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**DR. ELAINE FAHEY 'INTRODUCTION: FRAMING THE ACTORS OF POST-NATIONAL RULE-MAKING' IN *THE ACTORS OF POSTNATIONAL RULE-MAKING: CONTEMPORARY CHALLENGES OF EUROPEAN AND INTERNATIONAL LAW* EDITED BY ELAINE FAHEY (ROUTLEDGE – 2015)**

**Dr. Elaine Fahey\***

**Introduction: Framing the Actors of Post-National Rule-Making**

This publication has its origins in a workshop held in Amsterdam organised by the 'Architecture of Postnational Rule-Making' research project at the University of Amsterdam, devoted to dissecting new means and forms of actors engaging in rule-making beyond the Nation State. While there may be vast legal literature devoted to dissecting functional actors, courts and forms of private actors and legislative or executive power, legal scholarship rarely hones in on the precise idea of an actor in rule-making. Arguably this publication takes an even narrower cut of the theme and selects predominantly- but not exclusively- two subject areas as its focus, which are European Union (EU) law and Public International law as manifestations of postnational rule-making. EU and PIL arguably constitute the leading contemporary sources of study for postnational rule-making and for this reason are worthy subjects. However, this is not to suggest that it is the only or optimum take on postnational rule-making. Part of the difficulty targeted by this publication is that irrespective of the subject area, many of the most significant actors engaging in rule-making in contemporary times are not technically 'actors' in strict legal terms. The publication thus focusses upon certain 'blind spots' in our understanding of actors in rule-making, that impact upon and even shape our analysis of conduct and the reasons for their status quo as blind spots. In order to further narrow the terms of the contribution, its focus is in large measure upon the analysis of practices of rule-making, specific behaviour and action taking place in what might be termed 'in the shadows' of other institutional components. Postnational rule-making is a term which may capture a vast range of rule-making beyond the Nation State. It may capture EU and Public International law in their entirety. As living sciences such subjects appear often highly flexible and innovative. And while postnational rule-making poses challenges for understanding the place of the nation State it also affords a useful *tabula rasa*. The *tabula rasa* of postnational rule-making must be approached by the user with caution. In this regard, part of the challenge of postnational rule-making maybe empirical as much as metaphysical, i.e. as to what it is and what is could and should be are equally challenging.

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## I. On 'postnational' rule-making

### (i) An overview

A 'constellation' is the infamous and commonly-used construct of 'postnational' rule-making, embracing all transnational law and theory. It is often used to depict in all-embracing terms its components, by way of a term which specifically captures its spatial and theoretical complexity.<sup>1</sup> The lexicon of the 'spatial' is not unique to the transnational.<sup>2</sup> The appeal of spatial metaphors explains from assertions of its usefulness as to its methodological components.<sup>3</sup> Yet for all of its spatial associations, such a constellation encompasses a conglomeration of institutions, transnational and supranational organisations, private economic power, and, of course, the Nation State.<sup>4</sup> The vastness of the number of actors within this context may readily cause us to lose sharp focus. Moreover, the 'direction' of one's focus upon actors may be methodologically dominant.<sup>5</sup> For example, private economic power has tended to form the subject and object of much contemporary analysis, but in a 'unidirectional' fashion.<sup>6</sup> And newer actors and configurations of actors may attract more attention, than existing institutional entities or international organisations.

What this publication focusses upon is how the postnational 'constellation' comprises many active and 'living' institutional components. Institutional and specific forms of international law have traditionally been enacted so as to provide information for political actors in decision-making process, to provide certainty for the global legal order and to constrain, develop and evolve global politics. The goals of such changes have been shown to be easily overtaken over time, by time itself, power, politics and many other internal and external criteria. The postnational constellation inherently comprises active and living entities acting beyond the control of political processes or organised institutional design. There is an organic quality to it that is both challenging but also explanatory thereof. As a landscape, it operates within an uneasy actor-causative dynamic-: has it

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<sup>1</sup> P. Zumbansen, 'Transnational Law, Evolving' (2011) *Osgoode CLPE Research Paper No. 27/2011* accessed <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975403](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975403)>.

<sup>2</sup> 'Public administration' is similarly a space of proliferating actors, a proliferation that comes in waves of developments at national and international level - see D. Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford: OUP, 2009).

<sup>3</sup> Zumbansen, (n 1), see D. Chalmers, 'Post-nationalism and the quest for constitutional substitutes' (2000) 27 *Journal of Law and Society* 178.

<sup>4</sup> A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* pp. 999-1046.

<sup>5</sup> K. Abbott and D. Snidal, 'International Regulation without International Government: Improving International Organization Performance Through Orchestration' (2010) 5 *The Review of International Organizations* pp 315-344.

<sup>6</sup> *Ibid.*

resulted in the need for or more so the significance of *more* actors in the rule-making space.<sup>7</sup> Least of all, it has not particularized our focus upon its components.

## (ii) On Postnational Rule-Making and its lexicon

The terms such as ‘postnational constitutionalism’ or ‘postnational democracy’ have been deployed to depict ‘the state of the State’ as much as the *decline* of the boundaries of societal orthodoxy.<sup>8</sup> Yet there is no accepted normative idea of postnational ‘law’. At its height, the deployment of the term postnational in legal scholarship has been critiqued as being both ‘EU-centric’ and ‘Court-centric’. It has been dismissed as lacking relevance to any legal order or field outside of the context of the EU, constructed largely through judicialised understandings of conduct that may not be readily transposed elsewhere. Fundamentally, the postnational is perceived not to have a broad reach, precisely because, as has been wryly remarked, ‘we have yet to arrive at a post-national world’.<sup>9</sup> Nonetheless, its context and lexicon indicates that the performance of constitutionalism and politics is no longer configured around or constructed *within* the territorial strictures of the Nation State. It signifies the importance of the proliferation of new forms of law and politics, interactions between legal orders and political disordering.<sup>10</sup> The study of the ‘postnational’ is arguably less a study of single or specific actors, instruments or policies and instead is probably more accurately a broader methodology to study shifts in actors, norms and processes.<sup>11</sup>

Whatever about its over-arching ‘lexicon’,<sup>12</sup> postnational rule-making as a process is more intrusive than ever, taking place under public scrutiny, around or alongside the increasing openness of a

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<sup>7</sup> B. Kohler-Koch and C. Quitkat, *De-Mystification of Participatory Democracy: EU-Governance and Civil Society* (Oxford: OUP, 2013).

<sup>8</sup> K. Ladeur, ‘The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law - From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships’ (1999) *Law No. 99/3, EUI Working Papers* European University Institute, Law Department; E. Eriksen, C. Joerges and F. Rödl (eds.), ‘Law, Democracy and Solidarity in a Post-national Union: the Unsettled Political Order of Europe – Routledge Studies on Democratising Europe’ (Oxford: Routledge, 2008); E. Eriksen, C. Joerges and F. Rödl (eds.), ‘Law and Democracy in the Post-National Union’ (2006) *Arena/European University Institute Arena Report 1/2006*, ; N. Walker, ‘Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms’ (2012) 3 *Transnational Legal Theory* pp. 61-86.

<sup>9</sup> G. Shaffer, ‘A Transnational Take on Krisch’s Pluralist Structure of Postnational Law’ (2012) 23 *European Journal of International Law* pp. 565-582, 582; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2011).

<sup>10</sup> See Chalmers, (n 3).

<sup>11</sup> R. Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (The Hague: Martinus Nijhoff Publishers, 2012).

