

# Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities

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## A. Introduction: The Project in a Nutshell

The research project which this article introduces, proposes a distinctly public law approach to the deep transformation in the conduct of public affairs epitomized by the term global governance. We were intrigued to find in many policy fields an increasing number of international institutions playing an active and often crucial role in decision-making and policy implementation, sometimes even affecting individuals. Thus, a private real estate sale in Berlin is blocked by a decision of the UN Security Council Al-Qaida and Taliban Sanctions Committee;<sup>1</sup> the construction of a bridge in Dresden is legally challenged because the affected part of the Elbe river valley had been included on UNESCO's list of World Heritage;<sup>2</sup> or educational policies most relevant to our children are profoundly reformed due to the OECD Pisa rankings.<sup>3</sup> These examples illustrate that governance activities of international institutions may have a strong legal or factual impact on domestic issues. This calls upon scholars of public law to lay open the legal setting of such governance activities, to find out how, and by whom, they are controlled, and to develop legal standards for ensuring that they satisfy contemporary expectations for legitimacy.

This article sketches out the objective, argument and approach of our project and proceeds in three steps: a first step specifies the object of analysis (B.); a second step discusses how the phenomena thus identified should be approached in a legal perspective (C.); in a third and final step, we explain the concrete methodology of our project (D.).

In the first step, we argue that the discourse on global governance provides important new perspectives on phenomena of international cooperation (B.I.); but it is deficient from a public law perspective as the concept of global governance does not allow for the identification of what the focus of a *legal* discourse should be, i.e. those acts by which unilateral authority is exercised. Such unilateral authority is the greatest

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<sup>1</sup> ECJ, Case C-117/06, *Möllendorf*, 2007 ECR I-8361. On the Al-Qaida and Taliban Sanctions Committee see Clemens Feinäugle, in this volume.

<sup>2</sup> Sächsisches Oberverwaltungsgericht, Case 4 BS 216/06, decision of 9 March 2007, published in 60 DIE ÖFFENTLICHE VERWALTUNG 564 (2007); see Diana Zacharias, in this volume.

<sup>3</sup> Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority through National Policy Assessments. The OECD's PISA Policy as a Paradigm for a New Standard Instrument*, 5 INTERNATIONAL ORGANIZATIONS LAW REVIEW 241 (2008).

challenge to the basic principle of individual freedom. Public law, at least in a liberal and democratic tradition, concerns the tension between unilateral authority and individual freedom, and is a necessary requirement for the legitimacy of public authority, which is both constituted and limited by public law (B.II.). In order to provide a basis for legal analysis and to identify phenomena that need justification, we propose focusing on *the exercise of international public authority*. We argue that any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions. We believe that this concept enables the identification of all those governance phenomena which public lawyers should study (B.III.). Proposing this concept means complementing the concept of global governance with a concept more appropriate for legal analysis and the development of legal standards for legitimate governance. On a more general level, this concept should contribute to a deeper understanding of the historic transformation underlying the concept of global governance.<sup>4</sup>

In the second step, we develop a public law approach to the exercise of international public authority on the basis of international institutional law (C.). We share the aim to better understand and develop the law relating to international governance activities with recent streams of legal research such as the Global Administrative Law movement,<sup>5</sup> the research on an emerging international administrative law,<sup>6</sup> as well as the

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<sup>4</sup> For different interpretations of this transformation see e.g. JÜRGEN HABERMAS, *DIE POSTNATIONALE KONSTELLATION* (1998); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2002); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). From a domestic viewpoint see e.g. *TRANSFORMING THE GOLDEN-AGE NATION STATE* (Achim Hurrelmann, et al. eds., 2005).

<sup>5</sup> Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 15 (2005); Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS* 663 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE LAW JOURNAL* 1490 (2006).

