

## **Effective Law-Making in Times of Global Crisis – A Role for International Organizations**

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### Table of Contents

Abstract .....	270
A. Introduction: The Challenge of Legislative Responses to Crises .....	270
B. Rules of International Law .....	271
C. Trans-governmental Networks and the G20-hype .....	273
D. Law-making by International Organizations .....	277
I. Recommendations by International Organizations .....	277
1. General Remarks .....	277
2. The World Health Organization (WHO).....	278
II. Conventions Drafted by International Organizations .....	279
III. International Organizations as Law Makers .....	281
1. The United Nations Security Council (UN SC) .....	281
2. The United Nations General Assembly (UN GA) .....	285
3. The International Civil Aviation Organization (ICAO) .....	285

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4. Coordination Between Different International Organizations .....	289
IV. A Role for International Organizations - Intermediate Conclusions.....	290
E. Conclusions .....	292

## Abstract

Public International Law is often slow to react to changes and challenges. Due to the need for consensus among the subjects to which rules are meant to apply, the creation of new rules often requires more time than is available in times of crisis. At the same time, Public International Law is highly flexible and might provide alternative means for the effective and fast creation of new rules. In this article I will examine several alternatives to traditional treaty-based law-making with regard to their effective creation and operation. Alternatives could include soft law, which, although relatively fast to create, is non-binding, raising doubts as to its effectiveness for regulation in times of crisis. In the last few years, network approaches to law-making have been discussed, most recently with regard to the Group of Twenty (G20). While this approach might look modern, it raises serious questions as to the legitimacy of the rules created hereunder. A more legitimate form of law-making could be through international organizations. This leaves two options: the mere drafting of rules by international organizations, and actual legislation by them. It is the latter option which appears to be most efficient. In this text, the work of several international organizations is investigated more closely, ranging from the loose G20 to international organizations which rely on non-binding recommendations to international organizations which have an actual law-making capacity. At the center of the investigation is the question of how existing international organizations can effectively create new rules which enable states parties to react swiftly, while at the same time taking into account the technical expertise required to formulate an effective response to a global crisis. In this context, the experience of the International Civil Aviation Organization (ICAO) can serve as a model for other international organizations. The ICAO's reaction to the threat of terrorism provides an interesting example for effective law-making in times of crisis. After a short introduction to the law-making capabilities of the ICAO, we will examine how effective it really is and whether the ICAO can serve as a model for future reactions to crises by rapidly providing new rules for a large number of member states in a field which can be technically complicated – characteristics which apply to the global financial crisis as well as global epidemics, climate change and similar issues.

## A. Introduction: The Challenge of Legislative Responses to Crises

In the 1970s, Oxford University Press had a series entitled “International Crises and the Role of Law”.<sup>1</sup> Back then, the crises dealt with were inter-national in the classical sense – i.e. crises between (or at least involving) states such as the Suez Crisis or the Cuban Missile Crisis. Typically, Public International Law is designed to deal with such inter-state crises. In such cases, the legal situation might be unclear, but at least in principle, current classical Public International Law is fit to address such issues. This is no longer the case. In a globalized world, crises are no longer merely international. A health problem in Mexico City or Hong Kong is soon also a health problem in New York, Frankfurt or Sydney.

Global crises require global solutions. To provide an effective response to a global crisis, a rule must not only be created without much delay, but its creation must be informed by the necessary technical expertise. In addition, it must hold an increased promise of global enforceability, if necessary against the political or economic interests of powerful states.

The 2008/2009 financial crisis caused a hype surrounding the Group of Twenty which calls for an investigation into whether this type of cooperation provides an effective way to deal with global crises, or if more institutionalized global international organizations can be utilized to provide effective answers to global crises from a law-making perspective.

International, i.e. inter-governmental, organizations are often approached from a domestic perspective by placing emphasis on the idea of state sovereignty and the vertical transfer of power from the state to the international organization. But this is just one aspect of the relationship between states and international organizations. The other main aspect is the function of international organizations,<sup>2</sup> which is more easily understood from inside the international organization.<sup>3</sup> The “functional finality” of in-

<sup>1</sup> See for example: A. Chayes, *The Cuban missile crisis: international crisis and the role of law* (1974); R. R. Bowie, *Suez 1956* (1974); G. Abi-Saab, *United Nations Operation in the Congo, 1960-1964* (1978).

<sup>2</sup> M. Virally, ‘Le notion de fonction dans la théorie de l’organisation internationale’ in M. Virally (ed.), *Le droit international en devenir – Essais écrits au fil des ans* (1990), 271.

<sup>3</sup> Notably in France and Italy this functional approach has been recognized by domestic authorities. H. G. Schermers & N. M. Blokker (eds), *International Institutional Law: Unity within diversity*, 4th ed. (2003), 10, with further references.

international organizations “embodies three normative aspects”: the authorization of the organization to act with regard to member states, the limitations of such powers and the organization’s duty to act, [and] its obligation “to perform the functions entrusted to [the organs of the organization] by the members”.<sup>4</sup>

The practical question is then: “from the moment when states have acknowledged the existence of common interests justifying the establishment of an international organization and the attribution to this organization of functions destined to be of service to them, are they still allowed to consider their sovereignty as an unlimited power to dissociate themselves and to pursue dysfunctional activities, no matter what damage might result from this for the international community to which they have adhered?”<sup>5</sup>

The answer must be a clear “no”. But the reality on the ground, of course, looks different. In general, compliance is a major issue in Public International Law, because, unlike national legal systems, Public International Law remains in an archaic state, lacking an enforcement agency, which is global both geographically and with regard to different subject matters. While rules created by international organizations are no exception, they benefit greatly from specific intra-organizational enforcement mechanisms. More advanced internal enforcement mechanisms, such as the judiciary of the European Community (EC) or the European Court of Human Rights leads to increased compliance on the part of the member states. This higher chance for compliance strengthens the case for employing international organizations for law-making purposes.

## B. Rules of International Law

Article 38 of the Statute of the International Court of Justice lists all sources of Public International Law.<sup>6</sup> Since treaties and customary international law are, practically speaking, the most important sets of rules, we will focus our investigation on them. Customary international law requires both *opinio juris* and state practice. The latter is often overlooked when claims are made based on alleged rules of customary international law. But customary international law “is founded on practice, not on preaching”.<sup>7</sup> Espe-

<sup>4</sup> *Id.*, 11.

<sup>5</sup> M. Virally, as quoted and translated by Schermers & Blokker, *id.*, 13.

<sup>6</sup> *Statute of the International Court of Justice*, 26 June 1945, 33 U.N.T.S. 993.

