"What the Secretariat Makes It": United Nations Civil Servants between Administrative Function and Contemporary International Lawmaking

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Abstract:

As the only international organization that aspires to be universal both in terms of its membership as well as in terms of the policy fields in which it intervenes, the UN occupies a unique position in international lawmaking. However, focusing on the UN's political and judicial or quasi-judicial organs does not fully capture the organization's lawmaking activities: much of the UN's import on international law today stems from its bureaucrats, its civil service. In this paper, I argue that international lawmaking today is best understood as processual and fluid, and that in contemporary lawmaking thus understood, the UN Secretariat plays an important role. I then propose two ways in which international civil servants add to international lawmaking: they engage in executive interpretation of broad and elusive norms, and they act as an interface between various actors on different governance levels.

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> *"It has rightly been said that the United Nations is what Member nations make it. But it may likewise be said that, within the limits set by government action and government cooperation, much depends on what the Secretariat makes it. That is our pride in the Secretariat and that is the challenge we have to face."*
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> - Dag Hammarskjöld, 1955

1 Introduction

Over the past almost 80 years of its existence, the United Nations (UN) has evolved from a primarily state-driven inter-governmental forum to an increasingly bureaucracy-driven international organization. This has led to a fundamental if incremental shift in the role that international bureaucrats, or civil servants as they are called in UN jargon, play within the organization and beyond: international civil servants are today crucial actors in contemporary lawmaking. In this paper, I pursue two aims. The first aim is to focus international lawyers'

attention on the crucial role played by international organizations in general and the United Nations in particular in international lawmaking processes. Secondly, building on existing literature that highlights the import of international bureaucrats on international organizations' work,[1] I propose a conceptualization of two ways in which international civil servants contribute to international lawmaking[2]: they engage in executive interpretation of broad and elusive norms, and they act as an interface between various actors on different governance levels.

I proceed as follows: In a first step, I clarify my understanding of international lawmaking today and suggest that contemporary international law is best characterized as processual and fluid, cutting vertically across global, regional, domestic, and local levels. I then provide a brief overview of existing literature that addresses international organizations' contribution to international lawmaking and the shortcomings of functionalism as an explanation for international organizations' activities. The third section dives into lawmaking in and through the United Nations and shows that the UN has evolved into a complex web of quasi-independent entities, rather than a neatly organized state-driven forum. In a last step, I propose two ways in which the UN Secretariat typically contributes to lawmaking today: through executive interpretation, and through acting as an interface.

[1] See from the extensive literature only Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004); Tana Johnson, *Organizational Progeny: Why Governments Are Losing Control over the Proliferating Structures of Global Governance* (Oxford University Press, 2014); specifically on the United Nations Simon Chesterman (ed.), *Secretary or General* (Cambridge University Press, 2007), John Mathiason, *Invisible Governance: International Secretariats in Global Politics* (Kumarian Press, 2007).

[2] I understand international lawmaking not as a set of static rules, but rather as a dynamic process of transnational legal ordering, cf. Gregory Shaffer, 'Theorizing Transnational Legal Ordering', (2016) 12 *Annual Review of Law and Social Science*, pp. 231-253 and *infra* Section 2.

2 International lawmaking today

International lawmaking is traditionally understood as the process through which norms are adopted that are directly binding upon states.[3] International treaties have long been considered the hallmark of international legislation, and the power to conclude such treaties is considered a corollary of international legal personality.[4] States as "original", "full" or "objective" international legal subjects are then at the core of international lawmaking.[5] This view of international lawmaking has been subject to various challenges that are all related to the changing nature of international law. International law was long considered as a static set of rules that are negotiated by and apply to states. Today, however, this has given way to the image of international law as a decentralized multipolar order (or orders). Consequently, challenges to the traditional understanding of international lawmaking concern both the actors that are bound by (and therefore should participate in the creation of) international law, as well as the nature of the international legal order and international norms. Here, I briefly sketch out three of the most common challenges to the static, positivist vision of international law.

First, international lawmaking is no longer confined to the process of generating norms that are binding upon states only. Instead, international criminal law for example is comprised of norms of a genuinely international character that are binding upon individuals. International human rights law is perhaps the most prominent field of international law today that confers rights upon

[3] Jutta Brunnée and Christopher Campbell-Duruflé, "International Legislation", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law (Oxford University Press 2008–)* <*www.mpepil.com*>, last updated August 2022), para. 1.

[4] Anne Peters, "Treaty-Making Power", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law (Oxford University Press 2008–)* <*www.mpepil.com*>, last updated March 2009), para. 2.

[5] For explanations of "original", "full" and "objective" legal personality see Christian Walter, "Subjects of International Law", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law (Oxford University Press 2008–)* <*www.mpepil.com*>, last updated May 2007). Walter acknowledges that this view is actor-centered and has been challenged by process-oriented approaches, citing notably to Rosalyn Higgins, cf. *infra* Section 2.

individuals, but international law knows other subjective rights bestowed on the individual as well.[6] Transnational companies and armed groups are but two non-state actors that have come into focus of international law over the past two decades; the Security Council regularly issues resolutions, including binding resolutions under Chapter VII, that are addressed at armed groups.[7] Norms of contemporary international law are then considered not only to be binding upon states but also upon other subjects of international law. The pool of actors has significantly widened, both in terms of rights-holders and duty-bearers of norms of international law.

A second challenge is leveled at understanding international law exclusively as a collection of rules. The international legal process school, inspired by Yale scholars Myres McDougal and Michael W. Reisman, has long advocated viewing international law as a *process of legal decision-making* by competent authorities rather than a collection of rules that are static and simply need to be found and applied by international legal scholars. Rosalyn Higgins, an alumna of and explicitly relying on the New Haven legal process school, has argued that international legal scholarship should look at international law as the whole process of authoritative decision-making, taking into account developments *de lege ferenda* as well as *lex lata*, which ultimately implies that the distinction of *lex lata* and *de lege ferenda* is less significant than more positivist stances would allow.[8] This last assertion has made the legal process school vulnerable to the criticism of political motivation: if the distinction between *lex lata* and *de lege ferenda* is no longer tenable, then this opens a door to inserting political preferences and claim them to constitute law, be it *de lata* or *de ferenda*, and this might make it easier to argue for politically motivated views. But it has perhaps always been a false

[6] Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press, 2016).
[7] Markus Wagner, "Non-State Actors", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law (Oxford University Press 2008–) <www.mpepil.com>*, last updated July 2013).
[8] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), p. 10. See on the international legal process school as it developed not only in New Haven, but also at Harvard Law School Mary Ellen O'Connell, 'New International Legal Process', (1999) 93 *American Journal of International Law* pp. 334-351.

belief that international law could be insulated from politics to begin with.[9] If this is correct, then it is precisely the task of legal *scholarship* (as opposed to legal practice) to look at both *lex lata* and *de lege ferenda* and to critically examine the processes that lead to both, including extra-legal factors such as political motives, ideologies, and path-dependencies, to name but a few.

A third challenge concerns the kinds, or types, of norms that are part of the international legal system. Article 38 ICJ Statute is a paradigmatic codification of the traditional canon of sources of international law, but it has long been clear that there is a wealth of international norms that are generated through international legal processes and that are not easily subsumed under the sources of Article 38 ICJ Statute. An early example is Mohamed Bedjaoui's forceful argument against customary international law as insufficient to respond to a world with newly independent states that never consented to many of the norms that constitute customary international law. Instead, Bedjaoui advocated UN General Assembly resolutions as a flexible tool of international law that should play a greater role.[10] Resolutions, but also other forms of informal international law, such as guidelines, standards, or simple policy coordination, have since become prevalent,[11] even if the success that Bedjaoui had hoped for in using resolutions as a tool to advance newly independent states' interests did not materialize.[12]

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[9] Martti Koskenniemi, 'The Politics of International Law', (1990) 1 *European Journal of International Law* pp. 4-32.

[10] Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes&Meier, 1979), at pp. 134-144. The plea to include resolutions in the canon of formal sources of international law has been repeatedly voiced, a recent example is Nigel D White, "Lawmaking", in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, 2017), pp. 559-580.

