

# Informal International Law-Making as a New Form of World Legislation?

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## Abstract

Law-making by formal, intergovernmental international organizations received abundant attention over the past years. The aim of the present contribution is to investigate whether the notion of ‘word legislation’ would also be appropriate in the case of ‘*informal* international law-making’. It is argued that this could be the case when international public authority is exercised, in which case ‘informal’ rules have effects similar to domestic legislation.

## Keywords

informal law; world legislation; global governance; international organizations

## 1. Introduction

These days there is some agreement on the idea that “law-making is no longer the exclusive preserve of states”.<sup>1</sup> While debates on a world government and world legislation date back to (at least) the beginning of the twentieth century, the development of rule-making functions of international

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<sup>1</sup> A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007), p. vii. See for a non-legal approach: M.J. Warning, *Transnational Public Governance: Networks, Law and Legitimacy*, (Palgrave Macmillan, 2009).

organizations in particular triggered a new debate on this phenomenon.<sup>2</sup> Indeed, international organizations and informal international regimes and networks are engaged in normative processes that, *de jure* or *de facto*, impact on states and even on individuals and businesses.<sup>3</sup> Decisions of international organizations are increasingly considered a source of international law,<sup>4</sup> and it is quite common to regard them in terms of world legislation.<sup>5</sup> 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.<sup>6</sup> While the use of the term ‘world legislation’ has become quite accepted, the contributions to this Forum show that a clear consensus on how to interpret the notion is still lacking.<sup>7</sup> This is partly related to the fact that developments related to ‘global governance’ are not only related to the Security Council. Over the past decade or so students of international law seem to broaden their scope to include normative processes in which states may not be the main actors. Apart from

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<sup>2</sup>) See, e.g., B.S. Chimni, ‘International Institutions Today: An Imperial Global State in the Making’ (2004) *European Journal of International Law*.

<sup>3</sup>) See R.A. Wessel and J. Wouters, ‘The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres’ (2007) No. 2 *International Organizations Law Review* pp. 257-289. More extensively see: 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).

<sup>4</sup>) See also, 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), pp. 215-236.

<sup>5</sup>) Cf. P.C. Szasz, ‘The Security Council Starts Legislating’ (2002) *American Journal of International Law* pp. 901-905; S. Talmon, ‘The Security Council as World Legislature’ (2005) *American Journal of International Law* pp. 175-193; B. Elberling, ‘The Ultra Vires Character of Legislative Action by the Security Council’ (2005) *International Organizations Law Review* pp. 337-360; M. Akram, and S.H. Shah, ‘The Legislative Powers of the United Nations Security Council’, in R. St. J. MacDonald and D.M. Johnston, *Towards World Constitutionalism – Issues in the Legal Ordering of the World Community* (Martinus Nijhoff Publishers, Leiden/Boston, 2005), pp. 431-455.

<sup>6</sup>) Usually reference is made to resolutions 1373 (2001) and 1540 (2004) in particular.

<sup>7</sup>) Jan. Anne Vos, in his contribution, seems to claim that the UN Security Council acts as a world legislator, whereas Cathleen Powell argues that Fuller’s criteria stand in the way of calling any of the present UNSC Resolutions ‘legislation’.

regular international organizations – which are suddenly studied in terms of their contribution to ‘law-making’<sup>8</sup> – an increasing number of other fora and networks have been recognised to play a role in international or transnational normative processes. As José Alvarez notes, more and more technocratic international bodies “appear to be engaging in legislative or regulatory 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.”<sup>9</sup>

Students of international relations and public administration pointed to the fact that the absence of a world government did not stand in the way of an “emerging reality of global governance.” Recently, Koppell sketched – both empirically and conceptually – the “organization of global rulemaking”. Even in the absence of a centralized global state, the population of some international organizations is not a completely atomized collection of entities. To underline the function these organizations have in ‘global governance’, Koppell coined them ‘Global Governance Organizations (GGOs)’: “They 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.”<sup>10</sup> While it may remain difficult to use a term like ‘world legislation’, we do see a network of multiple GGOs consisting of a variety of governmental, non-governmental and hybrid organizations which have as their main objective the crafting of rules for worldwide application.

