due to the fact that the checks and balances that we are used to at the state level cannot always be found to the same extent at the global level. The emergence of new academic debates (e.g. international constitutional law, constitutional pluralism, global administrative law) can largely be explained as a reaction to these developments.

International organizations have found their place in global governance, and are even considered “autonomous actors,” following an agenda that is no longer fully defined by their member states, which has caused the latter to devote much of their time and energy to responding to what has been termed the “Frankenstein problem.”¹² The fact that this problem has become more visible, may tell us something on the changing structure of international law. In fact, the question could very well be raised as to whether the term “international” still reflects what the global system of rule-making and adjudication is

9 J. Klabbers, *International Law* (Cambridge University Press, Cambridge: 2013) 3; J. Crawford, *Brownlie's Principles of Public International Law* 8th (Oxford University Press, Oxford: 2012) 6.

10 Cf. Bröllman and Radi, note 9; R. Liivoja and J. Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge, London/New York: 2014); A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, Oxford: 2007); J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (Oxford University Press, Oxford: 2012).

11 I.F. Dekker and R.A. Wessel, “Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions” in I.F. Dekker and W.G. Werner (eds), *Governance and International Legal Theory* (Martinus Nijhoff Publishers, Leiden/Boston: 2004) 215–236.

12 A. Guzman, “International Organizations and the Frankenstein Problem” (2013) 24(4) *European Journal of International Law* 999–1025; Cf. also J. Klabbers, *An Introduction to International Institutional Law* 2nd (Cambridge University Press, Cambridge: 2009).

about. “Nations” may still be the key actors in the global legal order, but certainly no longer the only ones. Over the past decade renewed attention has been drawn to other actors, new law-making processes and a diverse normative output. The problem with *international* law appears to be its (perhaps necessary) inflexibility to adapt to new developments which may risk it being by-passed by reality. Recent studies not only point to the decline of the number of international agreements between states, but at the same time point to an emerging institutionalized layer of global governance.¹³

During his academic career, Professor Fred Soons has shared his ideas on these developments with many of us – not only in academic publications, but perhaps above all in his numerous contributions to conferences and research meetings. Thus he pointed to the role of international institutions in the law of the sea,¹⁴ as well as their role in arbitration,¹⁵ and also contributed to the work on the accountability of international organizations.¹⁶ In fact, in many of his writings and teachings he – together with his colleagues at the Netherlands Institute for the Law of the Sea (NILOS) – witnessed the gradual institutionalization (through the emergence of treaty organizations and regulatory bodies)

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- 13 See for references J. Pauwelyn, R.A. Wessel and J. Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking” (2014) *European Journal of International Law*.
- 14 A.H.A. Soons, B. Kwiatkowska and E.D. Brown, “International Organizations and the Law of the Sea” (1993) 17 *Marine Policy: The International Journal for Economics Planning and Politics of Ocean Exploitation* 67; A.H.A. Soons, “The U.N. Security Council and the Law of the Sea” in T.A. Mensah (ed) *Ocean Governance: Strategies and Approaches for the 21st Century* (Proceedings for the 28th Annual Conference of the Law of the Sea Institute, 11–14 July 1994, Honolulu: LSI 1996) 279–288; A.H.A. Soons, “A ‘New’ Exception to the Freedom of the High Seas: the Authority of the UN Security Council” in T.D. Gill and W.P. Heere (eds), *Reflections on Principles and Practice of International Law* (Kluwer Law International, The Hague: 2000) 205–221; A.H.A. Soons (ed) *Implementation of the Law of the Sea Convention through International Institutions: Proceedings of the 23rd Annual Conference of the Law of the Sea Institute* (Noordwijk: 12–15 June 1989) 772; A.H.A. Soons, “Enforcing the Economic Embargo at Sea” in V. Gowlland-Debbas (ed) *United Nations Sanctions and International Law* (Kluwer Law International, The Hague: 2001) 307–324; A.H.A. Soons, “The Position of the EEC towards the Law of the Sea Convention” (1990) 84 *Proceedings of the 84th Annual Meeting of the American Society of International Law* 278.
- 15 E.g. A.H.A. Soons, *International Arbitration: Past and Prospects. A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1888–1987)* (Martinus Nijhoff, Dordrecht: 1990).
- 16 F.D. Berman, M.N. Shaw, A.H.A. Soons and K. Wellens, *Accountability of International Organisations* Report of the Seventy-first Conference of the International Law Association held in Berlin, 16–21 August 2004.

of areas of international law that originally were subject to cooperation agreements between states only. And this is exactly the topic of the present contribution to a volume compiled in his honor.