<sup>12</sup> ‘The vocabulary of a person, language, or branch of knowledge’ accessed <<http://www.oxforddictionaries.com/definition/english/lexicon>>

digitally-connected global society.<sup>13</sup> It is a change that is said to reflect the shifting empirical landscape of the exercise of authority beyond the Nation State.<sup>14</sup> The actors of this context may be said to have become more easily visible and more responsive to this scrutiny in recent times, in the era of transparency and public protests for accountability.<sup>15</sup> This leads to a consideration of the empirics of actors engaging in rule-making beyond the Nation State, as to, *inter alia*, what we measure and how we understand such measurement.

### (iii) The empirics of what we speak about beyond the Nation State

From an empirical perspective, our understanding of the 'postnational' or its constellation remains limited, variable and even haphazard. Despite the evolved state of transnational law as an established subject,<sup>16</sup> with its own communities, literature, esoteric publications across subject fields, there are comparatively few 'agreed' data sets, databases or agreed empirical sources used by lawyers as to the basis of our understanding of the operation of the subject.<sup>17</sup> The rising incidence of the delegation by Member States of authority to international organisations, the rising number of international organisations, the exponential rise of transnational non-governmental organisations (NGO's) and the increase of majority-voting in international organisations provide important empirical examples.<sup>18</sup> The number of transnational entities exercising political influence has increased considerably, from international courts and tribunals to rating agencies, accounting standards and education setting bodies.<sup>19</sup> Allied to this is the so-called development of 'juristocracy',

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<sup>13</sup> See, for example, Michael Zürn 'The politicization of world politics and its effects: Eight propositions' (2014) 6(1) *European Political Science Review*, 47-71.

<sup>14</sup> Ibid.

<sup>15</sup> See, for example, the evolution of the EU-US Transatlantic Trade and Investment Partnership (TTIP) negotiations and the place of transparency therein or the evolution of ICANN rule-making and its gradual openness for and to the world.

<sup>16</sup> Which arguably has a much broader reach than postnational rule-making but may be considered synonymous to a large degree.

<sup>17</sup> See B. Koremenos, 'The Continent of International Law' (2012) *Journal of Conflict Resolution* pp. 1-29.

<sup>18</sup> See, Zürn (n 13). See also M. Herdegen *Principles of International Economic Law* (Oxford: OUP, 2014) at p 29 where he notes how according to the Union of International Associations in 1909 the number of IGOS amounted to 37 while in 1999 this number had increased to over 3637 see <[www.uia.org/statistics/organisations/ytb299/php](http://www.uia.org/statistics/organisations/ytb299/php)>. See Yearbook of International Organizations (BRILL, Hague), listing 1,200 new organizations annually. It registers 64000 transnational civil society organisations generally. The number of intergovernmental organisations listed in the *Yearbook of International Organizations* for 2013-2014 is 7710, a dramatic rise from the 123 recorded in 1951, (Leiden, Brill: 2013) Kanetake, 2014; see the 'Continent of international law' project accessed <<http://www.isr.umich.edu/cps/coil/>>; the Authority of International Institutions, Transaccess accessed <<http://www.statsvet.su.se/english/research/research-projects/transaccess>>; PICT-PICT Project on international courts and tribunals accessed <[www.pict.picti.org](http://www.pict.picti.org)>; M. Zürn (n 13), L. Hooghe and G. Marks, 'Delegation and Pooling in International Organizations' (2014, Forthcoming) in *Review of International Organizations*.

<sup>19</sup> See Zürn (n 13).

meaning the proliferation and the empowerment of international courts and reflections on how the epistemic authority of transnational and international bodies and their rising and measurable influence.<sup>20</sup> The prominence of international bodies and courts within these disparate but unifying developments is apparent.<sup>21</sup> This has perhaps incited many to reflect on new metrics of global governance emerging, for example, indicators from technologies,<sup>22</sup> while older metrics ('hard' numbers) become part of a historical-sounding account of 'proliferation'.<sup>23</sup> One may pose the question as to whether sufficient empirical or conceptual clarity may be brought to bear upon 'the whole' and the sum of the parts together as one enterprise in the current status quo, and constitutes the context for the current contribution.

An empirical account of the circles of influence surrounding such rule-making practices:- i.e. those such as private associations, private economic power, lobbyists and experts including academics, who initiate, bolster, support or sustain rule-making, arguably remains on the margins of our knowledge. It may also differ substantially between legal orders and legal cultures. The 'superstructure' of postnational rule-making may cause us concern because sometimes its components may seem more significant than the 'sum of its parts'. For instance, its actors comprise powerful and independent judiciaries, new manifestations of 'executive' actors after the State or transnational parliamentarianism. They may all be broadly understood as entities engaged in autonomous rule-making, to whatever degree.<sup>24</sup> Such institutional components of organisations exercising public authority after the State, constitute the institutionalized phenomena of this landscape.<sup>25</sup> These institutional components of organisations, not limited to the judiciary, may

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<sup>20</sup> R. Hirschl, 'Juristocracy vs. Theocracy: Constitutional Courts and the Containment of Sacred Law' (2009) 1(2) *Middle East Law and Governance* pp. 129-165; R. Mackenzie, C. Romano, P. Sands, and Y. Shany, *The Manual on International Courts and Tribunals* (Oxford: OUP, 2010); see Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford: OUP, 2014); B. Kingsbury and C. Romano (eds.), 'Symposium on Proliferation of International Tribunals: Piecing Together the Puzzle' (1999) 31(4) *NYU Journal of International Law and Politics*. K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014, forthcoming). M. Kanetake and A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (Oxford: Hart Publishing, forthcoming).

<sup>21</sup> See Alter, (n 19).

<sup>22</sup> See Kevin E. Davis, Benedict Kingsbury, Sally Engle Merry IILJ Working Paper 2010/2 Rev (Revised August 2011) Global Administrative Law Series Indicators as a Technology of Global Governance.

<sup>23</sup> B. Kingsbury and C. Romano (n 20).

<sup>24</sup> I.e. see R. D. Kelemen, 'Eurolegalism and Democracy' 50(1) *Journal of Common Market Studies* 55-71 and R. D. Kelemen *Eurolegalism: The Transformation of Law & Regulation in the European Union* (Harvard: Harvard University Press, 2012) (on transnational courts and European courts in particular); D. Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford: OUP, 2009) (on the executive in the EU); see Walker, (n 8) on transnational parliaments. See D. Jančić, 'The European Parliament and EU-US relations: revamping institutional cooperation?' in E Fahey and D. Curtin (eds.), *A Transatlantic Community of Law Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge: CUP, 2014).

<sup>25</sup> A. Bogdandy et al 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal* pp. 1909-1938, accessed <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1048>>.

manage to engage in rule-making practices through exhibiting *inter alia* influence, independence, autonomy, contestation and an ‘active’ development of their functions and roles. So what could be an optimal means or method to capture them, collectively? Nevertheless, current descriptors (and metrics) of the ‘postnational’ may not give us adequate analytical tools to measure the intrusiveness of contemporary rule-making nor its actors. This provides more forceful reasons to sharpen our analytical and normative focus as to *actors*.