Law-making by formal, intergovernmental international organizations received abundant attention over the past years,<sup>11</sup> and other contributions to this journal assess to what extent the use of the term ‘world legislation’ is appropriate in these cases. While the focus in these contributions is on more traditional international organizations and normative processes (the Security Council and resolutions 1373 and 1540 in particular), the purpose

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<sup>8</sup>) J. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2005).

<sup>9</sup>) *Ibid.*, p. 217.

<sup>10</sup>) J.G.S. Koppell, *World Rule. Accountability, Legitimacy, and the Design of Global Governance* (The University of Chicago Press, Chicago/London, 2010).

<sup>11</sup>) A prime example being Alvarez, *supra* note 8.

of the present contribution is to investigate whether the notion of ‘word legislation’ would also be appropriate in the case of ‘*informal* international law-making’. This concept is the subject of an international research project and some first results serve as a basis for our analysis.<sup>12</sup> To be able to answer this question we will first present the concept of ‘informal international law-making’ (section 2). Secondly, we will analyse to which extent the output of ‘informal international bodies’ can or should be approached in terms of ‘legislation’ (section 3). Obviously, the scope of this contribution does not allow for conclusive findings. At best we will be able to point to new areas for research (section 4).

## 2. Informal International Law-Making

A large number of non-governmental or hybrid organizations play a role in global governance in the sense that they are involved in international rule-making. Recently this phenomenon has been approached from the perspective of international institutional law, by introducing the term ‘informal international law-making’. It is ‘informal’ in the sense that it deviates from traditional law-making in relation to three aspects: *output*, *process* or the *actors involved*.<sup>13</sup> The term ‘informal’ may not be adequate in all cases, as we are often confronted with formalised processes, but it is used to highlight that either in terms of output, in process or in the actors involved, the normative process deviated from traditional international law-making. Moreover, it is still an open question whether in all cases actual ‘law’ is being made,<sup>14</sup> let alone whether we can see this as ‘legislation’ (see *infra* section 3). Nevertheless, Pauwelyn defined informal international law-making as:

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<sup>12</sup> See for the Informal International Law-Making (IN-LAW) project: <<http://www.informallaw.org>>, 21 July 2011.

<sup>13</sup> See J. Pauwelyn, ‘Informal International Law-Making: Mapping the Action and Testing Concepts of Accountability and Effectiveness’, unpublished paper presented at the workshop Informal International Public Policy Making, Geneva, 24–25 June 2010, p. 1.

<sup>14</sup> See on this issues for instance: D.W.P. Ruiter and R.A. Wessel, ‘The Legal Nature of Informal International Law: A Legal Theoretical Exercise’, paper presented at the conference *Informal International Law-Making*, Wassenaar, The Netherlands, 17–18 March 2011. Admittedly, parts of the debate show a strong resemblance with the discussion on ‘soft law’. That debate, however, mainly focused on the output, where informal international law-making is more interested in a broader structural change. Cf. J. Klabbers, ‘The Redundancy of Soft Law’ (1996) 167 *Nordic Journal of International Law* p. 181. See more recently and extensively on

“Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or legally enforceable commitment (output informality).”<sup>15</sup>

The bottom-line is that many of the normative output that is the result of international (or transnational) cooperation does not fit our traditional understanding of international law-making as other instruments or procedures are used or different (non-state) actors take the lead. Whereas it may have been relatively easy for students of political science or public administration to accept a shift from *government* to *governance*, lawyers struggle with the new and extensive normative output in global governance. Indeed, “we continue to pour an increasingly rich normative output into old bottles labelled ‘treaty’, ‘custom’, or (much more rarely) ‘general principles’”.<sup>16</sup>

Different types of international bodies play a role in informal international law-making. In one categorisation they could be *transgovernmental networks* and *international agencies*. Transgovernmental networks have been defined by Anne Marie Slaughter as “informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways”.<sup>17</sup> 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.<sup>18</sup> The networks are composed of national government officials, either appointed by elected officials or directly elected themselves, and they may be among judges, legislators or

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the ‘legal overstretch’ we see in international law: J. d’Aspremont, *Formalism in International Law, Ascertainment of International Legal Rules After Post-Modernism* (Oxford University Press, Oxford, 2011).