An Emerging Global Institutional Layer

While many international organizations were set up as frameworks to allow states to institutionalize cooperation in a specific field, decisions of international organizations are increasingly considered a source of international law.¹⁷ Yet, not each and every decision taken by an international organization contributes to law-making. Indeed, traditionally, law-making is not seen as a key-function of international organizations.¹⁸ The reason being that most international organizations have not been granted the power to issue binding decisions as states were believed not to have transferred any sovereignty. Nevertheless, currently it is undisputed that many organizations do “exercise sovereign powers”¹⁹ in the sense that they not only contribute to law-making by providing a framework for negotiation, but also take decisions that bind their member states. Indeed, the current debates on international law-making to a certain extent mirror the “governance” debates in other academic disciplines. In that respect, Koppell pointed to the fact that we can indeed use the term governance for the different normative activities, as many of the international bodies are “actively engaged in attempts to order the behavior of other actors on a global scale.” Even without a global government we see “normative, rule-creating, and rule supervisory activities” as indications of global governance.²⁰ For lawyers, “governance” becomes interesting whenever it involves legal rules, or at least normative utterances with an effect on the legal order.

17 J. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford: 2005). But see already I. Detter, *Law-Making by International Organizations* (Norstedt & Söners Förlag, Stockholm: 1965). Also J.E. Alvarez, “International Organizations: Then and Now” (2006) 100 *American Journal of International Law* 326–336.

18 Not even of the United Nations. See O. Schachter, “The UN Legal Order: An Overview” in C. Joyner (ed) *The United Nations and International Law* (Cambridge University Press, Cambridge: 1997) 3: “Neither the United Nations nor any of its specialised agencies was conceived as a legislative body.”

19 D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, Oxford: 2005).

20 J.G.S. Koppell, *World Rule. Accountability, Legitimacy, and the Design of Global Governance* (The University of Chicago Press, Chicago/London: 2010) 77–78.

It is this element in particular that may point to a developing “vertical” dimension in international law as it highlights the existence of a dimension that cannot be explained by a focus on contractual relations between states. Elsewhere I referred to this dimension as an “institutionalized global normative web.”²¹ This web not only contains formal international organizations, but also transnational/regulatory bodies. Most bodies in one way or another contribute not only to traditional law-making in the form of international decisions, but also form part of a process of informal international law-making.²² Indeed, a mere focus on traditional organizations would leave us with too limited a picture of the international normative output.²³ Although international networks and informal bodies have existed for a long time,²⁴ their proliferation and (legal) impact through harmonization methods (standardization, certification) has made it impossible for lawyers to disregard them in their analysis of international law-making. In many cases – and increasingly as “autonomous” actors²⁵ – these bodies exercise a public authority which goes beyond a mere cooperation between public as well as private actors.²⁶ The distinction between formal and informal institutions and networks may have been helpful for