## II. Actors in EU and international law: between formalism and flexibility

### (i) Overview

The idea of ‘actors’ is critical to the theorisation of power, autonomy, influence and even legitimacy in rule-making beyond the Nation State. However, there is no consensus in scholarship on what it means to be an actor, despite its centrality to discussions on rule-making, power and influence, across disciplines, not least in legal scholarship.<sup>26</sup> An actor engaging in rule-making is understood in this account as those who adopt acts, practices and/ or standards in the exercise of legal authority. These challenges are felt acutely in rule-making beyond the Nation State, where the actors may either be fledging or evolving and where the rule-making practices may vary substantially from conventional practices. To view an institution as an actor in their own right is a technically rather inaccurate one from a legal perspective.<sup>27</sup> This is because legal doctrine employs formal and arguably limiting criteria to assess ‘actor qualities,’ e.g. legal personality, legal authority to act and institutional autonomy. These criteria are heavily rooted in the *Trias Politica*.<sup>28</sup> The problem they pose is a circular one because such formalism may pose endless limitations. For example, one may consider in this light the challenges faced by those seeking to conceptualise actors in international law as ‘participants’ or those arguing for a departure from an understanding of international legal

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<sup>26</sup> C. Hill, ‘The Capability-Expectations Gap, or Conceptualizing Europe’s International Role’ (1993) 31(3) *Journal of Common Market Studies* pp. 305-328; J. Jupille and J. Caporaso ‘States, Agency and Rules: the European Union in Global Environmental Politics’ (1998) in C. Rhodes (eds.), *The European Union in the World Community*, (Boulder, Colorado: Lynne Rienner, 1998, pp. 213-229); M. Barnett, M. Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004).

<sup>27</sup> While it is difficult to find clear statements to this effect, it is perhaps a self-evident proposition within scholarship.

<sup>28</sup> M. Cremona, ‘The European Union as a global actor: Roles, models and identity’ (2004) 41 *Common Market Law Review* pp. 553-573; D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford: OUP, 2005); R. Collins and N. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (United States: Routledge, 2011);



personality limited to State actors.<sup>29</sup> Or to similar effect, one might consider in Public International law the complexity of the formulation of an 'international foreign fighter' in the UN Security Council Resolution or in EU law, the evolution of the European External Action Service (EEAS) as a 'legal actor'.<sup>30</sup> By contrast, other disciplines may appear often significantly less burdened by formalism. For example, emerging theories of international politics readily embraced the new phenomenon of secretariats of international organisations.<sup>31</sup> These practices cause us some difficulty in that they appear to open up a greater distance between law and other disciplines as to the lexicon of actors.

To put the issue differently, one may ask how malleable should legal principles be for each new actor as part of a system and/ or organisation? For example, the autonomous 'arrangements' in multilateral environmental agreements adverted to above have been accorded their own lexicon and are now the working language of International environmental law.<sup>32</sup> This in turn raises the question as to appropriate flexibility and pragmatism of legal theory as to actors. It has been argued that to construe public international law in overly simplified terms of 'subjects' and 'objects' would subject it to a form of intellectual prison.<sup>33</sup> Instead, many call for more elaborate conceptual tools to systematize the lexicon of non-state actors and their role played in contemporary international law.<sup>34</sup> Yet whether the solution lies in relativizing the subjects or subjectivising the actors remains for some time open to doubt.<sup>35</sup>

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<sup>29</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP, 1994); C. Walter, 'Subjects of International Law' (2007) in R. Wolfrum et al (eds.), *The Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2012) Vol 9 pp. 634ff; A. Bianchi, *Non-State Actors and International Law* (London: Ashgate Publishing 2009); S. Woolcock, 'State and Non-State Actors' in S. Woolcock and N Bayne (eds.), *The New Economic Diplomacy* (London: Ashgate Publishing, 2<sup>nd</sup> ed, 2007); R Hofmann, *Non-State Actors as New Subjects of International Law - from the Traditional State Order towards the Law of Global Community* (Berlin: Duncker and Humblot, 2000).

<sup>30</sup> UN Security Council Resolution 2178 on foreign terrorist fighters S/RES/2187 (2014) (24 September 2014); see also <<http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/>> ; <<http://www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/>>; M. Gatti, 'Diplomats at the Bar: the European External Action Service before the EU courts' (2014) 39(5) *European Law Review* 664.

<sup>31</sup> M. Barnett and M. Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 *International Organizations* pp. 699-732.

<sup>32</sup>E.g. involving a conference or meeting of parties with decision making powers, a secretariat and specialist subsidiary bodies; see R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94(4) *American Journal of International Law* pp. 623-659; F. Biermann and B. Siebenhüner (eds.), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (Cambridge, Massachusetts: MIT Press, 2009).

<sup>33</sup> See Higgins, (n 29).

<sup>34</sup> S. Woolcock, 'State and Non-State Actors' in S Woolcock and N Bayne (eds.), *The New Economic Diplomacy* (London: Ashgate Publishing, 2<sup>nd</sup> ed., 2007); R Hofmann and N. Geissler (eds.), *Non-State Actors as New Subjects of International Law - from the Traditional State Order towards the law of Global Community* (Berlin: Duncker and Humblot, 1999); see Bianchi (n 29).

<sup>35</sup> See Bianchi (n 29).

One issue might be that legal scholarship lacks catch-all categories for actors, unlike, for example, in political economy. In political economy, 'actors' comprise state actors, international organisations, club forums e.g. G 7, 8 and 20, market actors, Non-Governmental Organisations and significantly, the catch-all category of 'everyday actors'.<sup>36</sup> As a science, it is a curious one because these categorisations are dependent upon which of them receives the most attention. Instead, we might argue that legal scholarship is much more matter of fact. International law traditionally recognises only a small number of entities capable of possessing international rights or duties and of bringing international claims because its primary subjects have always been States. Other traditional subjects of international law are insurgents or sui generis entities e.g. the Holy See, the International Committee of the Red Cross. International organisations with international legal personality have followed thereafter, more prominently the UN and the number of international organisations has risen substantially over time- from the IMF, the World Bank Group, and the WTO.

The problem lies in that international rules are shaped increasingly by actors *beyond* the traditional subjects of international law e.g. International non-governmental organisations, transnational corporations, inter-agency cooperation. Private economic actors and companies have been strengthened by the rise of international investment protections. 'Actors' as a domain of study in legal scholarship tend to be depicted in esoteric subjects which have distinctive interactions between markets, private and public actors. For example, International Economic Law carves up actors to comprise States, State enterprises, International organisations, non-institutionalised forums of cooperation, international inter-agency cooperation, non-governmental organisations and private corporations and standard-setters for transnational cooperation.<sup>37</sup> Nevertheless, such analyses remain rooted in the 'subject' paradigm of public international law. This has an awkward relationship with 'standard-setting' and bottom-up practices or conduct that generates rule-making beyond these categories. No matter how vast the categorisation of actors appears, it arguably has a static quality to it.

The proliferation or 'pluralisation' of actors are also key concerns of contemporary EU law. Yet there is no agreed definition of an actor under EU law.<sup>38</sup> Instead, a sharp distinction is drawn there between

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<sup>36</sup> E.g. A. Broome, *Issues and Actors in the Global Political Economy* (London: Palgrave Macmillan, 2014) Part I and Ch. 9. See the diagrammatic structure on pp. 12.

<sup>37</sup> M. Herdegen, *Principles of International Economic Law* (Oxford: OUP, 2014), Chapter 3

<sup>38</sup> See M. Ruffert, *Personality under EU Law: a conceptual answer towards the pluralisation of the EU* *European Law Journal* (2014) 20(3) *European Law Journal*, pp. 346-367; M. Ruffert and C. Walter (eds.), *Institutionalised International Law* (Oxford: Hart Publishing, forthcoming, 2015).

the masters of the treaties and those amenable to judicial review or those with legal personality.<sup>39</sup> This concern is usually framed around the control of discretion or legality control of the powers of burgeoning agencies *vis a vis* the Commission, the Member States and national authorities. As a result of these developments, a permissive approach to the rule-making of the proliferating agencies has been recently adopted by the Court of Justice, where it has laid emphasis upon the importance of highly structured functionality rather than controls *per se*, even where extensive institutional design has been built up upon thin legal authority.<sup>40</sup> As will be discussed next, the grant of legal personality under EU law has been predominantly accorded to entities such as agencies in a wholly pragmatic rather than conceptual basis.<sup>41</sup> Similarly, the burgeoning use of the term 'non-state' actors as a term of art to comprise almost any entity *inter alia* contesting legitimacy, authority or accountability in public international law has followed a similarly pragmatic rather than conceptual path.<sup>42</sup> Flexibility and pragmatism are dominant and enduring themes in both subjects but do not necessarily provide analytical frameworks of any sophistication.<sup>43</sup> Instead they may be said to demonstrate the somewhat crudely factual understanding of actors in contemporary legal scholarship. However, such a conclusion would appear unduly harsh or quick to judge and reflects little upon the question of methodology. This would seem to lead to the question of the method to identify actors in EU and International law.