<sup>15)</sup> Pauwelyn, *supra* note 13, p. 4.

<sup>16)</sup> Alvarez, *supra* note 8, p. x.

<sup>17)</sup> A.-M. Slaughter and D. Zaring, ‘Networking Goes International: An Update’ (2006) *Annual Review of Law and Social Science*, p. 215.

<sup>18)</sup> *Ibid.*, p. 215; K. Raustiala, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law’ (2002-2003) *Virginia Journal of International Law*.

regulators.<sup>19</sup> According to Jayasuriya, these new regulatory forms have three main features: (1) they are governed by networks of State agencies acting as independent actors rather than on behalf of the State but; (2) they lay down standards and general regulatory principles instead of strict rules; and (3) they frequently contribute to the emergence of a system of decentralised enforcement or the regulation of self-regulation.<sup>20</sup> A transgovernmental *regulatory* network is basically cooperation between regulatory authorities of different countries.

A second category may be defined as ‘international agencies’: international bodies that are not based on an international agreement, nor on a bottom-up cooperation between national regulators, but on a decision by an international organization.<sup>21</sup> According to some observers, these new international entities even outnumber the conventional organisations.<sup>22</sup> International regulatory co-operation often is conducted between these non-conventional international bodies.<sup>23</sup> It is not unusual for international agencies to engage in international rule-making. Here also, the tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other international organizations and agencies, which sometimes leads to the creation of common bodies. International (regulatory) co-operation is often conducted between these non-conventional international bodies.<sup>24</sup> It is not entirely uncommon for international organizations to establish bodies with public law functions.

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<sup>19</sup>) A.-M. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004), pp. 3-4. Slaughter seems to use the term ‘transgovernmental networks’ to point to what we would call informal international law-making (Chapter 6).

<sup>20</sup>) See K. Jayasuriya, ‘Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1999) *Indiana Journal of Global Legal Studies* p. 453.

<sup>21</sup>) E. Chiti and R.A. Wessel, ‘The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?’, in N. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy* (Routledge, 2011).

<sup>22</sup>) See C. Shanks, H.K. Jacobson and J.H. Kaplan, ‘Inertia and Change in the Constellation of International Governmental Organizations, 1981-1992’ (1996) *International Organization* pp. 593.

<sup>23</sup>) Cf. C. Tietje, ‘Global Governance and Inter-Agency Cooperation in International Economic Law’ (2002) *Journal of World Trade* p. 501.

<sup>24</sup>) *Ibid.*

Since these bodies are usually not based on a treaty, they do not qualify as international organizations themselves.<sup>25</sup> A first possibility is that these bodies are set up by one organization only, to help attain the objectives of that organization (for instance the UN ‘subsidiary bodies’). A second group of bodies is created by two or more international organizations in areas where the problems they face transcend their individual competences. While these bodies may be established on the basis of a treaty concluded between international organizations, more frequently they are the result of decisions taken by the respective organizations. It is not even exceptional for the above-mentioned ‘subsidiary organs’ to, in turn, act as a ‘parent organization’ for the newly created bodies (thus leading to what could be termed ‘third-level’ international bodies). In some issue areas, there is intense co-operation between State and non-State actors. One could point to the Codex Alimentarius Commission, or to ICANN (Internet Corporation for Assigned Names and Numbers), which governs the internet.<sup>26</sup> In some areas, States have even ceased to play a role in governance, and transnational actors have taken over. A prime example is the International Standardization Organization (ISO).<sup>27</sup>

All in all, the list of informal international law bodies is quite extensive and can be found in very different market sectors.<sup>28</sup>

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<sup>25</sup> In the law of international organizations the view is still held that international organizations should be based on an international agreement. Cf. H.J. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers, Leiden, 2003); J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, Cambridge (UK), 2009).

<sup>26</sup> See M. Hartwich, ‘ICANN – Governance by Technical Necessity’, in 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, 2010), pp. 575-605.

<sup>27</sup> See R.B. Hall & Th. J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, Cambridge (UK), 2002).

