

## Informal International Public Policy Making:

### *New International Law or Not International Law and Does it Even Matter?*

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#### Introduction

Not all norms intended to affect human behavior are part of what we call law. The law may issue normative prescriptions but so can religions, morality or parents as well as your local street gang or sports club. In domestic law, we know since long that formal, legally binding *private* law is supplemented, and sometimes even eclipsed, by what is referred to as “social norms”<sup>1</sup>, as in the diamond industry<sup>2</sup> or neighbor relations.<sup>3</sup> Similarly, domestic *public* law, formally issued by public authorities, is increasingly supplemented by informal, non-legislative rules, policy statements or administrative guidelines<sup>4</sup> that, much like in international law, are often referred to as “soft law”.<sup>5</sup>

Conversely, not all law or legal norms impose or proscribe specific behavior or legally binding “rights and obligations”.<sup>6</sup> Normativity must not be confused with

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<sup>1</sup> ERIC POSNER, *LAW AND SOCIAL NORMS* (2002).

<sup>2</sup> Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *Journal of Legal Studies* (1992), 115-157.

<sup>3</sup> ROBERT ELLICKSON, *ORDER WITHOUT LAW, HOW NEIGHBOURS SETTLE DISPUTES* (1991).

<sup>4</sup> John Manning, *Nonlegislative Rules*, 72 *George Washington Law Review* (2003-4), 893; Robert Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke Law Journal* (1991-1992) 1311; ELINOR OSTROM, *GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

<sup>5</sup> Alexandre Fluckiger, *Régulation, dérégulation, autorégulation: l'émergence des actes étatiques non obligatoires*, Rapport à la Société suisse des juristes, *Revue de droit suisse*, II, 2004, p. 159-303; Jacob Gersen and Eric Posner, *Soft Law: Lessons from Congressional Practice*, 61 *Stanford Law Review* 573 (2008).

<sup>6</sup> See JEAN-PAUL JACQUE, *ELEMENTS POUR UNE THEORIE DE L'ACTE JURIDIQUE EN DROIT INTERNATIONAL PUBLIC* (1972), p. 227 : « L'acte juridique est source de droits et d'obligations. Il est donc revêtu de la force obligatoire ... S'il peut y avoir d'acte juridique sans creation de droits et d'obligations, la force

imperativity<sup>7</sup>: “The normative is a genus with two main species: the imperative and the appreciative”.<sup>8</sup> Something can therefore be law -- and, in that sense, be “legally binding” -- but at the same time be rather murky or imprecise. Rather than imperative it may “nudge” behavior in beneficial directions without restricting freedom of choice.<sup>9</sup> While law is, by definition, legally binding<sup>10</sup> it does not always amount to an obligation or imperativity. An instrument can be legally binding (law) but only hortatory.

In the domestic context, as much as in the context of this Project, the core question is this: How to find a balance between, on the one hand, the efficiency, flexibility and effectiveness thought to be inherent in informal rule-making and, on the other hand, the legitimacy, control and accountability that is widely regarded to go hand in hand with formal legal processes. On this spectrum, informal rulemaking could be “one of the greatest inventions of modern government”<sup>11</sup>, the efficient, rational way of steering behavior; or, in contrast, a vast, sinister ploy by bureaucrats and unelected agencies to “pass below the radar screens of international law”<sup>12</sup> and circumvent democracy and the rule of law.

When it comes to “informal” international public policy making (IIPPM), as defined in this Project, one question is whether the output of this IIPPM is *international* law in the first place (a question to be distinguished from whether it is, or is ultimately implemented as, *domestic* law). IIPPM output takes the form of guidelines,

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obligatoire est un element de l'acte juridique » ; Virally, *ILI*, Vol. 60-I, p. 181, stating that the question of “textes de portee juridique ... ne peut pas etre appreciee uniquement au point de vue de la creation ... d'obligations juridiques ... textes obligatoires ou non obligatoires » and at p. 182 referring to « effets de droit voulus par leurs auteurs, quels que soient ces effets ». Baxter, p. 549: “legal norms occupy a place in international law, even though they do not create rights or duties”.

<sup>7</sup> Alexandre Fluckiger, *Why Do We Obey Soft Law*, in *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: A Tribute To Peter Knoepfel* (Stéphane Nahrath, Frédéric Varone, eds), 45, at 49.

<sup>8</sup> [Transl.] Andre Lalande, *Vocabulaire technique et critique de la philosophie*, Paris, 1993, entry : « Normatif ».

<sup>9</sup> R. THALER AND C. SUSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (20

<sup>10</sup> Jacque, p. 231: “On ne peut affirmer simultanement que la resolution n'a pas de force obligatoire et la qualifier d'acte juridique”.

<sup>11</sup> KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE*, para. 6.15, at 283 (1<sup>st</sup>. ed. Supp. 1970).

<sup>12</sup> Eyal Benvenisti, *Coalitions of the Willing and the Evolution of Informal International Law*, in “Coalitions of the Willing” - Avantgarde or Threat? 1 (C. Calliess, C. Nolte, G. Stoll, eds., 2008) at 2.

recommendations or standards (rather than formal treaties) which are, or are perceived to be, not legally binding. The Framing Paper refers to “output informality” as compared to “process” and “actor” informality. Does this mean that IIPPM output is *not* international law? If so, would this imply the gradual marginalization of international law? If not, would international law be stretched beyond its limits? If IIPPM output were *not* international law, does (or can) it still have *legal effects* or is (or should) it nonetheless be *regulated by*, or *controlled by*, international (and/or domestic) law on the ground that it is an exercise of public authority that determines behavior (even if it were not law as such)? Does any of this even matter beyond conceptual debates? These are the questions that this paper tries to distinguish and answer.

Questions related to the legal nature or effects of certain international instruments are not new or unique to IIPPM output. A huge literature exists, for example, on the legal impact of UN General Assembly resolutions.<sup>13</sup> Moreover, as early as 1983, the International Law Institute adopted resolutions on *The Distinction between International Texts of Legal Import and Those of No Legal Import*.<sup>14</sup>

Placing IIPPM output in legal context raises at least six core questions. They are closely related to the debate on soft law and its place within domestic and international law: (1) the *divide* between law and non-law; (2) the *criterion* (or criteria) to distinguish what is law from what is not; (3) the *capacity* to make law; (4) the *consequences* of distinguishing between law and non-law; (5) the *interaction* between law and non-law (or question of *legal effects*) and (6) the question of what needs to be regulated or controlled by law (as opposed to what is law).

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<sup>13</sup> The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective (with report by Krzysztof Skubiszewski), *Annuaire de l'Institut de Droit International*, Helsinki Session, Vol. 61-I, p. 29 (1985). Sloan, *BYIL*, 1948 and again 1987.

<sup>14</sup> Michel Virally, *La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique*, *Annuaire de l'Institut de Droit International*, Cambridge Session, Vol. 60-I, p. 166 (1983).

## I. The *Divide* Between Law and Non-Law: Bright Line or Grey Zone?

A first, preliminary question is this: Is the line between law and non-law a bright line or rather a grey zone? Two fundamentally different approaches have emerged.

### 1. *The bright line school*

A first school swears by the binary nature of law: An instrument is either law or it is not; the line between law and non-law is, and must continue to be, a bright line. As Jan Klabbers puts it: “within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; *the only thing it cannot be is more or less binding*”.<sup>15</sup> Prosper Weil laments the “blurring of the normativity threshold” and argues that “the threshold does exist: on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes an internationally wrongful act giving rise to international responsibility; on the other side, there is nothing of the kind”.<sup>16</sup>

This school is endlessly irritated by the very term of “soft law”. On their view, if something is law, it cannot, by definition, be soft law since an instrument is either legally binding or it is not (it cannot be “softly binding”). In contrast, if something is *not* law, it is simply wrong to refer to it as law in the first place, making the term soft law wholly inappropriate. Put differently, in their view, one cannot be bound softly (one is either bound or not); yet a binding can be soft (as in hortatory law).

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<sup>15</sup> Jan Klabbers, *The Redundancy of Soft Law*, 65 *Nordic Journal of International Law* (1996) 167, at 181 (italics added). See also Weil, comments to Virally report, p. 369: “Un engagement est juridique, ou il ne l’est pas; il ne peut pas l’être plus ou moins”.

<sup>16</sup> Prosper Weil, *Towards Relative Normativity in International Law?* 77 *AJIL* (1983) 413, at 415, 417-8. See also Robert Jennings, *What is International Law and How Do We Tell It When We See It?* 37 *Schweizerisches Jahrbuch für Internationales Recht* (1981) 59-88 and Michel Virally, p. 245 (who sees “pas de dégrade dans la force d’une obligation”) and GUNTHER TEUBNER, *LAWS AS AN AUTOPOIETIC SYSTEM* (1993) at 90, arguing that the legal validity of a legal norm is an either/or question but that its social validity can be a matter of degree (more or less).

## 2. *The grey zone school*

A second school regards legal normativity as a matter of degree with varying scales of normativity and a large grey zone between what is law and what is not law. Baxter has famously referred to international law “in her infinite variety”, arguing that the differences [between ‘norms that are binding and those norms that are not’] are not qualitative but quantitative – that different norms carry a variety of differing impacts and legal effects”.<sup>17</sup> This blurring of the normativity threshold has taken place in particular in the context of the longstanding debate on the legal nature of UN General Assembly resolutions, at times found to “have varying legal value”<sup>18</sup> or to constitute “embryonic norms” of “nascent legal force” or “quasi-legal rules”.<sup>19</sup> The so-called “law as process”<sup>20</sup> and New Haven school of international law<sup>21</sup> take a similar, gradual approach to legal normativity.<sup>22</sup> More recently, in the context of global administrative law, Kingsbury has argued that “[a] convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated” and proposed a weighing exercise to gauge normativity whereby “compliance with publicness considerations [e.g. legality, rationality and proportionality] becomes more and more important in

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<sup>17</sup> R.R. Baxter, *International Law in “Her Infinite Variety”*, 29 ICLQ (1980) 549. See also O. Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL (1977) 296.

