

Institutional lawmaking: The emergence of a global normative web

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1. INTRODUCTION: A DIVERSE COLLECTION OF NORMATIVE BODIES

There is nothing new in arguing that international organizations engage in lawmaking.¹ Apart from the fact that states may use international organizations as frameworks for *treaty*-making, it is well-accepted that also many *decisions* of international organizations can be seen as 'law'. While over the past years lawmaking by international organizations has received abundant attention,² institutional lawmaking has moved beyond the traditional methods and actors and is increasingly studied in a broader sense, including new actors and new regulatory activities.

First, the role of many international institutions has developed well beyond a 'facilitation forum', underlining their autonomous position in the global legal order.³ In those cases lawmaking takes place on the basis of well-defined procedures with an involvement of institutional actors other than states, but also on the basis of a sometimes dynamic interpretation of the original lawmaking mandate of the organization.⁴ Indeed, the outcome comes closer to a *decision* of an international

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¹ cf A Boyle and C Chinkin, *The Making of International Law* (OUP 2007), vii: 'Law-making is no longer the exclusive preserve of states'. The scope of this chapter does not allow us to address the notion of 'law' and the question of its sources. Yet, obviously, using the term 'lawmaking' somehow implies that we accept legal effects of the norms addressed here, be it through customary law or simply because we accept the competence of the international institutions to enact legal norms.

² One of the most influential books may very well have been J Alvarez, *International Organizations as Law-Makers* (OUP 2005).

³ R Collins and ND White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011). See also RA Wessel, 'International Governmental Organizations as Non-State Actors' in M Noortmann ao (eds), *Non-State Actors in International Law* (Hart Publishing 2015), 185-203; as well as IF Dekker and RA Wessel, 'Identities of States in International Organizations', (2016) 13 *International Organizations Law Review* (forthcoming).

⁴ J Wouters and Ph De Man, 'International Organizations as Law-Makers' in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011) 190, 192:

"It is possible [...] that the treaty provisions pertaining to the law-making powers of the organization will be construed in a different way than was originally intended by the drafting nations, as it proves very difficult to draft an instrument in such a manner as to effectively preclude any other possible interpretation."

organization than to an international *agreement* concluded between states. In fact, it could be argued that this is what ‘institutional lawmaking’ is all about: it is lawmaking *by* international institutions (be it formal international organizations or other international bodies) and less about lawmaking *through* international institutions.⁵ Yet, the distinction is not always easy to make. In some cases institutionalisation is ‘light’ and serves as an ad hoc vehicle for a multilateral diplomatic process. Thus, the 3rd UN Conference of the Law of the Sea led to UNCLOS III and at the 1998 Rome Conference states adopted the Statute of the International Criminal Court. In these cases the conferences were indeed not much more than meeting points, facilitating states to conclude treaties.⁶ Similar processes also take place within more permanent structures, including formal international organizations. Obvious examples include the UN General Assembly⁷ and the UN specialized agencies.⁸ In these cases an important function of international organizations is to reveal state practice (and opinion juris⁹) and to allow for a speedy creation of customary law, although — one needs to remain aware of the distinction between state practice and the practice of an international organization.¹⁰

Secondly — and leading in this chapter — the set of international institutions encompasses not only formal international organizations, but also other international bodies, consisting of governmental representatives and/or other stakeholders. There are indications that these forms of (informal) international lawmaking outnumber the traditional forms.¹¹ Yet, given the fact that other chapters will deal with transnational and private actors,¹² our focus will be on international institutions consisting of (at least) governmental representatives and/or bodies with a public mandate. We use a

⁵ See on these two dimensions of international organizations J Klabbers, ‘Two Concepts of International Organization’ (2005) 2 *International Organizations Law Review* 277; as well as his ‘Contending Approaches to International Organizations: Between Functionalism and Constitutionalism’ in Klabbers and Wallendahl (n 4) 3.

⁶ Wouters and De Man ((n 4), 205) have argued that in these cases International organizations ‘merely act as agents, since they only propose draft conventions through gathering information and offering their expertise, which then may or may not be entered into by the member states’.

⁷ Following art 13 of the UN Charter, which refers to its responsibility for ‘encouraging the progressive development of international law and its codification’.

⁸ See for examples also Boyle and Chinkin (n 1), 124–41.

⁹ cf the ICJ’s advisory opinion on the *Legality of the threat or use of nuclear weapons* [1996] ICJ Rep 226: ‘General Assembly resolutions:

“[...] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinion juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinion juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinion juris required for the establishment of a new rule.”

¹⁰ Wouters and De Man (n 4), 207–8. Once consensus has been reached within an international organization, it will be difficult for states to deny their acceptance of a norm and to be recognized as a ‘persistent objector’.

¹¹ See J Pauwelyn, J Wouters and RA Wessel, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25 *European Journal of International Law* 733.

¹² See chapters 3, 13 and 14 in this book.

broad definition of lawmaking, including regulatory and other normative institutional output.¹³ Recent research projects underline that a focus on traditional formal law enacted by traditional international organizations would amount to a far too limited perspective on institutional lawmaking.¹⁴

Finally, institutional lawmaking hardly takes place on a 'stand-alone' basis: formal and informal international norms are increasingly connected, and norms are adopted or referred to by other international bodies, resulting in an unprecedented global institutionalized normative web.¹⁵

In this chapter we will approach institutional lawmaking with these developments in mind. Section 2 will first assess the lawmaking functions of traditional international organizations and will also further clarify the notion of institutional lawmaking itself. Section 3 will focus on possible lawmaking functions of other international bodies and in doing so will point to the wide variety of bodies and networks active in lawmaking processes. Both sections lead us to a concluding part (section 4) in which we underline the interconnectedness between different international norms originating in distinct formal and informal bodies and networks. Implicitly, this section calls for a broader understanding of institutional lawmaking to allow us to take full account of a rich institutional normative output.

2. LAWMAKING BY INTERNATIONAL ORGANIZATIONS

2.1 Defining Institutional Lawmaking

International organizations can be defined in many ways. We follow Schermers and Blokker: 'international organizations are defined as forms of cooperation (1) founded on an international agreement; (2) having at least one organ with a will of its own; and (3) established under international law'. On the basis of this definition we can count somewhere between 500–700 international organizations,¹⁶ ranging from more general ones such as the United Nations or the World Trade Organization to organizations in a specific area, such as the International Coffee Organization or the International Network on Bamboo and Rattan. While many international organizations were set-up as frameworks to allow states to institutionalize cooperation in a specific field, decisions of international

¹³ Including international agreements to which the international organization itself becomes a party, although from an institutional lawmaking' perspective this is mainly interesting when the role of the international organization in the negotiating process can clearly be distinguished from the role of the states.