<sup>7</sup> J. Conradie, ‘*S v. Petane*’, Cape Town Provincial Division (3 November 1987) available at <http://www.icrc.ch/IHL-NAT.NSF/46707c419d6bdfa24125673e00508>

cially when dealing with declarations by, for example, the G20, it has to be kept in mind that it is necessary “to consider the action or practice of states, and not their promises or rhetoric”.<sup>8</sup> The creation of new rules of customary international law requires a process which will often, albeit not necessarily, be time-consuming. Yet, during a global crisis, this time will often not be available to allow for the creation of new rules. If new rules are required, customary international law is hardly the best way to deal with any form of crisis. Just like recourse to general principles of the law, customary international law can be a very useful tool when we need to address new problems for which no adequate rules of Public International Law exist as of yet, in that we can draw analogies to existing rules of customary international law. But these analogies will not carry the legal strength of directly applicable customary international law and might be subject to debate as to their validity. In times of global crises, though, what is required are clear rules, which can be utilized on the spot. This is not the case with analogies to customary international law. Even customary international law proper will not be well-suited to address global crises from an international legislative point of view. Customary international law, by its very nature, will usually<sup>9</sup> require a certain amount of time for its formation, especially when one takes into account that what is required is a general practice. What constitutes a general practice “much depends on the circumstances of the case and on the rule at issue. ‘General’ practice is a relative concept and cannot be determined in the abstract.”<sup>10</sup> This also explains how it is possible that customary international law can be created instantaneously.<sup>11</sup> This happened for example in the early days of the space age<sup>12</sup> with regard to the outer limits of state sovereignty and the difference between national airspace and outer space as well

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145/50c59239e1b869edc1256b0500490120!OpenDocument (last visited 23 February 2010), 59 F-G.

<sup>8</sup> J. Dugard, *International Law – A South African Perspective*, 2nd ed. (2001), 29; See also ICJ, *South West Africa (Liberia v. South Africa)*, Judgment, Separate Opinion of J. T. van Wyck, ICJ Reports 1966, 67, 169, para. 52, 18 July 1966, available at <http://www.icj-cij.org/docket/files/47/4963.pdf> (last visited 23 March 2010).

<sup>9</sup> The exceptional instantaneous creation of customary international law will be dealt with later in this paragraph.

<sup>10</sup> P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed. (1997), 42.

<sup>11</sup> R. Ago, *Science juridique et droit international*, in *Recueil des Cours* 1956 II, 850, 928-935; ICJ, *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. the Netherlands)*, Judgment, ICJ Reports 1969, 43, para 74, 20 February 1969, available at <http://www.icj-cij.org/docket/files/52/5561.pdf> (last visited 23 March 2010).

<sup>12</sup> B. Cheng, ‘United Nations Resolutions on Outer Space: ‘Instant’ Customary International Law?’, *Indian Journal of International Law* (1965) 5, 23.

as with regard to the treatment of spacefarers in distress, not despite, but due to the fact that at that time only the United States and the USSR were capable of sending men into space. At the same time, this example illustrates that, when it comes to global problems which affect not two but almost 200 states, there can be little hope for spontaneous general practice. In fact, customary law is particular ill-fitted to deal with global crises.<sup>13</sup>

Since instant customary law is the rare exception, treaty law or rules based on treaties, binding or otherwise, provide the only realistic and fast means of creating legal rules to address a global crisis. The more important question is, who should create such rules? Taking into account that the classical multilateral conference-style of drafting a new international treaty can take a considerable amount of time, in particular when the subject matter includes a large number of technical aspects, we need a more time-efficient manner of creating or at least drafting new rules.

### C. Trans-governmental Networks and the G20-hype

One approach, which has been championed by Anne-Marie Slaughter, is that of informal trans-governmental networks. This approach is not merely a brainchild of the Internet era, although it might not have gained that much attention if we did not live in a world of networks. In this network model, cooperation is not only between states, but between officials and experts. For many foreign ministries, this kind of cooperation is part of the everyday work and indeed things are often much easier to accomplish if agreement is forged on a lower level, i.e. between bureaucrats rather than between heads of government. This kind of network is particularly helpful in the preparatory phase of a new agreement and can facilitate a fast drafting of a new treaty, but it cannot in itself establish new rules.

In the perception of the general public, this function might be fulfilled by networks of government leaders such as the G20, which was created in response to the economic crisis of the late 1990s.<sup>14</sup> In particular, the latter has gained a lot of prominence during the financial crisis, although it has

<sup>13</sup> But it could be the other way around: similar responses by many states to a global challenge can amount to the state practice necessary for the creation of a new rule of Public International Law. It remains to be seen whether this practice is really based on the opinion to be obliged to take the action in question not merely for political reasons or based on domestic law, but to be obliged to do so under Public International Law.

<sup>14</sup> 'What is the G20' available at [www.g20.org/about\\_what\\_is\\_g20.aspx](http://www.g20.org/about_what_is_g20.aspx) (last visited 21 March 2010).

been around for a decade. But it appears dubious whether the G20 can really fulfill a meaningful legislative task. G20 and the like, such as the Group of Seven (G7) or the Group of Eight (G8) are neither allies in a classical sense, nor do they represent treaty partners.<sup>15</sup> Rather, they are more comparable to the Concert of Europe of 1815,<sup>16</sup> - the *de facto* balance of power on the continent in the century between the end of the Napoleonic era and the beginning of World War II. In a reminder of the 19<sup>th</sup> Century, the inner workings of the G20 are relatively untransparent when compared to institutionalized international organizations. While the term “network” suggests a certain degree of openness and transparency, this assumption is misleading when it comes to trans-governmental networks.<sup>17</sup> This lack of transparency inevitably leads to questions concerning the G20’s legitimacy. Indicators for legitimacy are representation and procedural fairness.<sup>18</sup> While the G20 is more representative than, for example, the G7 or the G8, the absence of an international treaty establishing the G20 also means that national organs (parliaments, in most states) had little or no say in a state’s membership in the G20, which started as an informal forum for finance ministers and central bank governors.<sup>19</sup> More importantly, the representational premise on which the G20 is built is fundamentally flawed as it considers representation on the basis of economic power alone. As it describes itself, the G20’s “member countries represent around 90 per cent of global gross national product, 80 per cent of world trade (including EU intra-trade) as well as two-thirds of the world’s population.”<sup>20</sup> This focus on economic representation leads to the conclusion that “[t]he G-20’s economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system.”<sup>21</sup> This view of course is incompatible with the sovereign equality of nations and should serve as a warning

<sup>15</sup> A.-M. Slaughter, *A New World Order* (2004), 37.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, 219.

<sup>18</sup> T. C. Halliday & B. G. Carruthers, *Bankrupt – Global Lawmaking and Systemic Financial Crisis* (2009), 125. On the issue of legitimacy see also T. Franck, *The Power of Legitimacy Among Nations* (1990); D. Bodansky, ‘The Legitimacy of International Governance’, 93 *American Journal of International Law* (1999) 3, 596; J.-M. Coicaud & L. A. Pereira Da Silva, *The Legitimacy of International Organisations and the future of the global governance* (2003); H. H. Koh, ‘Why Do Nations Obey International Law?’, 106 *Yale Law Journal* (1996/1997) 8, 2599-2659.

<sup>19</sup> *What is the G20*, *supra* note 14.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



against making the G20 “the world's main economic governing council”,<sup>22</sup> as British Prime Minister Gordon Brown envisages, whose country currently holds the rotating G20 presidency.