<sup>18</sup> Award in *Texaco / Calasiatic v. Libya* 17 I.L.M. 28-29, paras. 83 and 86 (1978).

<sup>19</sup> J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 176 (1969).

<sup>20</sup> ROSALYN HIGGINS, PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT (1995). In Higgins’ view, “[i]nternational law is not rules” or “accumulated past decisions” but rather a continuous “process” -- from the formation of rules to their refinement by means of application in specific cases, with multiple actors, institutions and legally relevant instruments and conduct at play (Rosalyn Higgins, ‘General Course on Public International Law’ 230 Recueil Des Cours 23 (1991-V)).

<sup>21</sup> See Remarks by Michael Reisman, *A Hard Look at Soft Law*, AJIL Proceedings (1988-89), 371, at 373, defining the normativity of international law on a varying scale along three axes: content, authority and control: “Lawmaking at any level of social organization, and whether it is accomplished in a formal or informal, organized or unorganized setting, refers to the processes in which expectations of authority, and communications about intentions of control – the intention to make that authority effective – are generated and mobilized to sustain certain policy formulations, which are themselves designed to affect human behavior”.

<sup>22</sup> Criticising the traditional theory on the sources of international law, Abi-Saab phrased it thus: “Elle [the traditional theory] représente le développement du droit en termes d’explosions et de ruptures, plutôt que de transitions et de transformations, ou comme un processus continu et en constante évolution ... Nous aboutissons ainsi à une théorie de création juridique par ‘big bang’ ... En réalité cependant, le droit international, comme tout droit, ne provient pas d’un ‘néant’ ou d’un vide social » (Georges Abi-Saab, ‘Les Sources du Droit International: Essai de Déconstruction’, in Mélanges E.J. De Arechaga, *Le Droit International dans un Monde en Mutation* (1994), 29-49, at 47).

determining weight (perhaps even rising to be requirements of validity) the less the established sources criteria are met”.<sup>23</sup>

For the grey zone school, the term “soft law” is entirely appropriate: it covers legally binding instruments which are only softly enforced (e.g. with no courts to resort to) as well as instruments which are in the grey zone of normativity, be they softly binding in some respects only, or in the process of becoming law as part of the formation of customary international law.<sup>24</sup>

**TABLE 1: THE THRESHOLD OF LEGAL NORMATIVITY**

<p><b>LAW</b> imperative - appreciative/hortatory</p>	<p>Grey Zone</p>	<p><b>NON-LAW</b> social, political, moral norms etc.</p>
<p>Bright Line</p>		

3. *Relevance for IIPPM output*

In the context of IIPPM output, this conceptual debate is of practical importance. For the bright line school (Klabbers, Weil and other “positivists”), IIPPM output is either law or it is not. For the grey zone school (Baxter, Schachter and members of the “law as process”, New Haven or global administrative law schools), there are more options: IIPPM output could be clearly law, clearly not law, but it could also fall somewhere in between, that is, in the grey zone separating law from non-law.<sup>25</sup>

<sup>23</sup> Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EJIL (2009) 23, at 29 and 31.

<sup>24</sup> See Boyle.

<sup>25</sup> See, for example, Alain Pellet, ‘The Normative Dilemma: Will and Consent in International Law-Making’, 12 *Australian Yearbook of International Law* 22-53. Elsewhere, Pellet makes a distinction between « le juridique » et « l’obligatoire », soft law being part of the former, not the latter (Q. D. Nguyen, P. Daillier and A. Pellet, *Droit International Public* (Paris, 1999), para. 254).

Crucially, the bright line versus grey zone schools described here have to do with the threshold of what is law, not with relative normativity amongst norms that are law or have passed the normativity threshold.<sup>26</sup> Whereas Weil vehemently argued against both types of relative normativity, Klabbers, for example, belongs to the bright line school when it comes to normative threshold but accepts relative normativity as amongst legal norms (such as the idea of *jus cogens*).

In addition, the mere fact that something falls on the non-law side of the bright line distinction between law and non-law does not necessarily mean that such non-law has no legal effect. As discussed below (section V), at times, the distinction between something *being law* and not being law but having *legal effects* may be difficult to make. From this perspective, the divide between the bright line school and the grey zone school may be smaller than one thinks: for the bright line school something may be law; for the grey zone school it may not be law (or fall in the grey zone between law and non-law) but still have legal effects, with little practical difference between the two approaches.

## **II. Criteria to Distinguish Between Law and Non-Law: Sanction, Form, Intent, Effect, Substance or Belief?**

Second: Irrespective of whether law and non-law are divided by a bright line or a grey zone, what is it that makes an instrument fall within law or outside law, i.e., on one or the other side of the bright line or the grey zone between law and non-law?<sup>27</sup> A first

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<sup>26</sup> On hierarchy between legal norms, see JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* (2003). On different ways to protect legal entitlements, see JOOST PAUWELYN, *OPTIMAL PROTECTION OF INTERNATIONAL LAW* (2008).

<sup>27</sup> We deliberately do not want to start our discussion of what is international law with a reference to the “sources” of international law in Article 38 of the ICJ Statute. We do so for several reasons: (i) the list in Article 38 is generally considered as not exhaustive anyhow; (ii) Article 38 tells us something about the formal sources of international law, that is, the stones under which one can find it; it does not say anything about what makes something law (this goes back to Oppenheim’s distinction between the “source” and the “cause” of international law (Oppenheim, 1995, p. 24, para. 15)); moreover, even when it comes to “formal sources”, it is generally accepted, as discussed in this section, that it is not formalities or form that make international law, but rather the intent of the parties; (iii) part of figuring out whether certain IPPM output could be international law relates to defining what a “convention” or “agreement” is, that is, a source that is listed in Article 38:1(a) but which Article 38 does not further define anyhow. Finally, we want to

approach follows Austin's definition of law which would classify an instrument as law only if it were backed-up with centralized and effective sanctions.<sup>28</sup> On such command theories of law, little, if anything of today's traditional international law -- let alone IIPPM -- would be law. Posner and Goldsmith's *The Limits of International Law*, for example, follow in Austin's footsteps.<sup>29</sup> In reaction to Austin, Hart focused not on sanctions but on rules of recognition or secondary rules which define the emergence and life cycle of law even in the absence of effective sanctions.<sup>30</sup> The rules of recognition of international law are notoriously vague. At least four strands can be identified focusing, respectively, on form, intent, effect and substance.

### 1. *Form*

First, there is the idea that form or certain formalities or procedural steps elevate an instrument from non-law to law. In domestic law, this could be enactment by Parliament or signature by the President. In international law, it could be the formality of using a "treaty" (or certain *instrumentum*), signature by a certain representative (e.g. the Minister of Foreign Affairs) and/or registration with the UN Secretary General pursuant to the UN Charter.<sup>31</sup> Besides the question of capacity or authority to conclude international law (further discussed below in section III), it is generally recognized that whether or not an instrument is international law is *not* decided on the basis of formalities or the official title of the instrument.<sup>32</sup> Article 2.1(a) of the Vienna Convention on the Law of Treaties (VCLT), for example, defines as a legally binding "treaty", any

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broaden the discussion and start from basics. Too often Article 38, as illustrative and limited as it is accepted to be, prevents such exercise.

<sup>28</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832). See also Hobbes' command theory in N. MALCOLM, *ASPECTS OF HOBBS* (2002), 432.

<sup>29</sup> J. GOLDSMITH AND E. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>30</sup> H.L.A. HART, *THE CONCEPT OF LAW*, 1961.

<sup>31</sup> UN Charter, Article 102: "1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations".

<sup>32</sup> Jacque, p. 128 : « On estime généralement que le droit international n'est pas formaliste. Les règles de forme seraient extrêmement rares ». Virally, *ILI*, Vol. 60-I, p. 181, defining international law instruments as "les textes qui résultent d'un accord entre plusieurs sujets de droit international, quelle que soit leur qualification juridique formelle".



“international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*”. On top of this broad definition of “treaty”, Article 3(a) VCLT adds:

“The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, *shall not affect ... the legal force of such agreements*”.

Similarly, Klabbers extensively analyzed the relevant case law of the European Court of Justice (ECJ) and the International Court of Justice (ICJ) to conclude that both courts “applied norms with a benign neglect of the type of instrument in which the norm was laid down”, instead “derived their legally binding force from the underlying agreement” and attached “legal effect (and full legal effect at that, in binary terms) to such instruments as resolutions, codes of conduct, guidelines, etc.”.<sup>33</sup> Most recently, for example, in *Pulp Mills on the River Uruguay*, the ICJ applied a joint press communiqué as an “agreement” between Argentina and Uruguay, even though the communiqué was neither a formal treaty nor formally signed by the respective ministers.<sup>34</sup> As a result, although the form or instrument chosen (*instrumentum*) may not be a formal treaty, the underlying, substantive agreement it embodies (*negotium*) can still be part of international law.

This non-formalistic approach stands in contrast to the rules of recognition in most domestic legal systems which are formal. In the context of IIPPM, this means, crucially, that notwithstanding the non-formal nature of IIPPM output, some of this output might still be classified as international law: If formalities do not matter for an instrument to be international law, the mere “informality” of IIPPM is not sufficient for it to fall outside international law.

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<sup>33</sup> Klabbers, *Undesirability*, p. 388-9.

<sup>34</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, paras. 132-150.