¹⁴ See in particular the leading study by Alvarez, *International Organizations as Law-Makers* (n 2); but also J Pauwelyn ao (eds), *Informal International Lawmaking* (OUP 2012) and A Berman ao (eds), *Informal International Lawmaking: Case Studies* (TOAEP 2013).

¹⁵ A Føllesdal ao (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff Publishers 2008).

¹⁶ HG Schermers and NM Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers 2011), 37.

organizations are increasingly considered a source of international law.¹⁷ Indeed, this seems to lie behind the term institutional lawmaking. Thus, Klabbers defined lawmaking instruments as instruments ‘laying down more or less general abstract rules of general application, binding upon all subjects of a given legal system’. These instruments would be different from those that are merely ‘applying the law’, acts of a ‘household nature’ and ‘acts which [aim] to influence behaviour, but without creating law’.¹⁸ It has even become quite common to regard these types of acts as contributing to the development of ‘world legislation’. Over the past decade, the use of the term *legislation* in this context was triggered in particular by the adoption of a number of resolutions by the UN Security Council, which aimed at a certain ‘harmonisation’ of domestic rules worldwide, rather than at regulating a concrete situation. The idea behind the term ‘legislation’ is that ‘the consent of states need not always be decisive, and may at times be overruled for the sake of the interests of mankind’.¹⁹ Yet, a clear consensus on how to interpret these notions is still lacking.²⁰ While some are quite generous in granting legislative powers to international organizations,²¹ others would stress the idea that in the end it would be the member states that are in charge, which would make the term ‘legislation’ (as a top-down instrument) inappropriate.

At the same time it is very difficult to define the broader notion of institutional *lawmaking* as its development differs from one organization to another and presents itself in various shapes.²² Moreover, despite its current topical nature, international lawyers were quite late in recognizing an ‘emerging reality of global governance’ and the ‘organization of global rulemaking’.²³ They only recently started to see and study international organizations as autonomous actors which have as their main objective the crafting of rules for worldwide application.²⁴

¹⁷ For a theoretical perspective see also IF Dekker and RA Wessel, ‘Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions’ in IF Dekker and WG Werner (eds), *Governance and International Legal Theory* (Martinus Nijhoff Publishers 2004) 215.

¹⁸ J Klabbers, *An Introduction to International Organizations Law*, (CUP 2015), 174.

¹⁹ *ibid*, 205.

²⁰ See the different contributions to the forum on ‘World Legislation’ in (2011) 8(1) *International Organizations Law Review*.

²¹ cf Schermers and Blokker (n 16), 1066 para 1657: ‘It is submitted that international organizations empowered to issue Decisions have legislative capacity’.

²² As José Alvarez notes, more and more international bodies ‘appear to be engaging in legislative or regulatory 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.’ Alvarez (n 2), 217.

²³ JGS Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (The University of Chicago Press 2010), 11.

²⁴ *ibid*; as well as K Jayasuriya, ‘Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1998–99) 6 *Indiana Journal of Global Legal Studies* 425.

Indeed, traditionally, lawmaking is not seen as a key function of international organizations.²⁵ The reason is 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, these days it is undisputed that many organizations do 'exercise sovereign powers'²⁶ in the sense that they not only contribute to lawmaking by providing a framework for negotiation, but also take decisions that bind their member states. Indeed, the current debates on international lawmaking 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 behaviour 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.²⁷ For lawyers, 'governance' becomes interesting whenever it involves legal rules or at least normative utterances with an effect on the legal order. Institutional lawmaking would then be part of 'global governance'.²⁸

2.2 Lawmaking in Practice

Organizations with some competence to take legally binding decisions which go beyond a mere application of the law include the EU, the UN, the World Health Assembly of the WHO, the Council of the ICAO, the OAS, the WEU, NATO, OECD, UPU, WMO and IMF.²⁹ In addition, as Alvarez's survey reveals, it includes standard setting by the IMO, the FAO, the ICAO, the ILO, the IAEA, UNEP, the World Bank, and the IMF.³⁰ Furthermore, the fact that many international conventions – including UNCLOS

²⁵ 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* (CUP 1997) 3: 'Neither the United Nations nor any of its specialised agencies was conceived as a legislative body.'

²⁶ D Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2005).

²⁷ Koppell (n 23), 77–78.

²⁸ See also B Oxman, 'The International Commons, the International Public Interest and New Modes of International Lawmaking' in J Delbrück (ed), *New Trends in International Lawmaking: International 'Legislation' in the Public Interest* (Ducker & Humblot 1996), 28–30. cf also T Stein and C Schreuder, 'Comments' in the same volume.

²⁹ Cf Schermers and Blokker (n 16); Klabbers, *An Introduction to International Organizations Law* (n 18); CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (CUP 2005); and ND White, *The Law of International Organisations* (Manchester University Press 2005); PJ Sands and P Klein, *Bowett's Law of International Institutions* (Sweet and Maxwell 2001).

³⁰ European Union (EU), the United Nations (UN), International Civil Aviation Organization (ICAO), Organization of American States (OAS), Western European Union (WEU), North Atlantic Treaty Organization (NATO), Organization for Economic Co-operation and Development (OECD), Universal Postal Union (UPU), World Meteorological Organization (WMO), International Monetary Fund (IMF), International Maritime Organization (IMO), Food and Agriculture Organization (FAO), International Labor Organization (ILO), International Atomic Energy Agency (IAEA), UN Environment Programme (UNEP).