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- 21 R.A. Wessel, “Institutional Law-Making: The Development of a Global Normative Web” in C. Bröllman and Y. Radi (eds), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar Publishing, Cheltenham/Northampton: 2015).
- 22 Pauwelyn, Wessel and Wouters, note 10; A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (eds), *Informal International Lawmaking: Case Studies* (TOAEP, Oslo: 2013). It may even be argued that informal international law-making (with a focus on non-traditional actors, processes and output) is gradually replacing traditional law-making through treaty-making; see Pauwelyn, Wessel and Wouters, note 13.
- 23 Boyle and Chinkin, note 10 – the authors accept and describe the role of numerous state and non-state actors in international law-making. It is striking that “treaties as law-making instruments” is only dealt with marginally (Section 5.4).
- 24 Cf. S. Baldwin, “The International Congresses and Conferences of the Last Century as Forces Working towards the Solidarity of the World” (1907) 1 *American Journal of International Law* 565; as well as H. Laski, *The Limitations of the Expert* (The Fabian Society, London: 1931) (criticizing the influence of experts in the making of international public norms).
- 25 N.D. White and R. Collins (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London/New York: 2011). See also R.A. Wessel, “International Governmental Organizations as Non-State Actors” in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing, Oxford: 2014) (forthcoming).
- 26 Cf. A. Von Bogdandy, R. Wolfrum, J. Von Bernsdorff, Ph. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Heidelberg etc.: 2010).

lawyers to define their object of study, but it no longer does justice to the interconnectedness of the norms they produce. Indeed, as has been observed, the institutions involved in global governance “interact, formally and informally on a regular basis. In recent years, their programs are more tied together, creating linkages that begin to weave a web of transnational rules and regulations.”²⁷

The emerging picture is one of a broad range of international normative fora, from intergovernmental organizations with a broad mandate (e.g. the UN and its related institutions), treaty-based conferences that do not amount to an international organization (e.g. Conferences of the Parties under the main multilateral environmental agreements, such as the Framework Convention on Climate Change and the Kyoto Protocol), informal intergovernmental cooperative structures (e.g. the G20, the Financial Action Task Force on Money Laundering, the Basel Committee on Banking Supervision), and even private organizations that are active in the public domain (e.g. the International Organization for Standardization (ISO), or private regulation of the internet by the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Engineering Task Force (IETF) or the Internet Society (ISOC)).²⁸ In addition, normative activities can also be discovered in international bodies that are neither based on a treaty nor on a bottom-up cooperation between national regulators, but on a decision by an international organization. By delegating or outsourcing some of their tasks, these “international agencies” as we perhaps call them,²⁹ may obtain a role in norm-setting that can be distinguished from the “parent organization.”

Constitutional Questions

Obviously, this development raises new questions – for instance related to the constitutionalization of the international legal order, the legitimacy of the

27 Koppell, note 20 at 12.

28 More extensively on the normative activities of these bodies: R.A. Wessel, “Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors” in M.A. Heldeweg and E. Kica (eds), *Regulating Technological Innovation: A Multidisciplinary Approach* (Palgrave MacMillan, Basingstoke: 2011) 77–94.

29 See more extensively E. Chiti and R.A. Wessel, “The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?” in White and Collins, note 25 at 142–159; as well as A. Berman and R.A. Wessel, “The International Legal Status of Informal International Law-making Bodies: Consequences for Accountability” in Pauwelyn, Wessel and Wouters (eds), note 22 at 35–62.

decisions or the accountability of the actors.³⁰ While “constitutionalism” is a more general theme in current international legal discourse³¹ the increasing autonomy of international organizations (or at least the perception that this is the case) has triggered a new stream of literature, which basically aims to apply to international organizations, (variations of) constitutional and similar state-oriented notions related to the rule of law. The aim of the present section is not to add to the already vast amount of publications that were written in at least the past fifteen years. Rather it aims to briefly remind the reader of some of the strands of research in order to support the argument that we seem to be dealing with a structural change in the international legal order (after all, one may argue, this is when constitutional questions arise).

As noted by Klabbers, “there is an uncomfortable paradox (or set of paradoxes, perhaps) at the heart of the current trend towards constitutionalism in international organizations. The very thing that is subjected to control tends to escape from control and instead ends up in control (not unlike Frankenstein’s creation).”³² Yet, the trend towards constitutionalism is a logical consequence of the “Frankenstein problem” in the first place.³³ In fact this was also noted by Klabbers: “Indeed, in one way, also the very phenomenon of constitutionalism is a plea to re-invigorate the agora concept, precisely by suggesting that there are limits to action. Action may be great, but somehow action should be placed under scrutiny, scrutiny by judges perhaps, or even only by the court of public opinion. Constitutionalism then is the agora concept responding to the overly grand ambitions of the managerial concept.”³⁴