Some international law scholars (both hard-core positivists and adepts of the critical legal studies school), however, regard a turn to formalism as the only way for international law to remain its neutrality and to distinguish itself from international politics. Most of these formalists would also agree with the binary nature of law and side with the bright line school identified above.<sup>35</sup>

## 2. *Intent*

Second, law and non-law could be distinguished not based on form or formalities, but based on the express or implied intentions of the parties. If the parties want the instrument to be law, it is law; if not, it is not law. Although criticism has been voiced from several quarters, it seems fair to say that the criterion of intent of the parties is the criterion generally accepted under international law for purposes of distinguishing what is international law and what is not.<sup>36</sup>

What matters, on this view, is whether or not IIPPM participants themselves wanted or intended particular IIPPM output to be legally binding or part of international law; nothing more, nothing less. Based on the limited case studies carried out so far, many IIPPM participants believe or intended that their activities are “not legally binding” or fall outside international law. If one adopts intent as the decisive criterion, this would mean that a lot of IIPPM output would *not* be international law.

Although it may seem fairly obvious to let the parties decide whether or not they want to bind themselves under international law (especially in a legal system based on consent and voluntary participation), the criterion of intent is not without problems. First, unless the parties explicitly state that the instrument is or is not part of international law (something that is rather exceptional) it may be hard to reconstruct the intent of the

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<sup>35</sup> Weil, Koskenniemi, Klabbers, O'Connor.

<sup>36</sup> Aust (p. 794), Oppenheim, McNair, Fawcett, Klabbers, Virally<sup>36</sup>, idea of “acte juridique”<sup>36</sup>, ILI 1984 resolution ILI; 1984, vol 60-II, p. 287, resolution, para. 1(b) : « international texts of legal import in the relations between their authors include, irrespective of their form ... texts by which their authors agree to produce ... legal effects, whatever their nature ».

parties. This, in turn, may lead to insecurity as to whether something is or is not law.<sup>37</sup> In the context of IIPPM, for example, most IIPPM output may not explicitly state that it is in or outside international law. It would then be for observers or tribunals to reconstruct the intent of the parties and to decide whether a particular IIPPM output was “intended” to be part of international law.<sup>38</sup> The informal nature of IIPPM output may then be an indication of intent; not a decisive criterion.

Second, where the parties explicitly stated that the instrument is *not* international law, one could question whether parties should be allowed to contract-out of the legal system and this for any type of issue. Should there, for example, be certain types of agreements or cooperation that must be done formally within the context of international law? In the United States, for example, a formal treaty and, as a consequence, a 2/3 majority in the US Senate, is required for territorial and extradition related questions.<sup>39</sup> These fundamental matters cannot be regulated with simple executive agreements.<sup>40</sup> In addition, the question may be raised whether parties can contract-out of the legal system in the first place and whether “commitments” other than legal commitments are even possible. Klabbbers, for example, is of the view that when states make commitments they necessarily do so under law. In his view, at the inter-state level, there are no such things as “morally or politically binding agreements”.<sup>41</sup>

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<sup>37</sup> The website of the Kimberley Process (KP) on Conflict Diamonds, for example, states that the KP cannot “be considered as an international agreement from a legal perspective, as it is implemented through the national legislations of its participants” ([http://www.kimberleyprocess.com/faqs/index\\_en.html](http://www.kimberleyprocess.com/faqs/index_en.html)). Yet, the text itself of the KP does not explicitly state that is not part of international law even if it uses a lot of terminology that may point in that direction such as “scheme”, “participants” and “undertakings” (rather than “treaty”, “parties” or “obligations”). On the other hand, a lot of the provisions in the KP do seem to imply that the parties wanted to make some form of commitment (e.g. its provision on compliance and dispute prevention) even if these commitments were not in the form of “shall” but “should”.

<sup>38</sup> See Virally, advocating the use of the following “indices” to reconstruct intent (p. 342): (i) “le texte lui-même”, (ii) “les circonstances de son adoption” and (iii) “le comportement ultérieur des auteurs du texte ».

<sup>39</sup> See Panama deal.

<sup>40</sup> Similarly, in most domestic legal systems, if one goes above a certain money threshold, one needs a written or notarized agreement (an oral agreement or simple piece of paper may not do).

<sup>41</sup> JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* (1996), at p. 9, 13, 155, 156 and back cover (“instruments which contain commitments are, *ex hypothesi*, treaties”). Contra: Virally, Weil, comments to Virally report, p. 368: “L’engagement politique ne lie pas moins que l’engagement juridique: il lie autrement”, adding that the core difference between a legal and a political commitment is that “le premier entend defier le temps, le second entend s’y plier”.

### 3. *Effect*

Third, international law has been defined not with reference to form or intent, but based on effect. For Jose Alvarez, for example, everything is law that proves to have “normative ripples”.<sup>42</sup> In other words, international law is comprised of those instruments or norms which change state behavior. This *ex post* sociological approach to law finds expression also in theories of domestic law and quite naturally leads to legal pluralism.<sup>43</sup> The external perspective of concentrating on effects or what states actually do is common also in international relations scholarship.<sup>44</sup> Moreover, more so than domestic law, international law and its historical focus on custom has deep sociological roots, transforming description or state practice into law, albeit with the added ingredient of *opinio juris*.<sup>45</sup>

A focus on effects or what ultimately guides behavior has the advantage of law being, in the words of Paul Kennedy, “sociologically clever” so as to remain meaningful and not to be condemned to oblivion. On the other hand, critics have pointed out that if law wants to be more than descriptive and to have its own, internal normative pull or value, law cannot be defined on the basis of actual behavior alone.<sup>46</sup> If not, whatever states do is lawful and whatever they refrain from doing cannot be legally required. An instrument is then not implemented because it is law, but law because it is implemented.

It goes without saying that using effect as the criterion to define international law is diametrically opposed to using form, similar to the traditional debate on what matters: form or effect? In the context of IIPPM, to use effect as the criterion to distinguish

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<sup>42</sup> JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005).

<sup>43</sup> See, for example, Brian Tamanaha, *A General Jurisprudence of Law and Society*, 2001, 167 (defining law as “whatever people recognize and treat as law through their social practices”).

<sup>44</sup> Rittberger, for example, has argued that an arrangement should only be considered a regime if the actors are persistently guided by its norms and rules, making inquiry into effects of regimes on behaviour tautological (VOLKER RITTBERGER, *INTERNATIONAL REGIMES IN EAST-WEST POLITICS* (1990)).

<sup>45</sup> See Alan Boyle, at 904, noting that “the non-binding form of an instrument is of relatively limited relevance in the context of customary international law-making”.

<sup>46</sup> Jan Klabbers, *Reflections on Soft International Law in a Privatized World*, p. 9 (arguing that the problem with an effects-based approach is that “one cannot tell law from non-law until after some rule or other has been invoked or applied: one has to await the ‘normative ripples’ before anything meaningful about the contents of the law can be said”).

between law and non-law would mean that a great deal of IIPPM output, on the assumption that much of it is actually implemented or complied with by participants, would become law. It would, in other words, dramatically expand the field of international law. Indeed, even the staunchest critic of soft law, Prosper Weil, recognized that soft law norms “do create expectations and exert on the conduct of states an influence that in certain cases may be greater than that of rules of treaty or customary law”.<sup>47</sup> In other words, an effects-based definition of international law may well lead to the conclusion that a lot of soft law is “more law” than what we traditionally describe as hard law or legally binding treaties.<sup>48</sup>

#### 4. *Substance*

Fourth, there is the approach that something achieves the threshold of law only when it meets certain objective standards related not to form, intent or effect, but rather to substance. Thomas Frank, for example, has underlined the importance of norms being “legitimate” using four indicators which, in his view, are inherent in every norm (determinacy, symbolic validation, coherence and adherence).<sup>49</sup> Kingsbury defines law within the field of global administrative law with reference to “requirements of ‘publicness’ in law”, including “the entity’s adherence to legality, rationality, proportionality, rule of law, and some human rights”.<sup>50</sup> On this view, “only rules and institutions meeting these publicness requirements immanent in public law ... can be regarded as law”.<sup>51</sup> Without offering a specific, substantive standard, Klabbers comes close to this approach: “whether or not something is a treaty (i.e. hard law) must be

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<sup>47</sup> Weil, p. 415.

<sup>48</sup> Indeed, Posner & Gersen, at 573, use an effects-based definition of “soft law”, namely: “norms that affect the behavior of agents, even though the norms do not have the status of formal law”. If an effects-based definition of international law were used, what is international law would then coincide with this very definition of “soft law”.

<sup>49</sup> THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) and *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium* 100 *AJIL* (2006) 88-106.

<sup>50</sup> Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 *EJIL* (2009) 23, at 23.

<sup>51</sup> *Ibid.*, p. 30. See also LON FULLER, *THE MORALITY OF LAW* (1969) arguing that law is unlikely to be morally repugnant if the law-making process adheres to a number of basic procedural propositions (“procedural natural law”): law must be publicized, prospective, needs rules (not case by case), must be reasonably clear, not contradict each other unduly; not ask for the impossible; remain fairly constant over time, offer congruence between declared rules and official action.

established following objective standards, and cannot solely depend on the intentions of the authors of the document”.<sup>52</sup> Elsewhere, when he defines what is “legally binding”, Klabbers seems to use consent or agreement on some future behavior as the objective criterion to distinguish between law and non-law: “any statement or agreement aimed at influencing the behaviour of states and not itself amounting to a violation of international law, be they unilateral or multilateral, is to be presumed to be legally binding, unless proven otherwise”.<sup>53</sup> Similarly, van Hoof reformulated the traditional sources of international law in terms of “recognized manifestations of consent” abandoning most formal aspects of law-making in favor of substance.<sup>54</sup>

If, in the analysis of IIPPM, this objective, substantive approach were followed, quite a bit of IIPPM output could be classified as “law” in the sense that it reflects “agreement aimed at influencing the behavior of states” (Klabbers/van Hoof) and/or meets basic requirements of legitimacy or “publicness” (Franck/Kingsbury), depending, ultimately, on how the particular IIPPM was set up, operates and how accountable it is. The latter approach is, of course, intriguing. Rather than asking whether certain control or accountability processes are needed or triggered *because something is law* (even if it is less formal than traditional international law), the opposite would then be true: something *becomes law* because it is legitimate, “public” or accountable (if not, it cannot claim to be “law”).