<sup>28</sup> To name just a few: in the health sector we come across the International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products (VICH), the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), the Global Harmonization Task Force (GHTF), the World Anti-Doping Agency (WADA), the International Cooperation on Cosmetic Regulation (ICCR), or the International Conference of Drug Regulatory Authorities (ICDRAs). In the financial sector we have the Basel Committee on Banking Supervision, the OECD Financial Action Task Force (FATF), Financial Stability Board

### 3. Informal International Law as World Legislation

To what extent could the output of these bodies be seen as ‘world legislation’? As some other contributions to this Forum show, it has become quite accepted to use the term for some recent activities of the UN Security Council. Those cases, however, are much closer to traditional (‘formal’) law-making and it is perhaps easier to perceive the UN as a ‘world government’ than to see a ‘world government’ made up of networks and informal non-state structures. Here, lawyers may perhaps learn from the debates in International Relations and Public Administration about the possibility to have ‘governance’ without ‘government’.<sup>29</sup> Indeed, the debates on informal 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 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.<sup>30</sup>

At the same time, ‘governance’ is not the same as ‘law-making’ and ‘law-making’ may be distinguished from ‘legislation’. For lawyers, ‘governance’ becomes interesting whenever it involves legal rules. Assuming that parts of informal law-making indeed somehow lead to new legal rules,<sup>31</sup> the purpose of the present contribution is to assess whether these legal rules may be perceived as contributing to ‘world legislation’. The answer to that question

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(FSB); and International Organization of Securities Commissions (IOSCO). The Internet is largely regulated by Internet Corporation for Assigned Names and Numbers (ICANN, with sub-bodies such as the Governmental Advisory Committee (GAC) and the Country Code Names Supporting Organisation (ccNSO)), the Internet Engineering Task Force (IETF), Internet Society (ISOC), the Internet Governance Forum (IGF) and the Global Cybersecurity Agenda (GCA). Many of the bodies are involved in standard-setting activities we also know from the ISO, the Codex Alimentarius Commission (CAC) or the Kimberley Scheme on Conflict Diamonds.

<sup>29)</sup> See in particular the influential volume by J.N. Rosenau and E.-O. Czempiel (Eds.), *Governance without Government; Order and Change in World Politics* (Cambridge University Press, Cambridge/New York, 1992).

<sup>30)</sup> J.G.S. Koppell, *World Rule. Accountability, Legitimacy, and the Design of Global Governance* (The University of Chicago Press, Chicago/London, 2010), pp. 77-78.

<sup>31)</sup> As said, the scope of this contribution does not allow addressing that question in detail. See more specifically Ruiter and Wessel, *supra* note 14.

obviously depends on the definition of ‘legislation’. Other contributions in this journal refer to existing definitions of ‘legislation’. Thus, Vos, quoting Waldron, defines the concept of legislation as a practice whereby laws are made (or changed or repealed) deliberately by formal processes dedicated explicitly to that task.<sup>32</sup> Along similar lines, but with a strict focus on the UN Security Council, Powell argues that ‘legislation’ refers only to those resolutions by which the Council purports unilaterally to create general norms of law binding on all states, irrespective of their consent. She refers to four distinctive criteria of legislative resolutions: that the Council be acting unilaterally when it legislates; that it intends its norms to be mandatory (by which the use of Chapter VII of the UN Charter is generally implied); that the norms in the legislative resolution be general; and that these norms be new. At the same time she argues – on the basis of a Fullerian analysis – that the content of the norms should be decisive.

Again in a similar vein, Oxman held ‘legislative power’ to have three characteristics: (1) a written articulation of rules that (2) have legally binding effect as such and (3) have been promulgated by a process to which express authority has been delegated *a priori* to make binding rules without affirmative *a posteriori* assent to those rules by those bound.<sup>33</sup> An even more distinguishing element, perhaps, is that such rules imply future application to an indeterminate number of cases and situations.<sup>34</sup>

These criteria help us in defining ‘legislation’, for our purpose of assessing the normative output described above in legal terms. However, in the case of informal international law-making some of the criteria may easily lead to the conclusion that we are not dealing with legislation. Both the legally binding effect and the formal processes are subject to debate when informal rules are being assessed. What is questioned less, however, is their effect, which may leave the subjects of regulation “with as little effective choice as some Security

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<sup>32)</sup> See the contribution by J.A. Vos, elsewhere in this journal. J. Waldron, ‘Legislation’, in M.P. Golding and W.A. Edmundson, *Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005), pp. 236–247.