## (ii) Functional and technical identification of actors in EU and International law

The criteria for identifying actors in EU and public international law are dominated by legal personality. Methodologically, it plays a highly relativist function. Legal personality is a quality granted by certain legal norms and is exclusively recognized in the light of a respective norm. As a

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<sup>39</sup> See Ruffert, *ibid* IV, (D).

<sup>40</sup> Eg Case C-270/12 *UK v. European Parliament and Council* (Judgment of the Grand Chamber of 22 January 2014), on the basis of Article 114 Treaty of the Functioning of the European Union

<sup>41</sup> It arguably also reflects the under-developed conceptualisation of institutional balance in contemporary EU law: J. Jacqu , 'The principle of institutional balance' (2004) 41(2) *Common Market Law Review* pp. 383-391; J. Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament : A Historic Vote and Its Implications' (2010) 15(2) *European Foreign Affairs Review* pp. 143-151; P. Craig 'Institutions, Power and Institutional Balance' in P. Craig and G. B rca (eds) *The Evolution of EU law* (Oxford: OUP, 2011) pp. 41-84; R. Dehousse, 'Misfits: EU Law and the Transformation of European Governance' in C. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002). B. Smulders and K. Eisele, 'Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon' (2012) College of Europe, European Legal Studies, 04 *Research Papers in Law* accessed <[http://aei.pitt.edu/39285/1/researchpaper\\_4\\_2012\\_smulderseisele\\_final.pdf](http://aei.pitt.edu/39285/1/researchpaper_4_2012_smulderseisele_final.pdf)>; G. Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* pp. 304-322; J. Ziller, 'Separation of Powers in the European Union's Intertwined System of Government - A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers' (2008) 73 *Il Politico* pp. 133-179.

<sup>42</sup> See above, n 34.

<sup>43</sup> The rise of pragmatism is further evident in recent debates on the possible decline of formal treaties as a mechanism for cooperation in international law.

result, legal personality is frequently 'side-lined' as a highly technical, doctrinal or functional issue. Personality in the EU legal order often appears to be granted less on a conceptually reflected basis and rather for pragmatic reasons, thereby enabling entities to perform legal activities.<sup>44</sup> Thus, it is a 'doers' vision of functionality, rather than a 'thinkers' one. For example, while all 35 regulatory agencies of the EU have legal personality and independence,<sup>45</sup> many non-independent executive agencies established to perform programmes on behalf of the European Commission also have legal personality.<sup>46</sup> Some agencies have explicit clauses granting powers of legal supervision to the Commission, others not but such distinctions are not necessarily perceived to have any significance.

And if personality is 'granted' by public international law, this signifies recognition of an entity in the international sphere and direct submission of the entity under the principles and rules of public international law.<sup>47</sup> Public international law differentiates sharply between entities vested with personality and institutions acting on behalf of these entities. For example, the United Nations bear

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<sup>44</sup> Ruffert, (n 38) pp. 350; M. Cremona, 'The European Union as an international actor: the issues of flexibility and linkage', (1998) 3(1) *European Foreign Affairs Review* pp. 67-94; R. Leal-Arcas, 'EU Legal Personality in Foreign Policy?' (2006) 24(2) *Boston University International Law Journal*, pp. 165-212; R. Wessell, 'Revising the international legal status of the EU' (2000) 5(4) *European Foreign Affairs Review*, pp. 507-537. P. Caldwell, *EU External Relations Law and Policy in the Post Lisbon era* (The Hague: T M C Asser Press, 2012). Cf The conference on 'The Category of the Person in EU Law' EUI/ University Paris 1 in 2014, focussing upon the protection of the person as the chief asset and interest of EU law, reflecting its shift from agency to identity, as well as the prominence of justice.

<sup>45</sup> Ruffert n 38, pp. 349; E. Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) 46 *Common Market Law Review* pp. 1395 - 1442; S. Griller and A. Orator, 'Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' (2010) 35 *European Law Review* pp. 3 - 35; M. Busuioac, *European Agencies: Law and Practices of Accountability* (Oxford: OUP, 2013).

<sup>46</sup> Article 4(2) Council Regulation (EC) No. 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

<sup>47</sup> J. Nijman, *The Concept of International Legal Personality - An Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004); D. Akande, 'International Organizations' in M. Evans (eds.), *International Law* (Oxford: OUP, 3<sup>rd</sup> edn, 2010); J. Klabbbers, 'Presumptive Personality: the European Union in International Law', in M. Koskeniemi (eds.), *International Law Aspects of the European Union* (The Hague: Nijhoff, 1998) at 231; C. Brölmann, *The institutional veil in public international law* (Oxford: Hart Publishing, 2007); G. Weissberg, *The International Legal Personality of the United Nations* (Columbia: Columbia University, 1959); C. Jenks, 'The Legal Personality of International Organisations' (1945) 22 *British Yearbook of International Law* 267, at 270; M. Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations (1970) 44 *British Yearbook of International Law* pp. 111-155; A. Reinisch, 'Securing the Accountability of International Organizations' (2001) 7(2) *Global Governance* pp. 131-149; I. Seidl-Hohenveldern, 'The Legal Personality of International and Supranational Organisations' (1965) 21 *Rev Egyptienne Droit Int* pp. 35-72; F. Seyersted, 'International Personality of Intergovernmental Organizations: do their capacities really depend on their constitutions' (1964) 4 *Indian Journal of International Law* pp 1-74; J. D'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 *International Organizations Law Review* pp. 91-119; H. Aufricht, 'Personality in International Law' (1943) 37 *American Political Science Review*, pp 217-243; D. Bethlehem, 'The end of geography: the changing nature of international system and the challenge to international law' (2014) 25(1) *European Journal of International Law* pp 9-24; J. Klabbbers, 'The concept of legal personality', (2005) *Ius Gentium, Journal of the University of Baltimore*, pp 35-66; M. Sellers, 'Legal personality: International legal personality', (2005) 11 *Ius Gentium, Journal of the University of Baltimore*, pp 67-78.

personality while the Security Council and General Assembly do not. Yet while the international legal capacity of the IMF is not disputed, there is dispute concerning the form of agreements that it enters with Member States.<sup>48</sup> And although there may be a 'notion' of personality under public international law or national private law, there is no concept of a legal person under EU law.<sup>49</sup> More practically, the EU does not become legally subdivided by institutions such as the European Central Bank or European Investment Bank and instead they gain such powers as functional or practical means to allow them to become active in the international field, indicating the dominance of pragmatism. The redundancy of legal personality as a functional tool might be emphasised by contemporary EU law. Many new actors created in recent times are not technical actors for example, the European External Action Service (EEAS), the European Cybercrime Centre (EC3) or the European Public Prosecutors Office (EPPO).<sup>50</sup> Instead, they are carved up in other ways, for example, in the case of the EC3 as 'desks' of other institutions, i.e. of the evolving entity, Europol. As practice demonstrates, this does not preclude their autonomous development as actors who litigate or can be subject to judicial review. Arguably, such developments serve to underscore the unhelpful limits of doctrinalism and legal formalism, lacking realism about autonomy and institutional behaviour.