Apart from such fundamental issues, it also remains to be seen whether the G20 can be as efficient as the Concert of Europe, but it has to be clear that neither has had a legislative function. After all, performance and effectiveness<sup>23</sup> are indicators of legitimacy, too. But the term effectiveness appears to be elusive. In the context of any legislation, effectiveness can only be reasonably measured against the goal which is pursued with the newly created rule. Key ingredients of effectiveness of new legislation, which aims at solving a global crisis, are not only the speediness of the legislative process, but also the binding nature of the rule in question. Given Public International Law's general enforcement deficit, effectiveness requires not so much enforceability rather than a binding nature – there has to be a general understanding on the parts of the states involved that the new rule is considered binding. This is valid even if there should be no formal enforcement mechanism in place, although the existence of one would increase the norm's effectiveness. Crises require effective legislation, both in terms of speedy creation and the promise of compliance. The G20 still has to prove that it can provide such effective rules. Given the absence of both a binding character of G20-rule and a structure to ensure compliance and thus enforce the rules, there has to be some doubt as to the G20's ability to be an effective legislator.

Despite the political importance of the G20 member states, it lacks the power to create binding rules. The G20 is hardly able to create anything more binding than soft law and the obvious downside of soft law is its lack of enforceability. This is not to say that soft law is useless.<sup>24</sup> But it will often

<sup>22</sup> S. Desai, ‘G20 will become main economic council: UK's Brown’ (24 September 2009) available at [www.reuters.com/article/topNews/idUSTRE58N2NB20090924](http://www.reuters.com/article/topNews/idUSTRE58N2NB20090924) (last visited 15 March 2010).

<sup>23</sup> Halliday & Carruthers, *supra* note 18, 125.

<sup>24</sup> A notable soft law success is the Organization for Security and Cooperation in Europe (OSCE). On the role of soft law see also D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2000); C. M. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’, 38 *International and Comparative Law Quarterly* (1989) 4, 850; K. Abbott & D. Snidal, ‘Legalization and Dispute Resolution - Hard and Soft Law in International Governance’, 54 *International Organization* (2000) 3, 421; C. Chinkin, ‘A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States’, 10 *Leiden Journal of International Law* (1997) 2, 223.

be unclear whether a joint declaration is supposed to be binding,<sup>25</sup> and it takes clear and binding rules to address global crises effectively.

Soft law instruments have their own functions, such as providing indicators on emerging trends in international *opinio juris*<sup>26</sup> and reflecting new concerns for the international community.<sup>27</sup> It is the latter function which is being fulfilled by the recent G20 declarations. So far the G20 is comparable to the UN GA, albeit the GA has the benefit of near-universality and decades of experience and acceptance.

But political statements by the G20 can lead to the emergence of soft law (and potentially of customary international law). “The emergence of ‘soft law’ also has to do with the fact that states in agreement frequently do not (yet) wish to bind themselves legally, but nevertheless wish to adopt and test certain rules and principles before they become law. This often facilitates consensus which is more difficult to achieve on ‘hard law’ instruments.”<sup>28</sup> Yet the G20 has failed to address important questions, such as, what happens if large banks fail in the future?<sup>29</sup> After all, there is a global consensus that the undue bailout of banks which were considered “too large to fail” contributed to the current financial crisis<sup>30</sup> and that the money used for bailouts directly hurt poorer countries, which are not represented in the G20. It is against this background that the G20’s statements in the wake of the 2008/2009 financial crisis must be considered. The G20 is a purely polit-

<sup>25</sup> For example, in the Aegean Sea Continental Shelf Case, the International Court of Justice considered a joint communiqué by the Prime Ministers of Greece and Turkey to be insufficient to give the ICJ jurisdiction, while it came to the contrary conclusion regarding the minutes of a meeting between the respective Foreign Ministers in the Case concerning the Maritime Delimitation and Territorial Questions between Qatar and Bahrain. See A. Cassese, *International Law*, 2nd ed. (2005), 128. In the Eastern Greenland Case (Denmark v. Norway), the Permanent Court of International Justice (PCIJ) even considered the declaration by the Norwegian Foreign Minister not to cause any “difficulties” in the matter of Greenland as a binding promise. W. Heintschel von Heinegg, ‘Die weiteren Quellen des Völkerrechts’, in K. Ipsen, *Völkerrecht*, 5th ed. (2004), 239; *Eastern Greenland Case (Denmark v. Norway)*, PCIJ Ser. A/B, No. 53 (1933), 71.

<sup>26</sup> M. Dixon, *Textbook on International Law*, 6th ed. (2007), 47; Cassese, *id.*, 160.

<sup>27</sup> Cassese, *supra* note 25, 160.

<sup>28</sup> Malanczuk, *supra* note 10, 54.

<sup>29</sup> J. E. Stieglitz, ‘Anpacken, und zwar sofort – Globale Antworten auf eine globale Rezession’ (11 September 2009) available at <http://www.monde-diplomatique.de/pm/2009/09/11.mondeText.artikel,a0211.idx,10> (last visited 22 March 2010).

<sup>30</sup> *Id.*

ical enterprise which reflects the political interests of the member states and should not be expected to be more than that.

## D. Law-making by International Organizations<sup>31</sup>

It seems therefore that such networks like the G20<sup>32</sup> are an addition to the scene but not a replacement of existing actors. This brings us to more traditional inter-governmental organizations, which seem to have been neglected somewhat in the discussion surrounding several global crises in favor of trans-governmental networks, in this case the G20. The same happened when it came to the prevention of the proliferation of nuclear materials after 9/11, in particular with the aim of preventing nuclear terrorism.<sup>33</sup> Instead of relying on existing structures, the Proliferation Security Initiative (PSI) was created for this purpose. At the center of PSI efforts is the interdiction of third party ships on the high seas for the purpose of preventing the transport of particular weapons and materials to terrorist organizations and the like.

### I. Recommendations by International Organizations

#### 1. General Remarks

Normally, international organizations do not have law-making powers, which is why they usually act through non-binding decisions.<sup>34</sup> “However, the non-binding nature of decisions does not mean that a particular

<sup>31</sup> A general overview is given by K. Zemanek, ‘International Organisations, Treaty-Making Power’, in Rudolf Bernhard (ed.), *Encyclopedia of Public International Law*, Volume II (1995), 1343.

<sup>32</sup> Of course, international lawyers also form networks, which can play at least informal roles. See O. Schachter, ‘The invisible College of International Lawyers’, 72 *Northwestern University Law Review* (1977), 217. On the contemporary role of writers in Public International Law, whose work after all is a “means for the determination of alleged rules of international law”, see G. Schwarzenberger, *International Law – General Principles*, Vol. 1, 3rd ed. (1957), 26 and K. Wolfke, *Custom in Present International Law*, 2nd ed. (1993), 77.

<sup>33</sup> S. Kirchner, ‘Preventing Nuclear Terrorism and a new Nuclear Arms Race’ (6 January 2005), *Review of International Social Questions*, available at <http://www.risq.org/article393.html> (last visited 22 March 2010); B. L. Rothberg, ‘Averting Armageddon: Preventing Nuclear Terrorism in the United States’, 8 *Duke Journal of Comparative and International Law* (1997) 1, 79.