Note that using a substantive criterion to decide whether something is international law in the first place dramatically departs from the traditional neutrality of international law, that is, its voluntarism and value-free architecture. While using “consent” or underlying “agreement” as substantive criterion could still fit, using publicness or compliance with other substantive principles would move international law into an entirely new direction, away from it merely being a neutral “toolbox” which

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<sup>52</sup> Klabbers, *Redundancy*, *supra* note 15, at p. 172.

<sup>53</sup> Klabbers, *Finnish Yearbook*, 1994.

<sup>54</sup> G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983). Similarly, Baxter defined “international agreement” broadly as “all those norms of conduct which States or persons acting on behalf of States have subscribed to, without regard to their being binding, or enforceable, or subject to an obligation of performance in good faith” including “political treaties” and instruments as “legally fragile as are the joint communiqués” (p. 551).

offers states instruments to cooperate. It would transform international law into a principles-based, constitutional order where certain norms or substantive criteria stand above state consent. The notion of *jus cogens* went in this direction. More broadly conditioning the very status of international law on compliance with a substantive criterion would imply a huge, additional step in the same direction.

##### 5. Conclusion and “law as belief”

Depending on how one distinguishes between law and non-law -- with reference to formalities, intentions of the parties, effect on behavior or substantive criteria -- IIPPM output may or may not be part of international law. If formalities or intent matter, a lot of IIPPM output would *not* be law. If, in contrast, effect or substantive factors decide, a lot of IIPPM *would* be law. This indeterminacy of the rules of recognition of international law is rather striking. More so than in domestic law, we must admit that it is often hard to decide whether something is international law in the first place. Even if the predominant criterion seems to be the “intention of the parties”, there remains doubt and flexibility (if only because, in most cases, instruments do not explicitly disclose such “intent”). Formal elements -- such as concluding a formal treaty and calling it that way or being an IO vested with law-making powers -- may trigger a positive presumption that something is international law. Other indications could be found in the actual text or words used, the subject matter of the agreement,<sup>55</sup> the circumstances of its conclusion and subsequent conduct or pronouncements by the parties.<sup>56</sup> Effect on behavior and compliance with substantive criteria may offer further support and/or increase the weight or compliance pull of the norm in question.

When it comes to IIPPM output this means that the conventional view that “informal” international public policy making is, by definition, not part of international law is at least debatable. Since international law is not defined with reference to formalities, the “informal” nature of IIPPM output should not automatically disqualify it as international

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<sup>55</sup> Klabbbers, Finnish Yearbook, 1994, pointing out that agreements of a household or social nature (such as agreement to hold a summit on a certain day) can be presumed not to be legally binding.

<sup>56</sup> Virally, p. 238, 342.

law. Moreover, even when it comes to the intentions of the parties, such intent in the context of IIPPM output may not be beyond doubt. If, on the other hand, the effect of IIPPM output would make it law, much of this output, on the assumption that most of it is implemented or complied with domestically, would be elevated to the status of international law. Finally, given the transparent and public nature of many (though certainly not all) IIPPM mechanisms, if substantive criteria such as legitimacy or “publicness” would be decisive, a good slice of today’s IIPPM output would, indeed, be part of international law (or what some have called global administrative law). Conversely, if something is only law when it is backed-up with centralized sanctions (pursuant to command theories of law), most, if not all, IIPPM output would *not* be law. Yet, the same would then be true for most of what we define today as traditional or hard international law since most of those norms are not backed-up by centralized sanctions either.

This indeterminacy is puzzling and may lead some to conclude that the vagueness and difficulty to define what *is* international law (i.e. the absence of clear rules of recognition) implies that international law may *not* be law in the first place (even on the Hartian assumption that there can be law without centralized sanctions). Rather than reverting to this old debate of whether international law is law, this indeterminacy opens another possibility: Given the vagueness of what makes a norm a norm of international law, could it be that ultimately it is the collectivity of observers, participants and stakeholders including scholars and tribunals -- and not just the “intentions” of the original parties -- that determines whether something is international law depending, more particularly, on whether a critical mass of this collectivity -- whose constituent elements may have varying weights -- *thinks, believes, says or advocates* that it is? If so – and whether we like it or not -- what makes something international law may well be *belief* that it is. Or, to put it more bluntly, as soon as enough people *believe* and *say* that something is law, it *becomes* law. As Guzman and Meyer put it, albeit limited to the belief of actual subjects of international law (rather than external observers): “Obligations are, to a large extent, in the eye of the beholder. In a legal system in which enforcement relies on self-help by



the law's subjects, those subjects' perceptions as to what an obligation requires effectively define the obligation".<sup>57</sup>

To figure out whether we, as observers, should *say* or *believe* that an instrument is international law it may then be useful, by way of reverse engineering, to think about the practical consequences of doing so. Put bluntly, the consequences of classifying something as law may guide whether we want to classify it as law in the first place. Before addressing those consequences (section IV), we need, however, to briefly expand on one formal element of lawmaking: capacity (section III).

### III. The *Capacity* to Make Law

In the previous section (section II.1), we referred to one type of formality that may be decisive of whether something is law, that is, the *capacity* or *authority* of those enacting the instrument to “make law”. We delayed an analysis of this formal factor – which, contrary to other formalities, does carry a lot of weight in the definition of international law -- until this section for the following reasons. First, the question of capacity has to do with *who* can make law, not with *what* amounts to law. The latter (what) was discussed in the previous section; the former (who) is discussed in this section and deserves separate treatment. Second, as it is defined in this Project, IIPPM can not only be “informal” in the sense that its output is not a formal treaty or not perceived as legally binding (“output informality”). IIPPM can also be “informal” with reference to the forum or process in which the IIPPM takes place, in particular, a network that is not a formal international organization (IO) (“process informality”), or because of the actors involved in the IIPPM which are often domestic agencies or regulators, not diplomats or ministers generally accepted as representing the state (“actor informality”). We do not address in this Project the question of whether *private* entities can make international law

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<sup>57</sup> Andrew Guzman and Timothy Meyer, *Explaining Soft Law*, UC Berkeley Public Law Research Paper No. 1353444. Available at SSRN: <http://ssrn.com/abstract=1353444>. See also, Dupuy, ASIL, “States are not only the subjects but also the makers of international law and are as such free to invent new processes of law-making as it suits their purposes, *as long as these processes are accepted by the system partners*” (italics added).

since IIPPM is, by definition, limited to activities which involve *public* authorities (although private actors may also participate in IIPPM).

1. *Does the IIPPM network itself have the capacity to make law?*

Both “process informality” and “actor informality” relate, *inter alia*, to the capacity or authority to make international law. If IIPPM does not emanate from an international body with its own legal personality, “will of its own” or capacity to make law, then the maker of IIPPM output can be no other than the individual participants in the IIPPM process. Put differently, if the Kimberley Scheme is not itself an IO, a subject of international law or otherwise endowed with the authority to make international law, then Kimberley Scheme instruments or decisions can hardly be classified as something akin to “acts of an international organization”. Instead, they must then be instruments emanating from the consent of individual Kimberley Scheme participants and, if anything, be closer to “agreements between states”. That is also how we will examine IIPPM output (as output coming from individual participants which is, or is not, part of international law), unless there is evidence that the output emanates from an inter- or transnational body, transcending the individual participants, with a legal authority of its own. The question of legal personality and status of IIPPM networks themselves is addressed in a separate paper part of this Project (Wessel & Berman). Suffice it to say here that if an IIPPM network has its own authority to make international law, the chances of IIPPM output being international law increase and that, in this event, the question of whether IIPPM output is international law must be examined also from the angle of “acts of an international organization”.<sup>58</sup>

2. *Can agreements between domestic regulators or agencies be part of international law?*

When it comes to “actor informality”, a crucial question is whether public authorities other than diplomats or ministers presumed to represent the state have the

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<sup>58</sup> See also legal capacity of IOs and EU Commission versus member states.

capacity or authority to make international law. Is or can, for example, an agreement between US and European regulators or administrative agencies (be they competition authorities, central banks or food safety agencies) be part of international law? In this respect, IIPPM is “informal” not so much because participants wanted to avoid the strictures of formal lawmaking (as in the general debate on soft law), but because it is unclear whether the participants themselves can even make law. Put differently, even if they wanted to make hard, formal law, the question is whether certain IIPPM actors have the capacity or authority to do so in the first place. Something then becomes IIPPM not because of choice but out of necessity.

- US accepts idea of agency agreements as binding under international law; France has doubts
- even under VCLT, agencies could bind state if they were delegated the authority to do so.
- Without such specific mandate to bind the state, can agencies bind the state as such? Should such be presumed the way wrongful conduct by any public authority is attributed to the state under rules on state responsibility? Why these different rules of attribution?
- Common understanding that agencies are, however, not subjects of international law in their own right (but quid sub-federal entities that are concluding treaties as subjects of international law, see Flanders-Belgium?; quid impact of debate on individuals/private parties as actors/subjects of international law?); should agencies/regulators become subjects?
- Could agencies conclude gentlemen’s agreements which only bind agency or even only current head of the agency? Would such be political/moral agreements, agreements part of international law, domestic law or part of some other legal system (e.g. GAL)?

#### IV. The *Consequences of Distinguishing Between Law and Non-Law: Does Any of the Above Matter?*

Depending on where and how one draws the line between law and non-law, it is now obvious that the field of international law could be huge and include a lot of IIPPM output (Klabbers, Reisman, Alvarez) or, in contrast, be very small and exclude IIPPM altogether (Weil, d'Aspremont<sup>59</sup>). Conversely, depending on one's criterion, the parallel world of non-international law, including certain definitions of soft law and political or moral commitments, could then be vast (and include alternative legal regimes such as global administrative law or commitments between agencies or regulators) (Virally, Kingsbury), or close to non-existing (Klabbers). On that basis, inter-disciplinary turf wars could be fought and theories could be built around the motivations for academic commentators to favor an expansive or narrow definition of their discipline (d'Aspremont).

