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Introduction: International lawmaking in a global world

Catherine Brölmann and Yannick Radi

1. TAKING STOCK

International lawmaking in the past 70 years has become increasingly varied and has come to involve different loci of authority, levels of governance and shades of normativity. The perception that our time is very different from the early days of the United Nations era has inspired for example the well-known psychedelic image of

[a] brave new world of international law where transactional actors, sources of law, allocation of decision function and modes of regulation have all mutated into fascinating hybrid forms. International Law now comprises a complex blend of customary, positive, declarative and soft law.¹

That picture is quite unlike the doctrinal framework usually found in textbooks. Scholars and practitioners have sought new ways to explain and understand the continuities and dynamics in the creation of normativity in international affairs,² and that process is ongoing. ‘Linguistic instability is one sign of a changing world’,³ and the word ‘lawmaking’ is indeed used with various and divergent meanings – depending on one’s premises, as set out below. This makes the term limited in theoretical vigor but flexible enough to describe the multifaceted normative practice that is observed by policy-makers and lawyers today.

Against this background we have considered there is room for a project aimed at taking stock at the conceptual and the empirical level of the various instances of ‘international lawmaking’. This comprehensive objective brings with it an inductive approach, which takes as a starting point apparent signs of creation of international normativity, rather than rules on the creation of normativity prescribed by the ‘system’ of international law.

As in Harold Koh’s ‘brave new world’, which is presented as the ‘fourth era of international law’ (in time located after the Cold War), today’s international legal sphere is frequently represented by contrasting it to another period or paradigm –

¹ H Koh, ‘A World Transformed’ (1998) 20 *Yale Journal of International Law* ix, xi.

² See in this regard the study by A Boyle and C Chinkin, *The Making of International Law* (OUP 2007), and earlier of GM Danilenko, *Law-Making in the International Community* (Nijhoff 1993).

³ N Onuf, ‘Review of GM Danilenko, *Law-Making in the International Community* (Nijhoff 1993)’ (1995) 89 *American Journal of International Law* 661, 661.

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'post-national'⁴ and 'post-ontological'⁵ being two categories especially relevant also for our subject matter. The current project, however, is placed in the context of a 'global world',⁶ so as to delineate the outer boundaries of the field under study, without excluding domestic and transnational societies, and without evoking a particular doctrinal or theoretical angle.

About the *lawmaking* prism a number of observations can be made. First, it puts the focus on the ways and means, and in some cases techniques, used to create norms. This is to say that the primary concern is not with what 'law' is, but rather and specifically how its creation comes about. Obviously, a focus on lawmaking must also engage with the theory and doctrine of *sources* of international law, which are generally understood as referring, ultimately, to recognized processes of law *creation*.⁷ Otherwise, a qualification is called for in that if 'law' is conceptualized as a dynamic process (see section 2.2 below), the distinction between 'law' and its 'making' collapses. At a conceptual level an investigation into lawmaking as a separate phenomenon makes sense only if law is taken, at least partly, as a static body of rules. Especially in practice this is, in fact, the perspective generally adopted. The analysis of lawmaking is then geared to the actual ways and methods, and in some cases techniques, of creating law, while it does not primarily engage with ontological definitions of 'law' or with sources doctrine as such.

In line with the approach set out above, this project's working definition of 'law' is a broad one. It does not proceed from a binary classification in 'law' and 'non-law', but takes legal normativity as a sliding scale.⁸ 'Making' refers to different degrees of agency: it can involve 'conscious lawmaking'⁹ as with the conclusion of treaties, but comprises also diffuse processes of interaction between legal actors and involuntary crystallization of normativity.¹⁰ 'International', finally, signifies normative authority whose effect transcends the boundaries of the national legal domain, while the term is not limited to the classic inter-state framework.

2. TWO LANDSCAPES

Who seeks to gain an understanding and analytical overview of international law-making, moves through at least two 'cognitive landscapes': one might be called the 'socio-legal landscape' and the other the 'theoretical landscape'. The socio-legal landscape is made up by features such as types of stakeholders, economic

⁴ cf 'The Architecture of Postnational Rulemaking', Project of the University of Amsterdam <<http://acil.uva.nl/research/research-projects/current-projects/current-projects/current-projects/content/folder/the-architecture-of-postnational-rulemaking-architecture.html>>.

⁵ See Th Franck, *Fairness in International Law and Institutions* (OUP 1995).