<sup>34</sup> D. Akande, ‘International Organizations’, in M. D. Evans (ed.), *International Law*, 2nd ed. (2006), 277, 291.

decision is devoid of legal effect for members. Some constituent instruments oblige members to consider recommendations in good faith. For example, the ILO<sup>35</sup> and UNESCO Constitutions<sup>36</sup> (Article 19(b) and Articles 4(4) and 8 respectively) require member states to submit recommendations to their competent national authorities for consideration and are to report back to the organization on action taken. Furthermore, a separate international treaty may contain an obligation to have regard to (and possibility to comply with) non-binding decisions of an international organization. For example, in the WTO Agreement on Sanitary and Phytosanitary Measures (SPS),<sup>37</sup> Article 3 encourages members to base their SPS measures on standards adopted by other international organizations. Likewise the United Nations Convention on the Law of the Sea<sup>38</sup> obliges States to comply with standards adopted by the 'competent international organization' (usually the International Maritime Organization (IMO)). Additionally, it is arguable that there is a presumption that members acting in accordance with a relevant decision of an international organization are acting lawfully, at least between the members of that organization."<sup>39</sup>

## 2. The World Health Organization (WHO)

But the lack of enforcement also reduces the chance for compliance on the part of states on which the implementation of such non-binding decisions depends. Fortunately there are some exceptions, such as the World Health Organization (WHO). The WHO can adopt binding regulations<sup>40</sup> under Art. 21 of the WHO Constitution.<sup>41</sup> To limit their effect or to avoid being bound by these regulations, member states have to notify reservations

<sup>35</sup> *Constitution of the International Labor Organization*, 4 June 1934, 15 U.N.T.S. 35.

<sup>36</sup> *Constitution of the United Nations Educational, Scientific and Cultural Organization*, 16 November 1945, 4 U.N.T.S. 275.

<sup>37</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures*, 1 January 1995, U.N.T.S. 493.

<sup>38</sup> *United Nations Convention on the Law of the Sea*, 16 November 1994, 1833 U.N.T.S. 397.

<sup>39</sup> D. Akande, *supra* note 34, 292.

<sup>40</sup> Schermers & Blokker, *supra* note 3, 781. For an insightful analysis of the decision-making at the WHO, see J. Siddiqi, *World Health and World Politics: The World Health Organization and the U.N. System* (1995).

<sup>41</sup> *Constitution of the World Health Organization*, 7 April 1948, 14 U.N.T.S. 186; On WHO reform in the 1990s see also M. Koivusal & E. Ollila, *Making a Healthy World: Agencies, Actors and Policies in International Health* (1997).

or their rejection of the rule as a whole (Art. 22, WHO Constitution).<sup>42</sup> But unlike the Food and Agricultural Organization (FAO), which has been involved in a number of law-making initiatives, including those concerning the protection of global fish stocks, the WHO has had “relatively little involvement in international law-making”<sup>43</sup> proper. Most of the time, the WHO does not resort to binding rules but prefers to rely on its scientific reputation in hope of compliance with non-binding measures,<sup>44</sup> “Even serious global health risks, such as the threat of severe acute respiratory syndrome (SARS) have been dealt with through non-binding guidelines rather than [binding] regulations”.<sup>45</sup> Rather, the WHO tackles global problems with global campaigns. An example is the WHO’s campaign against selected diseases,<sup>46</sup> such as malaria.<sup>47</sup> These campaigns are not law-making campaigns in the classical sense, although they contain a somewhat similar aspect in that national compliance with WHO methods needs to be monitored. But since the WHO - often aided by the United Nations Environmental Programme (UNEP), the World Bank (officially named the International Bank for Reconstruction and Development or IBRD) and non-governmental organizations (NGOs) - plays a large role in funding the necessary measures, the problem is rarely legal in nature. This makes the WHO less suited for an examination of legislative solutions to global crises.

## II. Conventions Drafted by International Organizations

While these recommendations are non-binding tertiary rules, international organizations also often limit themselves to drafting secondary rules in the form of conventions which, then, have to be ratified by states. These conventions are international treaties<sup>48</sup> and differ from other international treaties only in the manner in which they are drafted.<sup>49</sup> Usually, the term “convention” refers to international treaties, especially “multilateral treaties

<sup>42</sup> *Id.*; See also M. Vierheilig, *Die rechtliche Einordnung der von der Weltgesundheitsorganisation beschlossenen regulations* (1984).

<sup>43</sup> A. Boyle & C. Chinkin, *The Making of International Law* (2007), 128.

<sup>44</sup> *Id.*, 128-129.

<sup>45</sup> *Id.*

<sup>46</sup> K. Lee, *The World Health Organization (WHO)* (2009), 47.

<sup>47</sup> *Id.*, 47. See also F. Fenner *et al.*, *Smallpox and its Eradication* (1988) and L. Gordenker *et al.*, *International Cooperation in Response to AIDS* (1995).

<sup>48</sup> This is meant in the sense of law-making treaties rather than contract-treaties. On the terminology see Malanczuk, *supra* note 10, 37.

<sup>49</sup> *Id.*, 52.

of a law-making character”<sup>50</sup> and even if “the procedure leading to their adoption is different, the net result of this procedure often closely resembles”<sup>51</sup> a treaty. In effect, “the organization drafts rules to which the members may adhere.”<sup>52</sup> But the members do not have to adhere to these rules. While one problem of organization-drafted conventions is that they are rarely ratified by all member states,<sup>53</sup> at the same time these conventions are not necessarily restricted to members of the international organization in question.<sup>54</sup> The connection between the drafted convention and an international organization also can have a most welcome side effect, in that member states might be willing to adhere to the new rules prior to the convention officially coming into force. Crisis situations can make it necessary to take concerted action immediately. Art. 25 of the Vienna Convention on the Law of Treaties (VCLT)<sup>55</sup> allows for the provisional application of an international treaty prior to its entry into force,<sup>56</sup> regardless how the treaty was created, Art. 5 VCLT.<sup>57</sup> Such an early compliance is, of course, more likely if there is already some kind of connection between the member states and the convention, in this case the membership in the drafting body.

While the creation of a multilateral convention is dominated by political negotiations, this approach allows for technically adequate solutions which are based on the technical expertise of the organization’s staff. Needless to say, this approach also allows for much faster drafting. Conventions created by international organizations are treaties, which give them the benefit of legal force.<sup>58</sup> At the same time, they benefit from a greater degree of

<sup>50</sup> Schermers & Blokker, *supra* note 3, 780.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, 780 - 781.

<sup>53</sup> *Id.*, 783.

<sup>54</sup> *Id.*, 800 – 801; For example, the Council of Europe’s (CoE) Cultural Convention (European *Cultural Convention*, 19 December 1954, 218 U.N.T.S. 139) and the Convention on the Equivalence of Diplomas leading to Admission to Universities (*European Convention on the equivalence of diplomas leading into admission to universities*, 11 December 1953, 218 U.N.T.S. 125) were ratified prior to Spain’s membership in the CoE. Australia and South Africa are parties to the CoE Patent Law Convention (*European Convention on the International Classification of Patents for Invention*, 25 March 1957, 298 U.N.T.S. 52).

<sup>55</sup> *Vienna Convention on the Law of Treaties*, 27 January 1980, 1155 U.N.T.S. 331.

<sup>56</sup> Schermers & Blokker, *supra* note 3, 798; D. Vignes, ‘Une notion ambiguë: La mise en application provisoire des Traités’, 18 *Annuaire française de droit international* (1972), 181.