**(iii) The 'whole' and the sum of the parts: speaking about institutional components of international organisations as actors in rule-making**

One means to look beyond legal and doctrinal formalism might be to gauge how we have evolved our understanding of the measurement of entities *qua* institutions. In this respect, pragmatism remains a challenge to the measurement of institutions, as much as the malleability of language. For example, consider those who have argued that each piece of international law should be studied as an institution itself, such that the set of institutions comprises a 'continent'.<sup>51</sup> International and EU law have proven themselves both to be flexible and pragmatic projects and yet risk much analytical clarity through the dominance of this pragmatism.<sup>52</sup> We may observe how legal theory specifically adopts a highly *internal* analytical perspective that renders its evolution more challenging. So this raises the question as to the usefulness and workability of *external* perspectives.

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<sup>48</sup> E. Denters, *Law and policy of IMF Conditionality* (1996) (The Hague: Kluwer Law International, 1996), at 306. N. Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability' (2005-2006) 12 *U. C. Davis J. Int'l L. & Pol'y* at 344. J. Jackson, T. Cottier, J. Jackson and R. Lastra (eds.), *International Law in Financial Regulation and Monetary Affairs* (Oxford: OUP, 2012).

<sup>49</sup> Ruffert, (n 38).

<sup>50</sup> See Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office COM/2013/0534 final; <https://www.europol.europa.eu/ec3>. See n 30.

<sup>51</sup> See Koremenos, (n 17).

<sup>52</sup> See Bianchi, (n 29).

Formalist understandings of those who are ‘actors’ engaged in rule-making are unable to capture much about EU law-making with many new manifestations of ‘executive’ actors after the State, powerful and independent judicial components or the rise of transnational parliamentarianism, broadly understood as actors engaged in rule-making after the State. To be sure, some may act with considerably more institutional, social or political legitimacy than others. We may say that formalist criteria and theorisations operate to exclude the acts or practices of institutional entities or components that are part of international organisations who exercise public authority beyond the State, who are not regarded as unitary actors or equivalent to the organisation itself. Yet how do they in reality interact with private associations, unions or certain experts? What is their zone of influence? How do we assess the autonomy of these component parts?

The rise of transnational parliamentarianism - such as in the Transatlantic Legislatures Dialogues (TLD),<sup>53</sup> the Association of Southeast Asian nations (ASEAN) or the Arctic Council assemblies- through embryonically formalised contacts and then rule-making initiatives, may indicate ‘living’ practices of actorness. Similarly, ‘agencification’ in regional, national and international legal orders- empowering many independent actors and according them legal personality with increasingly less checks- might lead us to draw similar deductions. Yet are they appropriately excluded from actorness as a result? Lexicon has provided with relative flexibility and creativity which notably has not availed of actorness in its evolution. For instance, new entities labelled as ‘quasi-autonomous’ actors under EU law have generated a new lexicon of accountability in EU law and governance.<sup>54</sup> It suggests a flexibility through law which is absent in actorness theorisations.

Courts are largely omitted from theorisations of actorness, even courts that are globally and/ or empirically acknowledged to be powerful, independent bodies engaging in rule-making practices, directly or indirectly.<sup>55</sup> It raises the question as to when do courts act as actors in transnational rule-making, formally and informally and/ or directly and indirectly inside and outside the courtroom? How are practices of judicial institutions changing? Are courts overlooked as actors outside their courtrooms, for example, their formal interventions in legislative processes? How does (such) actorness impact upon adjudication of such rules, as regards accountability? Do such questions detract from the usefulness of actorness or simply indicate its ‘distance’ from legal theory?

One such means to look beyond challenges posed by formalism is to consider understandings of actors and structural power, which is considered here next.

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<sup>53</sup> See Jančić (n 24).

<sup>54</sup> See the account of M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13(4) *European Law Journal* pp. 447–468.

<sup>55</sup> See in particular the work of Kelemen, (n 24); Alter, (n 19)

### III. Looking through and beyond law in conceptualising actors in rule-making

In non-legal scholarship on the study regions and organisations, the phenomena of ‘actorness’ embraces less readily evolving organisations or their institutional components, even when they obtain legal personality or legal authority to act, for example, the EU or ASEAN.<sup>56</sup> The criteria remain much disputed and in flux but paradoxically retain much significance across subject fields.<sup>57</sup> The conceptualisation of actorness capacity provides that four distinct dimensions be studied:- authority, autonomy, external recognition and internal cohesiveness.<sup>58</sup> Yet the perspective of the ‘poser’ of the question is significant, if we may term it this way. Is actorness *actively* ever sought-after by either fledging or components of international organisations? Or both? Do events in the Crimea indicate to us that the external perspective, i.e. of recognition, remains the most dominant component for lawyers? Adopting a more *internal* perspective, however, we may observe that practices as to actorness could have a dramatic impact upon an international organisation *vis a vis* its constituent institutional components. But would this be a more ‘valid’ analytical frame?

The criteria of ‘actorness’ in non-legal scholarship often include *inter alia* the *de facto* or *de jure* recognition of its actions, the legal authority to act, its institutional autonomy or distinctiveness and the cohesion between its constituent parts in the formulation of policy.<sup>59</sup> Each of the criteria has a distinctive and formal legal component: for example, external recognition, *de facto* and *de jure*, external delegation of competences, institutional independence and competence-derived cohesion. If legal scholarship is largely ‘fixated’ upon formalist criteria of legal personality or legal authority to act, we might usefully consider whether non-legal scholarship may also be said to reify such criteria. There are descriptive and normative components to actorness that may appear to sit together uneasily from a legal perspective. For example, do the criteria logically and analytically flow from one another? Who is to judge the criteria? Which of them is most legally, socially or politically authoritative? It raises many other challenging questions for legal scholarship:- for example, how do actorness practices impact upon rule-making itself? How has or should legal scholarship responded

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<sup>56</sup> M. Cremona, ‘The European Union as a global actor: Roles, models and identity’ (2004) 41 *Common Market Law Review* pp. 553-573; U. Wunderlich, ‘The EU an Actor Sui Generis? A Comparison of EU and ASEAN Actorness’ (2012) 50(4) *Journal of Common Market Studies* pp. 653-669; T. Forsberg, ‘Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type’ (2011) 49(6) *Journal of Common Market Studies* pp. 1183–1204.

<sup>57</sup> E. Conceicao-Heldt and S. Meunier (eds.), ‘Speaking with a Single Voice: Internal Cohesiveness and External Cohesiveness of the EU in World Politics’ (2014) 21(7) *Journal of European Public Policy* pp. 961-979.

<sup>58</sup> See J. Jupille and Caporaso, (n 26)

<sup>59</sup> C. Bretherton and J. Vogler (eds.), ‘The European Union as a Sustainable Development Actor: the Case of External Fisheries Policy’ (2008) 30(3) *Journal of European Integration* pp. 401-417; C. Gebhard, ‘Coherence’ (2011) in C. Hill, M. Smith (eds) *International Relations and the European Union* (Oxford: OUP, 2<sup>nd</sup> ed. 2011), pp. 101-127.

to the evolution of actorhood? And how does and should the attribution of legal personality of an organisation strengthen its actorhood *vis a vis* its institutions and other components? It also raises the issue as to whether there is a distinction between *de facto* and *de jure* actorhood? If so, is it pragmatic or valid? How do the actors advance the components of actorhood through law? And how flexible is actorhood? How does and should actorhood influence theorisations of legitimacy and accountability?