⁶ cf S Pryke, *Nationalism in a Global World* (Palgrave Macmillan 2009).

⁷ S Besson, 'Theorizing the Sources of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 163.

⁸ CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

⁹ O Schachter, 'Scientific Advances and International Law Making' (1967) 55 *California Law Review* 423.

¹⁰ See Danilenko (n 2).

developments, social challenges, legal practices, changing power-structures and developments in legal doctrine. The theoretical landscape is constituted by different theoretical views on international law and lawmaking, as well as meta-theories on such theoretical views. To visualize the cognitive background of jurists concerned with international lawmaking in terms of two ‘landscapes’ is a helpful analytical tool. But of course, it leaves the understanding that the social and the theoretical realm in truth cannot be separated; and that on a practical level one’s (conscious or unconscious) theoretical outlook on law and lawmaking will determine the features encountered in social reality. As these landscapes constitute the background for any exploration into the making of international law, a brief sketch is warranted.

2.1 Features of the Socio-legal Landscape

The first cognitive landscape typically consists of facts that are: 1) ‘social’ (for example a change in the number or type of participants in the international arena); or 2) ‘legal’ (for example the fact that in our days more treaties are concluded by simplified signature than 70 years ago); or what we term 3) ‘doctrinal’ (for example a change in international law doctrine regarding the attribution of legal personality). Thus, while these categories cannot always easily be separated, we are dealing with distinct features (sometimes subsumed in the notion of ‘globalization’) which are each a factor in contemporary international affairs including international lawmaking.

Social facts include the growing interdependency between states, and between states and other legal actors, as well as the growing cooperation in the international arena. While the international society has always been characterized by ‘co-existence’ and ‘cooperation’, since the Second World War emphasis has been on the latter.¹¹ States are more and more interdependent and willing to cooperate in order to promote their common interests, for instance in the area of environmental protection. The trend towards cooperation has gained an additional dimension by the growing number and variety of actors in international affairs, such as international intergovernmental organizations, non-governmental organizations (NGOs), and multinational corporations. Especially intergovernmental organizations, after having come of age as legal actors in the past two decades, have assumed a prominent role. In our global world, all these actors are interacting and cooperating more and more, in fields as diverse as the economy, finance, climate change, culture, security, science and sport. The ensuing network of relations is, however, also marked by conflicts and contestation, as illustrated for example by the recurring criticism expressed by NGOs on financial institutions¹² and multinational corporations.¹³

¹¹ See W Friedmann, *The Changing Structure of International Law* (1964 Columbia University Press); PM Dupuy and Y Kerbrat, *Droit international public* (Daloz 2014), 386.

¹² On the interaction between NGOs and financial institutions, cf Global Policy Forum, ‘NGOs and the Bretton Woods Institutions’ available at <<https://www.globalpolicy.org/social-and-economic-policy/the-three-sisters-and-other-institutions/ngos-and-the-bretton-woods-institutions.html>>.

¹³ On the interaction between NGOs and multinational corporations, cf M Yaziji and J Doh, *NGOs and Corporations* (CUP 2009).

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These are a few of the social facts that impact the practice of international lawmaking, a practice which as such pertains to the category of ‘legal facts’. In that category we find the phenomenon of lawmaking by international organizations, which has been on the rise together with the aforementioned rise of the institutional dimension of the international society. Organizations create normativity both in their relations with third parties and vis-à-vis their member states. Notably in the latter case we can observe a shift from the contractual to the institutional paradigm with elements of centralized lawmaking such as majority decisionmaking.¹⁴

This category furthermore comprises the ‘legalisation’ (or ‘juridification’) of international life in the sense of ‘law’s expansion and differentiation’.¹⁵ Nowadays, there simply is *more* international law than 70 years ago, and it moreover spans an increasing number of issue areas. This fact, coupled with the notoriously decentralized nature of the international legal order, has in turn increased the impact of the ‘fragmentation’ of international law into separate regimes that is considered the late-modern condition of international legal affairs.¹⁶

Other *legal facts* worth mentioning include the often composite nature of prominent legal (mainly treaty) regimes. Many such regimes are made up of more than one legal instrument, linked on the basis of content, as in the case of a Framework Agreement and a number of Protocols. The field of environmental law shows how such a setup secures the continuous development of the legal framework and essentially supersedes classic temporal rules such as *lex posterior*.¹⁷ Such frameworks are by now a familiar tool in the public domain for on-going processes of policy-making and normative development in a particular issue area. An example is the UN Framework Convention on Climate Change and its protocols, tied together and dynamized by annual COPs and MOPS and ensuing ‘decisions’. At the same time the last decades have witnessed a trend of ‘informalisation’ in legal relations. This move away from formal requirements in the creation of normativity – illustrated in treaty practice for example by a trend to use simplified signature in lieu of ratification procedures – is fundamentally related to the theoretical discourse of ‘deformalisation’ mentioned below. In a practical sense it might be seen as one consequence of the aforementioned intensification of international (legal) relations.

