Extended table of contents

List of contributors xv
Preface xvii

Introduction: International lawmaking in a global world 1
  Catherine Brölmann and Yannick Radi
  1. Taking stock 1
  2. Two landscapes 2
     2.1 Features of the socio-legal landscape 3
     2.2 Features of the theoretical landscape 6
  3. The organization of this Handbook 7

PART I THEORETICAL VIEWS OF INTERNATIONAL LAWMAKING

1. State consent as foundational myth 13
   Wouter G. Werner
   1. Introduction 13
   2. Consent, norm evolution and the purposes of law 15
   3. Consent and sovereign equality 21
      3.1 Consent as instrument to protect sovereign equality 21
      3.2 The indeterminacy of sovereign equality 23
   4. Territoriality 26
   5. Conclusion 30

2. Subjects and actors in international lawmaking: The paradigmatic divides in the cognition of international norm-generating processes 32
   Jean d’Aspremont
   1. Introduction 32
   2. Empirical concord: The pluralization of international lawmaking 35
      2.1 Manifestations of pluralization in the practice of international lawmaking 35
      2.2 Persisting state dominance? 39
   3. Conceptual discord: The paradigmatic divides in the cognition of international lawmaking 41
      3.1 Subject and participant as cognitive tools of lawmaking processes 41
      3.1.1 Static subject-based approaches to lawmaking 42
      3.1.2 Dynamic participation-based approaches to lawmaking 45
      3.2 Alternative models for the cognition of lawmaking processes 48
      3.2.1 Static pedigree-based approaches to lawmaking 48
      3.2.2 Dynamic output-based approaches to lawmaking 51
      3.2.3 Dynamic pedigree-based approaches to lawmaking 52
3. Transnational lawmaking 56

*Dennis Patterson*
1. Introduction 56
2. Transnational legal phenomena 57
3. Causal and normative questions 60
4. Transnational law: International examples 60
5. Beyond positivism: Theorizing transnational law 62
6. Future work 65

4. Contemporary theories and international lawmaking 66

*Ingo Venzke*
1. Introduction 66
2. From sources to communicative practice 69
   2.1 Distinguishing lawmaking from law application 69
   2.2 The linguistic turn: Lawmaking in communicative practices 70
   2.3 Making law this way? 72
3. The New Haven School 74
4. Theory of transnational legal process 75
5. Systems theory 77
6. Practice theory 79
7. Governance theory 81
8. Outlook: Global administrative law and international public authority 83

PART II  INTERNATIONAL LAWMAKING IN AN INTER-STATE SETTING

5. Lawmaking by treaty: Negotiation of agreements and adoption of treaty texts 87

*Kirsten Schmalenbach*
1. Introduction 87
2. Negotiation of international agreements 88
   2.1 Defining international negotiation 88
   2.2 Principles and rules of international treaty negotiations 89
      2.2.1 Attempts to codify rules of international treaty negotiations 89
      2.2.2 Procedural rules on negotiation 90
      2.2.3 Substantive rules applicable to negotiations 94
3. Two-party negotiations 97
4. Multiplayer negotiations at diplomatic conferences 97
   4.1 Pre-conference phase: Getting organised for formal negotiations 98
   4.2 Conference phase: Formal negotiations 99
      4.2.1 Decision on rules of procedure 99
      4.2.2 Commencement of the formal negotiations 99
      4.2.3 Fine-tuning of negotiation text(s) 99
4.2.4 Managing complexity 100
4.2.5 Group and coalition building 101
4.2.6 Background factors: Non-state actors, IOs and state observers 102
4.2.7 Final act 104
4.3 Negotiating international regimes 104
5. Adoption of the treaty text 105
5.1 Procedural placement and significance of the adoption of the text 105
5.2 Voting procedures 106
5.2.1 Conclusion of bilateral treaty negotiations 106
5.2.2 Multilateral treaty negotiations: Article 9 para 2 VCLT 106
5.2.3 International practice: If possible consensus 107
5.2.4 Pragmatic stance: Bypassing consensus 109
6. Conclusion 110
6. Lawmaking by treaty: Conclusion of treaties and evolution of treaty regimes in practice 111
Daniel Costelloe and Malgosia Fitzmaurice
1. Introduction 111
2. The expression of consent to be bound in the procedure for the conclusion of a treaty under the VCLT 112
2.1 The forms of a state’s expressing consent to be bound in lawmaking by treaty 114
2.2 Lawmaking instruments going beyond the requirement of consent under the VCLT 116
3. Lawmaking through an evolving treaty regime 117
3.1 Lawmaking through tacit acceptance (‘opting out system’) under a treaty 118
3.2 Lawmaking through the decisions and activities of treaty bodies 118
3.2.1 Bases for the powers of COPs and MOPs to develop a treaty regime in practice 118
3.2.2 Types of powers typically enjoyed by treaty bodies 121
3.2.3 Instances of lawmaking by COPs and MOPs 123
4. Lawmaking through the evolutionary interpretation of a treaty regime by a judicial organ 128
5. Lawmaking through subsequent practice 130
6. Conclusions 131
7. The emergence of customary international law: Between theory and practice 133
Omri Sender and Michael Wood
1. Custom as a principal source of international law 134
2. The essential elements: Theory 137
3. The essential elements in practice 145
4. Bringing practice and theory a little closer? The International Law Commission’s topic ‘Identification of customary international law’ 154
5. Conclusion 157
PART III INTERNATIONAL LAWMAKING BEYOND THE STATE