The conventional conceptualisation of the actorhood qualities of international organisations only embrace formal international organisations, and less so fledgling or new supranational organisations or their institutional components, however powerful. As a result, the conventional criteria for actorhood are innately challenged by transnational rule-making practices. For example, evolving international organisations such as ASEAN or the EU bedevil characterisation in non-legal scholarship, even after the recent acquisition of legal personality by the latter and the adoption of settled practices of representation in the former.<sup>60</sup> It also poses the question perhaps as to whether a lack of general agreement on the actorhood of an organisation may be said to be 'exploited' by the organisation itself or its components. In this regard, one could take as an example the EU's far-reaching efforts to legislate in environmental matters, with implications outside of its territory.<sup>61</sup> Or similarly, one could consider the increasingly 'tense' construction of territory in EU regulation of financial services.<sup>62</sup> Understandably, then, there is a movement to reconsider why 'actorhood' *must* evolve. And such a movement takes as its starting point frequently the exceptionalism of the EU as a case study as a means to reconsider the content of actorhood, one which legal scholarship may derive much benefit from engaging with.<sup>63</sup> However, one risks easily an 'EU-centric' theorisation.

Moreover, 'formal' actorhood criteria are particularly 'after the fact' and do not necessarily explain how actorhood emerges nor how it interacts with other institutions presently or in the future- or even generates other actorhood fact matrices.<sup>64</sup> In this regard, actorhood has a very formalistic and descriptive character that can appear rigid and unhelpful. The enhanced international actorhood of

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<sup>60</sup> U. Wunderlich, 'The EU an Actor Sui Generis? A Comparison of EU and ASEAN Actorhood' (2012) 50(4) *Journal of Common Market Studies* pp. 653-669.

<sup>61</sup> The EU Emissions Trading System (EU ETS), accessed <[http://ec.europa.eu/clima/policies/ets/index\\_en.htm](http://ec.europa.eu/clima/policies/ets/index_en.htm)>; D. Ellerman and B. Buchner (eds.), 'The European Union Emissions Trading Scheme: Origins, Allocation, and Early Results' (2007) 1(1) *Review of Environmental Economics and Policy* pp. 66-87.

<sup>62</sup> E.g. J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) *American Journal of Comparative Law* pp. 87-126.

<sup>63</sup> K. Čmakalová and J. Rolenc, 'The Dimensions of EU's Actorhood: Internal Legitimacy' in Petr Kratochvíl, *The EU as a Political Actor – The Analysis of Four Dimensions of the EU's Actorhood* (Berlin: Nomos, 2013) pp. 47-58.

<sup>64</sup> M. Groenleer and L. Van Schaik, 'United We Stand? The European Union's International Actorhood in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45(5) *Journal of Common Market Studies* pp. 969-998.



an actor such as the EU may enable it to act as a central player in the creation of new international bodies, for example, the International Criminal Court. Such 'subsequently-enacted' entities may, as this example might demonstrate, engender much critique as to legitimacy in the form of social acceptance as much as authority. Yet does actorhood offer any real window of insight as to such developments? Or into the specific legitimacy (and also authority) questions that these developments provoke?

Actorhood may not yet provide a suitably reliable framework for legal scholarship but it is argued to offer an important example of disciplinary reflection as to the contours of rule-making. This publication seeks to look more broadly at conceptualisations of actors and rule-making, even beyond the subject areas of EU and Public International law, particularly leading casestudies of transnational law or of international relations, so as to identify common themes and possible alternative means to reflect upon the conceptualisation of actors beyond flexibility and pragmatism. Part of the challenge of evaluating how we understand actors in rule-making is the nature of the action itself i.e. *how* it occurs matters. The next section thus considers the relevance of behavioural and sociological understandings of postnational rule-making in the subjects of EU and Public International Law.

#### (IV) The behavioural dimension of postnational rule-making

##### (i) Zooming in upon acting in the shadows

Institutional components of organisations may manage to engage in rule-making practices through *inter alia* influence, independence, autonomy, contestation and an active development of their functions and roles. However, the nature of such rule-making may be said to occur ‘in the shadow’ of other institutions or bodies within organisations, who are formal actors, eluding thus a more doctrinal debate. It remains ‘in the shadow’ in so far as it may occur as part of a larger organisation or structure where it may have many informal influences, lack formal power structures, may operate with a grey-zone of autonomy or independence or may even be subject to multiple influences beyond other institutions.<sup>65</sup> For example, much emphasis in EU rule-making has been placed on regulating *ex ante* participation of stakeholders without formally regulation of lobbyists- and thereby makes distinct choices concerning the penumbra of ‘legality’. The temporal choices exercises in our study of zones of rule-making can swiftly exclude the ‘shadows’. The lexicon of ‘foreground’ and ‘background’ actors has been central to mapping the theorisation of the EU’s composite executive, as much as ‘high level’ and ‘low level’ functionality thereof.<sup>66</sup> In this regard, spatial zones of rule-making can be shrouded in their own malleable lexicon- but paradoxically, also elucidated, often sharply, in this manner.

There are notably very few ‘dedicated’ or ‘actual’ inter-institutional bodies in the EU, save, for example, European Personnel Selection Office (EPSO) or the Publications Office. Such entities range in task from the technical, the functional to the wholly administrative. The evolution of inter-institutional agreements in EU law are considered as a ‘constitutionalisation’ process by lawyers and political scientists alike.<sup>67</sup> They are even theorised as action from ‘below’, whereby the institutions themselves have been empowered and autonomously steered the evolution of practice.<sup>68</sup> Current debates concern their actual opacity or transparency, given their tendency to evolve into hard law. Yet why should institutional action from ‘within’ an organisation be considered as being ‘from below’? What does it indicate about our understanding of zones of action between legal orders?

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<sup>65</sup>See Biermann and Siebenhüner, (n 32); Chalmers, (n 3); Lescano and Teubner, (n 4); D. Curtin and I. Dekker ‘The European Union from Maastricht to Lisbon: institutional and legal unity out of the shadows’ in P. Craig and G. Búrca (eds.), *The evolution of EU law* (Oxford: OUP 2<sup>nd</sup> edn, 2011), pp. 155-186.

<sup>66</sup> Curtin and Dekker, (n 65); Curtin, (n 2).

<sup>67</sup>See Curtin, (n 2); A. Heritier and D. Kerwer et al (eds.), *Differential Europe: The European Union Impact on National Policymaking* (United States: Rowman & Littlefield, 2001). See their place in the political guidelines of the Juncker Commission, accessed <[http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf)>.

<sup>68</sup> E.g., B. Driessen, *Interinstitutional Conventions in EU Law* (London: Cameron May, 2007).

This raises the question as to the appropriate normative frame through which to understand EU action.

## (ii) The centrality of social legitimacy for postnational rule-making

In sociological terms, legitimacy may be an objective fact but it is socially constructed.<sup>69</sup> Legitimacy in this context means social credibility and acceptance. Of course, legitimacy may be pragmatic or normatively or cognitively based.<sup>70</sup> It is not necessarily a study of legal formalism or legal validity, a study which some suggest could be even irrelevant or unproductive. Legitimacy can differ across time and space and between actors, systems and contexts and is characterised by malleability but also much semantic ambiguity. The concept of legitimacy has been argued to have been long neglected in public international law until more recently.<sup>71</sup> The three 'dominant' theoretical categorisations or taxonomies of legitimacy, of legal, moral and social legitimacy are not always regarded as self-contained.<sup>72</sup> There remain important distinctions to be drawn between normative and sociological legitimacy, between normative and empirical legitimacy, between de jure and de facto legitimacy and between moral and descriptive legitimacy, and perhaps also formal legitimacy.<sup>73</sup> Functional categorisations are argued to have driven the significance of mixed approaches. Legitimacy may change but may also be resilient. Legitimacy communications can 'forgive' individual transgressions.<sup>74</sup> There is a particular in scholarship a tendency to focus upon normative or cognitive bases of legitimacy rather than on whether it is regarded as legitimate.<sup>75</sup> And while the questions are analytically distinct, each may have a normative or cognitive basis, for example, legitimacy that is so deeply rooted as to be beyond question.<sup>76</sup> Social legitimacy is defined as its projection on to an

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<sup>69</sup> W. Scott, *Institutions and Organizations – Ideas, Interests and Identities* (Sage: SAGE Publications, 2001).