[11] Joost Pauwelyn, Ramses Wessel, and Jan Wouters, *Informal International Lawmaking* (Oxford University Press, 2012), for these examples see at p. 15. Informality can be observed in terms of output (i.e. the outcome document is not within the traditional source canon of international law), process (i.e. the way in which a document is negotiated is informal), and actors (i.e. the negotiating parties are not the foreign executives of states), cf id.

[12] See for a reconstruction of the history of international economic law and the failure to put into place a New International Economic Order Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), Chapter 4, using the example of the doctrine of permanent sovereignty over natural resources and the New International Economic Order, pitted against the evolution of transnational law and in particular international investment law, shows how difficult and ultimately unsuccessful this quest was. According to Anghie, beyond international economic law, "the law relating to self-determination, human rights, state responsibility, state succession, acquired rights, sources doctrine and the international law of development, may all be seen as involved, in one way or another, in this contest", at p. 198 and "it was through the use of international law

In characterizing the current international legal order, transnational legal ordering is one attempt at trying to integrate the insight that international law is no longer confined to states as the main drivers behind and benefactors of international law and that international law is of a processual nature and increasingly intersecting with regional and domestic legal orders.[13] Halliday and Shaffer view transnational legal orders as an analytical tool that allows them to capture the way in which international, regional, and domestic law intersect today. They define transnational legal orders as norms that are produced by or in conjunction with a legal organization or network transcending the nation-state, that engage legal institutions within more than one nation-state, and that are produced in a recognizable legal form (i.e. that are written).[14] The norms thus produced, importantly, are not static but are constantly re-negotiated by a number of different actors situated at different governance levels, ranging from the global to the local and back. Halliday and Shaffer thus advocate a processual concept of legal order that is marked by recursive relationships.[15]

If we build on such processual theories of international law, questions of who engages in such transnational legal ordering and how these actors are constrained by secondary rules gain center stage.[16] In this context, international organizations play a crucial role. In the following section, I

itself that the new states sought to further their own interests and to redeem the discipline from its colonial past", p. 202.

[13] Terence C Halliday and Gregory Shaffer (eds.), *Transnational Legal Orders*, (Cambridge University Press, 2015); Shaffer, *supra* note 2, for an overview of different takes on transnational legal ordering.

[14] Halliday & Shaffer, *supra* note 13. Halliday and Shaffer's definition is very broad: their criterion that norms need to be produced by or in conjunction with a legal organization includes not only formal international organizations, but also loose networks of actors.

[15] They are not the only ones to describe contemporary international law as processual in nature and as marked by recursivity, i.e. by interaction of actors at different governance levels with regard to the interpretation and understanding of transnational norms. For a similar approach at the descriptive level, but with a normative spin, arguing that recursive relationships between the global and local governance levels and thus the inclusion of local actors in norm-setting processes lead to a normatively desirable form of deliberative global governance, called "global experimentalist governance", see Gráinne De Búrca, Robert O Keohane, and Charles Sabel, 'Global Experimentalist Governance', (2014) *British Journal of Political Science* pp. 477-486.

[16] See in a similar fashion José E. Alvarez, *The Impact of International Organizations on International Law* (Brill/Nijhoff, 2017): "[There is] the reality of institutionalization that has occurred over the course of the past one hundred years, while the myopic gaze of many international lawyers remains fixed on rules rather than on the dramatic changes in how those rules (and other norms) are being fashioned, interpreted, and applied - and by whom", at p. 21.

recap some of the ways in which international organizations are traditionally thought to contribute to international lawmaking.

One last clarificatory remark is in order at this point. In this paper, I do not address the question of whether lawmaking by international organizations, and specifically by international civil servants, is normatively desirable and/or legitimate (although I briefly raise this question in the conclusion). My primary interest is to explore how to best characterize international lawmaking, and the increasing role international civil servants play in this regard, as a matter of fact.[17] I am aware that by labeling the activities undertaken by international bureaucrats as "international lawmaking", there is a risk of legitimizing such activities because the label "lawmaking" carries an implicit legitimacy assumption. I do not share this view but start from the assumption that legitimacy is a category independent of legality.[18] It is an interesting and contested question which standards should guide the evaluation and development of international law, but this paper does not engage with this issue.[19] Rather, I submit that in order to make informed judgments on the legitimacy question, we first ought to understand what *is.* Responding to José Alvarez's contention that international lawyers have not studied their creations closely enough,[20] this paper is concerned with better description. On that basis, better prescription might then be developed in future projects.

[17] In this sense, I am engaging in a descriptive endeavor, trying to unveil dynamics that might remain foreclosed if we approach matters with too much of a normatively charged mindset. This approach owes much to Anne Orford, 'In Praise of Description', (2012) 25 *Leiden Journal of International Law* pp. 609-625.
[18] In fact, legitimacy is often used in juxtaposition to legality: Filipe dos Reis and Oliver Kessler, "Legitimacy", in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law* (Edward Elgar, 2019), pp. 650-661.
[19] For different approaches to legitimacy in international law see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law. An Interactional Account.* (Cambridge University Press, 2010); Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press Oxford, 1995); Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics & International Affairs* pp. 405-437.
[20] José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), p. 586.

3 International organizations in international law(-making)

The law of international organizations was long considered a subfield of general international law and referred mainly to international organizations' institutional law. This includes topics such as international organizations' legal personality and legal powers, privileges and immunities, their membership, their various administrative, political, and judicial organs, financing, and their dissolution. The question of international organizations' impact on substantive fields of international law was not at the center of international institutional law, even though it has been pointed out that a clear demarcation between international organizations' institutional law and their functional aspects as well as general international law is not easily made.[21]

How international organizations impact substantive international law has, however, moved more to the fore over the past two decades or so. There are very few (if any) transnational activities today that are not regulated by at least one international organization, and by most counts, international organizations today outnumber states.[22] In his seminal treatment on international organizations' impact on international lawmaking, José Alvarez distinguishes four main ways in which international organizations contribute to international lawmaking: they provide a forum for negotiating new international treaties; their "internal" rules, in particular international organizations' financing and budgeting powers, have external effects; their political organs take hortatory action, such as issuing soft-law declarations; and their adjudicatory and quasi-judicial bodies clarify and further develop rules of international law.[23] Alvarez has since expanded his work to include not only political and judicial organs as important actors in shaping international law,

[21] See e.g. Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2005), p. 15.
[22] Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press, 2015), p. 1.
[23] Alvarez, *supra* note 20, Alvarez, *supra* note 16.

but has more recently claimed that "the study of international legal process is today, therefore, also the study of bureaucratic paralysis and politics".[24]

Yet, when identifying the various ways in which international organizations contribute to international lawmaking, we often conceive of international organizations as one single entity, corresponding to its legal personality.[25] This is particularly visible in international treaty-making, perhaps the field in which international organizations' impact on substantive international law is most obvious:[26] here, international organizations either act as fora for the negotiation of such treaties by states, or they are parties to international treaties, in which case it is the organization as a whole that is bound. And where inquiry focuses on specific organs that serve as lawmaking fora, it is often the state-composed, political organs that are at the center of the inquiry.[27]

The focus on state action is a result of a deeply rooted state-centrism in international law that does not stop at international organizations. For a long time, international organizations were examined by international lawyers in terms of their function as creatures set up by member states, perhaps best exemplified by French international organizations' theorist Michel Virally: an international organization, he claimed, could only be examined through referring it to the state, and one had to keep in mind that any international organization was, in the first place, constituted by states.[28]

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[24] Even if his subsequent case studies remain primarily focused on the UN's political organs (General Assembly and Security Council) and their engagement with bureaucrats, rather than centering on bureaucrats, cf. Alvarez, *supra* note 16, Chapters II and III, as well as adjudication, Chapter V.

[25] It is the organization as a whole that is considered as a legal entity in international law Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity.* (Brill, 2019), § 1148, pp. 758-59; for the United Nations see Rosalyn Higgins et al., *Oppenheim's International Law: United Nations.* (Oxford University Press, 2017), Chapter 11.

[26] Klabbers, *supra* note 22, Chapter 12; Simon Chesterman, David M Malone, and Santiago Villalpando (eds.), *The Oxford Handbook of United Nations Treaties*, (Oxford University Press, 2019).