<sup>57</sup> Schermers & Blokker, *supra* note 3, 785.

<sup>58</sup> *Id.*, 782.

flexibility which is hardly found in the traditional multilateral treaty-making process.

### III. International Organizations as Law Makers

Apart from merely drafting new rules, international organizations can also set new rules,<sup>59</sup> i.e. act as legislators. Therefore the final, and, as we will see, most promising, alternative for legal approaches to international crises are tertiary rules - that is, rules which are based on international treaties and are binding upon the member states of an international organization without further measures being required on the part of the member states.

#### 1. The United Nations Security Council (UN SC)

The United Nations Security Council (UN SC) is rightfully considered one of the most powerful institutions in international law, but initially, it was seen as an institution that applies international law rather than creates it.<sup>60</sup> But, as decisions by the UN SC have legal effect,<sup>61</sup> it was inevitable that the UN SC would also be involved in law-making. "The hallmark of any international legislation is the general and abstract character of the obligations imposed".<sup>62</sup> It does not matter that the creation of new rules has been triggered by a specific event as long as the rules are neutrally phrased.<sup>63</sup> In that sense, the UN SC made law in the context of fighting global terrorism:<sup>64</sup> after 9/11, the UN SC has taken on more of a legislative role,<sup>65</sup> most notably<sup>66</sup> with UN SC Res. 1373 and 1540.<sup>67</sup>

<sup>59</sup> Malanczuk, *supra* note 10, 52; On the processes leading to norms created by international organizations see also R. W. Cox *et al.*, *The Anatomy of Influence; Decision-Making in International Organizations* (1973); R. W. Cox & H. K. Jacobson, 'Decision Making', in 29 *International Social Science Journal* (1977), 115 and H. van Ruller (ed.), *Management van Internationale Organisaties: Een Bedrijfskundige Visie op Internationaal Bestuur* (1990).

<sup>60</sup> Boyle & Chinkin, *supra* note 43, 109.

<sup>61</sup> *Id.*, 110.

<sup>62</sup> S. Chesterman *et al.*, *Law and Practice of the United Nations: Documents and Commentary* (2008), 109.

<sup>63</sup> *Id.*, 110.

<sup>64</sup> *Id.*, 109-110. On the UN SC's counterterrorism efforts see also J. E. Alvarez, 'Hegemonic International Law Revisited', in 97 *American Journal of International Law* (2003) 4, 873, 874 [Alvarez, Hegemonic International Law]; On terrorism as a challenge for Public International Law as a whole see J. A. Frowein, 'Der Terrorismus als Herausforderung für das Völkerrecht', in 62 *Zeitschrift für ausländisches öffentliches*

Under Res. 1373, all UN member states are obliged to punish acts of terrorism and support of terrorists. The idea behind the resolution was to deny terrorists a safe haven. Under Art. 25 of the UN Charter, all UN member states have to carry out the resolutions of the Security Council, placing the responsibility for enforcement into the hands of states. When it came to fighting global terrorism, the UN SC actually tried to remedy this flaw inherent in Public International Law, creating the Counter-Terrorism-Committee (CTC),<sup>68</sup> a new institution to enforce Resolution 1373, which has “far-reaching supervisory powers”.<sup>69</sup> The idea of Security Council-created institutions for the enforcement of Security Council resolutions is anything but new, as UN SC Res. 1373 and 1540 do not stand alone. Instead they have to be seen in context with UN SC Res. 1267 (1999), which established the Taliban Sanctions Committee even before 9/11. After 9/11 it became clear that the 1267-regime “is no longer limited, time-limited nor restricted to the specific threat posed by the Taliban’s support for groups within Afghanistan”.<sup>70</sup> The Security Council continued this trend in 2004 in the context of combating the proliferation of weapons of mass destruction with Resolution 1540.<sup>71</sup> UN SC Res. 1540 “combines the Council’s declaratory, promotional, interpretative, and enforcement functions into a tidy tool of global law.”<sup>72</sup> The preventive approach in Resolution 1540 and the UN GA’s 2005 Convention on the Suppression of Acts of Nuclear Terrorism<sup>73</sup> already show the next

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Recht und Völkerrecht (2002), 879; T. M. Franck & B. B. Lockwood, ‘Preliminary Thoughts Towards an International Convention on Terrorism’, in 68 *American Journal of International Law* (1974) 1, 69; H. Duffy, *The ‘War on Terror’ and the Framework of International Law* (2005).

<sup>65</sup> Boyle & Chinkin, *supra* note 43, 7. For an illustrative overview of law-making in response to global terrorism see also *id.*, 3.

<sup>66</sup> These were by no means the first instances in which the UN SC made law, albeit they were important steps in the development of the UN SC’s legislative role. Earlier, the UN SC had taken a legislative role, for example, with regard to South Africa’s occupation of Namibia and the 1991 cease-fire after Operation Desert Storm (UN SC Res. 687, 3 April 1991), Boyle & Chinkin, *supra* note 43, 110.

<sup>67</sup> *Id.*, 7. See also M. Happold, ‘SC Resolution 1373 and the Constitution of the UN’, in 16 *Leiden Journal of International Law* (2003) 3, 593.

<sup>68</sup> Boyle & Chinkin, *supra* note 43, 7.

<sup>69</sup> *Id.*

<sup>70</sup> J. E. Alvarez, *International Organizations as Law-makers* (2005), 198 [Alvarez, IOs as Law-makers].

<sup>71</sup> Boyle & Chinkin, *supra* note 43, 8.

<sup>72</sup> Alvarez, IOs as Law-makers, *supra* note 70, 197.

<sup>73</sup> UN GA Res. 59/290, 13 April 2005.



step in dealing with a global crisis.<sup>74</sup> While UN SC Resolution 1373 was a reaction to the 9/11 attacks, UN SC Res. 1540 and the aforementioned Convention are preventive in nature. Together these resolutions show the existence of a “legislative agenda”<sup>75</sup> on the part of the Security Council when it comes to fighting global terrorism.<sup>76</sup>

While the UN SC has, at least partially, taken over the role of world legislature *de facto*, the Council’s legitimacy to do so remains controversial. After all, neither Public International Law as a whole, nor the UN system in particular, know a universal “legislature [...] in the technical sense of the term”.<sup>77</sup> If the term “legislation” is interpreted broadly, as is done here, the Council’s work is not short of legislation. The fact that the Council gets to act as *de facto* legislator is owed to the permissiveness of states which have failed to restrict the Council to the tasks which were originally allocated to it in the UN Charter. The fall from grace came with Res. 1373, which created binding law applicable to all member states. In the debate leading up to Res. 1373, which included 37 representatives of states as well as the Palestinian observer<sup>78</sup> “[n]o speaker expressed concerns that the Council was legislating in that resolution for the international community”.<sup>79</sup> As the British representative reported, the issue for states was not so much the legal basis on which the Council was acting but rather the work of the CTC,<sup>80</sup> the creation of which was simply accepted.

As Alvarez states it when referring to Higgins and Schachter: “States and their lawyers turn to the Council for guidance on these extraordinarily significant legal issues at the heart of state power[,] apparently because they assume (or hope?) that the Council acts in accordance with international law; because Council decisions that incorporate declarations of legality are legally binding; and because they have so few alternative sources for collec-

<sup>74</sup> Boyle & Chinkin, *supra* note 43, 8.