<sup>6</sup> Eberhard Schmidt-Aßmann, in this volume; German original published under the title *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 *DER STAAT* 315 (2006).

debate surrounding the constitutionalization of international law.<sup>7</sup> We hold that a *synthesis* of these approaches is best suited to provide a meaningful framework for analysis and critique. The legal framework of governance activities of international institutions should be conceived of as international institutional law, and enriched by a public law perspective, i.e. with constitutional sensibility and openness for comparative insights from administrative legal thinking.

Finally, we outline how the research project was conducted, i.e. specifying the selection of thematic studies (D.I.), recapitulating the aim of and questionnaire guiding these studies (D.II.), and explaining the scope and intention of the cross-cutting analyses (D.III). We conclude by rephrasing the normative intention and underlying international ethos of this project (E.).

As was to be expected in such a new field of research, we went through an intense learning process. In this paper we lay down how we think these phenomena should now be approached. It should be stressed though that the authors of this research project do not form a monolithic block. Not every aspect of this framework is shared by all other contributions, nor do the cross-cutting studies or the thematic studies simply aim at providing evidence for the research agenda set out here. They stand on their own and display the possible diversity within the public law approach to international law. Yet, the ensuing thoughts will aid the understanding of the overall thrust of this research project. Moreover, we firmly believe that further research on the “publicness” of public international law along the lines of this paper will provide a better understanding and legal framing of global governance activities.

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<sup>7</sup> Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, in 39 BERICHTER DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, 427 (Klaus Dicke *et al.* eds., 2000); Christian Walter, *Constitutionalizing (Inter)national Governance*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 170 (2001); Brun-Otto Bryde, *International Democratic Constitutionalism*, in TOWARDS WORLD CONSTITUTIONALISM 103 (Ronald Macdonald *et al.* eds., 2005); Stefan Kadelbach & Thomas Kleinlein, *Überstaatliches Verfassungsrecht*, 44 ARCHIV DES VÖLKERRECHTS 235 (2006); Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework Analysis*, 15 EUR. J. INT’L LAW 907 (2004); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 579 (2006).

## B. From Global Governance to Public Authority: A Focus for Legal Research

### I. Global Governance: Strengths and Weaknesses of the Dominant Approach

This research project is motivated by our experience of strengths and weaknesses of the concept of global governance for legal research.<sup>8</sup> Since the mid-1990s, this concept has become a widely used analytical perspective for describing the conduct of world affairs in many disciplines.<sup>9</sup> Four characteristic traits of this concept are of relevance in this context. First, the global governance concept recognizes the importance of international institutions, but highlights the relevance of actors and instruments which are of a private or hybrid nature, as well as of individuals – governance is not only an affair of public actors. Second, global governance marks the emergence of an increased recourse to informality: many institutions, procedures and instruments escape the grasp of established legal concepts. Third, thinking in terms of global governance means shifting weight from actors to structures and procedures. Last but not least, as is obvious from the use of the term “global” rather than “international,” global governance emphasizes the multi-level character of governance activities: it tends to overcome the division between international, supranational and national phenomena.

As becomes visible from these four characteristic traits, the concept of global governance has the merit of providing a forward looking alternative to a so-called “realist,” i.e. a state-centric and power oriented world

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<sup>8</sup> The origins of the term global governance can be traced back to James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT 1 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); Jan Kooiman, *Findings, Recommendations and Speculations*, in MODERN GOVERNANCE: NEW GOVERNMENT-SOCIETY INTERACTIONS 249 (Jan Kooiman ed., 1993). The concept of “governance” was borrowed from economics. See Oliver E. Williamson, *The Economics of Governance: Framework and Implications*, 140 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 195 (1984).