30 See also J. Klabbers, “Law-Making and Constitutionalism” in J. Klabbers, A. Peters, and G. Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, Oxford: 2009) 12 – arguing that non-state actors have “started to compete with states for the scarce resource of politico-legal authority (i.e. the power to set authoritative standards).” In general the book discusses international constitutionalism as a framework within which further normative debate on a legitimate and pluralist constitutional order can occur (Klabbers, at 4, 10). But see also Pauwelyn, Wessel and Wouters, note 13 – where we have argued that the effects on legitimacy should not be overestimated as the traditional “thin state consent” is replaced by a “thick stakeholder consensus.”

31 See for instance Klabbers, Peters and Ulfstein, *ibid*; A. Peters, “Are we Moving toward Constitutionalization of the World Community” in A. Cassese (ed) *Realizing Utopia: The Future of International Law* (Oxford University Press, Oxford: 2012) 118–135.

32 J. Klabbers, “Constitutionalism Lite” (2004) 1 *International Organizations Law Review* 37.

33 I.F. Dekker and R.A. Wessel, “De constitutionalisering van internationale organisaties: Over bevoegdheden en democratische legitimiteit” (Vrede en Veiligheid, Nijmegen: 2004) 61–81.

34 J. Klabbers, “Two Concepts of International Organization” (2005) 2 *International Organizations Law Review* 277–293.

It is clear however, that a return to (or a stronger focus on) the “agora” dimension of international organizations is just one way to deal with the fact that the transfer of “checks and balances” has not kept pace with the transfer (or creation) of competences. At the same time it has become clear that the “managerial” dimension of international organizations – with a focus on the indispensable role of experts, bureaucracies, practical cooperation, standards and flexible decisions-making – has become more important and in many cases forms the very *rationale* of international organizations. In fact, the notion that international organizations can (and are allowed to) do things that cannot be done on the basis of a mere cooperation between states, underlines their coming of age. The proliferation of their tasks over the past decades has brought new questions related to the executive and governing roles of the organs and in particular to the ways in which these organs (and boards in particular³⁵) still allow international organizations to act in a democratic and accountable manner. This indeed is the tension between functionalism and constitutionalism, or between managerialism and legalism.³⁶ In fact, both are different sides of the same coin and oscillate: legalism “sets limits to use of power and holds the experts responsible for their actions. However, such abstract rules prescribing standard solutions to recurrent types of problems easily turns into a bulwark of the status quo, wholly incapable of reacting to changing circumstances. Accordingly, managerialism will be needed.”³⁷

The obvious reflex in relation to the increasing “managerial” powers of international organizations – combined with the notion that many of these powers formed a *de facto* source of “public authority” (see *infra*) and new normative output (see *supra*) – was to raise the question of the legitimacy of international organizations.³⁸ After all – and we are slowly getting to the “publicness” of international law – the relation between the international organization and

35 R.A. Wessel, “Executive Boards and Councils” in J. Cogan, I. Hurd and I. Johnston (eds), *Oxford Handbook of International Organizations* (Oxford University Press, Oxford: 2015).

36 J. Klabbers, “Contending Approaches to International Organizations: between Functionalism and Constitutionalism” in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing, Cheltenham, UK/Northampton, USA: 2011) 3–30; and in the same volume J. Petman, “Deformalization of International Organizations Law” 398–430.

37 Petman, *ibid* at 421.

38 The scope of this contribution does not allow us to address the different definitions and approaches to legitimacy. See on the application of the concept to international organizations for instance V. Heiskanen, “Introduction” in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, Tokyo etc.: 2001) 1–43; as well as other contributions to that volume.

the individual seems to have changed: “the system seems capable of encroaching upon the rights of individuals [...], without their specific consent”³⁹ When the governments in intergovernmental international organizations are too disconnected from the normative processes (leading to a diverging output from standards of behavior to law-making) the legitimacy of this output could be at stake. The many studies on the accountability of international organizations – e.g. pointing to the need for international organizations to be transparent, introduce consultative processes, or to establish remedies systems – find their source in this development.⁴⁰