Yet, does any of the above matter beyond academic debates? Should practitioners care about whether something is or is not formally part of "international law" and how/where to draw the line? Put differently, it is commonly understood why negotiators may want to *avoid* the strictures of making formal international law (consent rule; flexibility in terms of conclusion, adaptation and actors participating; avoidance of strict rules on domestic ratification<sup>60</sup> etc.).<sup>61</sup> However, by contracting outside international law could they also be giving up on certain *advantages*?

At least four practical consequences emerge from how and where one draws the line between law and non-law. For some, these will be "advantages" that are given up when concluding non-law; for others, in contrast, they may precisely explain why non-law was chosen.

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<sup>59</sup> Of course, the fact that something is then not international law must not mean that international lawyers should completely disregard it.

<sup>60</sup> Note, however, that certain IOs require that even non-binding recommendations be submitted to domestic parliaments for adoption. See Art. 19:6 ILO Constitution; Art. IV:B(4) UNESCO Constitution; FAO, Art. XI; WHO, Ch. XIV, art. 62.

<sup>61</sup> Aust, Lipson.

1. *Application by international (and some domestic) courts and tribunals*

First, and probably of greatest practical importance, if something falls within international law there is no doubt that it can be applied or referred to by international courts and tribunals.<sup>62</sup> Even where the instrument itself cannot be enforced under the compulsory jurisdiction of a court or tribunal (think of the Kimberley Scheme), as international law it could also influence the enforcement of other treaties or the settlement of other disputes (think of the ICJ, ITLOS or WTO dispute settlement). To the extent domestic courts give effect to international law, the same is true before domestic courts.<sup>63</sup> If certain IIPPM output were, therefore, international law, there can be no doubt that it could be applied by courts and tribunals where relevant (e.g. as part of the applicable law between the disputing parties or as a rule of international law relevant for purposes of treaty interpretation pursuant to, for example, Art. 31.3(c) of the VCLT). The fact that the instrument does not set out imperative rules but rather guiding principles or “should” instead of “shall” obligations may then soften the impact of the instrument but does not take away from its status of “international law” (the same way that non-imperative language in, for example, the WTO Agreement or UN Charter is and remains part of international law).

This “advantage” (for others, “disadvantage”) of falling within the radar screen of courts and tribunals is subject to a number of caveats. First, although the number of international courts and tribunals has increased in the last decades (and more and more domestic courts may refer to international law), it remains so that violation of large parts of international law cannot be challenged before any court or tribunal. This is the case for virtually all IIPPM output. As a result, to say that there is a qualitative enforcement advantage to classifying something as “international law” may go too far: most legally

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<sup>62</sup> See Weil above; Virally, p. 245 : « La véritable question est de savoir si les dispositions d’un texte international sont susceptibles, ou non, d’être valablement invoquées devant un tribunal international et prises en considération par ce dernier dans les motifs sur lesquels il basera sa décision. C’est la le test décisif ».

<sup>63</sup> See *Swiss Tribunal Administratif Federal*, finding that US-Swiss administrative arrangement on UBS lacked legal basis where after Swiss authorities made it a formal treaty so as to avoid domestic legal problems.

binding international law is anyhow not subject to compulsory jurisdiction of any court or tribunal.

On the one hand, elevating something to the status of international law (although it may increase the “cost of non-compliance”<sup>64</sup>) does not necessarily mean that it will be enforced by a court or tribunal, and even if it is, such enforcement may, in the absence of centralized sanctions, be far from effective. On the other hand, leaving an instrument in the underworld of non-law (which may make participation easier) does not, by definition, mean that it will be less effective or that countries will more easily disregard it. There are plenty of examples of non-binding international instruments that have a better compliance record than hard law treaties.<sup>65</sup>

In other words, if making something legally binding is only on paper, without actual enforcement, is the extra cost of thus making it binding worth the benefit? Indeed, to the extent informal remedies or compliance pull is attached to both law *and* non-law instruments (think of reciprocity, reputation costs, legitimacy of the norm etc.), whether or not something is international law may matter little. Zemanek phrased the point as follows:

“if ‘hard’ international law is normally observed and applied, it is hardly because of the fear of eventual enforcement measures. Observance owes more to its general acceptance, to the recognition that the existing legal rules reflect the shared values and interests of the members of the international community and are, therefore, legitimate

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Although ‘soft’ law engagements of the sort considered here are not obeyed because of a legal command, they are normally performed when they correspond to carefully balanced reciprocal interests. As long as these interests subsist, the possible political and/or economic consequences of non-performance are often a far stronger deterrent than the consequences of the non-performance of most legal obligations. This suggests that reciprocity as an incentive of performance is independent of the nature of the commitment”.<sup>66</sup>

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<sup>64</sup> Lipson, Guzman, soft law.

<sup>65</sup> Boyle: “the assumption that they [treaties] are necessarily more authoritative is misplaced”, p. 904.

<sup>66</sup> Zemanek, p. 856 and 885; T. Franck, legitimacy; self-interest of states, Goldsmith & Posner; Guzman, reputation.

A second caveat to the “advantage” of falling within the radar screen of courts and tribunal is that courts and tribunals have applied not only instruments that are legally binding or part of international law, but also non-law instruments to guide their decisions (see WTO case law, e.g. US – Shrimp). To that extent, the line between law and non-law is blurred (a practice that is, of course, criticized by people in the bright line school such as Klabbers and Weil) and the advantage of being “international law” is tempered. If non-law is anyhow referred to by courts, why go through the hassle of making it law? We come back to this point in the next section (Section V, interaction between law and non-law).

## 2. *Application of the secondary rules or “toolbox” of international law*

Second, if an instrument is classified as part of international law, the toolbox of international law automatically applies to it. Application of general international law rules on treaty formation, interpretation and modification as well as rules on state responsibility offer predictability for the entire life-cycle of the instrument. If the instrument falls outside international law, this toolbox of secondary rules does not apply (although it could be applied by analogy<sup>67</sup>) and practical difficulties or misunderstandings may arise.

That said, the fact that the secondary rules of international law do not technically apply to non-law instruments must not mean that there is no role for (international) lawyers in IIPPM mechanisms that operate outside international law. Indeed, early data indicates that many IIPPM processes set out detailed procedural rules and follow precisely defined steps in the elaboration of, for example, internet or safety standards. In this context, the role for lawyers is obvious (albeit lawyers as technicians or ‘plumbers’; not lawyers as constitutionalists or ‘architects’). In addition, the fact that an instrument is

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<sup>67</sup> E.g. also breach of political, non-binding commitment may give rise to retorsion, so may have same enforcement as hard law (ILI, 1983-II, p. 289), Zemanek, p. 861.

not international law does not mean that it is completely irrelevant to international lawyers or the discipline of international law.<sup>68</sup>

### 3. *Respect or legitimacy that comes with the status of being law*

In any domestic legal system worth that name, the fact that a norm passed through Parliament or other constitutional processes before being minted as formal law gives it an aura of legitimacy that demands respect. Some of this may be true for international law that was enacted by consensus of a large share of the international community (think of the UN Charter, Geneva Conventions or UNFCCC) or may derive from the hierarchical superiority of international over domestic law. At the same time, also non-binding international declarations may have this effect (think of the Universal Declaration of Human Rights or the Millennium Development Goals).

More fundamentally, given the neutrality and value-free architecture of international law (to make it, all that is needed is consent; no substantive or constitutional checks and balances apply other than the vague test of *jus cogens*), merely elevating an instrument to the status of international law does not necessarily make it more legitimate. A treaty signed by the military juntas of North Korea and Burma is as much international law as a treaty ratified by the democratically elected Parliaments of The Netherlands and India.<sup>69</sup> Hence, unless one were to use substantive criteria to distinguish between law and non-law (such as “publicness” or legitimacy discussed in section II.4), classifying an instrument in or outside of international law may say little about its legitimacy or substantive pedigree. If so, why bother making formal international law? Indeed, if anything, based on preliminary results so far, the processes and procedures followed by many IIPPM mechanisms seem more transparent, with more input from stakeholders and more checks and balances between different actors, than traditional treaty-making

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<sup>68</sup> See Virally, p. 243: “Si la science du droit ne se réduit pas à la description des différents éléments normatifs composant le droit positif et si son objet s’étend, comme je le pense, à toutes les dimensions du phénomène juridique, pris en tant que phénomène social spécifique, elle ne peut se désintéresser du droit en train de se faire. Tout au contraire, le processus de formation du droit, considéré dans son déroulement historique et social, constitue un objet d’étude du plus haut intérêt pour comprendre le fonctionnement réel d’un système de droit ... ».

<sup>69</sup> See Petersmann critique of UN.



processes.<sup>70</sup> From this perspective, the critique that IIPPM is less legitimate than traditional international law rings rather hollow: IIPPM may avoid *domestic* legal protections, yet at the *international law* level there seems little of substance imposed in the first place.

4. *Impact on power relations: Does a broad definition of law defend the weak or empower the strong?*

Fourth, deciding on what is law, and how to do so, can be so much more than a technical exercise. It may have a tremendous impact on the power relations between different actors on the international scene.

Depending on the times and perspective, broadly defining international law has been regarded as either (i) progressive activism in support of the weak or newcomers (see the debate on UN General Assembly resolutions and new, non-state actors) or, in contrast, (ii) favoring the establishment or powerful (critical legal scholars on soft law; coalitions of the willing critics).