[27] Judicial organs are also often at the center of international law scholarship, perhaps because courts and court-like institutions are so unambiguously *legal* creatures by definition. While their role as lawmakers is important, their institutional set-up and their lawmaking function is quite different from what could be labeled "intentional" lawmaking that takes place in international organizations' policy organs. It is therefore not at the core of this paper.

[28] Michel Virally, 'Le Rôle Des Organisations Internationales Dans L'atténuation Et Le Règlement Des Crises Internationales', (1976) 41 *Politique étrangère* pp. 529-562, at p. 530.

Functionalism, however, has at least two shortcomings. First, its focus on the relationship between member states and the organization does not tell us much about how an organization operates internally, i.e., how its different organs relate to one another and interact. Second, functionalism stays silent on international organizations' interactions with third parties that are *not* (member) states.[29] A focus on international organizations' member-state composed organs falls short of capturing how new concepts are forged within international organizations, even if we expand our view to include non-traditional sources and informal instruments, including both secondary instruments issued by international organizations (resolutions, decisions, declarations etc.) as well as more informal processes. Recent studies of international organizations have taken up this challenge, providing a more fine-grained, historically informed analysis that provides us with a better understanding of how international organizations have expanded their mandates beyond what was initially envisioned by member states through the help of international bureaucrats and the role that international law, broadly understood, has played in these processes.[30] I add to these contributions by focusing on contemporary lawmaking at the United Nations, the only international organization that is universal both in its geographical reach as well as in its topical ambit, and conceptualizing two ways in which civil servants within the UN system act in international lawmaking processes today.

[29] In international law, Jan Klabbers has perhaps most forcefully formulated this critique of functionalism. See Jan Klabbers, "Contending Approaches to International Organizations: Between Functionalism and Constitutionalism", in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011), pp. 3-30 and Jan Klabbers, 'The Ejil Foreword: The Transformation of International Organizations Law', (2015) 26 *European Journal of International Law*, pp. 9-82.

[30] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017); Dimitri Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press, 2023).

4 International lawmaking and the United Nations

The general public often perceives the United Nations (UN) as constituting the paradigmatic international organization.[31] In reality, the UN is quite unique: it is the only international organization that aspires to be universal both in terms of its membership as well as in terms of the policy fields in which it intervenes.[32] While there are many other international organizations that are universal in terms of membership, they are restricted to one policy field, e.g. the World Health Organization or the International Labour Organization. International organizations that cover several policy fields are in turn regionally constrained, e.g. the European Union or the Organization of American States. Put in slightly different terminology, the UN is the only general-purpose organization that operates at the global level.[33] This makes it a particularly important site of international lawmaking.

This section shows in the first part that lawmaking in the UN is not confined to its role in treaty-making. Rather, treaties are but one substantive outcome of UN activities and are set in a context of policy processes that build on one another. These processes have led to important declarations and action plans, all of which shape contemporary global governance even if they cannot be subsumed under the traditional canon of international law sources. In the second part of this section, I argue that one crucial, but often overlooked impact of world conferences, declarations, and action plans has been their institutional consequences: all main global summits have ushered in institutional changes, leading to an ever-growing bureaucratic apparatus within the UN system. The UN Secretariat with its many entities and departments that often are accountable to more than

[31] In the following, the term "international organization" is understood as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality", cf. Art. 2 lit. (a), Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10, para. 87.
[32] Schermers and Blokker point out that the UN is the only truly universal organization in terms of vocation and that the term "universal organization" is typically used for organizations with universal membership, not universal mandate, cf. Schermers & Blokker, *supra* note 25, p. 56.
[33] Tobias Lenz et al., 'Patterns of International Organization: Task Specific Vs. General Purpose', (2014) *PVS-Sonderheft* pp. 131-156.

one policy organ can no longer be explained solely in terms of delegation and power conferral. Rather, many Secretariat entities no longer have unidirectional accountability relationships with UN member states.

4.1 The UN's universal mandate: from the Charter to treaties and declarations and global action plans

The UN's broad lawmaking activities can be traced back to the organization's broad mandate, which is rooted in the Charter itself. Its core at least can be explained in functional terms, even if that does not hold for all UN activities today. The UN's foundational ideal, first formulated in the 1941 Atlantic Charter and then codified in the Preamble and Articles 1 and 2 of the UN Charter, is the prevention of further world wars and the maintenance of international peace and security. One key norm in this regard is the prohibition of the threat or use of force, enshrined in Article 2 (4) UN Charter, which constituted a revolutionary shift from prior international law that had provided for a right to resort to armed violence, even if under increasingly restricted circumstances. But the Charter does not stop at the prohibition of the use of force. Its notion of peace is not confined to the absence of war ("negative peace") but rather embraces a positive notion of peace that embeds the absence of war in a context of developing friendly relations amongst nations and furthering human rights as well as addressing economic, social, cultural and humanitarian problems (Arts. 1 (2) and (3) UN Charter).

This positive notion of peace that is closely related to both human rights and development is the basis for the UN's wide-ranging activities and provides the argumentative root for its quasi-universal mandate. The UN has long classified its activities into "three pillars", namely international peace and security, human rights, and development, based on Kofi Annan's 2005

report "In Larger Freedom".[34] Today, the UN presents its work as covering five areas: maintain international peace and security, protect human rights, deliver humanitarian aid, support sustainable development and climate action, and uphold international law.[35] It would be impossible to provide a comprehensive overview even of the most important UN contributions to international law over the past eight decades.[36] Instead, this section puts a spotlight on the various ways in which the UN has contributed to international lawmaking, including the ways that were long neglected by international law scholarship.

In general international law, the International Law Commission has long been considered a crucial actor in lawmaking, due to its explicit mandate to contribute to the "progressive development of international law and its codification" (Art. 13 (1) (b) UN Charter). Some of its most important codification efforts resulted in multilateral conventions in the fields of treaty law, state succession, diplomatic and consular relations, jurisdictional immunities, and the law of the sea.[37] At the same time, its latest codification projects were not always transformed into treaties,[38] and where treaties were adopted, these have not always been ratified by the requisite number of states for them to enter into force.[39] Today then, the International Law Commission is perhaps best regarded as an interpreter of international law.[40]

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[34] Kofi Annan's 2005 report on the occasion of the 60th anniversary of the United Nations, "In Larger Freedom", is a key document in the context of the 2005 World Summit, which acknowledged, amongst others, the responsibility to protect (UN Doc. A/Res/60/1, paras 138, 139). See *infra* Section 5.2.

[35] United Nations, *Our Work*, <www.un.org/en/our-work>, last accessed 3 May 2023.

[36] See for an early account Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963); more recently Rosalyn Higgins, 'The United Nations at 70 Years: The Impact Upon International Law', (2016) 65 *International & Comparative Law Quarterly* 1-19.

[37] See the ILC's analytical guide at https://legal.un.org/ilc/texts/texts.shtml (last accessed 3 May 2023).

[38] The most prominent example are the Articles on the Responsibility of States for Internationally Wrongful Acts, where the idea of implementing them through a treaty project was abandoned due to fear that states would undo the decades-long work of the ILC, cf. Jan Klabbers, *International Law* (Cambridge University Press, 2020), p. 139.

[39] See e.g. the United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/Res/59/38, Annex. It has to date 23 state parties, with a requirement of thirty parties to enter into force.

[40] Danae Azaria, ''Codification by Interpretation': The International Law Commission as an Interpreter of International Law', (2020) 31 *European Journal of International Law* pp. 171-200.

The UN has traditionally been an important treaty-making forum in various substantive areas of international law. In international human rights law, nine core human rights treaties that were negotiated and adopted under UN auspices between 1965 and 2006 testify to the importance of the world organization in this field.[41] In international environmental law, the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol as well as the three Rio Conventions on Climate Change, Biodiversity, and Desertification are amongst the core conventions in this area.[42] Combatting organized crime beyond state borders is at the heart of the UN Convention against Transnational Organized Crime and its additional protocols.[43] In the field of disarmament, the Arms Trade Treaty and the Treaty on the Non-Proliferation of Nuclear Weapons are two recent examples of negotiation processes of multilateral treaty-making processes that were initiated by the UN General Assembly. While the UN has not been successful in placing itself as a central actor in some areas, such as e.g. international trade, it remains an important actor in many substantive fields of international law, as these examples illustrate.