<sup>70</sup> See Thomas on the usefulness of distinguishing between the concept of legitimacy and legitimation, citing A. Appelbaum, 'Legitimacy in a Bastard Kingdom' (2004) *John F Kennedy School of Government Centre for Public Leadership Working Paper*, Spring 2004, pp. 74-94, accessed <<http://dspace.mit.edu/handles/1721.1/55927>> ; J. Weiler, Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law' (2012) *Singapore Journal of Legal Studies* pp. 248-269.

<sup>71</sup> Cf. Thomas 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* pp. 729-758, to the effect that it is easier to make things legal than to make them legitimate.

<sup>72</sup> Ibid, 744; see T. Franck *The Power Of Legitimacy among Nations* (Oxford: OUP, 1990)

<sup>73</sup> C. Thornhill and S. Ashenden (eds.), *Legality and Legitimacy: normative and Sociological Approaches* (Berlin: Nomos, 2010); A. Buchanan and R. Keohane (eds.), *The Legitimacy of Global Governance Institutions* in Rudiger R. Wolfrum and V. Roben (eds.), *Legitimacy in International Law* (United States: Springer, 2008); F. Scharpf, *Reflections on Multilevel Legitimacy* (2003) Max Planck Institute for the Study of Societies Working Paper 07/03 pp. 10-16.

<sup>74</sup> J. Gibson and G. Caldeira, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89(2) *The American Political Science Review* pp. 356-376.

<sup>75</sup> J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* pp. 137-164.

<sup>76</sup> For example, challenging the validity of legislation that is in force for some time and around which considerable enforcement regimes are built: data retention.

action, rule, actor or system by an actor's belief that the action, rule, actor or system is morally or legally legitimate. It is argued that unlike legal or moral legitimacy, social legitimacy does not make a normative commitment to any relationship of power, it drops any sense of an objective ought. On the basis that social legitimacy is an empty concept without an account of the moral or legal framework to which the 'believer subscribes', social legitimacy is an empirical concept but it one which is concerned specifically with what forms of power people believe morally or legally justified.<sup>77</sup> Weberian legitimacy has historically been strongly tied to the analysis of legal structures.<sup>78</sup>

We may easily overlook the social dimensions and significance of '*acting in the shadows*' for rule-making and our understanding of who are actors engaging in rule-making. It is argued here thus that an analysis of actors in postnational rule-making benefits most obviously - and even realistically- from a *social* understanding of legitimacy. To open up the 'black box' of the shadows to daylight enables us to address further questions such as the acceptance of the practices of post-national rule-making, i.e. the social legitimacy thereof.<sup>79</sup> Given the dominance pragmatism as an explanation of the evolution of the EU and International legal orders, acceptance appears as a reasonable tool to measure contemporary practices. The social legitimacy of actors in rule-making may have a differing resonance in in alternate areas of law such that it becomes even more challenging to transpose this to the transnational context. Take, for example, the greater social 'acceptance' and understanding of the work of lobbyists in rule-making in the US rather than in the EU.<sup>80</sup> However, theorisations unduly reliant upon sociological and/ or behavioural analysis risks over-expanding the malleability of vocabulary at the expense of analytical sharpness. It is all too easy to become emasculated in the malleability of words in the depiction of behaviour. What this publication makes a case for is the

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<sup>77</sup> See supra, Thomas (n 71), 741.

<sup>78</sup> M. Weber and E. Fischhoff (tr.), *Economy and Society: An outline of Interpretive Sociology* in G. Roth and C. Wittich eds., (Berkeley: University of California Press, 1978), p. 215

<sup>79</sup> E. Cohn and S. White (eds.), *Legal Socialization: A Study of Norms and Rules* (United States: Springer-Verlag, 1990); E. Cohn et al, 'An integrated model of legal and moral reasoning and rule-violating behaviour: The role of legal attitudes' (2010) 34(4) *Law and Human Behaviour* pp. 295-309.

<sup>80</sup> M. Cowles, 'The Transatlantic Business Dialogue and Domestic Business-Government Relations' in M. Cowles, J. Caparaso and T. Risse (eds.), *Transforming Europe: Europeanization and Domestic Change* (Cornell: Cornell University Press, 2001) pp. 159-179; J. Thurber, P. Griffin and M. Egan, 'Conference on Lobbying, Ethics Reform in U.S. and E.U.' American University, 17 March 2014 accessed <<http://www.american.edu/spa/news/lobbying-conference-2014.cfm>>. Contrast the scrutiny on all actors involved in the Transatlantic Trade and Investment Partnership (TTIP) negotiations, which currently includes videoing all stakeholders meetings, registering participation, tweeting all details of meetings and negotiations and feeding the public and civil society regularly with copious amounts of information; accessed <<http://ec.europa.eu/trade/policy/in-focus/ttip/>> The substantive and procedural 'acceptance' of this transparency on either side of the Atlantic seems highly divergent; see A. Bunea, 'Issues, preferences and ties: determinants of interest groups' preference attainment in the EU environmental policy' (2013) 20(4) *Journal of European Public Policy* pp. 552-570.

relevance of social legitimacy for our understanding of actors in rule-making from the perspective of EU and public international law. The publication also draws attention and focus to new sources and autonomous actors engaging in rule-making, falling outside standard definitions thereof. Many chapters of this publication focus upon new actors and practices of behaviour arising

This ties in with a movement in scholarship to reconstruct methodology and take into account the multi-disciplinarity of post-national rule-making, its highly diverse range of actors, instruments and processes.<sup>81</sup> It advocates approaches which accommodate *inter alia* the plurality of sources of EU law and which explicitly enunciate its method. There is a significant demand for attention to new methodologies in the direction of EU law, so as to move beyond doctrinal outcomes and understandings. The methodological focus required to pinpoint the actions of a new or underexplored actors e.g. the academy, or the less than regulated (lobbyists) simply mapping a new phenomenon (e.g. transnational parliaments) is thus done here through the use of inductive accounts.

Accordingly, this publication seeks to focus upon many of the individual components of institutional organisations, as well as other actors within rule-making structures that may be readily overlooked by formalism and doctrinalism, such as lobbyists and academia. The publication aims to capture new practices and themes and reflects upon the tensions that they pose for old 'lenses' by drawing together scholars, senior and junior of EU law, Public international Law, International relations, the doctrinal and non-conventional studies, those focussed upon Asia and South America as much as the EU.

#### **(IV) Overview of the thematic sections and individual chapters'**

By way of a background and then overview to the contributions to the publication, readers might find it useful to know that contributors to Section I on '*Framing Actors in Postnational Rule-making: between Doctrine and Lexicon*' were asked to reflect upon the following general themes or questions insofar as this proved relevant and/ or possible for them individually. These included the following issues:

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<sup>81</sup> R. van Gestel, and H-W. Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) *European Law Journal* 292-316, at 313-316 ('An Agenda for a European Debate'); See Vauchez (n. 1); T. Hervey, R. Cryer, B. Sokhi-Bulley and A. Bohm, *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011); R. van Gestel, H-W. Micklitz and M-P. Maduro, 'Methodology in the New Legal World,' *European University Institute Law Working Paper* 2012/13; U. Neergaard, R. Nielsen and L. Roseberry (eds.), *European Legal Method* (Copenhagen: DJOF Publishing, 2013); see 'The New History of EU law' project, of Copenhagen University, accessed <http://europeanlaw.saxo.ku.dk/>.