(on the law of the sea) and a number of WTO agreements – incorporate generally accepted international rules, standards, regulations, procedures and/or practices may effectively transform a number of codes, guidelines and standards created by international organizations and bodies into binding norms. This reveals the complexity of institutional lawmaking: it is not just about clearly legally binding decisions of international organizations; it may very well be about an acceptance of rules and standards because there is simply nothing else and the rules need to be followed in order for states to be able to play along.³¹ At the same time international organizations often adopt rules or standards developed in another organization and with less than 200 states they are bound to run into each other in many different institutions. Binding Security Council Resolutions or EU Regulations are just one example of a much broader set of normative activities that may contribute to institutional lawmaking and these include hard law as well as soft law measures. While the difference between hard and soft law may theoretically relevant to lawyers, recent studies increasingly focus on the effects of the measures. Indeed, while in most cases standard setting is accomplished through softer modes of regulation, this may leave the subjects of regulation ‘with as little effective choice as some Security Council enforcement actions’.³²

Some international bodies merit special attention. The UN Security Council is often used as *the* example of an international body with clear and autonomous lawmaking functions.³³ Whereas its Charter presents the UN as an intergovernmental organization dealing with the relations between its member states (compare articles 1 and 2), taking decisions that entail obligations on those member states (article 25), and extremely hesitant to interfere in the domestic jurisdiction of any state, the Security Council took a number of decisions that directly affect citizens within member states (an element usually seen as a characteristic of institutional lawmaking beyond the original objectives of the organization). Examples include the establishment of the Tribunals for the former Yugoslavia and

³¹ Interesting in this respect is Jan Klabbers’ notion of ‘presumptive law’: the author departs from the more or less pragmatic idea that law is ‘whatever people recognize and treat as law through their social practices’; J Klabbers, ‘Law-making and Constitutionalism’ in J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 81.

³² Alvarez, *International Organizations as Law-Makers* (n 2), 218.

³³ cf PC Szasz, ‘The Security Council Starts Legislating’ (2002) 96 *American Journal of International Law* 901; S Talmon, ‘The Security Council as World Legislature’ (2005) 99 *American Journal of International Law* 175; B Elberling, ‘The Ultra Vires Character of Legislative Action by the Security Council’ (2005) 2 *International Organizations Law Review* 337; M Akram and SH Shah, ‘The Legislative Powers of the United Nations Security Council’ in RStJ MacDonald and DM Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff Publishers 2005) 431; AJJ de Hoogh, ‘Attribution or Delegation of (Legislative) Power by the Security Council?’ in M Bothe and B Kondoch (eds), *International Peacekeeping. The Yearbook of International Peace Operations* vol 7 (Brill 2001) 1; and E de Wet, ‘The Security Council as a Law-Maker: The Adoption of (Quasi)-Legislative Decisions’ in R Wolfrum and V Röben, (eds), *Developments of International Law in Treaty Making* (Springer 2005) 184. The debate is somewhat older; see for instance E Yemin, *Legislative Powers in the United Nations and Specialised Agencies* (AW Sijthoff 1996); and FL Kirgis, ‘The Security Council’s First Fifty Years’ (1995) 89 *American Journal of International Law* 506, 520.

for Rwanda (creating a competences for international bodies to take individual decisions in the area of international criminal law), the cases in which the UN has taken over the interim administration of a region or state (UNMIK in Kosovo and UNTAET in Timor Leste)³⁴ and the replacement of traditional sanctions directed at states (eg Iraq) by 'smart sanctions' directed at certain individuals or groups.³⁵ Thus the Security Council placed greater emphasis on its ability to take decisions with a great impact on intra-state issues rather than being involved merely in relations between states.³⁶

Institutional lawmaking may perhaps also take shape in the form of 'case law' rather than as decisions of an organ of an international organization. The legal order of the EU has largely been shaped on the basis of case law that, allegedly, went beyond what states originally (thought to have) agreed on in the treaties. Less prominent examples may be found in other international organizations. Thus, the WTO's Dispute Settlement Body (DSB) has been said to be proof of the organization's 'legislative' or 'adjudicative' powers.³⁷ Indeed, while one may question whether dispute settlement can be seen as lawmaking, the fact remains that the DSB's reports reach beyond the WTO members involved in the dispute and may even have serious consequences for individuals (including enterprises in particular).³⁸ A similar phenomenon may be discovered in another dimension of the WTO:

³⁴ For example, in relation to UNTAET, UNSC Resolution 1271 (1999) provides in para 1 that UNTAET '[...] will be endowed with overall responsibility for the administration of east Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice [...].' See also C Stahn, 'Governance beyond the State: Issues of Legitimacy in International Territorial Administration' (2005) 2 *International Organizations Law Review* 9; B Kondoch, 'The United Nations Administration of East Timor' (2001) 6 *Journal of Conflict and Security Law* 245; and R Wilde, 'Representing Territorial Administration: A Critique of Some Approaches' (2004) 15 *European Journal of International Law* 71.

³⁵ Smart sanctions are also referred to as 'targeted' or 'designer' sanctions. More extensively see: I Cameron, 'Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159; RA Wessel, 'Debating the "Smartness" of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen' in C Fijnaut et al (eds), *Legal Instruments in the Fight Against International Terrorism. A Transatlantic Dialogue* (Martinus Nijhoff Publishers 2004) 633. On the sanctions committees dealing with the cases see: GL Burci, 'Interpreting the Humanitarian Exceptions Through the Sanctions Committees' in V Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International 2001) 143, 144–45.

³⁶ For a survey of Security Council activities in this area see: I Österdahl, 'The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council' (2005) 10 *Journal of Conflict and Security Law* 1. Earlier: B Graefrath, 'Leave to the Court What Belongs to the Court: The Libyan Case' (1993) 4 *European Journal of International Law* 184; M Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff Publishers 1994); JE Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1; DW Bowett, 'The Court's Role in Relation to International Organisations', in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996); and J Dugard, 'Judicial Review of Sanctions' in Gowlland-Debbas (ed) *ibid* 83. On the competence of the Security Council see B Eberling, 'The Ultra vires Character of Legislative Action by the Security Council' (2005) 2 *International Organizations Law Review* 337. On 'abstract' or 'thematic' decisions see also C Denis, *Le Pouvoir normatif du Conseil de sécurité des Nations unies: Portée et limites* (Bruylant 2004), paras 118–30 and 171–81; as well as Alvarez (n 2), 173–76.

³⁷ See in particular N Lavranos: *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States* (Europa Law Publishing 2004).