<sup>33)</sup> See 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, Berlin, 1996), pp. 28–30. Cf. also the ‘Comments’ by T. Stein and C. Schreuder in the same volume.

<sup>34)</sup> See A.J.J. de Hoogh, *Attribution or Delegatio of (Legislative) Power by the Security Council?* (2001) *Yearbook of International Peace Operations*.

Council enforcement actions.”<sup>35</sup> Indeed, *in effect* informal law-making seems part and parcel of the set of instruments used in global governance. But, as informal law-making partly takes place by non-state actors, it seems important to focus on an additional element. Following the notion that ‘governance’ is about creating *public* order,<sup>36</sup> we would need to take into account whether ‘public authority’ is exercised when we look at rule-making.<sup>37</sup> This notion was recently studied in the framework of a Max Planck project on the ‘Exercise of International Public Authority’.<sup>38</sup> Large parts of international cooperation (including some of the forms mentioned above) could be considered as merely affecting the private legal relationships between actors. Given the above-mentioned elements of the concept of ‘legislation’, the ‘public’ dimension is essential in particular when non-governmental actors are involved. Von Bogdandy, Dann and Goldman define the ‘exercise of international public authority’ in the following terms: “any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions”.<sup>39</sup> ‘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 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.”<sup>40</sup>

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<sup>35</sup>) Alvarez, *supra* note 8, p. 218.

<sup>36</sup>) For example: B.G. Peters, ‘Introducing the topic’, in B.G. Peters and D.J. Savoie (Eds.), *Governance in a Changing Environment* (MacGill-Queens University Press, Montreal, 1995).

<sup>37</sup>) The scope of this contribution does not allow us to refer to the large debate on the question how to differentiate ‘law’ from ‘non-law’. See also D.W.P. Ruiter and R.A. Wessel, *supra* note 14. Neither do we have room to investigate the ‘legal power’ or ‘capacity’ of international bodies to legislate. See on this latter issue the contribution by C.P. Powell elsewhere in this volume.

<sup>38</sup>) See Von Bogdandy et al., *supra* note 26. See also in the same volume: M. Goldmann, ‘Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority’, pp. 661-711; and A. von Bogdandy, P. Dann and M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, pp. 3-32.

<sup>39</sup>) *Ibid.*, p. 5.

<sup>40</sup>) *Ibid.*, pp. 11-12.

The ‘publicness’ of the international act indeed seems important and may be the most difficult element to establish. As noted by Von Bogdandy, Dann and Goldmann – it would be too easy to relate the ‘publicness’ of a legal act to an existing legal basis for the authority (cf. the definitions of legislation above). The above analyses of informal international law-making underlined that we cannot exclude that (*de facto*) public authority is exercised by non-governmental or hybrid international institutions.

This brings us to the question of the source of ‘world legislation’. Whereas world legislation may relate to general rules that need to be followed by States as well – as argued by Powell – by individuals, informal international law-making in particular relates to norms that have an effect within the domestic legal orders. While in most States the decisions of international organizations and bodies typically require implementation in the domestic legal order before they become valid legal norms, the density of the global governance web has caused some interplay between the normative processes at various levels. For EU Member States (and their citizens), this can imply that the substantive origin of EU decisions (which usually enjoy direct effect in, and supremacy over, the domestic legal order) is to be found in another international body.<sup>41</sup> In many areas, ranging from security to food safety, banking, health issues or the protection of the environment, national rules find their basis in international and/or European decisions. In those cases, decisions may enter the domestic legal orders as part of European law. The normative connection between different legal instruments is not limited to the EU, but is visible in a large number of connected international, regional and domestic normative processes.<sup>42</sup> This is not to say that international decisions have a direct effect in the sense we are accustomed to in EU law. From the point of view of international law, while “primacy is a matter of logic as international law can only assume its role of stabilizing a global legal order if it supersedes particular and local rules,” at the same time it “allows for an undefined variety of combinations based either upon the doctrine of

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<sup>41</sup> See also E. Chiti and R.A. Wessel, ‘The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?’, in N. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy* (Routledge, 2010) (forthcoming).