Indeed, in earlier debates on the legal nature of UN General Assembly resolutions, opponents of classifying such resolutions as “law” were branded as conservatives, keen on upholding the prevailing power of the developed world to the detriment of newly independent countries whose numbers control the UN General Assembly. In that context, Reisman, for example, has argued that embracing soft law goes against established elites and implies a “redistribution of political power in certain areas of international lawmaking”.<sup>71</sup> Put differently, on this view, broadly defining international law or giving legal weight to UN resolutions was seen as favoring the weak or newcomers (in contrast

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<sup>70</sup> There is, indeed, a surprising level of uniformity in terms of rules and principles that IIPPMs follow across different subject matters, e.g., attempts to involve all stakeholders, seeking comments, enacting standards with input of objective expertise, etc.

<sup>71</sup> Reisman, ASIL Proceedings, p. 4. At p. 6: ““While elites may find it possible to reach private agreements among themselves that maximize their own interests, public lawmaking must promise the fulfillment of the unrequited popular demands. This factor may account for the proliferation of normative formulations that are produced in international fora”.

to, for example, giving weight to custom which is generally regarded as reflecting the interests and practices of the powerful<sup>72</sup>).

The same could be said today of those trying to include as part of international law IIPPM instruments made by agencies, regulators or partnerships which include private actors or civil society: elevating those instruments to the status of law no doubt legitimizes and empowers such new actors on the international scene. In both examples - UN resolutions empowering newly independent states and IIPPM output empowering new actors – soft law and actor informality could then be seen not as a *problem of* lack of accountability but rather *the result of* more accountability and more stakeholder participation.

Yet, the opposite argument has been voiced too. Rather than defending the weak, broadly defining law to include soft law and moves away from formalism toward loose partnerships has been labeled as techniques which favor strong countries and ruling bureaucracies. Klabbers puts it as follows:

“if law loses its formalism, then what else will it become but a vehicle for administrative power? In this light, the very invention of the soft law concept can be regarded as a ploy by the powers that be to strengthen their own position”.<sup>73</sup>

With reference to Hannah Arendt, Klabbers adds:

“where bureaucracies apply standards, responsibility vanishes into thin air ... in modern bureaucracies nobody rules, and hence nobody is responsible. Administrators merely apply standards; they do not make them. And those who make the standards

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<sup>72</sup> See Michael Byers; Reisman, p. 7, arguing that customary law is “created primarily because of the great power that we in the industrial world exercise over others”. On the other hand, others have criticized customary international law on the ground that it gives too much power to low level officials within countries (e.g. actors in the trenches of international law) which could be read as power that may work against the central government or establishment (Bradley & Goldsmith).

<sup>73</sup> Klabbers, *Undesirability*, p. 387 and at p. 391: “Once political or moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality, and therewith becomes nothing but a fig leaf for power. In other words: unless we insist that law can only be made through the procedures that themselves have been created to regulate the creation of law, the resulting norms, no matter how nobly inspired, will always remain suspect. In yet other words: we need to insist on a degree of formalism, because it is precisely this formalism that protects us from arbitrariness on the part of the powers that be”. He concludes that soft law are “smokescreens that bureaucrats and politicians may be fond of, but that in the end are a danger to our cherished Rule of Law”.

merely make soft law: surely they cannot be held responsible for things that are only ‘soft’ to begin with”.<sup>74</sup>

See also Eyal Benvenisti, *Coalitions of the Willing*.

Similarly, d’Aspremont has argued that expanding international law to include soft law or IPPM output could be motivated by international law academics and observers to expand their own discipline in search of self-aggrandizement.<sup>75</sup>

##### 5. *Conclusion: So why bother making “legally binding” international law?*

As much as a negotiator may believe in “the rule of law” or the importance of international law, with a cool head, why would she go through the hassle of negotiating and implementing a formal treaty, unless the treaty were backed-up with a compulsory dispute settlement system? In the absence of judicial enforcement, what is there to gain (or lose) at the international level by calling something “international law”?<sup>76</sup> The burden is on “us” international lawyers to convince actors why they should operate within our discipline. Yet, when it comes to IPPM, it is unclear whether we can meet this burden.

First, soft law seems to have equal and sometimes higher compliance rates than hard law and where there are courts in other fields they tend to refer to non-binding instruments anyhow. Second, the toolbox or secondary rules of international law to regulate the life-cycle of the instrument may not technically apply but they could be applied by analogy. Third, given its neutrality and value-free architecture, international law does not add substantive legitimacy over and above what non-binding instruments can offer. Fourth, unlike traditional international law, instruments outside international

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<sup>74</sup> Klabbers, *Reflections on soft*, p. 12 referring to Hannah Arendt, *The Promise of Politics*, 2005, 70-80, at 77.

<sup>75</sup> D’Aspremont, at 1075, refers to the “proneness of international legal scholars to stretch the limit of their object of study by constantly seizing materials outside the realm of international law in order to alleviate the strain inherent in the contemporary proliferation of international legal thinking”.

<sup>76</sup> We make abstraction here of possible benefits domestically, e.g., by calling something a treaty, domestic ratification may be difficult, but once it is done, the instrument may obtain a higher legal status than other rules of national law (see UBS arrangement/treaty example).

law make no problem with involving new actors (be it agencies, the private sector or NGOs).

This position could also be turned on its head: if making an instrument legally binding under international law may not make much of a difference anyhow, why should negotiators be so afraid of making something “legally binding”? Rather than a move away from law we should then perhaps see a move back to international law.

This raises an interesting puzzle for the discipline of international law<sup>77</sup>: Should international law give up the little formalism it has (e.g. when it comes to the legal capacity of new actors) and embrace IIPPM output so as to stay sociologically relevant and put international law “back on the map”? Or should it, instead, insist on formalism and exclude IIPPM output to maintain international law’s independence<sup>78</sup>, at the same time making the point that IIPPM may be inappropriate as a power instrument of the strong? Both approaches may hope for a return to international law: the first, progressive approach, by wholesale annexing IIPPM to international law; the second, conservative approach, by excluding IIPPM and denying it legitimacy in the hope that actors (in particular weak players) realize the value-added of international law and return to it. There may be a third and far more radical way: be it within international law or in something akin to global administrative law, procedural and/or substantive rules of recognition could be imposed. In that case, the status of law would need to be “earned” and the law versus non-law distinction would regain momentum.<sup>79</sup>

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<sup>77</sup> See, P.-M. Dupuy, ASIL Proceedings, p. 11: “a new process of normative creation does exist and has been developing (for more than 20 years) which jurists feel uncomfortable to analyze; it certainly comprises part of the contemporary lawmaking process but, at the same time, being a social phenomenon, it evidently overflows the classical legal categories, familiar to scholars”. Baxter, p. 556: “they do form part of the agreed machinery by which governments avoid or soften clashes of interest. They have more of the character of agreed procedures of international public administration than of law, yet they belong to the domain of law in a qualified sense that makes it impossible to bring them within any of the existing categories of international law”.

<sup>78</sup> See South West Africa Cases, Second Phase, ICJ Reports 1966, p. 34, para. 49: “[i]t is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered”.

<sup>79</sup> From this perspective, international law would play a more substantive, legitimizing role. Not so much a “plumber” (fixing pipes, heating and the water supply of a building arising out of the “intent” of others),

## V. The *Interaction Between Law and Non-Law: The Legal Effects of Non-Law*

A fifth question is this: Once one has a view on whether law and non-law are separated by a bright line or a grey zone (Section I), and one has adopted one or more criteria to decide what makes an instrument law (be it sanctions, formalities, intent, effect, substance or belief, Section II), how is it that, during a legal dispute, the spheres of law and non-law interact, if at all?

### 1. *Sealed-off compartments or cross-fertilization?*

One school holds the view that once the line between law and non-law is drawn, what is “out” (e.g. social, moral or political norms) cannot and should not influence what is “in” (i.e. legal norms). Klabbers, for example, posits that “as soon as soft law is to be applied [by courts] to any specific set of circumstances, it collapses into either hard law, or no law at all”.<sup>80</sup> This is not to say that non-law has no role to play before a court. Obviously, facts are also non-law but play a huge role. The point is rather that, on this view, when a normative instrument -- say, certain IIPPM output which offers non-law guidelines or standards -- does *not* meet the threshold of law, it cannot be applied by a court to steer the outcome or to alter or influence what the law mandates. Weil refers to the “simplifying rigor” of law, which knows only categories of legal or illegal, making it possible to survive in a complex world. For this school, soft law or applying non-law as if it were law undermines this “blissful simplicity” and “instead of substituting legal simplicity for everyday complexity, it proposes to substitute legal complexity for everyday complexity”.<sup>81</sup>

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but an architect, to ensure that the “new type of building” that IIPPM is, is stable enough and meets basic building codes.

<sup>80</sup> Klabbers, *Undesirability*, p. 382. See also Klabbers, *Redundancy*, p. 179 (“as soon as soft law comes to be applied, it becomes indistinguishable from hard law”).

<sup>81</sup> Klabbers, *Undesirability*, p. 387.

Indeed, for this school, letting non-law penetrate law would be the end of law's neutrality and independence and favor prevailing powers, which tend to control the moral and political. For Klabbers, for example

“Once political or moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality, and therewith becomes nothing but a fig leaf for power”.<sup>82</sup>

Another school sees legal and other norms not as sealed-off compartments and takes the view that non-law may have a whole range of possible effects on what is law and how it should be interpreted and applied.<sup>83</sup> Virally, for example, speaks of a “voie de communication entre politique et juridique” and “effets juridiques secondaires”.<sup>84</sup> Put differently, law and non-law are in a relation of cross-fertilization. As pointed out in Section I, the legal effects of this now-law may then, however, bring non-law very close to what is law, and blur the distinction between the two. Hence, for one school something may then be law and can be applied (Klabbers); for the other school it may not be law (or fall in the grey zone between law and non-law) but still have legal effects, with little practical difference between the two approaches. As Boyle has pointed out “once soft law begins to interact with binding treaties its non-binding character may be lost or altered”.<sup>85</sup>

The first school (sealed-off compartments) is naturally close to the bright line school identified earlier. The second school (cross-fertilization) has much in common with the grey zone school in Section I.