It is important to emphasize that none of the aforementioned instruments came out of a vacuum. International treaties are typically preceded by decade-long action on each topic. The Convention on the Protection of the Ozone Layer and the Montreal Protocol followed the 1977 World Plan of Action on the Ozone Layer, which was adopted by the Governing Council of the UN Environmental Programme. Several core human rights treaties were preceded by declarations on the same topics, e.g. the Declaration on the Rights of Disabled Persons[44] or the Declaration on the

[41] Cf. Office of the High Commissioner for Human Rights, *The Core International Human Rights Instruments and their monitoring bodies*, available at https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies (last accessed 3 May 2023).
[42] United Nations Climate Change (UNFCCC), *The Rio Conventions*, available at https://unfccc.int/process-and-meetings/the-rio-conventions (last accessed 20 August 2023).
[43] United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, available at <www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (last accessed 20 August 2023).
[44] UN Doc. A/Res/3447 (XXX) of 9 December 1975. The Convention on the Rights of Persons with Disabilities was adopted over three decades after, on 13 December 2006.

Protection of all Persons from Enforced Disappearance,[45] both adopted by the General Assembly. The adoption of declarations or programmes of action is thus an important building block in the UN's lawmaking activities, even if we restrict those to treaty-making efforts.

Declarations are typically the result of world conferences or special sessions dedicated to the commemoration of anniversaries. Such conferences were held with increasing frequency throughout the 1960s and 1970s and often resulted in the creation of new programmes or centers at the United Nations, as the UN started to address newly emerging challenges and issues such as environmental protection, human settlement, or population growth.[46] Important conferences of these two decades include the 1968 International Conference on Human Rights (on the occasion of the 20th anniversary of the Universal Declaration of Human Rights), the 1972 First World Conference on the Environment, the 1974 World Food Conference, the 1975 First World Conference on Women, and the 1976 first UN Conference on Human Settlements. All of these conferences were regularly followed up with, both in the UN's main and subsidiary organs (in part created by these very conferences, or in their wake), as well as through regular follow-up conferences.

The practice of world conferences culminated in the 1990s, a decade in which global gatherings exceeded past events in all respects: size, length of the preparatory process, voluminous outcome documents, and types of actors involved in the negotiations, in particular NGOs.[47] Major world conferences of that decade included the 1990 World Summit for Children[48] and the 1990 World

[45] Un Doc. A/Res/47/133 of 18 December 1992. The International Convention for the Protection of All Persons from Enforced Disappearance was adopted on 20 December 2006.
[46] Thomas G. Weiss and Sam Daws, "The United Nations: Continuity and Change", in Thomas G. Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* (Oxford University Press, 2018), pp. 3-40, at p. 4.
[47] Arguably, the much broader civil society participation, especially compared with earlier World Conferences, was one of the main features of the 1990s' World Conferences, cf. United Nations Non-Governmental Liaison Service and Gretchen Sidhu, *Intergovernmental Negotiations and Decision Making at the United Nations: A Guide* (United Nations, 2007), at pp. 79-80
[48] World Declaration on the Survival, Protection and Development of Children and the Plan of Action for its implementation, https://www.unicef.org/wsc/.

Conference on Education for All,[49] the 1992 Conference on Environment and Development in Rio de Janeiro,[50] the 1994 International Conference on Population and Development,[51] the 1995 Fourth World Conference on Women in Beijing,[52] the World Summit for Social Development in Copenhagen in the same year,[53] the Second Conference on Human Settlements (Habitat II) in Istanbul[54] and the World Food Summit in Rome in 1996.[55] All of these conferences resulted in comprehensive outcome documents, typically consisting of a Political Declaration and a voluminous Programme of Action, such as Agenda 21 (Outcome of the Rio Summit), the Beijing Platform for Action (Outcome of the World Conference on Women), or the Habitat Agenda (Outcome of the Habitat II Conference). These programmes of action span hundreds of pages and contain several hundred recommendations for action.

However, as Annelise Riles has observed, while politically of huge importance and despite the fact that "the document [the outcome document of UN global conferences, HB] matters intensely to everyone involved", these gatherings have been treated (and continue to be treated) by international law scholars "with a fair amount of scepticism" due to their inherently political character and the fact that their outcome documents, formally speaking, are but mere recommendations.[56] The sheer volume of most of the outcome documents does not make them amenable to the kind of exegesis

[49] World Declaration on Education for All and Framework for Action to meet basic learning needs, http://www.unesco.org/education/pdf/JOMTIE_E.PDF.
[50] Rio Declaration on Environment and Development and Agenda 21, contained in UN Doc. A/CONF.151/26/Rev.1(Vol.I).
[51] Programme of Action of the International Conference on Population and Development, contained in UN Doc. A/CONF.171/13/Rev.1.
[52] Beijing Declaration and Platform for Action, contained in UN Doc. A/CONF.177/20.
[53] Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, contained in UN Doc. A/CONF.166/9.
[54] Istanbul Declaration on Human Settlements and the Habitat Agenda, contained in UN Doc. A/CONF.165/14.
[55] Rome Declaration on World Food Security and World Food Summit Plan of Action, contained in Food and Agriculture Organization (FAO) Document WFS 96/REP. For an overview and further information on major conferences and summits in the field of social development see http://www.un.org/en/development/desa/what-we-do/conferences.html.
[56] Annelise Riles, 'Models and Documents: Artefacts of International Legal Knowledge', (1999) 48 *International & Comparative Law Quarterly* pp. 805-825, quotes at pp. 815, 809.

that doctrinal international law scholarship has traditionally pursued. The many declarations and plans of action have had some effect at the domestic level (e.g. the 1992 Rio Declaration's Plan of Action, Agenda 21, has led to many local initiatives implementing ideals of sustainable development and environmental protection), but those effects were seldom of a clearly discernible legal nature, as would be the domestic implementation of an international treaty through legislation.

4.2 From a state-driven inter-governmental forum to a bureaucracy-driven international organization

Because world conference outcomes are considered "soft law", and as such outside of the remit of traditional international law, both their normative as well as institutional effects have long been neglected in legal scholarship. Beyond setting substantive, albeit "soft", standards, many of these "soft law" agendas have effected important organizational changes within the UN system. Today, the UN is no longer the primarily state-driven inter-governmental forum it may have been when it set out in 1946. Instead, it has evolved into a more and more bureaucracy-driven international organization that still serves as an important lawmaking forum, but is also, and crucially, concerned with delivering on past promises: with the implementation and monitoring of existing regimes through its manifold programmes, funds, and other entities.

Newly created entities have an impact on the further evolution of specific issue areas. I have mentioned the 1972 First World Conference on the Environment as one example of a series of world conferences that resulted in important declarations and action plans. This particular conference resulted, amongst others, in the creation of the UN Environmental Programme (UNEP) and thus laid one of the ground stones for the internationalization of environmental politics.[57] One of UNEP's first tasks was the supervision of the preparatory process for the 1976 UN Conference

[57] Maria Ivanova, *The Untold Story of the World's Leading Environmental Institution: UNEP at Fifty* (The MIT Press, 2021).

on Human Settlements, which resulted in the establishment of a United Nations Centre for Human Settlements (Habitat), transformed into a full UN programme, known today as UN-Habitat, in 2002.[58] The fact that UNEP was responsible for supervising Habitat's preparatory process has resulted in a close connection between environmental issues and questions of human settlement.

Other major conferences mentioned before have resulted in the creation of new entities. The 1974 World Food Conference established the World Food Council (disbanded in 1993, its tasks were fully absorbed by the Food and Agriculture Organization and the World Food Programme). The First World Conference on Women resulted in the creation of the UN Development Fund for Women (UNIFEM), which was one of three entities that were unified into the UN Entity for Gender Equality, UN Women, in 2011.[59] One of the main outcomes of the 1993 Vienna Conference on Human Rights was the establishment of the Office of the High Commissioner for Human Rights (OHCHR), a project that had been pursued for several decades.[60] These are again just a few examples related to the conferences mentioned in the previous section.