Finally, alongside legalisation we find, especially since the end of the Cold War, a proliferation of international courts and tribunals in different areas of international law such as the law of the sea, trade law, criminal law, human rights law and investment

¹⁴ As in the case for example of the United Nations Security Council enacting ‘legislative’ resolutions or the International Health Regulations of the WHO; see C Brölmann, ‘International Organizations and Treaties: Contractual Freedom and Institutional Constraint’ in J Klabbers (ed), *Research Handbook on International Organizations* (Edward Elgar Publishers 2011) 285.

¹⁵ LC Blichner and A Molander, ‘Mapping Juridification’ (2008) 14 *European Law Journal* 36, 42ff.

¹⁶ A Fischer-Lescano and G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

¹⁷ See J Pauwelyn who conceptualizes the WTO treaty, multilateral human rights treaties or environmental treaties as ‘continuing treaties’ in ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 *American Journal of International Law* 535, 546.

law. This proliferation¹⁸ is coupled with a ‘judicialisation’ of international affairs. Nowadays a number of courts, tribunals, and quasi-judicial mechanisms such as complaint procedures supervised by treaty bodies, can be said to engage with international lawmaking. Even if the inextricable link between application and creation of law has always existed,¹⁹ the increase in number of international courts and tribunals – and of the number of disputes submitted to them – amplifies the normative impact of the international judiciary.

Next to social and legal facts there is a category of ‘doctrinal facts’ relevant for issues of lawmaking. Thus, related to the abovementioned judicialization of international affairs, a change can be observed in doctrine’s appraisal of (quasi-)judicial pronouncements. Many jurists today, also those who take a doctrinal approach to international law, assign an important role to the judiciary’s application of international law that goes well beyond the subsidiary role in the traditional theory of sources.²⁰

As a relevant doctrinal fact also figures the flexible model for according legal personality which has developed in international law doctrine, and which has to some extent captured the increase in international actors next to states. Rather than a threshold set by a system of law that a priori settles which entities have legal personality and which do not (as it was up until the second half of the twentieth century), international law discourse now attributes ‘legal personality’ and (often used interchangeably) ‘subjectivity’ to any entity showing signs of apparent legal capacity on some counts. The notion of international legal personality, although still a key concept in legal doctrine, has become an *ex-post* predicate and all-purpose word, and in that sense can be said to retain little value as an analytical tool. This said, the new form has enabled the conceptualization of non-state entities as international legal persons.

The doctrinal validation of certain non-state entities also signifies the end of the international normative monopoly of the state. Doctrine has conceptualized certain instruments stemming from *actors* that are not the traditional international lawmakers as ‘soft law’. This includes for example instruments issued by (organs of) organizations that do not have the competence to take binding decisions, but also instruments through which actors self-regulate their activities, for instance multinational corporations that issue codes of conduct.²¹ The concept of ‘soft law’ is otherwise used to capture obligations whose *normative content* is open, such as an obligation of conduct or a programmatic norm; and finally to refer to softness *qua form* – the aforementioned COP and MOP decisions are an example of normative instruments whose form and consequent legal status is subject to debate, while their persuasive authority and

¹⁸ See T Buergenthal, ‘Proliferation of International Courts and Tribunals: Is It Good or Bad?’ (2001) 14 *Leiden Journal of International Law* 267.

¹⁹ cf Y Radi, *La standardisation et le droit international – Contours d’une théorie dialectique de la formation du droit* (Bruylant 2014).

²⁰ cf Y Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’ (2009) 20 *European Journal of International Law* 73.

²¹ See N Gunningham and J Rees, ‘Industry Self-Regulation: an Institutional Perspective’ (1997) 19 *Journal of Law and Policy* 363; D Richemond-Barak, ‘Can Self-Regulation Work? Lessons from the Private Security and Military Industry’ (2014) 35 *Michigan Journal of International Law* 773.

normative effect is undisputed. Notwithstanding it being challenged,²² the soft law discourse can be said to have been hugely successful.