<sup>9</sup> Martin Hewson & Timothy Sinclair, *The Emergence of Global Governance Theory*, in GLOBAL GOVERNANCE THEORY 3 (Martin Hewson & Timothy J. Sinclair eds., 1999); Renate Mayntz, *Governance Theory als fortentwickelte Steuerungstheorie?*, in GOVERNANCE-FORSCHUNG 11 (Gunnar F. Schuppert ed., 2006); Arthur Benz, *Governance – Modebegriff oder nützlichsozialwissenschaftliches Konzept?*, in GOVERNANCE – REGIEREN IN KOMPLEXEN REGELSYSTEMEN 11 (Arthur Benz ed., 2004).

view, and has opened our eyes towards phenomena that this perspective, as well as traditional accounts of international law, regularly underestimate. However, there is hardly any neutral, value-free terminology for historical phenomena. Thus, global governance is strongly influenced by so-called “liberal” conceptualizations of international relations. It follows the tradition of institutionalist ideas such as regime theory in providing an alternative to the “realist” world view.<sup>10</sup> However, the reverse side of this origin is that global governance is impregnated with normative difficulties typical of many liberal international relation theories. Thus, global governance is mainly understood as an essentially technocratic process following a little questioned dogma of efficiency.<sup>11</sup>

Yet, this understanding has been challenged. For diverse reasons, stakeholders cast into doubt the legitimacy of various global governance activities, doubts which have been elaborated by numerous scholarly analyses.<sup>12</sup> These doubts and concerns apply centrally to international

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<sup>10</sup> Michael Barnett & Raymond Duvall, *Power in Global Governance*, in POWER IN GLOBAL GOVERNANCE 1, 7 (Michael Barnett & Raymond Duvall eds., 2005); Michael Zürn, *Institutionalisierte Ungleichheit in der Weltpolitik. Jenseits der Alternative “Global Governance” versus “American Empire,”* 48 POLITISCHE VIERTELJAHRRESSCHRIFT 680 (2007).

<sup>11</sup> See e.g. Robert Latham, *Politics in a Floating World*, in GLOBAL GOVERNANCE THEORY 23 (Martin Hewson & Timothy J. Sinclair eds., 2000); Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241 (2004). On the related liberal bias of international organizations see Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, in POWER IN GLOBAL GOVERNANCE 161, 163-169 (Michael Barnett & Raymond Duvall eds., 2005). However, various critical perspectives on global governance have emerged. See e.g. CONTENTING PERSPECTIVES ON GLOBAL GOVERNANCE (Alice D. Ba & Matthew J. Hoffmann eds., 2005).

<sup>12</sup> It may suffice to cite only a few examples: Amichai Cohen, *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*, 30 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 1079 (2005); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29 (2005); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE 73 (2003); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 347 (2000-2001); Rainer Wahl, *Der einzelne in der Welt jenseits des Staates*, in VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG 53 (Rainer Wahl ed., 2003); Joseph H. H. Weiler, *The Ge-*

institutions as important participants in, and promoters of, global governance. Generally speaking, some international institutions are seen as a risk to individual rights, collective self-determination, as well as impediments to, rather than conveyors of, global justice. With respect to individual rights, the striking absence of judicial review and procedural safeguards – even when international institutions have a deep impact upon individuals – meets with harsh critique. The listing of terrorist suspects by the UN Security Council provides the most dramatic example of governance that would be hardly permissible at the domestic level.<sup>13</sup> From the viewpoint of collective self-determination, international institutions are operating in considerable distance from the communities concerned, often producing outcomes that deeply impact on domestic democratic procedures. Moreover, an international institution might display features of a secretive bureaucracy (as it can also be the case with any domestic public institution)<sup>14</sup> or might operate more in the service of the interests of particular stakeholders or states than of global social justice. As a result, the perception of global governance in scholarship today ranges from endorsement to chastisement.<sup>15</sup> The policies of several institutions of global governance are questioned and, often enough, perceived as more or less illegitimate.