All of these entities that were created over several decades have employed staff to follow up on the implementation of promises made by states, and over time have built their own bureaucratic structures, developing separate lives under the same organizational umbrella. As a consequence, the UN has evolved into a complex web of organs, subsidiary organs, programmes, funds, Secretariat departments and entities, and joint bodies set up with Specialized and Related Agencies.[61] As one commentator points out, the way in which the UN system has grown "does not

[58] UN Doc. A/Res/56/206 (2002).
[59] UN Doc. A/RES/64/289, paras 49 et seq.
[60] Higgins et al., *supra* note 25, at pp. 791 et seq.
[61] Such joint bodies include, amongst others, UNAIDS (co-sponsored by 11 UN programmes, funds and Specialized Agencies, namely the World Health Organization, the International Labor Organization, UNESCO and the World Bank Group), or the International Trade Center (a joint agency by the World Trade Organization and the United Nations).

reveal a consistent pattern because it has grown organically".[62] This growth is visible in terms of member states, civil service, and organizational structure. The UN started its work in January 1946 in London, with 51 member states and a mere 300 staff that quickly expanded to around 3000 employees within six months.[63] Today, membership has almost quadrupled[64] and the number of employees has increased by more than ten times. As of 31 December 2020, the Secretariat counted 36,827 staff members in all categories, not counting personnel on temporary contracts.[65] A similar expansion can be observed in the structure of the organization. In 1946, the Secretariat comprised eight administrative units that reflected the idea that the Secretariat should primarily render administrative services to the UN's member-state-composed main organs.[66] Today, the Secretariat is organized into no less than 26 organizational units according to one way of classifying, each with its own bureaucratic structure, and not counting the Secretariats of Programmes and Funds.[67] Many Secretariat entities service more than one member-state-composed policy organ. The OHCHR, for example, services both the Human Rights Council and various human rights treaty bodies through a dedicated unit (the Human Rights Council and Treaty Mechanisms Division), whereas the Executive Office of the High Commissioner – a different entity within OHCHR – liaises with UN headquarters and the General Assembly.[68] The Executive Office of the Secretary-

[62] Beate Rudolf, "United Nations Committees and Subsidiary Bodies, System Of", in Anne Peters and Rüdiger Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law (Oxford University Press 2008–)* <*www.mpepil.com*>, last updated October 2006).
[63] https://careers.un.org/lbw/home.aspx?viewtype=VD&lang=en-US (last accessed 23 June 2021).
[64] This growth has not been even: having started out with 51 member states in 1945, that number had almost doubled by 1960. Until the end of the Cold War, another 60 states joined. Between 1990 and 1995, another 25 states joined as a consequence of the dissolution of the Soviet Union. Today, the UN has 193 member states, the latest member to join being South Sudan after declaring independence through a partially UN-supervised process in 2011.
[65] UN Doc. A/Res/76/570, p. 18. This number does not take into account most categories of consultants and local staff. According to the UN Careers website, staff stands at roughly 44,000 Secretariat employees, of which roughly 60% are working away from Headquarters: https://careers.un.org/lbw/home.aspx?viewtype=VD&lang=en-US (last accessed 3 May 2023). Headquarters of the United Nations are located in New York, Geneva, Vienna and Nairobi. Posts away from headquarters include regional offices, information centres, but also the various country offices and civilian personnel in peacekeeping missions.
[66] UN Doc. A/Res/13 (I), establishing eight units in the Secretariat.
[67] *United Nations Handbook 2022-23* (Ministry of Foreign Affairs and Trade/Manatū Aorere of New Zealand, 2022), pp. 208-212.
[68] Office of the High Commissioner for Human Rights, *UN Human Rights Report 2020*, pp. 449 et seq.

General maintains, amongst others, a rule of law unit that services the annual debate in the General Assembly's Sixth Committee on the Rule of Law at the National and International Levels, but also interacts with the Security Council as well as the Global Focal Point for the Rule of Law, which is in turn an inter-agency coordination mechanism.[69] The entity for gender equality, UN Women, has a multi-tiered governance structure, where normative guidance is provided by no less than three policy organs, namely the General Assembly, the Economic and Social Council (ECOSOC), and the Commission on the Status of Women (itself a subsidiary organ of ECOSOC), whereas operational oversight – i.e. oversight of activities carried out by UN Women – is provided by the General Assembly, the ECOSOC, and the Entity's Executive Board.[70]

These are but a few examples of the complex governance structures present within the UN system today, but they clearly show the limits of functional explanation that draws on a unidirectional model of power conferral from member states to a given entity.[71] Simply characterizing an entity like UN Women or the OHCHR as a "subsidiary body" or a "Secretariat department" with delegated authority is insufficient to fully capture the manifold activities that international civil servants in these entities carry out today. Lawmaking through and by the United Nations has considerably changed over the past decades. When Rosalyn Higgins as one of the first scholars to investigate how the work of different UN organs impacted international law, she could rightly focus on the General Assembly and the Security Council and how member states' positioning in these organs had impacted concepts such as statehood, domestic jurisdiction, recognition, the law of

[69] Co-chaired by the Department of Peace Operations (DPO) and United Nations Development Programme (UNDP), the Global Focal Point includes as partners UNODC, UNHCR, OHCHR, EOSG, and UN Women, cf. https://www.un.org/ruleoflaw/un-and-the-rule-of-law/ (last accessed 5 August 2021).

[70] UN Doc. A/Res/64/289, para. 57.

[71] There are few in-depth studies that investigate power conferrals to international organizations and their composite entities. The term "power conferral" is taken from Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, 2005), who distinguishes three types of conferral: agency relationships, delegation of power, and transfer of power.

treaties and the law of the use of force.[72] But today, the picture is not complete without the many civil servants that act at different governance levels and in different functions, and thus have a considerable impact on how international law is shaped today. We shall turn to this in the next, and last, section of this paper.

5 The UN Secretariat and international lawmaking

In 1996, political scientist Inis Claude suggested that in order to meaningfully analyze the UN's successes and failures, a distinction between a "First UN" and a "Second UN" was necessary. For Claude, the First UN was the UN of the Secretariat, and it was the Secretariat that "[m]ost discussions of the intentions, hopes, and plans of the UN refer[ed]" to. The Second UN, in turn, is the UN of the member states, and they "hold the power of life and death over the organization".[73] This picture has since been complemented by a "Third UN", the network of non-state actors – NGOs, academics, consultants, experts, and other groups of individuals that are characterized by their close engagement with, but independence from, the First and Second UN.[74]

Claude's distinction between the First and Second UN reflects the fact that international organizations consist of bureaucracies whose internal workings affect the way international organizations act, because these bureaucracies possess forms of authority, specifically moral and expert authority,[75] that is independent of member states. Yet, at the same time, international bureaucrats, or UN civil servants as they are commonly called within the organization,[76] do not act

[72] Higgins 1963, *supra* note 36.
[73] Inis L Claude Jr, 'Peace and Security: Prospective Roles for the Two United Nations', (1996) 2 *Global Governance* pp. 289-298, quotes at pp. 290-91.
[74] Thomas G Weiss, Tatiana Carayannis, and Richard Jolly, 'The Third United Nations', (2009) 15 *Global Governance*, p. 123.
[75] Barnett & Finnemore, *supra* note 1 and *infra* section 5.2.
[76] See for an early discussion of their status and use of this Hammarskjöld, D. (1961). The International Civil Servant in Law and Fact. Retrieved from https://www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf.

in unconstrained ways. Rather than acknowledging openly that they act as "norm entrepreneurs",[77] UN civil servants will insist that all they do is "discharging mandates" and contributing to the implementation of international norms and standards. However, these activities of discharging mandates, interpreting international norms and assisting in their domestic implementation are not mere "interpretation only" that can be neatly separated from lawmaking.[78] Rather, international civil servants are important actors in a norm's life cycle, especially at the stages of norm emergence (at the global level) and norm cascade (through their operational activities in the field).[79] In that sense, they are lawmakers in their own right.

At the same time, the constraints under which UN civil servants operate should merit as much attention as their spaces of autonomy, as they condition each other. One important constraint is the legal framework as set up by an organization's constitutive document. In the following, I briefly survey the Secretariat's and the Secretary-General's functions as they are treated in the UN Charter, before presenting two ways in which UN civil servants today contribute to international lawmaking: through "executive interpretation" and through acting as an interface between different actors at different governance levels.