<sup>75</sup> Alvarez, IOs as Law-makers, *supra* note 70, 198.

<sup>76</sup> S. Talmon, ‘The Security Council as World Legislature’, in 99 *American Journal of International Law* (2005) 1, 175, 177-178; He also considers UN SC Res. 1422, 12 July 2002, and UN SC Res. 1478, 6 May 2003, to be legislative in nature. See also *id.* fn. 33.

<sup>77</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadić a/k/a “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (Appeals Chamber), 2 October 1995, para. 43.

<sup>78</sup> Talmon, *supra* note 76, 177.

<sup>79</sup> *Id.*

<sup>80</sup> See the quote of Sir Jeremy Greenstock, *id.*, fn. 30.

tive legitimation.”<sup>81</sup> Therefore, “the Council’s actions enjoy a presumption that they adhere to general principles of law, including respect for treating like cases alike, [which gives states an] incentive to read Council enforcement actions as legal precedents. [The latter in turn apparently] tempts those with power on the Council to use it to establish general law”.<sup>82</sup> This is what is happening in the UN SC because the Council’s new resolutions are general in nature (like laws), rather than situation-specific (like enforcement-actions, which are supposedly the Council’s core business).<sup>83</sup>

Although the UN SC remains selective, even after the end of the Cold War,<sup>84</sup> it is still nourished by the expectation of states that the Council will act in accordance with the law, even when creating new law. It is only this expectation of states which provides a basis for the Council’s legislative work. This of course opens the door for abuse and should the Council’s new found power be abused, future lawyers might find it hard not to consider the states’ reliance on the Council as a naive dereliction of duty on the part of the member states of the UN. The states’ reliance on the Council might reflect a wish for guidance, or in terms of a domestic politics, for a strong leader. It is the states’ responsibility to control the authority they have thus created and to protect the UN’s institutional structure against abuse. In the case of the UN Human Rights Committee, abuse was not only not prevented, the anti-Semitic abuse of the Committee (a tendency which appears to resurface in the successor body, the UN Human Rights Council) led to its eventual demise. Given the Security Council’s central position of power and its far-reaching competencies which dwarf those of the Human Rights Committee, a “hegemonic capture of the Security Council”<sup>85</sup> remains a source of worry.

Yet at the same time, the UN SC is significantly better equipped to deal with global crises than the G20. While there is a risk of the Security Council being abused, it has clear rules on how to create new rules which are also legally binding. Taking into account the aforementioned indicators of effectiveness, in particular fast law-making which results in binding rules, the UN SC’s experience fares better than what can be expected of the G20. The law-making process of the G20 is still too untransparent to allow for a final assessment of its effectiveness, but its legislative capabilities do

<sup>81</sup> Alvarez, IOs as Law-makers, *supra* note 70, 188.

<sup>82</sup> *Id.*

<sup>83</sup> Talmon, *supra* note 76, 176-177.

<sup>84</sup> Alvarez, IOs as Law-makers, *supra* note 70, 187.

<sup>85</sup> Alvarez, Hegemonic International Law, *supra* note 64, 874.

not hold the promise of reaching the effectiveness of the UN SC's law-making abilities. At the same time, it has to be kept in mind that the Council's authority is lacking a solid foundation. In fact, unless the Council is acting under Chapter VII, the Council's authority is based on the factual acceptance of states rather than a clear legal basis in the Charter.<sup>86</sup> In the perception of states, though, the UN SC represents almost 200 states, while the G20 is, albeit no longer as exclusive a club as the G7, far less representative. In comparison, the UN SC is far more efficient, although its relative strength in this respect poses a risk of abuse, particularly in times of global crises.

## 2. The United Nations General Assembly (UN GA)

Also, the UN General Assembly (UN GA) made law, e.g. UN GA Res. 2131 (XX) of 1965, concerning the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty.<sup>87</sup> But it has to be kept in mind that the UN GA's resolutions are, unlike those of the Security Council, not binding. However, that does not mean that UN GA resolutions are without effect. Soft law rules are not necessarily intended to be legally binding<sup>88</sup> - they are neither treaties nor indicative of an *opinio juris* for the purposes of creating customary international law.<sup>89</sup> Soft law rules cannot be enforced<sup>90</sup> but they nevertheless have an impact on the development of Public International Law as they can "later harden into custom, as has happened with the Universal Declaration of Human Rights or become the basis of a treaty", like the 1975 UN GA Declaration on Torture, which provided the basis for the 1985 Convention against Torture (CAT).<sup>91</sup>

## 3. The International Civil Aviation Organization (ICAO)

While the UN SC's law-making agenda in recent years seems to center on fighting terrorism, this is just a small aspect of the legislative work of

<sup>86</sup> Talmon, *supra* note 76, 179-180.

<sup>87</sup> Chesterman *et al.*, *supra* note 62, 117.

<sup>88</sup> D. J. Harris, *Cases and Materials on International Law*, 6th ed. (2004), 64.

<sup>89</sup> *Id.*, 65; ICJ, *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 826, para. 70.

<sup>90</sup> Harris, *supra* note 88, 65.

<sup>91</sup> *Id.*

the International Civil Aviation Organization (ICAO). The work of the ICAO provides a particularly interesting case study on how to react to an unprecedented challenge that required a fast legislative response, involving not only many technical aspects but also had to apply globally.

“The ICAO adopts ‘International Standards’ and ‘Recommended Practices’ as ‘Annexes’ to its constitution. The Recommended Practices are recommendations, the International Standards bind only those states which do not give immediate notification to the ICAO of the differences between their own practice and that established by the international standard [...]. To some extent therefore, international standards resemble conventions.”<sup>92</sup> But some ICAO standards have a wider geographical scope than conventions, in that they also apply to the high seas rather than only the territory of the member states.<sup>93</sup>

Originally, the ICAO aimed at improving air travel safety.<sup>94</sup> Only later did the organization start to have to concern itself with terrorism,<sup>95</sup> in particular in response to the hijackings in the late 1960s and the 1970s. Already around three weeks after the 9/11 terrorist attacks, the ICAO, in the Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation<sup>96</sup>, was able not just to present new rules, but actually to urge compliance with already existing rules (in this case, Annex 17 to the Convention on International Civil Aviation,<sup>97</sup> the ICAO’s “consti-

<sup>92</sup> Schermers & Blokker, *supra* note 3, 781. On the role of the ICAO on the development of International Air Law as a whole see G. F. Fitzgerald, ‘The International Aviation Organization and the Development of Conventions on International Air Law’, in 3 *Annals of Air and Space Law* (1978), 51.

<sup>93</sup> *Id.*; see also J. Carroz, ‘International Legislation on Air Navigation over the High Seas’, in 26 *Journal of Air Law and Commerce* (1959), 158.

<sup>94</sup> H. F. Schäffer, *Der Schutz des zivilen Luftverkehrs vor Terrorismus – Der Beitrag der International Civil Aviation Organization (ICAO)* (2007), 17 [Schäffer, Der Schutz]; See also H. F. Schäffer, ‘Von Kitty Hawk nach Montreal – Der Weg zur International Civil Aviation Organization (ICAO)’, 26 *Transportrecht* (2003), 377.