## II. The Deficiencies of Global Governance from a Public Law Perspective

What can the response be to such claims of illegitimacy from a public law perspective? The starting point of a public law perspective is to ask whether the respective activities amount to an exercise of unilateral, i.e. public authority. Public law, at least in a liberal and democratic tradition, has a dual function: first, no public authority may be exercised

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*ology of International Law – Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 547 (2004); Michael Zürn, *Global Governance and Legitimacy Problems*, 39 GOVERNMENT AND OPPOSITION 260 (2004). For a taxonomy see Armin von Bogdandy, *Globalization and Europe: How to Square Democracy and Globalization*, 15 EUR. J. INT'L LAW 885 (2004).

<sup>13</sup> See Clemens Feinäugle, in this volume. See also the contributions by Maja Smrkolj, Karen Kaiser, and Diana Zacharias, in this volume.

<sup>14</sup> Ingo Venzke, in this volume; Ravi Pereira, in this volume.

<sup>15</sup> For an overview see, BA & HOFFMANN (note 11).

that is not based on public law (constitutive function); second, public authority is controlled and limited by the substantive and procedural standards provided by public law (limiting function).<sup>16</sup> In particular, the second function helps to translate concerns about the legitimacy of governance activities into meaningful arguments of legality. The experience of liberal democracies teaches how important it is that legitimacy concerns can, in principle, be put forward as issues of legality.

This requires a workable concept of public authority. The concept of global governance is insufficient for this purpose. While the merits of the concept of global governance (namely the broadening of our horizons for important phenomena that influence public policy) are undisputed, it does not enable the identification of those acts which are critical because they constitute a unilateral exercise of authority. This is because global governance flattens the difference between public and private phenomena, as well as between formal and informal ones. Moreover, global governance is understood as a continuous structure or process, rather than a batch of acts of specific, identifiable actors causing specific, identifiable effects. These factors make it difficult, if not impossible, to distinguish from a global governance perspective authoritative from non-authoritative acts and to attribute the former ones to responsible actors. However, this distinction, as well as the attribution of responsibility, is crucial for the constitutive and limiting functions of public law. Only authoritative acts need to be constituted and limited by public law, and the limiting function of public law depends on identifiable actors on whom to impose limitations. Consequently, global governance cannot serve as the conceptual basis of a public law framework for authoritative acts on the international plane. We therefore suggest a new focus on the exercise of international public authority which might provide an avenue to an understanding of global governance phenomena which is more compatible with the function of public law.

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<sup>16</sup> See EBERHARD SCHMIDT-ARMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE* 16-18 (2nd ed. 2004). See also Benedict Kingsbury, *International Law as Inter-Public Law*, <http://www.iilj.org/courses/documents/Kingsbury,NewJusGentiumand.pdf>. For a similar account see Jean d'Aspremont, *Contemporary International Rulemaking and the Public Character of International Law*, IILJ Working Paper 2006/12, <http://www.iilj.org/publications/documents/2006-12-dAspremont-web.pdf>.



### III. The Exercise of International Public Authority as the New Focus

We suggest the shift towards the exercise of international public authority in order to better identify those international activities that determine other legal subjects, curtail their freedom in a way that requires legitimacy and therefore a public law framework. In other words, while the concept of global governance has a mostly functional focus, our interest is essentially a normative one: to move beyond mere functionalism. The concept of the exercise of public authority shall thus highlight issues that the concept of global governance obscures. At the same time, this shift does not mean discarding the concept of global governance entirely. The broader horizon that the notion of global governance has opened up should not be abandoned. Research on global governance has, for example, convincingly demonstrated that constraining effects do not only emanate from binding instruments or legal subjects.

Defining the exercise of international public authority requires a considerable conceptual innovation, as the concept of public authority has been coined in light of the state's monopoly of legitimate coercion and sovereign power over individuals. How exactly do we define the exercise of international public authority? For this project, we define<sup>17</sup> *authority* as the legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation.<sup>18</sup> An exercise is the realization of that capacity, in particular by the production of standard instruments such as decisions and regulations, but also by the dissemination of information, like rankings.<sup>19</sup> The determination may or may not be legally binding.<sup>20</sup> It is binding if an act *modifies the*

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<sup>17</sup> Definition is meant here as developing sufficient conceptual characterizations that cover the most important cases. We do not aim at a full definition. For details see HANS-JOACHIM KOCH & HELMUT RÜBMANN, JURISTISCHE BEGRÜNDUNGSLEHRE 75 (1982).