³⁸ See for instance DZ Cass, 'The "Constitutionalization" of Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39. On the

intellectual property, regulated in the so-called TRIPs,³⁹ which may affect the producers of for instance HIV/AIDS medicines, in that an international decision ensures that their products may be sold under the market value in developing countries. Apart from the fact that the WTO has no facilities for individual access to a judicial review procedure such as those applicable within the EU, it may nevertheless find itself bound by Security Council Resolutions, which may have a conclusive impact on the outcome of a WTO dispute settlement procedure.

Other examples of institutional lawmaking can be found with the UN High Commissioner for Refugees (in relation to the fixing of standards regarding the establishment of a refugee status of the governance of refugee camps), the World Health Organization (in establishing global health risks), the so-called Financial Action Task Force of the OECD (in the area of money laundering), WIPO (in the area of intellectual property), the World Bank (in setting criteria for obtaining financial support), or intergovernmental bodies with very technical and specific mandates (eg the International Civil Aviation Organisation, the International Telecommunication Union, the Codex Alimentarius Commission).

Finally, institutional lawmaking may also relate to and originate from the organization's own internal rules. In relation to the international financial institutions, for instance, it was argued that the evolution of so-called Operational Policies and Procedures (OP&Ps) and the establishment of international accountability mechanisms (IAMs) to enforce them are instrumental in transforming institutions such as the World Bank and the International Finance Corporation (IFC) into lawmaking and law-governed institutions in the sense that the OP&Ps address the same issues and are increasingly 'guided' by existing international law standards, especially in the international environmental law and international human rights law areas.⁴⁰

3. LAWMAKING BY OTHER INTERNATIONAL BODIES

3.1 New Forms of Institutional Lawmaking

In studying institutional lawmaking it became clear that many norms originate in other international bodies or form part of a much broader international debate, including many different actors. The emerging picture is one of a broad range of international normative fora, from intergovernmental organizations with a broad mandate (see above), treaty-based conferences that do not amount to an

impact of the WTO on the international legal order, see the important book by JH Jackson, *Sovereignty, the WTO and the Changing Fundamentals of International Law* (CUP 2006).

³⁹ SK Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP 2003).

⁴⁰ DD Bradlow and AN Fourie, 'The Operational Policies and Procedures of the World Bank and International Finance Corporation: Creating Law-making and Law-governed Institutions?' (2014) 10 *International Organizations Law Review* 3.

international organization (eg 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 (eg the G20, the Financial Action Task Force on Money Laundering, the Basel Committee on Banking Supervision (Basel Committee)), and even private organizations that are active in the public domain (eg the International Organisation for Standardisation (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).⁴¹

Three elements in particular make it difficult for traditional international law to grasp the developments and to translate everything into legal terms. The *decision-making processes* that result in normative or regulatory activity in these forums likewise seem to be very diverse. They differ, for instance, on the issue as to who can take the initiative and formulate proposals for decisions (governments, organs of the organization, interest groups, independent experts), the format wherein proposals are discussed (organization of negotiations, formal and informal sessions, caucuses, negotiating groups, amendments, etc.), and the actual decision-making mode (consensus, voting by unanimity or by a certain type of majority, equality or inequality of voting power, methods of voting), including the question of which actors and stakeholders (eg organs of the organization, governments, civil society organizations, businesses, parliamentarians, etc.) are involved – directly, or indirectly, formally or informally – in the decision-making.

At least as diverse seem the *instruments* used within these various regulatory forums. These range from ‘hard law’ to ‘soft law’, exchange of best practices and benchmarking, to mutual recognition and even to tools that at first sight may not seem normative in nature but that can have such effect, such as policy programmes, modes of assessment, reporting and monitoring systems, and loan conditionality.⁴² The degree to which such international regulatory regimes are binding is linked with both the character of the instruments and procedures aimed at implementation and compliance. Rules, standards and principles can be included in traditional, legally binding conventions, negotiated between states or in the framework of an international organization, or can have the status of technical annexes to such conventions, to be amended through simplified procedures; but they can also take the form of mere recommendations, policy guidelines or political declarations. A normative impact can even result from exchanges of best practices among states and the setting of benchmarks for good policies.

⁴¹ More extensively on the normative activities of these bodies: RA Wessel, ‘Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors’ in MA Heldeweg and E Kica (eds), *Regulating Technological Innovation: A Multidisciplinary Approach* (Palgrave MacMillan 2011) 77.

⁴² See Alvarez (n 2), 217.

Finally, what is clear is that the *impact*, direct or indirect, of such international lawmaking and regulatory activities upon citizens and businesses is as yet poorly understood. It is for that reason that many research projects have recently addressed the impact of international institutions' normative activities on domestic legal orders and subjects within the member states, and the mechanisms through which such effects occur.⁴³

One approach is to include bodies at the global level that play a role in international or transnational lawmaking, irrespective of the fact that they cannot be captured by the traditional definition of subjects of international law. That is, they are not states and do not fall within the traditional definition of an international organization and/or often lack international legal personality. What makes things even more complicated is that some of these bodies generate norms, such as best standards, practices, guidelines, and so forth that affect a wide range of countries, companies and people, without being considered formal sources of international law. Irrespective of the legal status of the norms that are the product of these non-traditional bodies, there is some agreement on the idea that the norms and rules produced by these bodies (or networks) contribute to institutional lawmaking.⁴⁴ Recently, this phenomenon was approached by coining it *informal international lawmaking* (INLAW) INLAW is defined as:

"cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or traditional source of international law (output informality). (see below).⁴⁵"

Other attempts to capture what is essentially the same phenomenon (albeit from slightly different perspectives) have been labelled *global administrative law*,⁴⁶ *postnational rulemaking*⁴⁷ or

⁴³ See also section 4 below. The impact of international norms is also part of a relatively recent stream of research focussing on the changing relationship between international law and national law. See for instance J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007).

⁴⁴ Boyle and Chinkin (n 2), vii. RA Wessel, 'Informal International law as a Form of World Legislation?' (2011) 8 *International Organizations Law Review* 253; see for a non-legal approach: MJ Warning, *Transnational Public Governance: Networks, Law and Legitimacy* (Palgrave/MacMillan 2009).

⁴⁵ See J Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Pauwelyn ao (eds) (n 14) 13, 15.

⁴⁶ See for instance B Kingsbury, N Krisch and RB Steward, 'The Emergence of Global Administrative Law' (2004–2005) 68 *Law and Contemporary Problems* 15; as well as the extensive case book by S Cassese ao (eds), *Global Administrative Law: The Casebook* (published by IRPA and IILJ) and available at <<http://www.irpa.eu/gal-section/9799/global-administrative-law-the-casebook-2/>>.