5.1 The Secretariat as a main organ of the World Organization

The Secretariat is one of the UN's principal organs, alongside the General Assembly, the Security Council, the Economic and Social Council, the now inactive Trusteeship Council and the International Court of Justice.[80] It is the Secretariat as a whole that is regarded as the main organ,

[77] Ian Johnstone, "The Secretary-General as Norm Entrepreneur", in Simon Chesterman (ed.), *Secretary or General* (Cambridge University Press, 2007), pp. 123-138.
[78] It is an old point of legal theory that legal interpretation and lawmaking cannot be neatly separated. Raised perhaps most often with a view to the lawmaking function of international courts, this point can be traced back to Kelsen at least.
[79] This terminology is taken from Finnemore and Sikkink's famous "norm life cycle", which includes three stages: norm emergence, norm cascade, and norm internalization, with the last step not being actor-led. Cf. Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', (1998) 52 *International Organization* 887-917.
[80] Article 7 (1) UN Charter.

rather than the Secretary-General (Article 97 UN Charter). The Charter determines that the Secretary-General ought to act as the "chief administrative officer" of the organization as a whole; however, in practice, the Secretary-General is generally seen as the "voice of the Secretariat".[81] Designating the Secretary-General as chief administrative officer makes it a constitutional requirement that the Secretariat be headed by an international civil servant (not a member state representative), and, together with Article 100 UN Charter on the exclusively international character of UN civil servants, provides a sound basis for the Secretariat's full political independence.[82]

Articles 98 and 99 lay out the Secretary-General's functions. According to Article 98, the Secretary-General "shall perform such…functions as are entrusted to him" by the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council. Article 99 confers an explicit political power upon the Secretary-General, namely the discretionary capacity to bring to the Security Council any matter which, in the Secretary-General's opinion, may threaten the maintenance of international peace and security (Article 99 UN Charter). Chesterman accordingly distinguishes between administrative and political functions of the Secretary-General (and by extension, the Secretariat), acknowledging, however, that the lines between the administrative and the political are not easy to draw.[83] The line between political and administrative functions is blurred even more by the fact that Article 99 UN Charter is only rarely

[81] Simon Chesterman, "Article 97", in Bruno Simma, et al. (eds.), *The Charter of the United Nations. A Commentary.* (Oxford University Press, 2012), para. 5.

[82] https://www.un.org/depts/dhl/dag/docs/internationalcivilservant.pdf, at p. 334. Article 100 UN Charter enshrines the principle of independence: Secretariat staff are "international officials responsible only to the Organization" (lit. a), and the same litera contains a duty for member states to refrain from influence, Simon Chesterman, "Article 100", in Bruno Simma, et al. (eds.), *The Charter of the United Nations. A Commentary.* (Oxford University Press, 2012), para 3. Of course, this does not mean that international civil servants can entirely free themselves of their national backgrounds. This explains why member states view the employment of their own nationals as being within their national interest, cf. Chesterman para. 11.

[83] Simon Chesterman, "Article 98", in Bruno Simma, et al. (eds.), *The Charter of the United Nations. A Commentary.* (Oxford University Press, 2012), para 1.

invoked explicitly. According to Simon Chesterman, there have only been two times where a Secretary-General explicitly invoked Article 99: Hammarskjöld's response in 1960 to the Congo crisis, which resulted in one of the worst constitutional crises in the history of the UN, and in 1979, when Kurt Waldheim informed the Security Council of the Tehran hostage crisis.[84]

The Charter provisions are important insofar as they determine in broad strokes the legal powers accorded to the UN Secretariat. Mandate matters: it is one crucial factor in determining the influence of secretariats of international organizations.[85] In addition, the Charter also provides the basis for the Secretariat's self-image as a professional civil service that acts independently from member states. Dag Hammarskjöld laid the foundations for a UN civil service that understands itself as being bound first and foremost by the values of the UN Charter and an "international responsibility", that is to say some form of international common good.[86] So mandate matters, but it is not the only thing that matters. What also matters, to use Hammarskjöld's words, is "what the Secretariat makes it".[87]

5.2 Two ways of bureaucratic lawmaking

At the outset of this article, I presented transnational legal ordering as a way of theorizing the current international legal order. This approach emphasizes the processual and recursive nature of contemporary international law. International law today is marked by an increasing amount of norms that leave much leeway for interpretation: legal norms are developed through interpretation

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[84] Simon Chesterman, "Article 99", in Bruno Simma, et al. (eds.), *The Charter of the United Nations. A Commentary*. (Oxford University Press, 2012), paras 20-25.

[85] Schermers and Blokker identify the following factors that determine the influence of secretariats of international organizations: the powers accorded to Secretariats in the constitutive documents; the financial means that are at a Secretariat's disposal; the degree of cultural homogeneity and common interest within an organization; and the quality of the personnel employed by the organization, Schermers & Blokker, *supra* note 25, § 439, p. 332. Barnett and Finnemore also identify delegated, or legal, authority as an important source of explaining IO behavior: Barnett & Finnemore, *supra* note 1.

[86] Hammarskjöld, *supra* note 76.

[87] Hammarskjöld, D. *Address by the Secretary-General Dag Hammarskjöld at University of California United Nations Convocation, Berkeley, Saturday, 25 June 1955*. Press Release SG/428, available at: https://digitallibrary.un.org/record/3946784?ln=en.

and practice[88] by a number of different actors situated at all governance levels – the global, regional, national and local levels, and back – and this is in no small part due to the fact that globally agreed goals often take the form of broad goals whose implementation is subject to considerable discretion.[89]

In this context, UN Secretariat members play a significant role in lawmaking at the UN. Secretariat staff is no longer confined to the global level alone. Their primary role might not be the actual goal formulation, which is traditionally the exclusive domain of states, even though other actors, especially non-governmental organizations and experts, play an increasingly important role here, too.[90] But the Secretariat is crucial in both interpreting norms and acting as an intermediary between the Second and Third UN – between member states and the wide web of non-governmental organizations, academic experts, think tanks and other non-state actors that are crucial for the UN's knowledge ecology.[91] These activities are not confined to headquarters alone. Of the Secretariat staff, around 43 per cent work away from headquarters, be it in peacekeeping operations, special political missions, or country offices.[92] This means that almost half of the UN's internationally appointed staff today work "in the field", i.e. in UN presences *within* member states. This was institutionally reflected in the establishment of a Secretariat Department of Field Support under Ban Ki-moon in 2007, which, according to a long-serving member of the International Civil Service Commission, reflected the development of the UN Secretariat from a mainly headquarter-driven organization into a network of field offices with delegated authority for the management of

[88] Halliday & Shaffer, *supra* note 13, p. 38.
[89] De Búrca et al., *supra* note 15, at p. 478.
[90] On the importance of transnational civil society see Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders* (Cornell University Press, 2014).
[91] This term is used by Nanette Svenson, *The United Nations as a Knowledge System* (Routledge, 2016).
[92] UN Doc. A/75/591, para. 5. Prior to 2019, the distinction was between "field operations" and "non-field operations". The 2020 report (covering 2019) changed terminology to "departments/offices, regional commissions and tribunals" and "peacekeeping operations and special political missions and other political presences", respectively.

their financial and human resources.[93] The Department of Field Support was replaced by the Department of Operational Support by António Guterres' 2018 administrative reform.[94]

Scholars, especially those who identify with the discipline of international relations, have for some time grappled with the question of why international organizations and their Secretariats wield powers and act in ways that are at times contrary to their members' interests and can even be described as pathological.[95] Barnett and Finnemore have famously argued that in addition to delegated authority, international bureaucrats wield moral authority, due to the presumption that international secretariats do not represent particular member state interests, but rather the interests of the international community as a whole, as well as expert authority, i.e. technical knowledge that international bureaucrats have developed over the years and that is deemed valuable by society at large.[96] In a similar vein, Klabbers has recently proposed to understand international organizations' activities not in terms of whether their outcomes are formally legally binding or not, but rather with regard to whether an organization wields what he labels "epistemic authority".[97] Expertise is used by many international civil servants as a means to legitimize their organizations' activities as "evidence-based" and "rational", and thus serving the common good.[98] Another explanatory approach is rooted in principal-agent theory and argues that international organizations' space of autonomy can be explained through the principal-agent problem, i.e. the fact that delegation of authority almost always leads to a conflict of interest between the principal and the