<sup>95</sup> *Id.*; See also M. C. Bassiouni, ‘Legal Control of International Terrorism’, in 43 *Harvard International Law Journal* (2002) 1, 83.

<sup>96</sup> International Civil Aviation Organization (ICAO): Declaration on Misuse of Civil Aircraft As Weapon of Destruction and Other Terrorist Acts Involving Civil Aviation, Assembly Declaration A 33-1, 41 ILM 2002, 5 October 2001, 501; see also Schäffer, *Der Schutz*, *supra* note 94, 18.

<sup>97</sup> *Chicago Convention on International Civil Aviation*, 4 April 1947, (1994) 15 *U.N.T.S.* 295 [Chicago Convention]; Cf. also R. Abeyratne, ‘The Legal Status of the Chicago Convention and its Annexes’, 19 *Air and Space Law* (1994), 113 and specifically on Annex 17 E. W. Faller, ‘Aviation Security: the Role of ICAO in Safeguarding International Civil Aviation Against Acts of Unlawful Interference’, 17 *Annals of Air and*

tution,” which is also known as the Chicago Convention, which had been created in response to the terrorist attacks against aircraft in the 1960s and 1970s<sup>98</sup>) and to take additional security measures, strengthen cooperation in investigating aerial terrorism cases, and punish perpetrators,<sup>99</sup> thereby pushing its mandate into the realm of criminal law. Today Annex 17 to Article 90 of the Chicago Convention contains a large number of rather detailed technical rules which oblige the member states to adapt their national legislations accordingly,<sup>100</sup> including, for example, procedures regarding the screening of checked-in luggage<sup>101</sup> and the creation of security-restricted areas which can only be entered after a security check.<sup>102</sup>

In an age in which non-state actors play an important role in global crises, be it through irresponsible financial behavior, the spread of disease, terrorism or in other ways, more direct measures are necessary. Again, it is the ICAO which provides a glimpse at how this might be possible. Art. 86 of the Chicago Convention gives the ICAO Council “the power to decide whether a particular international airline is operating in conformity with the Convention on International Civil Aviation.”<sup>103</sup> However, the ICAO Council’s finding works indirectly. For example, it may exert influence over the airline’s landing rights under the national laws of an ICAO member state (or

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*Space Law* (1992), 369; N. Mateesco-Matte, ‘The Chicago Convention – Where from and where to, ICAO?’, 19 *Annals of Air and Space Law* (1994), 371.

<sup>98</sup> Schäffer, *Der Schutz*, *supra* note 94, 146. On the ICAO’s more recent anti-terrorism work see H. Graumann, ‘International Civil Aviation Organization (ICAO), Arbeiten an einer “Draft Convention on the Marking of Plastic Explosives for Detectability”’, 40 *Zeitschrift für Luft- und Weltraumrecht* (1991), 30 and A. Kotaite, ‘Security of International Civil Aviation – Role of ICAO’, 2 *Annals of Air and Space Law* (1982), 95. But see also the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 4 December 1969, ILM, Vol. 2, Nos 4-6, 1963, 1042-1046 [Tokyo Convention]; the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, ILM, Vol. 10, Nos. 1-3, 1971, 133-136; the *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177 and its 1988 *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 24 February 1988, 1589 U.N.T.S. 474.

<sup>99</sup> Schäffer, *Der Schutz*, *supra* note 94, 18. On the ICAO’s response to the 9/11 terrorist attacks see also R. Abeyratne, ‘The Events of 11 September 2001 – ICAO’s Response to the Security and Insurance Crises’, 27 *Air and Space Law* (2002), 406.

<sup>100</sup> Schäffer, *Der Schutz*, *supra* note 94, 149.

<sup>101</sup> Annex 17 to Article 90 of the Chicago Convention, Standard 4.4.1, *supra* note 97, see Schäffer, *Der Schutz*, *supra* note 94, 153.

<sup>102</sup> Annex 17 to Article 90 of the Chicago Convention, Standards 4.7.1-4.7.3, *supra* note 97, see Schäffer, *Der Schutz*, *supra* note 94, 154.

<sup>103</sup> Schermers & Blokker, *supra* note 3, 820.

under EC law). Even where the ICAO regulates the airspace over the high seas, the organization requires her member states to take truly effective action. It is the member states which will punish those who violate ICAO's rules.<sup>104</sup>

The ICAO also is able to react quickly: Art. 48 (a), sentence 2 of the Chicago Convention allows for "extraordinary" sessions of the ICAO Assembly, the organization's legislative body.<sup>105</sup> In being able to rapid action, the ICAO benefits from the inclusion of non-voting technical experts in the Assembly.<sup>106</sup> Under Art. 49 (g) of the Chicago Convention, the ICAO Assembly has transferred a lot of competencies to the ICAO Council, the ICAO's executive branch. The Council, therefore, has become the true center of power of the organization. It is aided by a fifteen-member Air Navigation Commission, a technical body which wields a considerable degree of influence.<sup>107</sup> The Air Navigation Commission is what makes the ICAO truly effective, as it plays a key role in the creation of annexes to the Chicago Convention, and therefore in the creation of new rules. Although the Commission only makes recommendations to the Council, the Council will usually acknowledge the Committee's technical expertise and follow these recommendations,<sup>108</sup> supported by other committees.<sup>109</sup> If there is a risk of too great a dependency on technocrats, it has not translated into serious problems for the ICAO. To the contrary, it provides the ICAO with the capability to take actions in a rapid manner. The Council's power, and accordingly the committees' practical influence, is highlighted when one takes into account that Articles 54(I) and 37 of the Chicago Convention gives the Council the power to create and update annexes to the convention in numerous areas, including air traffic rules,<sup>110</sup> rules on the airworthiness of air-

<sup>104</sup> *Id.*, 821.

<sup>105</sup> Schäffer, *Der Schutz*, *supra* note 94, 60.

<sup>106</sup> *Id.*, 61; See also P. A.-A. Fossungu, 'The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions', 26 *Transportation Law Journal* (1998) 1, 1.

<sup>107</sup> *Id.*, 65-73.

<sup>108</sup> *Id.*, 73, fn. 350; See also R. Abeyratne, 'Law Making and Decision Making Powers of the ICAO Council – A Critical Analysis', 41 *Zeitschrift für Luft- und Weltraumrecht* (1992), 387.

<sup>109</sup> Schäffer, *Der Schutz*, *supra* note 94, 75; See also R. H. Mankiewicz, 'The Legal Committee – Its Organisation and Working Method', 33 *Journal of Air Law and Commerce* (1966), 94.

<sup>110</sup> Chicago Convention, *supra* note 97, Annex 2.

craft,<sup>111</sup> standard requirements for airports,<sup>112</sup> security (in particular in relation to the threat of terrorism),<sup>113</sup> and the safe transport of goods by air.<sup>114</sup>

At the center of the annexes are international standards and recommended practices.<sup>115</sup> While the recommended practices contain exactly that - recommendations<sup>116</sup> - the international standards are legally binding upon the member states. Although they do not yet cross the threshold from inter- to supra-national law, the international standards go far beyond the average power enjoyed by the executive body of an international organization. The Council's power is only borrowed and in using it the Council relies on technocrats. But this executive technocratic approach allowed for a fast response to the challenge of terrorism, both in the late 1960s and after the 9/11 terrorist attacks. The existing doubts concerning the legitimacy of the ICAO Council's approach can only be placated as long as this approach delivers the necessary results. The ICAO Council will have to continue to be up to date in order to combat new threats effectively, primarily by updating Annex 17 to Article 90 of the Chicago Convention.