⁴⁷ E Fahey (ed), *The Actors of Postnational Rulemaking. Contemporary Challenges of European and International Law* (Routledge 2015).

the *exercise of international public authority*.⁴⁸ The latter notion is particularly helpful if one wishes to develop an inclusive perspective on institutional lawmaking. Lawmaking then comprises ‘any kind of governance activity by international institutions, be it administrative or intergovernmental [and] should be considered as an exercise of international public authority *if it determines individuals, private associations, enterprises, states, or other public institutions*’.⁴⁹ ‘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’. Also important is the fact that the determination may or may be not 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.’⁵⁰

On the basis of the insights offered by these projects, this section will broaden the scope of international institutions that are (or may be) engaged in lawmaking by introducing three new categories: international institutions in which states cooperate on a more informal basis (the G20 being the prime example); international bodies created by international organizations (termed here ‘international agencies’); and informal international bodies composed of other actors (‘institutionalised networks’).

3.2 Informal Institutional Lawmaking

States not only cooperate in the framework of formal international organizations, but have also established more informal bodies.⁵¹ The question addressed here is to what extent these bodies play a role in institutional lawmaking. Given the vast amount of international bodies, we will only be able to highlight an example: the ‘Group of 20’ (or G20). The G20 is a prime example of an informal body that has been listed under ‘other autonomous organizations’.⁵² The Group was created in 1999, but started to meet at the level of heads of state and government in 2008.⁵³ The focus of the G20 gradually

⁴⁸ A von Bogdandy, P Dann and M Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ in A von Bogdandy ao (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 3.

⁴⁹ *ibid*, 5.

⁵⁰ *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; 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* 241, 261.

⁵¹ cf P Sands and P Klein, *Bowett’s Law of International Institutions* (6th edn, Sweet and Maxwell 2009), 13, 16. The authors adopt a broad definition of international organizations and include not only the organization’s membership and legal personality, but also the extent to which the body is ‘capable of adopting norms (in the broadest sense) addressed to its members’.

⁵² *ibid*, 13.

⁵³ See J Wouters and D Geraets, ‘The G20 and Informal International Lawmaking’ in Berman ao (eds) (n 14) 19. See for a historic overview C Schmucker and K Gnath, ‘From the G8 to the G20: Reforming the Global Economic Governance System’ in Chr Herrmann and J Terhechte (eds), *European Yearbook of International Economic Law* vol 2 (Springer 2011), 389–402.

shifted from enacting measures against the worst effects of the financial crisis, to topics ranging from the reform of the international monetary system to climate change and commodity price volatility.⁵⁴ Compared to traditional international organizations, the G20 resembles a loosely organized network or informal gathering. Meetings take place in different locations, there are no procedural rules and its output is anything but a treaty or any other form of traditional international law.⁵⁵

With its characteristics of a network, the question may be whether the G20 can be considered a 'body' that as such plays a role in institutional lawmaking. The fact is that the outcomes of G20 meetings cannot be ignored and affect and influence other international decisions.⁵⁶ As illustrated by Wouters and Geraets, the G20 is currently made up of seven advanced economies, 12 emerging economies and the EU.⁵⁷ The membership thus comprises five continents, two-thirds of the world's population, roughly 85 per cent of global GDP and approximately 80 per cent of world trade. The broadening of the agenda led to the fact that G20 meetings now take place not only at the level of heads of state or ministers of finance, but also at the level of specialized ministries.

Given the explicit informal nature of the G20, it remains difficult, however, to view the conclusions of the meetings as 'lawmaking'. This is not to say that the G20 does not play a role in the global lawmaking *process*. As argued by Martinez-Diaz and Woods,⁵⁸ the G20 outcomes effect decision-making by other international organizations in three different ways: 1. a 'complementary effect' will generate political support for the decision-making process in international organizations, thereby pressurizing them to accelerate their initiatives; 2. a 'competitive effect', whereby certain formal bodies such as the International Monetary and Finance Committee (IMFC) of the IMF and the Development Committee of the World Bank now compete with the G20 as the latter tries to gain authority on these matters; and 3. the G20 may have a 'rebalancing effect' in global governance and international organizations. It brings emerging economies into agenda-setting and coordination 'discussions and it may serve "as a catalyst for reform of formal international organizations"'.⁵⁹

While the G20 is a prominent example of an informal international body (in International Relations theory probably referred to as an 'international regime') with clear normative functions,

⁵⁴ Wouters and Geraets *ibid.*

⁵⁵ *ibid.*; as well as L Martinez-Diaz and N Woods, 'The G20 – the perils and opportunities of network governance for developing countries' (2009), 1 available at <<http://www.globaleconomicgovernance.org/sites/geg/files/Woods%20Martinez%20Diaz%20Networks%20PB.pdf>>.

⁵⁶ See 'What Is The G20?' available at <<http://www.g8.utoronto.ca/g20/g20whatisit.html>>. See also J Wouters and S Van Kerckhoven, 'The OECD and the G20: An Ever Closer Relationship?' (2011) 43 *George Washington International Law Review* 345, 373.

⁵⁷ Wouters and Geraets (n 53). The 19 countries are (alphabetically): Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom and the United States.

⁵⁸ Martinez-Diaz and Woods (n 55), 1.

⁵⁹ *ibid.*, 3.

others have a more formal basis. One may think of international committees which may be intergovernmental but may also consist exclusively of independent experts that have their basis in multilateral treaties, such as the UN human rights treaty bodies.⁶⁰ In terms of institutional lawmaking bodies such as the G20 therefore contribute to lawmaking indirectly. They serve as a forum for state representatives to draw conclusions on broad issues of global governance, thereby influencing actual lawmaking by other fora.

3.3 Delegated Institutional Lawmaking

Lawmaking 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 may perhaps call them,⁶¹ may obtain a role in norm setting that can be distinguished from the 'parent organization'. According to some observers, this type of bodies even outnumbers conventional organizations and may play an important role in the lawmaking process.⁶² 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 out,⁶³ 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

⁶⁰ See J Wouters and J Odermatt, 'Norms Emanating from International Bodies and Their Role in the Legal Order of the European Union' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (TMC Asser Press/Springer 2013) 47. The authors refer to Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT), Committee on the rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Right of Persons with Disabilities (CRPD), Committee on Enforced Disappearance (CED) (at 51). The general term is 'treaty organs'; see Schermers and Blokker (n 16), 294–96 paras 386–87.