This research is not limited to traditional formal intergovernmental organizations, but increasingly also takes normative processes in other bodies and international (regulatory) networks into account.⁴¹ While some studies have pointed to problems related to (democratic) legitimacy – in particular when experts rather than democratically elected politicians are in the driver’s seat⁴² – others pointed to the fact that the possible negative side-effects of international/transnational regulation in relation to legitimacy should always be weighed against

39 Heiskanen, *ibid* at 8. See also R.A. Wessel, “The Invasion by International Organizations. De toenemende samenhang tussen de mondiale, Europese en nationale rechtsorde” (Inaugural Lecture, University of Twente: 2006); as well as R.A. Wessel and J. Wouters, “The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres” in A. Føllesdal, R.A. Wessel and J. Wouters (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff Publishers, Leiden/Boston: 2008) 9–47; in shorter form published in (2007) 2 *International Organizations Law Review* 257–289.

40 See for instance G. Hafner, “Accountability of International Organizations” in (2003) *Proceedings of the Annual Meeting (American Society of International Law)* 236–240; A. Reinsisch, “Securing the Accountability of International Organizations” (2001) *Global Governance* 131–149; K. Wellens, *Remedies against International Organizations* (Cambridge University Press, Cambridge: 2004). Cf. also the Report of the International Law Association “Accountability of International Organizations” (2004) 1 *International Organizations Law Review* 221–293.

41 S. Duquet, J. Pauwelyn, R.A. Wessel and J. Wouters, “Upholding the Rule of Law in Informal International Lawmaking Processes” (2014) 6 *Hague Journal on the Rule of Law* 75–95.

42 See for instance G.C.A. Junne, “International Organizations in a Period of Globalization: New (Problems of) Legitimacy” in Coicaud and Heiskanen, note 38 at 219: “It is the rise of such alternative structures as a result of the globalization process that might prove to be a bigger challenge to the legitimacy of IOs that the direct impact of globalization on the demand for IO activity and on the effectiveness of their actions.” Cf. also M. Ambrus, K. Arts, E. Hey and H. Raulus (eds), *The Role of “Experts” in International and European Decision-Making Processes: Advisors, Decision-Makers or Irrelevant Actors?* (Cambridge University Press, Cambridge: 2014).

alternatives at the national or intergovernmental level, which are often less legitimate.⁴³ This is also generally seen as an outcome of the research on Global Administrative Law.⁴⁴ In fact, it has even been argued that – given the legitimacy problems of traditional international law-making – “informal international law-making” may have to prevail because it replaces a “thin state consent” with a “thick stakeholder consensus.”⁴⁵

Revealing the “Publicness” of International Law

The main point this contribution wishes to underline is that the developments reiterated above are all indications of a structural change in the international legal order. The term *international law* may no longer be the appropriate label for the many faces of global legal cooperation and governance.⁴⁶ Not only have international organizations increased in number and changed the way states cooperate, their role as autonomous actors and their interconnectedness has resulted in a more prominently visible global institutional layer. Obviously this observation is far from innovative. In fact, thinking in terms of an “international society” can be traced back to Grotius and forms the basis for an influential stream in international relations theory usually referred to as the “English school.”⁴⁷ Writing in 1964, Friedmann already noted the change from cooperation to organization

43 Cf. A. Pereira, “Why Would International Administrative Activity be Less Legitimate? – A Study of the Codex Alimentarius Commission,” in Von Bogdandy *et al.*, note 26 at 541–571. See also M. Poiares Maduro, “Europe and the Constitution – What if this is as Good as it gets?” in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press, Cambridge: 2003); and N.K. Komesar, *Imperfect Alternatives, Choosing Institutions in Law, Economics and Public Policy* (The University of Chicago Press, Chicago/London: 1994).

44 A relevant GAL publication in this respect is N. Krisch, “The Pluralism of Global Administrative Law” (2006) 17 *European Journal of International Law* 262–274.