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<sup>82</sup> Klabbers, *Undesirability*, p. 391, adding: “In other words: unless we insist that law can only be made through the procedures that themselves have been created to regulate the creation of law, the resulting norms, no matter how nobly inspired, will always remain suspect. In yet other words: we need to insist on a degree of formalism, because it is precisely this formalism that protects us from arbitrariness on the part of the powers that be”.

<sup>83</sup> Though not law or legally binding as such, doctrine and rulings by international courts and tribunals can, pursuant to Article 38 of the ICJ Statute, influence the meaning of international law. In this sense, non-law influences law. Law is applied/defined in context: the Oxford English dictionary is not “law” but is consistently referred by WTO Appellate Body as declaratory of ordinary meaning.

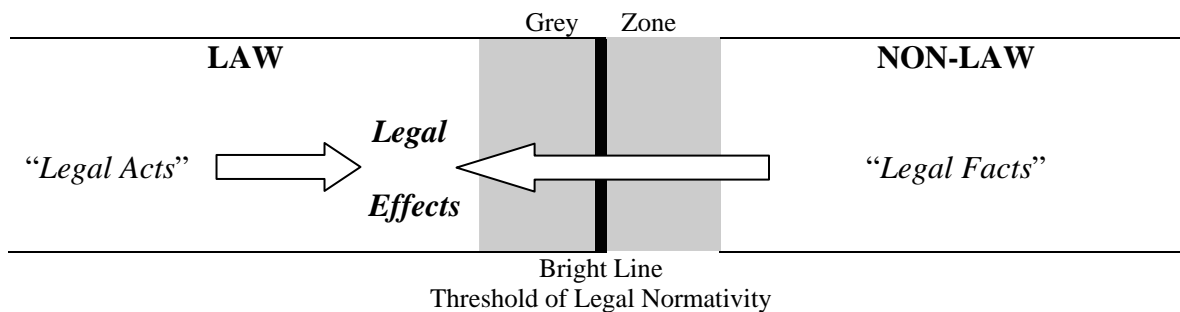
<sup>84</sup> Virally, Final report, p. 346.

<sup>85</sup> Boyle, p. 901.

2. *The legal effects of “legal acts” versus the legal effects of “legal facts”*

As pragmatic and appealing as the second, cross-fertilization school may sound (IIPPM output may not be law, but still have legal effects), it raises a fundamental question: If the criterion selected to divide law from non-law is to have any practical meaning, how can we explain that something that does *not* meet the threshold is still being applied by a court of law? This question, in any event, raises the issue of what the limits of the possible legal effects of non-law should be.<sup>86</sup> Can soft law or non-law be held against a state even if this state never agreed with it nor even got the chance to comment or participate in its development? Can political or moral norms influence legal outcomes?

**TABLE 2: THE LEGAL EFFECTS OF ACTS VERSUS FACTS**



A possible starting point to think about legal effects of non-law is the doctrinal distinction, derived from French law, between *actes juridiques* (legal acts) and *faits juridiques* (legal facts). Abi-Saab defines a “legal act” (*acte juridique*) as « un acte entrepris consciemment par le sujet de droit en vue de produire un certain effet juridique ... un ‘procède’ volontaire de creation de droits et d’obligations ». <sup>87</sup> Jacque refers to “une manifestation de volonte d’un ou plusieurs sujets de droit international ... de créer une norme [juridique], d’exercer une competence normatrice”. <sup>88</sup> This definition of law or legal acts falls within the prevailing school (presented in Section II.2 above) which

<sup>86</sup> Already in 1987, in respect of GA resolutions, Sloan detected a “movement away from a concentration on the question of ‘binding force’ to examination of other legal effects” (Sloan, 1987, p. 45).

<sup>87</sup> Abi-Saab, p. 40.

<sup>88</sup> Jacque, p. 188, 193. See also d’Aspremont.

considers that “intent” (*volonte*) divides what is law from non-law. It also implies that capacity to make law or being a subject of international law is a formal *sine qua non* for something to be law (see Section III).

A « legal fact » (*fait juridique*), in contrast, can emanate from anyone and anywhere. Unlike a legal act, a legal fact must not come from a subject or subjects of international law (it could come from nature, human behavior etc.).<sup>89</sup> Both legal acts and legal facts have, however, *legal effects*. Yet, the difference is that with a legal act these effects stem directly and independently from the legal act.<sup>90</sup> In contrast, the legal effects of a legal fact stem not from the fact as such but from the application of a separate legal act whose application is triggered by this fact. Put differently, a legal act is an expression of intent that in itself changes legal relations (think of an act of Parliament, treaty or contract; *Abi-Saab* refers to “un procede auto-normateur”), whereas a legal fact changes legal relations not by itself but by triggering an external legal act (think of non-payment of a debt or murder which activates certain contractual or criminal provisions; *Abi-Saab* refers to “un procede heteronome”). Whereas the effects of a legal act are fully controlled by the makers of the act; the effects of a legal fact are out of their control and determined mechanically by another legal act.<sup>91</sup> A statute (*legal act*) can, for example, criminalize murder and impose a life sentence for murderers. Murder itself (*legal fact*), in contrast, triggers the application of this statute but cannot, obviously decriminalize it or reduce the sentence for it (murder, as a legal fact, does not control its legal effects).

In this framework, legal facts do not become law (or legal acts) simply because they have legal effects.<sup>92</sup> Law is kept separated from non-law but non-law (legal facts)

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<sup>89</sup> For *Abi-Saab* a *fait juridique* is: « un etat ou une occurrence naturelle ou sociale ou un comportement auquel le droit attribue un effet juridique, en dehors de toute intention du sujet a cet egard » and « recoit de l’exterieur les lois qui le gouvernement ».

<sup>90</sup> D’Aspremont : « to qualify as a legal act, the legal effect of the act in question must *directly* originate in the will of the legal subject to whom the behaviour is attributed and not to any pre-existing rule in the system”. (p. 1078)

<sup>91</sup> *Jacque*, p. 193: “Dans l’acte c’est la volonte qui determine la portee de la norme creee tandis que le fait juridique entraine l’application mecanique d’une norme”.

<sup>92</sup> Or as D’Aspremont puts it, at 1088 : « qualifying acts with a soft instrument as soft law amounts to conflating *legal facts* and *legal acts*” (underlining added) and “[t]here is no such thing as a *soft international legal fact* ... only legal acts can prove soft”.



can still have legal effects. In the present context, IIPPM output can then be a legal act (to the extent it is law or an act intended to create legally binding norms) or a legal fact with or without legal consequences. Under this approach, merely having legal effects does not transform IIPPM output into law.

3. *Possible legal effects of IIPPM output*

Legal effects attributed to IIPPM output could include the following:

- (1) Explicit incorporation: a formal treaty may refer to standards or IIPPM output as the WTO does in respect of Codex or TBT standards and give it legal status (as an obligation, a permission or safe haven); see also UNCLOS; Pulp Mills case (treaty explicitly refers to environmental guidelines); UN GA gets powers through Peace Treaty to decide on fate of Italian colonies (Sloan, p. 61).

Still, these explicit references would seem to be law which elevates standards and IIPPM output to the level of law, thereby giving it legally binding effect and bringing it into the field of law.

- (2) a domestic hard law may implement it as legally binding by reference;
- (3) Interpretation: it may be used to influence the interpretation of a formal treaty (see WTO Appellate Body reference in US – Shrimp to non-binding environmental declarations; in EC –Tariff Preferences, to multilateral conventions, arguably not binding on the parties, that could shed light on what are “trade, financial and development needs”; in US – Gambling, reference to non-binding Secretariat paper to influence US schedule, albeit under VCLT Art. 32).

Here no explicit incorporation took place. This legal effect is arguably most debatable. It is an example where non-law influences legal meaning of law.

- (4) as evidence of custom;
- (5) as fact: it may be a fact relied on by another party and form the basis of an estoppel or good faith claim;
- (6) permissive effect: where a guideline or recommendation “permits” something without being legally binding, several authors have argued that where a state does what is thus “permitted” it cannot breach the law; such permission may even prevail over a hard law “prohibition” (as in an ILO recommendation to impose sanctions on Burma which arguably prevails

over a WTO prohibition on import bans). Jacque, p. 238; contra: Fitzmaurice, BYIL, 1958, p. 5.<sup>93</sup>

- (7) Even if a guideline is not legally binding, it may reflect the “agreement” of the parties on a particular issue, an agreement or vision of the world which may be referred to in the interpretation of a treaty which is legally binding<sup>94</sup> (see WTO Appellate Body reference to HS Treaty in EC – Chicken Cuts).

Yet, some authors would then call this “agreement” binding international law (what matters for them is the *negotium*, not the *instrumentum*). A lot of IIPPM output could, in this sense, meet Baxter’s definition:

“If some sort of written norm has been consented to by the States involved, the future course of discussion, negotiation, and even agreement will not be the same as they would have been in the absence of the norm ... the norm will establish new standards of relevance for the negotiations between the parties. Certain arguments will be ruled out”.<sup>95</sup>

- (8) IIPPM output may not be a formal source of law (*source formelle*); it could be a material source of law (*source materielle*), that is, a non-legal norm which inspires the creation of another legal norm of international or domestic law.<sup>96</sup>

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<sup>93</sup> See also ILI and Virally : l’acceptation d’un engagement politique = acte de renonciation = acte juridique : « en prenant un engagement politique determine, un Etat a, simultanement et du meme coup, renonce a invoquer certains droits » (p. 348) (e.g. if political agreement on something ; then renounce to invoke right to claim this is “domaine reserve”).