[93] Wolfgang Stöckl, "Article 101", in Bruno Simma, et al. (eds.), *The Charter of the United Nations. A Commentary*. (Oxford University Press, 2012), para 18.
[94] United Nations Department of Operational Support, <www.operationalsupport.un.org/en/background-0> (last accessed 10 August 2023).
[95] Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations', (1999) 53 *International Organization* 699-732.
[96] Barnett & Finnemore, *supra* note 1, Chapter 2, in particular pp. 23-27. See in a similar vein also Sinclair, *supra* note 30.
[97] Jan Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization', (2019) 16 *International Organizations Law Review* 272-298.
[98] Annabelle Littoz-Monnet, *The Politics of Expertise in International Organizations: How International Bureaucracies Produce and Mobilize Knowledge* (Taylor & Francis, 2017).

agent, who is supposed to act on behalf of the principal.[99] This is especially true when the content of the delegated authority is subject to a wide margin of interpretation. With regard to the UN Secretary-General, Simon Chesterman has pointed out that the manner in which the limited Charter responsibilities have been fulfilled have depended as much on politics as on the personality of each Secretary-General.[100]

The aforementioned literature engaging with the powers of international organizations' secretariats has largely sought to explain *why* the Secretariat, despite being dependent on member states, has gained such large measures of autonomy. In the following, I shift the focus on *how* secretariats do so. I suggest that there are two primary ways through which the UN Secretariat commonly uses its space of autonomy and contributes to international lawmaking. On the one hand, UN civil servants engage in executive interpretation through regular reporting to the main organs. Executive interpretation happens when the Secretariat imbues an elusive legal concept with concrete meaning. On the other hand, international civil servants act as important interfaces with several actors at different governance levels and thus act as conduits for the recursive processes of re-interpretation of norms that shape transnational legal ordering today. I address both ways in turn and illustrate them with recent examples of broad and elusive concepts in contemporary UN politics.

5.2.1 Executive interpretation

One important task of the UN Secretariat is the collection and dissemination of information. This includes the dissemination of information about the organization and its work to the outside world, but also the collection of information and relaying it to member states, civil society, and other

[99] Darren G. Hawkins et al., "Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory", in Darren G. Hawkins, et al. (eds.), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006).
[100] Simon Chesterman, "Introduction: Secretary or General? ", in Simon Chesterman (ed.), *Secretary or General* (Cambridge University Press, 2007).

actors that contribute to the functioning of the organization.[101] Articles 97 and 98 of the UN Charter on the administrative functions of the Secretary-General include a documentary function.[102] In addition to the overall report on the work of the organization, which is required by Article 98 UN Charter, this entails a vast amount of reporting by the Secretary-General to all of the organization's main and to some subsidiary organs. The Secretary-General typically reports to member state-composed organs on a regular (often annual) basis on each item that is on the agenda. These reports are in fact prepared by different Secretariat entities. To illustrate the amount, in the year 2022, the Secretary-General submitted almost 100 reports to the Security Council,[103] and over 600 reports to the General Assembly.[104] This routine annual reporting can be used to introduce important shifts and interpretations of elusive concepts. One early (and perhaps one of the most consequential) such endeavor is Dag Hammarskjöld's role in shaping the concept of armed peacekeeping as early as 1956.[105]

Another example of executive interpretation through reporting is the elusive notion of the rule of law. The rule of law was first introduced as an agenda item of a main UN organ in late 1993, as one of several follow-up resolutions to the 1993 World Conference on Human Rights.[106] Whereas

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[101] Schermers & Blokker, *supra* note 25, § 444-447, p. 336-338; Higgins et al, *supra* note 25,Vol. I, pp. 501-502.
[102] Chesterman *supra* note para. 32. According to Chesterman, the documentary function comprises both the preparation and dissemination of reports as well as acting as a depositary for international treaties.
[103] *Reports submitted by / transmitted by the Secretary-General to the Security Council in 2022*, < www.un.org/securitycouncil/content/reports-submitted-transmitted-secretary-general-security-council-2022>, last accessed 20 August 2023.
[104] Based on a search in the UN Digital Library, searching for reports issued to the General Assembly Plenary, see https://digitallibrary.un.org/search?ln=en&cc=General%20Assembly%20Plenary&p=&f=&rm=&sf=&so=d&rg=50&c=General%20Assembly%20Plenary&c=&of=hb&fti=0&fct__1=Reports&fct__3=2022&fct__2=General%20Assembly&fti=0, last accessed 20 August 2023.
[105] Johnstone, *supra* note 77, at p. 123; on the link between armed peacekeeping in Hammarskjöld's understanding and today's protection norms, including the responsibility to protect, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011)s.
[106] Cf. UN Doc. A/48/632/Add.2, p. 13; see the resulting resolution UN Doc. A/Res/48/132 (1993). Vienna Declaration had identified the "lack of the rule of law" as one of the main obstacles "to the full enjoyment of all human rights", alongside other obstacles such as religious intolerance, apartheid and xenophobia, and recommended the establishment of a "comprehensive programme" within the United Nations that could provide "technical and financial assistance to national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law.", A/CONF.157/23, Part I, para 30 and Part II, para 69.

member states have to this date never consented to any definition of the rule of law,[107] the Secretariat proposed no fewer than twelve constituent elements of the rule of law as early as in 1994, in its first report to the General Assembly.[108] Today, the UN largely subscribes to the definition of the rule of law provided by Kofi Annan in a 2004 report to the Security Council, in which he proposed a "common language" on the rule of law, a thick version of the rule of law that comprised accountability "to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights".[109] Here, the Secretariat takes an elusive notion – the rule of law – and imbues it with concrete meaning, by means of routine reporting on an agenda item. This is a way of executive interpretation, and it has a concrete impact as it provides the basis for the UN's rule of law assistance activities to this day. This means that where the UN is mandated to provide rule of law assistance – as is e.g. standardly the case in multidimensional peacekeeping operations – it discharges this task on the basis of an understanding of the rule of law that was never consented to by member states.

5.2.2 Interfacing

The responsibility to protect and the related norm of protection of civilians is another example of executive interpretation, and at the same time can also serve as an illustration for the second way in which UN civil servants contribute to international lawmaking, namely what I call "interfacing". Ian Johnstone has at length described Annan's role as a norm entrepreneur in generating and promoting the responsibility to protect and the protection of civilians as two closely related

[107] This is most visible in the 2012 Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, UN Doc. A/Res/67/1, which proclaims that "the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs", para 2, but does not contain any definition. On the background of this declaration see Edric Selous, "The Rule of Law and the Debate on It in the United Nations", in Clemens A. Feinäugle (ed.), *The Rule of Law and Its Application to the United Nations* (Nomos, 2016), pp. 13-28.
[108] UN Doc. A/49/512.
[109] UN Doc. S/2004/606. This definition can still be found on the UN's web presence on the rule of law: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (last accessed 3 May 2023).

norms.[110] To recall: the responsibility to protect was first introduced by the International Commission on Intervention and State Sovereignty, whose work was taken up by the High-Level Panel on Threats, Challenges and Change, in the run-up to the 2005 World Summit.[111] This High-Level Panel on Threats, Challenges and Change had been convened by Kofi Annan, following his famous "fork in the road"-speech after the invasion of Iraq in 2003,[112] and comprised a host of experienced and eminent persons in global governance. Kofi Annan relied on this expert panel report in his own report to the 2006 World Summit, *In Larger Freedom*.[113] Here, Annan explicitly understands the responsibility to protect norm as "a basis for collective action against genocide, ethnic cleansing and crimes against humanity…including enforcement action [by the Security Council], if so required."[114]

The convening of the High-Level Panel is a way of interfacing at the horizontal level, between experts and member states. *In Larger Freedom* in turn is an exercise in executive interpretation. While member states did not fully embrace Annan's clear call to enforcement action by the Security Council, but rather committed only to being "prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII"[115], Annan's report provided an important early interpretation of the norm as including authorization of the use of force. This may ultimately have proven detrimental to the norm's further cascading and internationalization: the 2011 NATO intervention in Libya with Security Council authorization on the basis of the responsibility to protect ultimately led to the killing of Muammar Gaddafi, a regime change, and an ongoing civil war in Libya. Ever since, there has been no further

[110] Johnstone, *supra* note 77.
[111] UN Doc. A/59/565, at paras 199-203
[112] United Nations General Assembly, 7th plenary meeting, Tuesday, 23 September 2003, 10 a.m., UN Doc. A/58/PV.7, pp. 3-4.
[113] UN Doc. A/59/2005.
[114] United Nations Secretary-General, *In larger freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, Annex, para 7 (b).
[115] United Nations General Assembly, *World Summit Outcome*, UN Doc. A/Res/60/1, para. 139.

enforcement action based on the responsibility to protect, in part because BRICS states have felt validated in their fear that the responsibility to protect would constitute a tool of agency for old colonial powers.[116] This does not change, however, Annan's role in shaping the responsibility to protect, both through interfacing as well as through executive interpretation.