<sup>18</sup> Our concept of authority is, thus, different from that of the New Haven School, which is defined as "the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decision by what criteria and what procedures." See Myres McDougal & Harold Laswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 9 (1959). In fact, this concept of authority resembles our concept of legitimacy.

<sup>19</sup> On standard instruments see Matthias Goldmann, in this volume.

<sup>20</sup> This concept of authority is similar to the concept of power developed by Barnett & Duvall (note 10). The main difference between their concept of

*legal situation* of a different legal subject without its consent. A modification takes place if a subsequent action which contravenes that act is illegal.<sup>21</sup> Yet, we hold that the concept of authority needs to be conceived in a broader way than this rather traditional definition. The capacity to determine another legal subject can also occur through a non-binding act which only *conditions* another legal subject. This is the case whenever that act builds up pressure for another legal subject to follow its impetus. Such exercise of public authority often occurs through the establishment of non-binding standards which are followed, *inter alia*, because the benefits of observing them outweighs the disadvantages of ignoring them (e.g. the OECD standards for avoiding double taxation),<sup>22</sup> or because they are equipped with implementing mechanisms imposing positive and negative sanctions (e.g. the FAO code of conduct for responsible fisheries).<sup>23</sup> Furthermore, legal subjects can also be conditioned by instruments without deontic operators (e.g. statistical data contained in PISA reports)<sup>24</sup> building up communicative power which the addressee can only avoid at some cost, be it reputational, economic, or other. However, such communicative power needs to reach a certain minimum threshold. This is especially the case where an instrument is equipped with specific mechanisms which ensure that the communicative power effectively has to be taken into account by the addressee. For example, in case of the OECD PISA policy, the reports are rendered effective through country rankings and repeated testing.<sup>25</sup>

This broad understanding of the concept of authority rests on the empirical insight that conditioning acts can constrain individual freedom and public self-determination as much as binding acts. The freedom not to obey a conditioning act is often purely fictional.<sup>26</sup> Accordingly, con-

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power and our concept of authority is that authority needs a legal basis. More narrow is the definition of authority as the power to enact law unilaterally. See Christoph Möllers, *GEWALTENGLIEDERUNG* 81-93 (2005).

<sup>21</sup> An example of such legal determination would be the refugee status determination by the UNCHR. See Maja Smrkolj, in this volume.

<sup>22</sup> Ekkehart Reimer, *Transnationales Steuerrecht*, in *INTERNATIONALES VERWALTUNGSRECHT* 181 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007).

<sup>23</sup> Jürgen Friedrich, in this volume.

<sup>24</sup> von Bogdandy & Goldmann (note 3).

<sup>25</sup> *Id.*

<sup>26</sup> From a political science perspective see Barnett & Duvall (note 10); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Gov-*

siderations of principle underline this broad understanding: if public law is understood, in keeping with the liberal and democratic tradition, as a body of law to protect individual freedom and to allow for political self-determination, any act that has an impact on those values, whether it is legally binding or not, should be included if that impact is significant enough to give rise to meaningful concerns about its legitimacy. By giving governance activities which rely upon conditioning acts a legal framework, international institutions have often shown that they share this understanding; and in German domestic public law, a correspondingly broad understanding of authority has been established in recent years.<sup>27</sup>

However, not every exercise of authority might be qualified as *international* and *public*. This turns our attention to the second and third elements of the proposed concept: what is public and international about international public authority? We consider as international public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest.<sup>28</sup> The “publicness” of an exercise of authority, as well as its international character, therefore depends on its *legal basis*. The institutions under consideration in this project hence exercise authority attributed to them by political collectives on the basis of binding or non-binding international acts.