This approach has its shortcomings from a democracy-theory perspective. But when it comes to providing fast legislative responses, existing specialized international organizations appear to provide an effective forum which should be used first, rather than looking for grand new political initiatives like the G20 which, after a decade of relative insignificance, has been activated only recently. Political initiatives will require time to build themselves and are better suited for agenda-setting rather than legislative purposes, in particular in times of crisis, which call for a fast response.

#### 4. Coordination Between Different International Organizations

Although the financial crisis has a large impact around the world, it is accompanied by other crises, such as for example global warming and the fact that more than 1 billion people live in hunger,<sup>117</sup> which is more than the

<sup>111</sup> Chicago Convention, *supra* note 97, Annex 8.

<sup>112</sup> Chicago Convention, *supra* note 97, Annex 14.

<sup>113</sup> Chicago Convention, *supra* note 97, Annex 17.

<sup>114</sup> Chicago Convention, *supra* note 97, Annex 18.

<sup>115</sup> For a closer look at both, see Schäffer, *Der Schutz*, *supra* note 94, 89.

<sup>116</sup> *Id.*, 106.

<sup>117</sup> Food and Agriculture Organization of the United Nations, *1.02 billion people hungry – One sixth of humanity undernourished – more than ever before* (19 June 2009) available at <http://www.fao.org/news/story/en/item/20568/icode/> (last visited 22 March 2010).

combined population of the U.S., Canada and the European Union.<sup>118</sup> Global crises will often require interdisciplinary solutions, as they are provided by the ACC. Should a topical approach prove to be too narrow to address problems which are not only global in scope but also interdisciplinary in nature, the UN can take a coordinating role, in particular when the international organizations in question are UN specialized agencies such as the ICAO or the WHO.<sup>119</sup> In everyday practice the specialized agencies are already coordinating their work,<sup>120</sup> which further reduces the need for additional new institutions. A long-term coordination could benefit from some institutionalized guidance, as already exists with the ACC for UN specialized agencies.

#### IV. A Role for International Organizations - Intermediate Conclusions

We can conclude that international organizations are uniquely equipped to deal with global crises to a degree not reached by either multilateral conferences or informal groups like the G20. International organizations can create subsidiary organs to focus subject matter expertise accordingly,<sup>121</sup> as the ICAO has done to extremes. In terms of enforcing tertiary rules (primary rules being based on the international law of treaties, secondary rules being the rules included in the international organization's constitutive treaty), international organizations have the advantage of potentially having enforcement options including in their respective constitutive documents, up to the exclusion of members in cases of non-compliance.<sup>122</sup> Without this almost supra-national element,<sup>123</sup> without any form of higher authority, it becomes much harder to enforce rules of Public International Law. Enforceability is a key ingredient of effective legislation. This is especially true when it comes to rules which can be very restrictive and therefore politically unpopular, increasing the risk of non-compliance. The international organizations' additional enforcement possibilities add to making

<sup>118</sup> World Food Program, *Hunger Stats*, available at <http://www.wfp.org/hunger/stats> (last visited 22 March 2010).

<sup>119</sup> But see also Schäffer, *Der Schutz*, *supra* note 94, 58.

<sup>120</sup> *Id.*, 60.

<sup>121</sup> Schermers & Blokker, *supra* note 3, 743.

<sup>122</sup> *Id.*

<sup>123</sup> This supra-national element extends to the international organization's staff, buildings etc., which are often exempt from the national jurisdiction of the host state, *id.*, 744.



international organizations highly qualified for the creation of rules in times of crisis. Furthermore, the functional approach to international organizations can provide them with wide mandates which allow them to act. For example, Article 71 of the Chicago Convention, which essentially is the “Constitution of the ICAO[,] empowers it to provide, man, maintain and administer airports. [...] Whenever the organization acts under this provision, a great number of internal decisions on the administration of such airports are required. These internal decision[s] resemble national laws on the same matter.”<sup>124</sup>

At least as far as new technical standards are required, the ICAO can certainly provide a template for a highly effective approach to global crises. One may ask whether ICAO’s approach is also adequate for cases which are more political than technical in nature. A crisis is characterized by the need for fast and effective action. If the situation requires a legislative approach, this will virtually always include new technical standards in the wider sense, regardless whether the standards in question deal with the threat of terrorism to international aviation or the question of if (and maybe how) to bail out banks which states deem to be too big to allow them to fail, to give just two recent examples. Should a crisis be purely or at least predominantly political in nature, the question is not so much whether the ICAO provides an adequate role model, but rather, whether law-making is the right approach in the first place.

Should the creation of new norms of international law be required, at least for the time being, tertiary law made by the specialized agencies of the UN remains the best available tool when it comes to creating rules effectively: firstly, in terms of creating them quickly; secondly, in terms of benefiting from the necessary technical expertise; and thirdly, in terms of reaching as many states as possible and in terms of being able to include the states which matter in solving crises. To realize this potential, a certain degree of permanence is necessary which cannot be provided by informal groups. The same applies to the required pool of human, intellectual and technical resources which makes specialized organizations, such as the ICAO or the WHO, better suited than less consolidated bodies such as G8 or the G20. The UN’s global reach furthermore benefits the creation of new rules as the membership in the UN is almost global, which benefits the UN specialized agencies, but even more so, the UN Security Council. The UN Security

<sup>124</sup> *Id.*

Council therefore can be considered the most effective organization to create tertiary rules.

## E. Conclusions

When compared to law-making under domestic law, Public International Law is not very effective in dealing with global crises. However, when measured independently against our effectiveness test based on the fast creation of binding rules, we have seen that Public International Law can indeed be utilized to address global crises. The most effective way to do so is through specialized international organizations, which can create binding law without the case-by-case consent of all states.

Specialized international organizations which can set tertiary rules without the express consent of all member states appear to provide the best approach to the fast and effective creation of new binding rules which are globally applicable and which aim to target a specific crisis situation. Decision-making by plenary organs such as the UN General Assembly, which meets once a year, is too slow and inefficient to provide a serious alternative for legislative reactions to global crises.<sup>125</sup> The same is true of traditional multilateral treaty negotiations outside the context of international organizations. That is not to say that these ways of creating new treaty law are obsolete - not at all. But they lack the efficiency which is required to deal with global crises. Political compromises between states will not often yield the best results,<sup>126</sup> which in turns makes it necessary to have some input by experts on the subject matter.<sup>127</sup> International organizations tend to be bureaucratic,<sup>128</sup> but it is this institutional character which gives them an edge over other actors,<sup>129</sup> in particular informal and untransparent trans-governmental networks such as the G20.

<sup>125</sup> *Id.*, 286.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> M. N. Barnett & M. Finnemore, *Rules for the World – International Organizations in Global Politics* (2004), ix, 16-18.

<sup>129</sup> *Id.*, ix.