2.2 Features of the Theoretical Landscape

The theoretical landscape that is the backdrop for scholars who reflect on lawmaking, is patchy, and consensus on the notions of ‘international law’ and ‘lawmaking’ is lacking. The definitions depend to some extent on factors such as the professional capacity (practitioner, practice-oriented academic, theory-oriented academic) in which one addresses the issue;²³ one’s own research agenda; and, more fundamentally, on the theory from which one proceeds – consciously or unconsciously – to think about (international) law.

That said, a number of concepts appear as prominent elements of the theoretical landscape. Four opposing pairs deserve brief mention, as they form conceptual axes often present in theoretical reflections on lawmaking. This is so even if the terms are not always used explicitly, and the concepts may be linked to differing elements of lawmaking. The axes are: ‘formal’ vs ‘informal’; ‘static’ vs ‘dynamic’; ‘society’ vs ‘community’; and ‘pluralism’ vs ‘constitutionalism’.

The axis between ‘formal’ and ‘informal’ is used in relation to at least two elements of international lawmaking: the normative output and the actors involved. As to the normative output, at the formal end of the spectrum it is considered that formalities have to be met for the rules and instruments to be regarded as part of international law (cf the classic theory of sources). At the informal end of the spectrum, the impact of the normative output and the recognition of its authority constitute the key requirement for rules and instruments to be characterized as international law.²⁴ When the degree of formality is linked, not to the output but to the *actors*, at the formal end of the spectrum a fixed catalogue of actors is validated as lawmakers (exemplified by the pre-war doctrine on international legal persons). At the informal end of this spectrum are mentioned next to states and organizations, bodies and networks involved in law-making,²⁵ as well as non-traditional diplomatic actors, such as domestic regulators or agencies.²⁶

²² See J Klabbers, ‘The Redundancy of Soft Law’ (1996) 65 *Nordic Journal of International Law* 167; P Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 *American Journal of International Law* 413.

²³ On international legal professions, cf A Nollkaemper et al (eds), *International Law as a Profession* (CUP forthcoming).

²⁴ See eg A von Bogdandy, P Dann and M Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (2008) 9 *German Law Journal* 1375.

²⁵ See eg B Kingsbury, N Krisch and R Steward, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

²⁶ See eg J Pauwelyn, ‘Mapping the Action and Testing Concepts of Accountability and Effectiveness’ (2011) Project Framing Paper available at <http://www.hiil.org/data/sitemanagement/media/HIIL_n23198_v1_INLAW_Framing_Paper_Pauwelyn_June_2011.pdf>.

A second axis in the theoretical landscape is the one that runs between ‘static’ and ‘dynamic’.²⁷ For one, this axis is helpful in the mapping of the different approaches to the concept of ‘law’. At the static end of the spectrum we find law as ‘rules’. The classic theory of sources constitutes the embodiment of this approach. At the dynamic end the notion of law is conceived of as a ‘process’, as famously illustrated by the New Haven school.²⁸

A third pair that needs to be mentioned is the axis between, at the one end, the conceptualisation of the international sphere as a ‘society’ and, at the other end, its conceptualization as a ‘community’.²⁹ Especially since the 1990s the debate on the idea of communal norms and needs to be protected by international law, has intensified.³⁰ Such a communal or ‘public’ legal sphere³¹ would inevitably prevail over individual interests and legal will. Moving along this conceptual axis – as the formal/informal and the static/dynamic axes – naturally affects the role of consent as a basis for legal obligation.

The fourth axis runs between ‘pluralism’ and ‘constitutionalism’. It is specifically geared to the *content* of the law that is created and, as indicated by the suffix ‘-ism’, to a particular normative agenda concerning the plurality of the legal universe³² or, on the other hand, unity and ‘constitutionality’³³ of the international law system.

3. THE ORGANIZATION OF THIS HANDBOOK

This cognitive background is clear also in the present volume, which, in the way of a handbook rather than a monograph, aims to provide a comprehensive and current guide to the theory and practice of international lawmaking. In accordance with the project’s working definitions set out above, it takes ‘law’ and ‘lawmaking’ in a broad sense, with no separate chapters envisaged on for example ‘soft law’ or ‘informal law’.

The Handbook is divided in four parts. Part I – *Theoretical Views of International Lawmaking* addresses certain key conceptual and theoretical aspects of international

²⁷ On static and dynamic approaches, see J d’Aspremont, ‘Herbert Hart in Today’s International Legal Scholarship’ in J Kammerhoffer and J d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 114.