9. Institutional lawmaking: The emergence of a global normative web
Ramses A. Wessel
1. Introduction: A diverse collection of normative bodies 179
2. Lawmaking by international organizations 181
   2.1 Defining institutional lawmaking 181
   2.2 Lawmaking in practice 183
3. Lawmaking by other international bodies 187
   3.1 New forms of institutional lawmaking 187
   3.2 Informal institutional lawmaking 189
   3.3 Delegated institutional lawmaking 191
   3.4 Lawmaking by networking 194
4. Conclusion: An institutionalized global normative web 198

10. International judicial lawmaking
Gleider I. Hernández
1. Introduction 200
2. International judicial lawmaking 200
3. The International Court of Justice 202
   3.1 The formal role of the International Court in international lawmaking 202
   3.2 Limitations to the International Court’s role in lawmaking 204
   3.3 The lawmaking authority of the International Court 205
      3.3.1 Beyond persuasive authority? 205
      3.3.2 Judicial lawmaking in the application and interpretation of unwritten law 208
      3.3.3 Judicial lawmaking through advisory opinions 209
4. Other international courts and tribunals 212
   4.1 European Court of Human Rights and Inter-American Court of Human Rights 213
   4.2 The ad hoc international criminal tribunals 215
   4.3 The World Trade Organization Appellate Body 216
   4.4 Interaction between international courts and tribunals? 218
5. Conclusion 219
11. Domestic judicial lawmaking
   Antonios Tzanakopoulos
   1. Introduction: Can courts (ever) make law? 222
   2. Domestic judicial engagement with international law
      2.1 The ‘directionality’ of international obligations 224
      2.2 The ‘domestication’ of international obligations 226
   3. Domestic judicial impact on international law
      3.1 Formal impact: Domestic court decisions as facts 230
      3.2 Actual influence: Domestic court decisions as triggers 231
      3.3 Domestic courts as the ‘natural judges’ of international law 237
   4. Domestic courts as ‘agents’ of international law development 239
   5. Conclusion: Assessing the lawmaking potential of domestic court decisions 241

12. Quasi-judicial bodies
   Mara Tignino
   1. Quasi-judicial bodies: Shared task, diverse practice 243
      1.1 The Aarhus Compliance Committee 243
      1.2 The Economic, Social and Cultural Rights Committee 244
      1.3 The International Financial Organizations’ investigative mechanisms 245
   2. Quasi-judicial bodies: Leading institutional reform? 246
   3. A contribution to common procedural fairness principles? 249
   4. Quasi-judicial bodies and the development of substantive international law
      4.1 Quasi-judicial bodies as caretakers of their applicable norms 253
      4.2 Quasi-judicial bodies as substantive international lawmakers: How much influence? 257
   5. Final remarks 260

13. International lawmaking by hybrid bodies: The case of financial regulation
   Michael S. Barr
   1. Introduction 262
   2. The international financial regulatory architecture before the recent crisis
      2.1 Phase I: The Bretton Woods System 264
      2.2 Phase II: Rise of the networks 267
   3. Post-crisis reforms
      3.1 The G-20 272
      3.2 The Financial Stability Board 274
      3.3 Procedural reforms
         3.3.1 More formality 276
         3.3.2 A clearer hierarchy 277
         3.3.3 More political involvement 279
         3.3.4 Stronger peer review 280
   4. Conclusion 284
14. International lawmaking and civil society

**Barbara K. Woodward**

1. Introduction
2. Definitions
   2.1 Civil society
   2.2 International lawmaking
3. Mapping and analysis of CS lawmaking
   3.1 Conference lawmaking
      3.1.1 International humanitarian law
      3.1.2 International human rights law
      3.1.3 International environmental law
      3.1.4 International human security and criminal law
   3.2 UN processes
      3.2.1 International human rights law
      3.2.2 International criminal law and state responsibility
      3.2.3 International security law
      3.2.4 International economic law
   3.3 Institutional lawmaking outside the UN
      3.3.1 UN specialized agencies
      3.3.2 UN programmes
      3.3.3 ‘Autonomous Institutional Arrangements’
   3.4 Adjudicatory lawmaking
      3.4.1 Human rights
      3.4.2 Economic relations
4. Considerations of legitimacy and accountability
   4.1 Legitimacy
   4.2 Accountability
5. Conclusion