<sup>42</sup> We have termed this phenomenon ‘multilevel regulation’. See Wessel and Wouters, *supra* note 3.

monism or the doctrine of dualism.”<sup>43</sup> However, the fact that many domestic legal orders do not allow their citizens to directly invoke international norms before national courts does not mean that these norms are devoid of impact.<sup>44</sup> As the norms usually are based on international agreements and/or decisions of international organizations, states will simply have to follow the rules of the game in their international dealings. This implies that even domestically they may have to adjust to ensure that the rules are observed by all parts of the administration. The *de facto* impact of the – often quite technical – norms and the need for consistent interpretation<sup>45</sup> may thus set aside more sophisticated notions of the applicability of international norms in the domestic legal order. The norms may indeed lead to a modification of an existing legal factual situation.

#### 4. Implications and suggestions for research

The project on ‘informal international law-making’ forms part of a larger debate on emerging and changing global governance phenomena. Like the project on the Exercise of Public Authority by International Institutions or the Global Administrative Law project<sup>46</sup> it aims to draw attention to developments that may call for a reassessment of the foundations of international institutional law. That is, if international law chooses not to shut its eyes for these new normative processes that may in some cases result in – or come close to – ‘world legislation’.

The different contributions to this Forum assess the reasons for and implications of the use of the term ‘legislation’ for some recent decisions by international organizations, in particular the UN Security Council. The point which the present contribution attempts to make is that if these decisions by international organizations are to be seen as ‘world legislation’, with

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<sup>43</sup> Th. Cottier, ‘A Theory of Direct Effect in Global Law’, in A. von Bogdandy et al. (eds.), *European Integration and International Co-ordination: Studies in Transnational Economic Law in honour of Claus Dieter Ehlermann* (Kluwer Law International, 2001).

<sup>44</sup> For a survey of the different legal systems in Europe, see A. von Bogdandy et al. (eds.), *Ius Publicum Europaeum, Band I: Staatliches Verfassungsrecht im Europäischen Rechtsraum* [National Constitutional Law in a European Legal Space], 2007.

<sup>45</sup> See Cottier, *supra* note 43, pp. 109–10 (discussing the impact of the doctrine of consistent interpretation in relation to the domestic effect of WTO law).

<sup>46</sup> See <<http://www.iilj.org/GAL/>>, 21 July 2011.

similar *effects* as ‘domestic legislation’, it then makes sense not to disregard other developments in global governance. Some of these developments have a more profound impact on the freedom of States and individuals than the mentioned Security Council resolutions.

The point is that studies on global governance teach us that international public authority may not only be exercised through formal decisions of traditional international organizations, but also through informal international law-making. Based on a number of case studies, the informal international law-making project revealed that States may have good reasons to turn to, or at least tolerate, informal law-making. This results in extensive sets of norms in areas ranging from finances or pharmaceuticals to food safety or the regulation of the internet. These rules are not created for specific concrete situations, but are meant to be applied in general abstract situations. Denying this development would exclude all kinds of global normative activity from our analysis of the development of the international legal order. Acknowledging this form of ‘world legislation’ reveals that we have moved beyond public international law as the counterpart of domestic *private* law (primarily based on contractual relations in the form of treaties) and face the emergence of a true *international public law*,<sup>47</sup> in which international public authority is exercised over the various participants in a global society.

This, admittedly, raises more questions. To name just a few: how can we construct the legal powers of informal international law bodies to enact legal acts?; Are we in need of additional sources (for instance related to ‘technical expertise’)?; How do we prevent a blurring between law and politics (and why would this be important)?; To which extent does the form of the bodies (regulatory networks, bodies managing conferences, international agencies, etc.) call for a differentiation in ‘legal status’? Or, more empirically, to which extent do informal rules actually change the legal situation of actors?; And how do judges take these rules into account (if at all)?

This is just the top of an emerging research agenda, but in view of the complex and widespread global normative activities, on the basis of which entire market sectors are regulated, in their search for ‘world legislation’ it seems to have become impossible also for lawyers to limit their discussion to law-making by traditional international organizations.

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<sup>47</sup> Cf. S. Kadelbach, ‘From Public International Law to International Public Law’, in Von Bogdandy *et al.*, *supra* note 26, pp. 33-49.