²⁸ See MS McDougal and WM Reisman, *International Law in Contemporary Perspective* (New Haven Press 1980).

²⁹ Following the distinction of Ferdinand Tönnies in *Gemeinschaft und Gesellschaft* frequently used in international law (1887 – Ch P Loomis tr Harper & Row 1957).

³⁰ B Simma and A Paulus ‘The “International Community”’: Facing the Challenge of Globalization’ 1998 (9) *European Journal of International Law* 266; U Fastenrath ao (eds), *From Bilateralism to Community Interest. Essays In Honour Of Bruno Simma* (OUP 2012).

³¹ B Kingsbury and M Donaldson, ‘From Bilateralism to Publicness in International Law’ in Fastenrath ao (eds), *ibid* 79.

³² N Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (OUP 2010).

³³ For an early treatment of this approach, see E de Wet in ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51, 51; cf J Klabbbers, A Peters, and G Ulfstein, *The Constitutionalization of Public International Law* (OUP 2011).

lawmaking. It explores the role of consent (primarily of states) in contemporary international lawmaking in relation to the classic voluntarist view of consent as a necessary basis for the binding nature of obligations (Werner). It also looks into the role and status of different participants in international lawmaking, and considers the main parameters for theorizing lawmaking and actors (d'Aspremont). It then focuses on the theoretical foundations of transnational lawmaking (Patterson). The first Part closes with a chapter on contemporary theories of international law and their particular take on international lawmaking – introducing ‘classic’ schools of thought, such as the New Haven school and the Global Administrative Law perspective, as well as more recent research projects (Venzke).

The chapters in Part II – *International Lawmaking in an Inter-State Setting* focus on the classic vehicles for lawmaking in an inter-state context – notably treaty, custom and principle – which however may lead to more complex legal structures than was traditionally the case. This Part starts out by addressing the current practice of treaty-making, taking into account bilateral and multilateral treaty processes. It treats the first of two main stages in the treaty-making process which are of particular relevance in the context of lawmaking, that is, the negotiations on the normative content of a treaty and the adoption of the text (Schmalenbach). The subsequent chapter looks into the second stage in the treaty-making process, viz. the creation of binding force and the life of the treaty as it evolves through its application. Account is taken of bilateral and multilateral treaty processes, and phenomena such as regime-building by several cumulative treaties (Costelloe and Fitzmaurice). The next chapter is a treatment of the making of customary law; it focuses both on the process(es) of creating customary international law and on customary norms as such. In addition, it considers issues such as the distinction between codification and progressive development and the distinction between the identification and the creation of customary norms (Sender and Wood). The final chapter addresses general principles in international law, and among others tackles the question of the autonomy of general principles in respect of other sources of law, and examines their actual and potential use by states and international courts and tribunals in processes of lawmaking (Bonafé and Palchetti).

Part III treats instances of *International Lawmaking Beyond the State* in that it moves beyond the state-centered image of international lawmaking. Accordingly, this Part starts with a consideration of lawmaking processes in the context of intergovernmental organizations and informal public frameworks such as the G20, addressing both rule-making *within* such institutions and legal interaction *among* them (Wessel). The Handbook goes on to analyze lawmaking by international judicial bodies, ranging from the ICJ to the ICTY (Hernandez); the contribution of domestic judicial bodies to international law-making (Tzanakopoulos); and the creation of international law by quasi-judicial bodies through monitoring, compliance and follow-up mechanisms (Tignino). The next chapter addresses the role of private and hybrid actors in the creation of international law – the Basel Committee and the financial sector serving as an example – inquiring into the self-regulation practices of these actors (Barr). The book continues with a look at the role of international civil society in the making of international law in settings where members of civil society, especially NGOs, are important stakeholders; it examines the contribution of these NGOs in the making of international law at the formal stage of both creation and enforcement and it addresses

issues of legitimacy and representativeness raised by this contribution (Woodward). This Part concludes by a treatment of lawmaking by scholars, examining to what extent academic discourses shape and make international law (Kammerhofer).

Part IV addresses *International Lawmaking in Selected Issue Areas* with chapters that analyze means and ways of lawmaking in specific, 'regulation-intensive' fields of international law, notably human rights law (Tzevelekos), international criminal law (Vasiliev), trade law (Footer), international environmental law (Romanin Jacur) and natural resources law (McIntyre).