15. Lawmaking by scholars

**Jörg Kammerhofer**

1. Introduction
2. Scholarship in article 38(1)(d) of the ICJ Statute
3. The juridical view and its limitations
   3.1 The sources as basis for assessing the lawmaking faculties of scholarship
   3.2 The dangers of admixture
      3.2.1 The role of legal scholarship: A theory of legal science?
      3.2.2 Scholarly activism
   3.3 Can scholarship make law?
4. The socio-empirical view and its limitations
5. Conclusion
PART IV INTERNATIONAL LAWMAKING IN SELECTED ISSUE AREAS

16. The making of international human rights law

Vassilis P. Tzevelekos

1. The making of human rights in international law: The short and the long version of the story to tell 329
2. A methodological impasse and two strands of shortcomings within international legal positivism 331
3. The role of judicial recognition
   3.1 Broadening already existing rights and the usefulness in that respect of tools like soft law or the positive effect of human rights 339
   3.2 The case of ethically sensitive questions and the role of consensus 343
      3.2.1 Consensus as the basis for custom 345
      3.2.2 Consensus versus principles 347
4. Concluding remarks: The main argument, its theoretical foundations and the quest for legitimacy 349

17. The making of international criminal law

Sergey Vasiliev

1. Introduction 354
2. Complexities of lawmaking in ICL
   2.1 Bridging formalist and realist views 356
   2.2 Specialization and profusion: Norms, institutions, sources 357
3. Substantive constraints on lawmaking: legality in a paradox field
   3.1 Sources of ICL: Legality between positivism and natural law 363
   3.2 Interpretation as spectrum: Elucidating, developing, making ICL 373
   3.3 Reclaiming legality in the march of progress 378
4. Source orthodoxy in ICL and dynamics of law (re)production
   4.1 Creation v determination of law: Whither, old formalism? 381
   4.2 An (almost) autopoietic system? Legitimacy of international criminal lawmaking 387
5. Concluding remarks 392

18. The making of international trade law

Mary E. Footer

1. Introduction 395
2. Primary lawmaking in the WTO
   2.1 Negotiation and adoption of WTO treaty instruments
      2.1.1 The MTN process 399
      2.1.2 WTO accession protocols 401
   2.2 Modification of WTO treaty obligations
      2.2.1 Treaty amendment 402
      2.2.2 Modification by waiver 403
      2.2.3 Authoritative interpretation 405
      2.2.4 Subsequent agreement and subsequent practice 406
3. Secondary lawmaking in the WTO 411
xv Research handbook on international lawmaking

3.1 Framework for analysis of secondary lawmaking 411
3.2 Forms of secondary lawmaking in the WTO 414
3.2.1 Delegated lawmaking 414
3.2.2 Waiver decisions as secondary legal acts 416
4. Conclusions 417

19. The making of international environmental law 419
Francesca Romanin Jacur
1. Introduction: The originality of international environmental law 419
2. Lawmaking by multilateral environmental agreements 420
   2.1 The normative and institutional architecture: The framework model 422
      2.1.1 The decision-making procedures 423
      2.1.2 The legal nature of CoPs’ decisions 425
      2.1.3 Legitimacy concerns: Loosening or losing state consent? 427
   2.2 The development and strengthening of environmental principles 428
3. Judicial lawmaking in the settlement of environmental disputes 429
   3.1 The judicial development of environmental law 430
   3.2 Judicial lessons in dealing with environmental matters 432
4. Normative developments in environmental matters through trade and investment law 434
   4.1 Environmental matters in trade and investment agreements 434
   4.2 The consideration of environmental matters in WTO jurisprudence 435
   4.3 The consideration of environmental matters by arbitral tribunals 437
5. Non-State actors’ participation in international environmental lawmaking: NGOs, private persons and standard-setting associations 438
6. Concluding remarks 440

20. The making of international natural resources law 442
Owen McIntyre
1. Introduction 442
2. Lawmaking in international natural resources law through classic sources 446
   2.1 International conventions 447
   2.2 Customary international law 451
   2.3 General principles of law 454
   2.4 Judicial and arbitral tribunals 456
   2.5 Publicists 458
3. Lawmaking in international natural resources law beyond article 38 458
   3.1 Reliance on ‘soft law’ 459
   3.2 Technical complexity and the role of international institutions 460
   3.3 Multi-level governance 461
   3.4 Sophisticated participatory processes 462
   3.5 Fragmentation vs integration 464

Index 467