45 Pauwelyn, Wessel and Wouters, note 13.

46 The argument was briefly made earlier in R.A. Wessel, “Internationaal recht in ontwikkeling” in N. Horbach, R. Lefebber and O. Ribbelink (eds), *Handboek Internationaal Recht* (T.M.C. Asser Press, The Hague: 2007) 1–17.

47 Cf. H. Grotius, *De Jure Belli ac Pacis* [1625], translated from the Latin by F.W. Kelsey (Clarendon, Oxford: 1925). According to Bull, the most prominent member of this English school, “states form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.” This framework of rules and institutions guides state behaviour in patterned ways. H. Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press, New York: 1977) 13.

In international law it is today of both theoretical and practical importance to distinguish between the international law of “coexistence,” governing essentially diplomatic inter-state relations, and the international law of co-operation, expressed in the growing structure of international organization and the *pursuit* of common human interests.⁴⁸

Indeed, ever since the creation of the League of Nations and Permanent Court of International Justice (PCIJ), the emergence of modern international organizations has been interpreted “less in terms of routine administration than progressive transformation of the international system,” as Koskenniemi noted.⁴⁹ Yet, it seems fair to say that the international system moved beyond the League of Nations and the short summary of developments presented above reveals nothing less than a dense institutional network that can no longer (if ever) be explained in terms of “routine administration.”

While debates on world government and world legislation indeed date back to (at least) the beginning of the twentieth century, the development of rule-making functions of international organizations in particular triggered a new debate on this phenomenon.⁵⁰ Recently, Trachtman even reintroduced the notion of “government” in his analysis of the future of international law:

[...] because of social change, international relations will be an increasing proportion of the concerns of citizens and the responsibilities of states. This will drive increasing production of international law and of organizational structures. This increasing dense body of law and organizations will be seen to perform governmental functions. It is in this sense that the future of international law is global government.⁵¹

Trachtman deliberately uses the term “government” rather than “governance” to underline the focus on formal rules and organizations. While for lawyers

48 W. Friedmann, *The Changing Structure of International Law* (Columbia University Press, New York: 1964).

49 M. Koskenniemi, *From Apology to Utopia* (Cambridge University Press, Cambridge: 2005) 611. See also White and Collins, note 25.

50 See, e.g., B.S. Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15 *European Journal of International Law*.

51 Trachtman, note 6 at 3. This notion is occasionally also used in other academic disciplines. See for instance M. Frattiani and J. Pattison, “The Economics of International Organizations” (1992) 35(2) *KYKLOS* 242: “The fourth level of government, after local, state or provincial, and national governments, is composed of international organizations.”

this is certainly a helpful way of looking at it, this restricted analysis runs the risk of losing sight of the gradual replacement of formal international rules by – what we have coined elsewhere as – informal international lawmaking.⁵² In fact, our analysis above indeed supports the idea of increasing institutional intensity, but the type of institutions vary from traditional intergovernmental organizations to transnational regulatory bodies. In Trachtman's analysis institutionalization is not *per se* necessary for international government: it is a combination of international law and organization which allows for government to be scalable and dependent on what is necessary for a particular international rule.⁵³ In the present contribution it is particularly the ongoing *institutionalization* of world order that is seen as a sign of a structural change in the nature of international law.

A key element in this change seems to be the exercise of public authority.⁵⁴ Whereas private or civil law may be defined as dealing with (horizontal) relations between equals, public law is characterized by (vertical) relations involving authority. It is this element in particular that is traditionally said to be lacking in public international law and at the same time forms the basis for international institutional law. As argued by Von Bogdandy, Dann and Goldmann

Developing international institutional law holds a great potential for the legal framing of international public authority, as international organizations are of enormous practical significance for the conduct of public affairs in times of global governance. It is therefore no wonder that this stream of research has greatly evolved of late in order to come to terms with the changes induced by global governance. New instruments, competencies and procedures of international organizations have come into its focus.⁵⁵

As these authors argue

any kind of governance activity by international institutions, be it administrative or intergovernmental [...] should be considered as an exercise of

52 See Pauwelyn, Wessel and Wouters, note X.

53 Trachtman, note 6 at 8–9.

54 Cf. also J. Delbrück, "Exercising Public Authority beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?" (2003) 10(1) *Indiana Journal of Global legal Studies* 29.