⁶¹ See more extensively E Chiti and RA Wessel, 'The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?' in White and Collins (eds) (n 3) 142; as well as A Berman and RA Wessel, 'The International Legal Status of Informal International Law-making Bodies: Consequences for Accountability' in Pauwelyn ao (eds) (n 14) 35.

⁶² See C Shanks ao (eds), 'Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992' (1996) 50 *International Organization* 593.

⁶³ On the different dimensions of the relationship between states and international organizations D Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 *British Yearbook of International Law* 413.

establishment of the new organization'.⁶⁴ One could argue that in these cases 'lawmaking' becomes even more 'institutional'.

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 would traditionally not qualify as international organizations themselves. A first possibility is that these bodies are set up by one organization only, to help attain the objectives of that organization. The most well-known examples include the bodies established by the UN General Assembly (such as UNCTAD, UNEP, UNIDO, UNCHS, UNFPA and UNDP). These bodies are usually referred to as subsidiary organs,⁶⁵ or as quasi-autonomous bodies (QABs)⁶⁶. Special bodies were also set up by the UN Specialized Agencies and other UN-related organizations.⁶⁷ In terms of lawmaking, a case in point is the Al Qaeda and Taliban Sanctions Committee, a subsidiary organ of the UN Security Council, with its competence to place an individual on the consolidated list of terrorist suspects.⁶⁸ In many cases this type of international agency has the characteristics of an international organization in its own right.

A second group of bodies is created by two or more international organizations in areas where the problems they face transcend their individual competences and lawmaking activities need to be combined. 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, IBDR, IFM, OECD and – later – the WTO), more frequently they are the result of decisions taken by the respective organizations, such as in the case of the Intergovernmental Panel on Climate Change (IPCC), established by the UN Environmental Programme (UNEP) and the World Meteorological Organization (WMO). 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

⁶⁴ C Martini, 'States' Control over New International Organization' (2006) 6 *Global Jurist Advances* 1, 25.

⁶⁵ See Sarooshi (n 63); S Torres Bernardez, 'Subsidiary Organs' in RJ Dupuy (ed), *Manuel sur les organisations internationales – A Handbook on International Organizations* (Martinus Nijhoff Publishers 1998), 109.

⁶⁶ P Szasz, 'The Complexification of the United Nations System' (1999) 3 *Max Planck Yearbook of United Nations Law* 1.

⁶⁷ 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 (n 64), 4–5.

⁶⁸ See on this nature of the Committee: C Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' (2008) 9 *German Law Journal*, 1513.

Change (WMO and UNEP in 1998), the Joint Group of Experts in the Scientific Aspects of Marine Environmental Protection (GESAMP, created by the IMO, FAO, UNESCO and WMO in 1969), and the Global Environmental Facility (GEF, created by the World Bank in 1991 and joined by UNDP and UNEP).⁶⁹ An example is also formed by the World Heritage Convention (WHC), whose parties are the UNESCO member states that have ratified the convention itself, while states, intergovernmental, or non-governmental organizations that are not UNESCO members may accede to the WHC, either as participants or as advisers.

In terms of lawmaking, the powers granted to these international bodies are often constructed either as simple coordination of member states' activities or as non-binding regulatory powers. And yet, such powers tend in practice to go well beyond mere coordination and gain a genuinely binding regulatory character. A case in point is formed by the World Heritage Convention. On the basis of its own text, this Convention is often defined as 'a system of international cooperation and assistance designed to support States Parties in their efforts to conserve and identify the world heritage' (article 7), essentially through the management of a World Heritage List and the allotment of international assistance, financed by the World Heritage Fund. At the same time, the Operational Guidelines adopted in the 1990s and their subsequent revision and application show that inscription of a property on the List of World Heritage in Danger may take place without the request of the relevant state party, and even against its express wishes, and may be accompanied by a number of suggested measures to be adopted by domestic authorities: an evolution which turns the World Heritage Convention from a case of international coordination to a system aimed at ensuring member states' compliance with the World Heritage regime. Another clear example is provided by the standards produced by the Codex Alimentarius Commission. These formally non-binding standards have gradually gained a quasi-mandatory effect via the interpretation of the SPS Agreement by the WTO Appellate Body, which has subjected the discretion of member states' to deviate from international standards to very strict limitation.⁷⁰

This substantial evolution of the powers of 'international agencies' is usually accompanied by the development of administrative law mechanisms. Such mechanisms vary considerably from case to case. Yet, in all cases they respond to the exigency of strengthening control over the functioning and operations of international agencies through the provision of a number of administrative principles

⁶⁹ See Martini (n 64), 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 Global Environment Facility Galaxy: On Linkages among Institutions' (1999) 3 *Max Planck Yearbook of United Nations Law* 243; and E Hey, 'Exercising Delegated Public Power' in R Wolfrum and V Röeben (eds), *Developments of International Law in Treaty Making* (Springer 2006), 437.

⁷⁰ See RA Pereira, 'Why Would International Administrative Activity be Any Less Legitimate? – A Study of the Codex Alimentarius Commission' (2008) 9 *German Law Journal* 1693, 1703. Credits are due to Edoardo Chiti for coming up with these examples.

and rules applying to decision-making. Their sources include treaties and general principles of public international law. More often, however, administrative law mechanisms are established by non-treaty lawmaking of the parent organizations as well as of international agencies per se, including soft law measures. As for their content, the emerging administrative law principles and rules tend to converge around decisional transparency, procedural participation and reasoned decisions, while review by a court or other independent tribunal is normally excluded. In particular, international agencies develop a practice of transparency by releasing, generally on their websites, administrative decisions, information on which they are based and material on internal decision-making. Moreover, participation in decision-making proceedings has been promoted. Notably, procedural guarantees are designed as rights of states and are granted to all member states, not only to those directly affected by regulatory decisions. Procedural guarantees are extended to civil society and private actors, although their effective role in the decision-making process is contested and their formal rights are often more limited than those granted to states.