- How limiting is doctrine or lexicon? Does it accommodate change and flexibility?
- How easily are new actors accommodated within postnational rule-making?
- How do you understand the postnational? Does it accommodate your subject or appear procedural? Limiting?
- Do you find 'lexicon' useful as a term of art?
- How do questions of legitimacy, e.g. social legitimacy and social acceptance, impact upon how you formulate doctrine and lexicon here?

Next, Contributors to Section II: '*New Institutional Components and Systems: Establishing Autonomy in Postnational Rule-Making*' were asked to reflect upon the following themes or questions:

- How is autonomy established or practiced by new institutional components? How does this autonomy relate to rule-making? Formally, informally etc?
- Is it a zero-sum game/ a loss and gain for other institutional components? How easily does a new institution(al component) become part of a system?
- Is post-national rule-making a help or a hindrance to reflect upon new institutions and institutional components? Is it embracing of the *sui generis*?
- How do you understand 'sui generis' within such rulemaking?
- How do you understand rule-making in this context?
- To what extent does a new institution or component seek to operate, function or act in the shadows? How evident is such behaviour? Is it covert? Does it raise legitimacy questions? Does it raise legitimacy questions more from an internal than an external perspective?

Contributors to Section III: '*Interactions between Actors in Postnational Rule-Making: Framing Practices 'in the Shadows' and Beyond*' were asked to consider the following themes or questions.

- What are practices 'in the shadows' of rule-making? What makes them 'shadowy'? Does your casestudy fall short of this? What could make the practices shadowy? Is there illegitimacy, malaise or malpractice arising from non-regulation? Or is it social acceptance? By whom? Does postnational rule-making incorporate 'shadows' or such zones of activity outside of our regular lexicon?
- What is a site of rule-making? How relevant is social acceptance?
- Are there legitimacy questions raised by the formulation of the practices?
- Is social acceptance useful to reflect upon?
- What makes certain actors interact in rule-making practices?

- Is postnational rule-making helpful to frame these practices? Does it embrace them?
- Are 'new actors' the chief source of concern in your casestudy?
- Is your casestudy a new method of interaction more than 'new actors'? How do you understand rule-making?

The fruits of the labours of the contributors are to be found in their individual contributions. Nonetheless, their contributions are summarised here briefly next.

In section 1, on 'Framing Actors in Postnational Rule-making: between Doctrine and Lexicon', Collins identifies the tension of the postnational with formalism in his paper '*International Law: Mapping the Terrain of Institutional 'Law-Making': Form and Function in International Law*'. He argues that that maintaining a limited, formal doctrinal perspective on subjects and sources is not to suggest the immutability or centrality of the state, but instead reflects the best approximation of a systemic construction of legality in a plural international community. He argues that this is not to suggest a fetishism of form over function but rather an interrelation and tension between form and function in structuring an understand of the actors of postnational rule-making.

Ruffert in his piece '*European Union Law: The Many Faces of Rulemaking in the EU*' demonstrates that there is a plurality even a plethora of rule-making actors, most of which are active in the executive but not the legislative field and tend to work in an informal way within their network. He demonstrates that when rule-making is governed by the European Council, these supranational institutions remain in the shadows.

Beyond the subjects of European and International law, Wunderlich reflects on what it means to be an actor in international scholarship and considers the concept of actorness and regional actorness using the casestudies of EU and ASEAN actorness in a chapter entitled '*International Relations and Global Governance: Actors in Global Governance Institutions: ASEAN and the EU*'. Is ASEAN really emerging as an international actor in its own right or is it mimicking EU actorness by creating a hollow mirror image of the EU? He argues that it is often difficult to discern a common rationale underlying various EU interregional contacts. EU interregionalism displays a bewildering variety of institutional models defying any simple categorisation. It remains difficult to evaluate regional actorness because it is influenced by the EU model. Similarly, focusing upon institutional criteria ignores other aspects. He cautions against exchanging one 'black box' for another.

In section II, on 'New Institutional Components and Systems: Establishing Autonomy in Postnational Rule-Making', Jančić maps both theoretically and practically the phenomenon of transnational parliaments beyond the Nation State in *'Transnational and Global Perspectives: Transnational Parliamentarism and Global Governance: The New Practice of Democracy'*. He reflects upon the challenges they pose for rule-making beyond the Nation State given that they are mostly score lowly in terms of influence, legitimacy, accountability and effectiveness. He outlines in detail categorisations of international parliamentary organs (IPOs). Despite their empirical surge, legal and political science approaches to the democratisation of global governance pay no more than marginal attention to the transnational parliamentary revolution. He argues that the externalisation of rule-making beyond the State brings sociological, non-constitutional functions of parliaments to the fore

De Waele charts the rise of the most stark but arguably complex actor of the EU's executive, that is the European Council, to a formal institution of the EU in his chapter *'European Union Law: The Practices of the 'New' European Council'*. He argues that the European Council is increasingly sidestepped under the pretext of the Union method, placing further strains on the institutions' actorness. Rather it might be assumed too quickly that the new European Council possess a genuine actorness.

Urueña focusses upon the dynamics of interaction in postnational rule-making. He argues that actors are part of a wider landscape that defines their actorness and are expressions of a changing global regulatory space in his chapter *'Interaction as a Site of Post-National Rule Making A case study of the Inter-American System of Human Rights'*. He selects the specific dynamics of interaction in a case study of Latin American, as to the Inter American Court of Human Rights and domestic constitutional courts in the region. Using the regulatory space as a site of law-making he argues that it allows us to better appreciate the complex dynamics of post-national rule-making. He argues that actors enter a populated regulatory space where they adapt to the other actors of that space as a subtle process of adaptation. Focussing upon events of conflict alone tells us little about the workings of postnational rule-making. His focus is a critical one upon the dominance of constitutionalism in the inter-American mindset and its conception of time and space and even international norms. Instead, the global regulatory space is useful to conceptualise change and temporariness in international law differently. The interaction approach is premised upon actors interacting in an unknown number of interactions.



In section III, on 'Interactions between Actors in Postnational Rule-Making: Framing Practices 'in the Shadows' and Beyond', Wouters, Odermatt and Chané outline how the EU struggles to become a more effective global actor in their contribution '*The European Union: A Shadowy Global Actor? The UN System as an Example*'. They depict how the EU can be viewed as a shadowy global actor both in light of its limited role and position and through the indirect influences that it exercises in internal law and policy making. It examines the case study of the EU within the UN system and its relationship to the targets within the Barroso-Ashton Strategy. It considers specific developments as to the Food and Agriculture Organisation, the International Atomic Energy Agency, the UN Educational, Scientific and Cultural Organisation as a variety of agencies where the EU has varying statuses.

In her contribution entitled '*European Private Law: Lawmakers in the Shadows: Legal academics in the Construction of European Private Law*', Sefton-Green provides a vivid account of the input of academia into rule-making and the place of expertise in the construction of European private Law, with multiple actors. She maps the variety of roles that European academics play in the prior stages of EU legislation. She argues that the official and shadow actors may have political agendas that blow the winds in opposite and converging directions, each with a degree of power to influence each other in various ways.

Korkeo-aha considers the place of lobbyists in EU rule-making and their complexity as regards their socialisation, their legitimacy and their transparency practices in '*European Union Law: Lobbyists: Rule-makers in the Shadow*'. She argues that lobbyists have become actors of rule-making by positioning themselves as either experts or stakeholders. She argues that the analytical challenge is our perception of lobbyists in these new roles and their acceptance as actors and draws upon Max Weber in offering a typology of a lobbyist, whereby the most pressing legitimacy concerns are raised by the practices of the expert lobbyist.

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**Dr. Elaine Fahey**

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