55 Von Bogdandy *et al.*, note 26 at 25.

international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions.⁵⁶

“Authority” is then defined as “the legal capacity to determine others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation.” Also important is the fact that the determination may or may not be legally obligating: “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.”⁵⁷ The “publicness” of the international act indeed seems important and may be the most difficult element to establish. It would be too easy to relate the “publicness” of a legal act to an existing legal basis for the authority. Yet, it seems fair to say that the above analyses – pointing to the impact of international decisions⁵⁸ – underlined that (*de facto*) public authority is exercised by international organizations.

While the development of a global institutional layer as a result of changes in the number and nature of international bodies certainly had an impact on the structure of the international legal order, it has been pointed out that international organizations do not replace states – thereby putting the impact of the change into perspective. Thus, one of the leading scholars in the field, José Alvarez, in one influential book, pointed to the role of law-makers taken up by many formal and informal international organizations, whereas in other publications he pointed to the myth that the state is withering away.⁵⁹ Indeed, adopting “public law” rather than “private law” as a system of reference may be helpful in highlighting the importance of international organizations, but runs counter to a number of other problems. As noted by Kadelbach

The “publicness” of classical public international law resulted from nothing more than the fact that the actors were states, but did not presuppose any legal hierarchy between them. To think in terms of public law suggests

⁵⁶ Ibid., 5.

⁵⁷ Ibid., 11–12. See also the author’s subsequent publications on this issue: A. Von Bogdandy and I. Venzke, “In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification” (2012) 23 *European Journal of International Law* 7–41; and A. Von Bogdandy and M. Goldmann, “The Exercise of International Public Authority through National Policy Assessment: The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument” (2008) 5 *International Organizations Law Review* 261.

⁵⁸ Cf. Bogdandy, note 26 at 44.

⁵⁹ Alvarez, note 17; as well as his “State Sovereignty is Not Withering Away: A Few Lessons for the Future” in Cassese, note 2 at 26–37.

that there are superiors and entities or individuals who are their subjects. This assumption is problematic. Not only legal realists would object that whether between international organizations and their member states such a hierarchy is established depends on the distribution of powers. Between the organization and its member states.⁶⁰

Indeed, many have pointed to the difficulties of the “domestic analogy” (and our inability to avoid it⁶¹) and in particular to the fact that “states” in the international legal system cannot be compared to “individuals” in domestic systems. Thus, already decades ago, Chayes, for instance, remarked

[i]f states are the subjects’ of international law, they are so, not as private persons are the “subjects” of municipal legal systems, but as government bodies are the “subjects” of constitutional arrangements.⁶²

More recently, Waldron argued that thinking in public law terms implies the possible application of the rule of law in international affairs. The question, however, is whether sovereign states are entitled to protection by the rule of law. After all, the rule of law was invented to protect human individuals from the power of the sovereign.⁶³ At the same time – still in Waldron’s view – states are “sources” and “officials” of international law rather than “subjects.” “Sources” because they participate in treaty-making and in the emergence of customary law; and “officials or agencies” as far as the administration and enforcement of international law is concerned, as

In the absence of any concentration of the means of legal coercion in international institutions, the coercive role often falls to individual states or coalitions of states, and when they undertake the enforcement of international law, they take on a public role in relation to the law, a role that is no doubt entangled with their own foreign policy interests, but must also be regarded as an independent vector in their decisions making, subjecting

60 Bogdandy, note 26 at 44.

61 Cf. J. Weiler, “The Geology of International Law – Governance, Democracy and Legitimacy” (2004) 64 *Heidelberg Journal of International Law* 550: “Analogies to domestic law are impermissible, though most of us are habitual sinners in this respect.”