3.4 Lawmaking by Networking

In some issue areas there is intense cooperation between state and non-state actors. Apart from the obvious example of the International Labour Organization, other well-known examples include the Codex Alimentarius Commission on food safety or to ICANN, which governs the internet. ICANN does not regulate on the basis of binding decisions. Rather, it concludes contracts with the registries in charge of the administration of internet 'top-level domains' (TLDs). However, given the fact that internet access is dependent on having a TLD name (such as .eu), one may argue that this comes close to 'de facto' bindingness. Indeed 'It seems quite logical that the uniformity of the rules is best guaranteed by a single "legislator"'.⁷¹

In some areas states have even ceased to play a role and transnational actors have taken over. A prime example is the International Standardization Organization (ISO), which by now has produced some 20,000 rules on the standardization of products and processes, covering almost all aspects of technology and business from food safety to computers, and agriculture to healthcare.⁷² These rules are often adopted by other international organizations, such as the WTO, which allows them to indirectly affect national legal orders.⁷³ 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

⁷¹ M Hartwich, 'ICANN – Governance by Technical Necessity' in Von Bogdandy et al (eds) (n 48) 575, 576.

⁷² RB Hall and ThJ Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP 2002).

⁷³ See S Shapiro, 'International Trade Agreements, Regulatory Protection and Public Accountability' (2002) 54 *Administrative Law Review* 435.

were adopted without any direct influence by the national legislator or that simply have to be adopted at the national level in order to be able to participate in international cooperation. These activities certainly form part of the international lawmaking process, albeit that more often the term 'regulation' is used to indicate the more practical or pragmatic dimension of this phenomenon. What one witnesses is a transnational cooperation that has already 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.⁷⁴ Other examples include the Basel Committee, in which the central bank directors of a limited number of countries harmonize their policies in such a way as to result in a *de facto* regulation of the capital market,⁷⁵ and the International Organization of Securities Commissions (IOSCO), which deals with the transnationalization of securities markets and attempts to provide a regulatory framework for them.⁷⁶ National agencies or other stakeholders thus participate in global (or regional) regulatory networks as 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.⁷⁷ Slaughter termed this phenomenon the 'nationalization of international law'.⁷⁸ According to Jayasuriya these regulatory forms have three main features: 1. they are governed by networks of state agencies acting not on behalf of the state but as independent actors; 2. they lay down standards and general regulatory principles rather than strict rules; and 3. they frequently contribute to the emergence of a system of decentralized enforcement or the regulation of self-regulation.⁷⁹

Harmonization networks as understood in this chapter are networks of public regulatory authorities (at times in collaboration with private partners) that are in the business of harmonizing their domestic rules, setting standards or other norms.⁸⁰ Anne-Marie Slaughter is the scholar to have made the most notable contribution to our understanding of networks of public regulatory authorities, or what she refers to as 'trans-governmental regulatory networks'. She defines them as 'pattern[s] of

⁷⁴ On the *lex digitalis* see for instance HH Perritt Jr, 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' (1999-2000) 15 *Ohio State Journal on Dispute Resolution* 675. On the *lex mercatoria* see for instance LM Friedman, 'Erewhon: The Coming Global Legal Order' (2001) 37 *Stanford Journal of International Law* 347. On some internet regulating bodies see also Wessel (n 41).

⁷⁵ D Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33 *Texas International Law Journal* 281; MS Barr and GP Miller, 'Global Administrative Law: The View from Basel' (2006) 17 *European Journal of International Law* 15.

⁷⁶ *ibid*; and Jayasuriya (n 24), 449.

⁷⁷ Jayasuriya (n 24), 440. See also S Picciotto, 'The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks' in W Bratton *ao* (eds), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Clarendon Press 1996) 89.

⁷⁸ AM Slaughter, 'The Real New World Order' (1997) 76 (5) *Foreign Affairs* 183, 192.

⁷⁹ Jayasuriya (n 24), 453. On the regulation of self-regulation in particular see G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239. Elements of this development are also addressed by AM Slaughter, *A New World Order* (Princeton University Press 2004).

⁸⁰ Credits are due to Ayelet Berman, who suggested this term. Parts of this section are based on her contribution to a joint publication: Berman and Wessel (n 61).

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.⁸¹ They allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior executives, and feature loosely structured, peer-to-peer ties developed through frequent interaction.⁸² The networks are composed of national government officials, either appointed by elected officials or directly elected, and they may be among judges, legislators, or regulators.⁸³

While Slaughter’s work focussed on networks composed purely of public regulatory authorities, in reality, regulators often collaborate with private bodies, in particular in harmonization networks. For example, the US, EU, and Japanese drug regulatory authorities collaborate with the medical devices industry associations in the Global Harmonization Task Force (GHTF), or US and EU aviation authorities collaborate with aviation industry organizations on the US-EU Aviation Harmonization Work Program. In some cases, trans-governmental regulatory networks are nothing more than talking shops, that is, they provide a forum for the exchange of information and experience. Yet, harmonization networks actually engage in standard setting, harmonization, or setting of norms. They therefore serve as examples of institutional lawmaking by actually issuing norms. Examples include the already mentioned Basel Committee and IOSCO, the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), or the Financial Stability Board (FSB).

In a chapter on institutional lawmaking, the question may rightfully be raised to which extend trans-governmental regulatory networks are institutionalized. Again, there is a great variety: while some may be extremely unstructured, some have become more institutionalized and may resemble an international organization.⁸⁴ The latter is in particular the case in harmonization networks such as Basel, IOSCO and the ICH that are highly institutionalized, and could rightfully be considered trans-governmental regulatory organizations (TROs).⁸⁵ They have many of the characteristics commonly associated with an organization. As far as their contribution to ‘lawmaking’ is concerned, the documents issued by harmonization networks are typically considered not legally binding. Nevertheless, members are expected to implement the guidelines in their domestic legal system. In

⁸¹ Slaughter (n 79), 14.

⁸² AM Slaughter and D Zaring, ‘Networking Goes International: An Update’ (2006) 2 *Annual Review of Law and Social Science* 211, 215; K Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law (2002–2003) 43 *Virginia Journal of International Law* 1.

⁸³ Slaughter, *A New World Order* (n 79), 3–4.

⁸⁴ See on this point also Slaughter and Zaring (n 82), 215.