The responsibility to protect is an example of horizontal interfacing between the UN Secretariat, member states, and the "Third UN" of experts and non-governmental organizations at the global level, where norms are negotiated. Another example of such horizontal interfacing can be taken from the negotiations of the 2030 Agenda and the Sustainable Development Goals (SDGs). A first stepping stone to what would later become the 2030 Agenda for Sustainable Development and the 17 SDGs was the 2013 Report of the High-level Panel of Eminent Persons on the Post-2015 Development Agenda, which proposed a set of "illustrative goals".[117] These goals proved crucial in the negotiation of a set of goals that would be inclusive of the social, environmental, and economic dimensions of development and address issues of good governance that had been marginalized in previous development agendas.[118] Interfacing is also done beyond the Office of the Secretary-General. Again, the SDGs and specifically goal 5, the stand-alone goal on gender equality, provide a good example: as UN Women was not able to loudly advocate for a stand-alone goal on gender equality, this task was primarily taken up by the alliance of non-governmental women's organizations, the Women's Major Group.[119] But UN Women proved to be an important strategic ally, serving as a conduit between the Women's Major Group and select member states,

[116] Mohammed Nuruzzaman, '"Responsibility to Protect" and the Brics: A Decade after the Intervention in Libya', (2022) 2 *Global Studies Quarterly* 1-12.
[117] United Nations General Assembly, *Report of the High-level Panel of Eminent Persons on the Post-2015 Development Agenda*, UN Doc. A/67/890.
[118] On the holistic ambition of the 2030 Agenda see Sakiko Fukuda-Parr, "Sustainable Development Goals", in Thomas G. Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* 2018).
[119] Sascha Gabizon, 'Women's Movements' Engagement in the SDGs: Lessons Learned from the Women's Major Group', (2016) 24 *Gender & Development* 99-110.

and was explicitly credited by representatives of the Women's Major Group as having been instrumental to the success of their work.[120]

The previous examples relate to horizontal interfacing at the global level, i.e. between outside experts and non-governmental organizations on the one hand and member states on the other hand, in shaping international norms and agendas. But UN civil servants occupy a position at a double interface: horizontally between Third and Second UN and vertically between different governance levels through their field operations, which, as I have mentioned, comprise almost half of the UN's civil service today. Global normative frameworks such as the 2030 Agenda for Sustainable Development are normative yardsticks for civil servants. They work towards implementing such norms through manifold assistance activities and projects at the country level and thus contribute to the dissemination, adaptation, and domestic implementation of such norms. Often, implementation measures of e.g., the SDGs, have a clear legal form at the domestic level, even if the SDGs in themselves are not formally legally binding. The results are communicated back to headquarters, and insights gathered in the field can have important feedback loop effects on normative developments at the global level. The interaction of international civil servants with domestic authorities and local actors cuts across a perceived distinction between the global and the local.[121] This is another contribution to processual and recursive transnational legal ordering today, and one that would merit further investigation.[122]

[120] S Wood and K Austin-Evelyn, 'Power Lessons: Women's Advocacy and the 2030 Agenda', (2017) *International Women's Health Coalition, New York*, p. 26.

[121] Anthropologists have termed such phenomena "glocal", a term that is only seldom used in international law. But see Michael Riegner, "International Institutions and the City: Towards a Comparative Law of Glocal Governance", in Helmut Philipp Aust and Anél Du Plessis (eds.), *The Globalisation of Urban Governance* (Routledge, 2019), pp. 38-64.

[122] For some examples on the legal impact of SDG 11.7 on safe cities and safe public spaces at the local and national levels see Hannah Birkenkötter, "Ensuring Access to Public Space as a Dimension of "Safe Cities"", in Helmut Philipp Aust and Anél du Plessis (eds.), *The Globalisation of Urban Governance* (Routledge, 2019), pp. 127-150.

6 Conclusion

A few years ago, Jan Klabbers observed, melancholically, how international legal scholarship seems to have lost touch with international legal practice, ascribing much of this disconnect to the self-referentiality of international legal scholars that seem to be caught up in debates on methods with little regard for actual practice.[123] I suggest that this is so because international law is still largely perceived as a static set of rules that can be subsumed under the formal canon of sources of international law. In this article, I have argued that international today should be viewed as a dynamic process of transnational legal ordering, and that international organizations play a crucial role in these processes. I have then shown that over the past decades, lawmaking at the United Nations has changed considerably. While the world organization remains an important forum for international treaty-making, these processes are embedded in yearlong (and sometimes even decade-long) contexts in which commitments get reiterated, applied in local contexts, interpreted, reinterpreted, fed back into international negotiation processes and so on and so forth. None of this is to say that states play no longer a role in international lawmaking. They are crucial actors for any international organization, including the United Nations. But they are no longer the sole players, and perhaps not even the most important ones.

Instead, I have suggested that international civil servants play an increasingly important role in shaping what is perceived as "UN activities", and I introduced two ways through which the UN Secretariat typically contributes to contemporary international lawmaking: through executive interpretation, i.e. imbuing vague concepts and notions with more concrete definitions and normative claims; and through interfacing, i.e. connecting various other actors – experts, non-governmental organizations, eminent persons and individuals – with member states. Often, both of

[123] Jan Klabbers, 'On Epistemic Universalism and the Melancholy of International Law', (2018) 29 *European Journal of International Law* 1057-1069.

these mechanisms go hand-in-hand. In closing, I briefly reflect on the implications of these dynamics for international lawmaking. I believe there to be important implications on at least three levels that require further investigation.

First, through field operations, UN civil servants directly interact with sub-state level entities, with local governments, with civil society on the ground. This potentially enables these actors to claim a larger say in norm-setting processes. Whether this is true or not would need to be empirically tested through case studies, where UN civil servants promote a specific norm or norms through their technical assistance activities. Second, UN civil servant activities provide a partial explanation for the increasing importance of soft-law standards in international law. While soft-law declarations do not directly impose obligations on member states, they are often perceived as the main guidelines and yardsticks for UN operational activities. A case in point is the 2030 Agenda for Sustainable Development, which is largely viewed as the main guidance for the UN's activities amongst civil servants, especially those in the development field. If a UN entity contracts with local partners on the basis of and with the aim to implement such formally non-legally binding standards, these standards have a legal effect not captured through the traditional sources of Article 38 ICJ Statute. Lastly, operations feed back into the policy debates through the manifold reports provided by the Secretariat as background to political negotiations, and through executive interpretation of elusive concepts provided by the Secretariat.

All of these implications raise important questions about the legitimacy of these forms of lawmaking. Traditionally, legitimacy has been conceived as centered in and channeled through the state, and there is a lively debate on legitimacy standards for international organizations, and, by extension, their civil servants.[124] If the above is correct, and international civil servants contribute

[124] See only the two contributions by Allen Buchanan and John Tasioulas in in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), Chapters 3 and 4, and Buchanan & Keohane *supra* note 19.

to international lawmaking in ways that traditional sources doctrine fails to capture and that are based on sociological notions of moral and expert authority, then a first step to asking questions about the legitimacy of such actions is to focus on these activities and labeling them as relevant for international legal scholarship in the first place. Looking more closely at the UN Secretariat as a key player in international lawmaking today might also bring us one step closer to closing the gap between legal scholarship and legal practice lamented by Klabbers. This paper has attempted to contribute to such an endeavor.