62 A. Chayes, “A Common Lawyer Looks at International Law” (1965) 78 *Harvard Law Review* 1410.

63 J. Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law?” (2011) 2 *European Journal of International Law* 315–343.

them to the rule of law in the way that a police department or a district attorney is subjected to the rule of law.⁶⁴

This is not the place to join the debate on some of the starting points of Waldron's analysis,⁶⁵ nor the debate on whether "the Rule of Law makes [...] sense as a normative ideal outside of the particular institutional conditions and political relationship pertaining within sovereign states."⁶⁶ However, clearly, "public law" is often connected to the rule of law. Waldron's argument seems to be that the public law analogy fails because of the fact that states are not humans. Yet, the point made in the present contribution is that is in particular the law-making – or in fact occasional *legislative* – functions of international bodies that limit the freedom of states and may have a direct effect on individuals.⁶⁷

The problem seems to be that the argument often goes as follows: public law implies the rule of law; the rule of law cannot properly be applied to international law; *ergo* thinking in terms of international *public* law does not work. Yet, the argument can also be used the other way around (and often is): the continuing institutionalization of the international legal order and the autonomy of many of the institutions result in the emergence of a layer of global governance beyond the state; this strengthens the public dimension of international law; *ergo* rule of law principles need to be applied at the global level (or at the domestic level to counter global influences) in order to maintain the same level of protection for individuals. Indeed, as noted by Collins, "we can understand the normative ambition of a Rule of Law at the global level as an attempt to restrain the exercise of arbitrary political power."⁶⁸ Yet, he also continues that thinking in terms of international public law, implying that we are dealing with a constitutional deficiency when we assess the way in which international organizations can regulate the behavior of states

64 Ibid., 330. In this quotation the abbreviations IL and ROL were replaced by "international law" and "rule of law" respectively.

65 See for that debate for instance some of the reactions in the same issue of the *European Journal of International Law*, including: A. Somek, "A Bureaucratic Turn" 345–350; and Th. Poole, "Sovereign Indignities: International Law as Public Law" 351–361.

66 R. Collins, "The Rule of Law and the Quest for Constitutional Substitutes in International Law", *Nordic Journal of International Law*, Volume 83, Issue 2, pp. 87–127.

67 See also the contribution to the special issue on "Informal International Law-Making as a New Form of World Legislation" (2011) 8 *International Organizations Law Review* 253–265. Cf. also the critique by Poole, note 65.

68 Collins, note 66.

to read international institutions in this way, as somehow fulfilling constitutional functions as part of an integrated legal system, is deeply problematic from both a theoretical and practical point of view. From a theoretical perspective, it is difficult to see interstate institutional processes as fulfilling functions of governance in the international system, when those same institutions are created within and are thus also subordinate to the broader constitutive rules of international law.⁶⁹

While valid in its own right, the normative dimension present in such analyses (compare also “rather than international institutions being perceived as a means to secure an international Rule of Law, the concern now runs in the opposite direction.”⁷⁰) sometimes seems to stand in the way of a more factual analysis of the changed role of international institutions and the impact of this development on the structure of the international legal system.

Conclusion

The aim of the present contribution is modest. It purports to draw attention to a dimension of the global legal order that is often ignored in traditional teachings of international law, but that has become more visible as a result of the proliferation, changing functions and interconnectedness of international institutions. This development is well-noted and documented in recent legal doctrinal and conceptual analysis.

It is this analysis in particular that seems to support the idea that there is indeed something wrong with *international* law in the sense that the concept as such reflects, to a large extent, the one-dimensional cooperation between nation-states. This thereby disregards the development of a global institutional layer highlighting the public law dimension of international law that in fact formed the source of the main scholarly debates on constitutionalism over the past decade. The changed international legal structure seems to call for a new terminology that takes into account the role of international institutions in exercising public authority. Replacing “Public International Law” by “International Public Law” will not do the job as this term still departs from relations between “nations” (as nation-states). Something like “global law” would perhaps do justice to a new legal system, in which norms are no

69 Ibid.

70 Ibid.

longer exclusively made by states, but by a variety of international institutions, ranging from intergovernmental organizations and treaty-based conferences to informal intergovernmental co-operative structures and even private organizations and regulatory bodies. At the same time, thinking in terms of “global law” may allow textbooks to take the “vertical dimension” of the global legal order into account while concurrently escaping a domestic analogy.