⁸⁵ Zaring refers to the Basel Committee and IOSCO as ‘international financial regulatory organizations’. See Zaring (n 75). See also S Donnelly, ‘Informal International Lawmaking: Global Financial Market Regulation’ in Berman *ao* (eds) (n 14) 181.

the GHTF, for example, 'founding Members will take appropriate steps to implement GHTF guidance and policies within the boundaries of their legal and institutional constraints'.⁸⁶ Similarly, the Basel Committee members have agreed to implement the accords within their own domestic system. And indeed, in practice the guidelines enjoy widespread compliance and considerable normative force, which puts their non-legally binding character into perspective. The normative effect of the guidelines extends beyond the member regions. In practice, the guidelines are often adopted by non-members. For example, more than 100 states have implemented the Basel Accords to a greater or lesser degree.⁸⁷ Similarly, ICH guidelines, setting out rules for approval of new medicines, have been adopted globally by many non-members.⁸⁸

As we have seen, international norms do not always reach states' domestic legal orders directly: they may have followed a route through other international bodies, which may strengthen the autonomy of the different institutions vis-à-vis their own members. In the EU the relation between EU decisions and decisions taken by other international bodies is indeed quite obvious.⁸⁹ While most types of lawmaking by international organizations are generally directed towards the organization's own members,⁹⁰ the above analyses underlines that decisions by international institutions either *de jure* or *de facto* become part of the domestic legal order of the member states and directly or indirectly affect citizens and/or businesses within those states. 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 an 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.⁹¹ 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

⁸⁶ Art 2.1, 'GHTF Roles and Responsibilities Document' available at <<http://www.imdrf.org/docs/ghtf/final/steering-committee/procedural-docs/ghtf-sc-n2r12-100421-ghtf-roles-and-responsibilities.pdf>>.

⁸⁷ M Savino, 'An Unaccountable Transgovernmental Branch: The Basel Committee' in S Cassese ao (eds), *Global Administrative Law: Cases, Materials, Issues*, (Institute for International Law and Justice: NYU School of Law, and Istituto di Ricerche sulla Pubblica Amministrazione 2008), 67.

⁸⁸ A Berman, 'The Role of Domestic Administrative Law in the Accountability of IN-LAW' in Pauwelyn ao (eds), (n 14) 468.

⁸⁹ See also Wessel and Blockmans (n 60). For a theoretical approach to regulatory interaction see also: V Mayer-Schönberger and A Somek, 'Introduction: Governing Regulatory Interaction: the Normative Question' (2006) 12 *European Law Journal* 431 (Special issue of the *ELJ Governing Regulatory Interaction: the Normative Question*).

⁹⁰ A number of international organisations also contain other international organisations as members: for instance, the WTO has the European Union as one of its founding members.

⁹¹ For a survey of the relations between the EU and other international organizations see: F Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies' (2007) 44 *Common Market Law Review* 41.

legal orders as part of European law. But international decisions may also have an independent impact on domestic legal orders. This is not to say that all international decisions have a direct effect in the sense we are familiar with 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'.⁹²

4. CONCLUSION: AN INSTITUTIONALISED GLOBAL NORMATIVE WEB

In the Introduction to this chapter we pointed to three phenomena which should guide a meaningful assessment of institutional lawmaking these days. The importance of these three phenomena is supported by our analysis:

1. International organizations and other international bodies have often obtained an autonomous normative position and no longer merely serve as facilitation fora for state cooperation. The lawmaking functions of many international organizations have developed in a way that may not have been foreseen by their creators, but could have been expected given the reason to establish the organizations in the first place: to delegate authority on matters which require expertise, knowledge, information, time and resources.⁹³ Institutional lawmaking has thus moved from using international organizations as facilitators for the conclusion of 'international agreements' to the taking of 'international decisions'.
2. A mere focus on traditional organizations would leave us with a very limited picture of the international normative output.⁹⁴ Although international networks and informal bodies have existed for a long time,⁹⁵ their proliferation and (legal) impact through harmonization methods (standardization, certification) has made it impossible for lawyers to disregard them in their analysis of international lawmaking. In many cases they exercise a public authority which goes beyond a mere cooperation between public as well as private actors. Obviously, this raises new questions — for instance related to the constitutionalization of

⁹² Th Cottier, 'A Theory of Direct Effect in Global Law' in A von Bogdandy ao (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in honour of Claus Dieter Ehlermann* (Kluwer Law International 2001) 99, 102 and 104.

⁹³ Wouters and De Man (n 4), 204.

⁹⁴ In their book *The Making of International Law*, Boyle and Chinkin (n 1) accept and describe the role of numerous state and non-state actors in international lawmaking. It is striking that 'treaties as law-making instruments' is only dealt with marginally (section 5.4).

⁹⁵ 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 1931) (criticizing the influence of experts in the making of international public norms).

the international legal order, the legitimacy of the decisions or the accountability of the actors — the answering of which goes beyond the scope of this chapter.⁹⁶

3. The distinction between formal and informal institutions and networks may have been helpful for lawyers to define their object of study, but 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’.⁹⁷

In a way, this third point is the result of the first two. Hence, the main lesson may be that institutional lawmaking (as well as the enforcement of the rules⁹⁸) cannot be studied by looking at one particular international institution or merely at traditional international organizations. Norms enacted by formal and informal international bodies and networks are more often interconnected and, given the increasing (technological) complexity of many issues, the origin of a norm may very well be found in a meeting of one of the hundreds of international bodies and networks that exist internationally as part of an institutionalized global normative web.

⁹⁶ See also Klabbers, ‘Law-making and Constitutionalism’ (n 31), 12, arguing that non-state actors have ‘started to compete with states for the scarce resource of politico-legal authority (ie 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 (4, 10). But see also Pauwelyn, Wessel and Wouters, ‘When Structures Become Shackles’ (n 11), 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’. On the possibly changing nature of the international legal order as a result of the new role of international institutions see also RA Wessel, ‘Revealing the Publicness of International Law’, in C Ryngaert ao (eds), *What’s Wrong With International Law? What’s Wrong With International Law?* (Martinus Nijhoff Publishers 2015), 449-466.

⁹⁷ Koppell (n 23), 12.

⁹⁸ MA Heldeweg and RA Wessel, ‘The Appropriate Level of Enforcement in Multilevel Regulation: Mapping Issues in Avoidance of Regulatory Overstretch’, (2016) 5 *International Law Research* (forthcoming).