<sup>94</sup> Abi-Saab, p. 37: “la valeur et les effets juridiques d’une resolution ne sont pas seulement ceux qui se rattachent formellement a cet instrument en tant que tel, mais doivent etre recherches egalement dans ceux de son contenu, c’est-a-dire de l’operation juridique que comporte cet instrument. C’est la distinction du droit romain entre l’*instrumentum* et le *negotium*. De telles resolutions peuvent effectivement faire fonction de **constatation**, temoigner d’un **accord** (en revelant un reel « consentement a etre lie »), ou porter une **interpretation** du traite constitutif ... ». See also, Namibia, ICJ Rec. 1971, p. 50, on GA resolutions «it would not be correct to assume that, because the GA is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within the framework of its competence, resolutions which make determinations or have operative design ».

<sup>95</sup> Baxter, p. 565. Also referring (at p. 566) to « the infinite variety of ways in which legal norms may reflect different intensities of agreement”.

<sup>96</sup> See George Abi-Saab, Les Sources du Droit International: Essai de Deconstruction, in Le Droit International Dans Un Monde en Mutation, Liber Amicorum, E. Jimenez de Arechaga (1994), 29 at 31, defining “source materielle” as “l’origine du contenu de la règle, c’est-à-dire de la proposition normative. Elle peut être d’inspiration religieuse ou philosophique ; ... une idée ou une valeur social nouvelle ou un besoin social reconnu ; ou, à la limite, la volonté d’un dictateur ». A « source formelle », in contrast is : « le procédé technique de formalisation ou de consécration de la règle ; la voie ou la manifestation par laquelle elle fait son entrée dans l’univers juridique et qui marque son rattachement a un système juridique donne ».

## VI. What Is Law *versus* What Ought To Be Regulated By Law

A sixth and final question is this: Irrespective of whether something *is* law, when must an instrument or conduct be regulated or controlled *by* law? IIPPM output could, in this light, be non-law but still, as an exercise of public authority, be regulated and controlled by law in the sense that it must comply with certain procedural and/or substantive criteria. In other words, to the extent IIPPM is activity by public authorities which changes behavior, must it not be made subject to the legitimizing force of law? If not, do we risk moving away from the rule of law? This would not mean that IIPPM must be transformed into treaties; only that it must respect certain basic principles of legality, due process, publication etc.

Such legal control could then come from several legal systems: international law, global administrative law, the rules imposed within the IIPPM itself or the domestic legal system of the public authorities active in the IIPPM.

In this respect, it is hard to disagree with von Bogdandy and others that any exercise of public authority -- which they define as “any kind of governance activity ... [which] *determines* individuals, private associations, enterprises, states, or other public institutions”<sup>97</sup> -- must meet basic requirements of public law. Similarly, Pauwelyn and Pavlakos, referring to “the normative conception of coercion”, have argued that “coercion whether it emanates from governments or international institutions, is coercion nonetheless and all forms of coercion ought to be subject to the same requirement of legal justification”.<sup>98</sup>

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<sup>97</sup> von Bogdandy, Dann and Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 German Law Journal 1375, at 1376, italics added. “Determines” is further clarified as “reduce their freedom” or “unilaterally shape their legal or factual situation”, adding that “determination may or may not be legally binding” (at p. 1381-2). See also Klabbers, *Reflections*, p. 5: “despite being soft, soft law nonetheless still has to do with the exercise of public power by public authorities”.

<sup>98</sup> Joost Pauwelyn & George Pavlakos *Principled Monism and The Normative Conception of Coercion [NCC] under International Law*, in *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World* (eds. Malcolm Evans & Panos Koutrakos), forthcoming 2010. In their view, “the absence of a world government or other form of Leviathan at the global level does not stop international law from being a genuine instance of action-direction in need of justification in the light of the

We saw earlier, however, that international law imposes little in terms of substantive validity requirements (see Section II.4 above). Another approach may be to argue that international law or, for that matter, global administrative law, imposes substantive standards such as transparency, proportionality etc. when it comes to certain IIPPM activity (even if this activity is not law as such). Most likely, however, one will need to revert to domestic law and, for example, impose Dutch rules and principles which limit the power and control of Dutch agencies or regulators active on the international scene to instill public law requirements into IIPPM. A related question is whether any transnational rules (“transnational constitutionality”) exist or could be imposed, rules which could then be enacted either internationally or by domestic courts.

## Conclusion

What does this admittedly conceptual paper tell us about the legal nature and effects of the documents, guidelines and standards routinely adopted in the context of “informal international public policy making” (IIPPM)?

The question of whether IIPPM output is part of international law is far more complex than it may appear at first sight. While most IIPPM output undoubtedly steers behavior and can therefore be classified as *normative*, the question remains whether these norms are *legal* norms or *law*. The fact that they are not imperative, but rather guidelines, standards or hortatory, does not preclude that they can still be legal norms or legally binding.

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morality of coercion. Similarly, it matters little whether coercion is exercised through hard law (eg UN Security Council resolutions) or soft law (eg non-binding OECD codes of good practice), or a highly institutionalized international agreement (such as the WTO) or very informal transnational networks (such as the Internet Governance Forum or International Organization of Securities Commissions). What matters, and triggers the need for justification, under NCC is the consequential limit on autonomy”. See also Lea Brilmayer’s so-called ‘vertical approach’ to international law (Lea Brilmayer, *Justifying International Acts* (Cornell University Press 1989) 2 and 11:

whenever a state exercises coercive power, in either the domestic or international arena, the issue of political legitimacy arises ... governmental coercion that extends across international borders is governmental coercion nonetheless. As such, it is subject to the same requirement of political justification as the state’s coercion of its own citizens.

For some, IIPPM output is either law or it is not (*the bright line school*). For others, there is a rather large grey zone between law and non-law and a lot of IIPPM output could fall within that grey zone (*the grey zone school*).

More problematically, whereas the rules of recognition in most domestic legal systems are rather clear (and focused on *formal* requirements), the rules of recognition of international law are fussy. Formalities (other than legal capacity) generally do *not* matter. As a result, the “informal” nature of IIPPM output should not automatically disqualify it as international law. Instead, the conventional view is that an instrument becomes international law when the parties to it *want it to be* international law. This intent-based criterion to distinguish law from non-law is, however, not without problems. In many cases, the intent of the makers of IIPPM output may be unclear. In addition, others have pointed out that being international law should not be a matter of mere intent but checked under more objective formal and/or substantive criteria (such as legitimacy or “publicness”). Yet others would argue that IIPPM output becomes law based on the effect or “normative ripples” that it actually exercises.

In sum, depending on how one distinguishes between law and non-law -- with reference to formalities, intentions of the parties, effect on behavior or substantive criteria -- IIPPM output may or may not be part of international law. If formalities or intent matter, a lot of IIPPM output would *not* be law. If, in contrast, effect or substantive factors decide, a lot of IIPPM *would* be law. Put differently, depending on which criterion is used, the field of international law could be huge and include a lot of IIPPM output (Klabbers, Reisman, Alvarez) or, in contrast, be very small and exclude IIPPM altogether (Weil, d’Aspremont). Conversely, depending on one’s criterion, the parallel world of non-international law, including certain definitions of soft law and political or moral commitments, could then be vast (and include alternative legal regimes such as global administrative law or commitments between agencies or regulators) (Virally, Kingsbury), or close to non-existing (Klabbers).

This indeterminacy may lead some to conclude that international law is not law in the first place (its rules of recognition are not clear enough). Others might derive from it that, in the end of the day, what is or becomes law is influenced not only by what parties *want* to be law but also by what the broader universe of relevant actors and commentators *say* or *believe* is law (law as belief).

If IIPPM output becomes international law based on what people want or believe, it is worth examining what the possible consequences are of calling an instrument “international law”. Several elements indicate that, unless a court is set up to enforce the instrument, little may be gained by calling it “legally binding under international law”. This could either lead to a further move away from formal treaties (if little stands to be gained, why conclude them?) or a move back to formal treaties (if it makes little difference after all, why be afraid of concluding legally binding documents?). First, soft law seems to have equal and sometimes higher compliance rates than hard law and where there are courts in other fields they tend to refer to non-binding instruments anyhow. Second, the toolbox or secondary rules of international law to regulate the life-cycle of a non-law instrument may not technically apply to non-law but they could be applied by analogy. Third, given its neutrality and value-free architecture, international law does not add substantive legitimacy over and above what non-binding instruments can offer. Fourth, unlike traditional international law, instruments outside international law make no problem with involving new actors (be it agencies, the private sector or NGOs).

This raises an interesting puzzle for the discipline of international law: Should international law give up the little formalism it has (e.g. when it comes to the legal capacity of new actors) and embrace IIPPM output so as to stay sociologically relevant and put international law “back on the map”? Or should it, instead, insist on formalism and exclude IIPPM output to maintain international law’s independence and stress the point that IIPPM may be inappropriate as a power instrument of the strong? Both approaches may hope for a return to international law: the first, progressive approach, by wholesale annexing IIPPM to international law; the second, conservative approach, by

excluding IIPPM and denying it legitimacy in the hope that actors (in particular weak players) realize the value-added of international law and return to it.

Finally, even where IIPPM output is not as such international law, it could still (i) have legal effects, and/or (ii) be subject to legal constraints (or be *regulated by law*), be it under international law, domestic law or the rules internal to the IIPPM. When it comes to *legal effects*, it may then be difficult to clearly distinguish between what is law and what merely has legal effects. The distinction between *actes juridiques* (legal act) and *faits juridiques* (legal fact) may be helpful in this context. IIPPM output can then be a legal act (to the extent it is law or an act intended to create legally binding norms) or a legal fact with or without legal consequences. Under this approach, merely having legal effects does not transform IIPPM output into law (or a legal act).

More importantly, when an instrument does not meet the threshold of law, serious thought must be given to what legal effects it may still have and how to control these effects. This brings us back full circle to how one thinks law should be separated from non-law, be it with a bright line (if something is not law its legal effects must be limited) or a grey zone (the legal effects of non-law can be wide and diverse).