Of course, this definition of publicness appears as rather formalistic and does not exhaust the meaning of publicness framed by the constitutionalist mindset of the Western tradition. Accordingly, public institutions in a liberal democracy are expected to respect and promote fundamental

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*ernance*, 54 INTERNATIONAL ORGANIZATION 421 (2000); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INTERNATIONAL ORGANIZATION 495 (1991).

<sup>27</sup> Horst Dreier, *Vorbemerkung vor Art. 1 GG*, in I GRUNDGESETZ-KOMMENTAR, margin number 125 *et seq.* (Horst Dreier ed., 2nd ed. 2004); Schmidt-Aßmann (note 16), 18 *et seq.*

<sup>28</sup> Some put the task to discharge public duties at the heart of their approach, see Matthias Ruffert, *Perspektiven des Internationalen Verwaltungsrechts*, in INTERNATIONALES VERWALTUNGSRECHT 395, 402 (Christoph Möllers, Andreas Voßkuhle & Christian Walter eds., 2007). We prefer to build on the concept of public authority, but qualify it by reference to public interest.

values, such as public ethos, transparency or accessibility for citizens.<sup>29</sup> Our understanding of the concept of publicness is deeply imbued by and intended to carry much of this tradition, which formulates issues that need to be addressed. Nevertheless, such expectations towards public institutions should not simply be transposed to international institutions, since the differences between domestic and international institutions remain fundamental. Therefore, we believe that the legal basis of authority provides the best criterion for qualifying it as *public* and drawing the line between public and private authority that we conceive as indispensable for legal research. Accordingly, an enterprise like Volkswagen which exercises contractual authority over employees in its Brazil subsidiary cannot be considered to exercise public authority because such an enterprise is constituted under private law and is not formally charged with performing public tasks.

However, one of the main revelations of the research on global governance is that institutions based on private law or hybrid institutions which lack any relevant delegation of authority may carry out activities which are just as much of public interest as those based on delegations of authority. This is the case when such activity can be regarded as a functional equivalent to an activity on a public legal basis. To identify such functional equivalence,<sup>30</sup> we suggest a topical catalogue of typical instances rather than a generic definition relying on the evasive concept of the “common good.” A typical instance would be, for example, any governance activity which directly affects public goods, by which global infrastructures are managed, or which unfolds in a situation where the collision of fundamental interests of different social groups has to be dealt with. Thus, an institution like ICANN, though perhaps not necessarily exercising public authority in a strict sense, should be subject to the same legal requirements which are applicable to comparable exercises of public authority, for it manages a global infrastructure (i.e. Internet domain names). Assessing such governance activities by the legal standards applicable to functionally comparable exercises of

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<sup>29</sup> CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND POLITICS 247 *et seq.* (1950); KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS (1957); Louis Henkin, *A New Birth of Constitutionalism, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 39 (Michel Rosenfeld ed., 1994); d’Aspremont (note 16).

<sup>30</sup> For a similar approach relying on functional context *see* Andreas Fischer-Lescano, *Transnationales Verwaltungsrecht*, 63 JURISTENZEITUNG 373, 376 (2008).

international public authority has two main objectives. It shows that public affairs can be regulated in other, and sometimes more effective legal settings from which public institutions might even draw insights. At the same time, such reconstruction provides a framework for critique, as private forms of organization might have even more severe legitimacy deficits than public ones.<sup>31</sup>

As we define the object of our analysis, we should also clarify which entities we consider to be exercising international public authority. Such authority may be exercised by various formal and informal entities. In many cases public authority under international law is vested in an institution that qualifies as an international organization with international legal personality. Again, however, global governance perspectives remind and inform us that there are other institutions exercising public authority as well.<sup>32</sup> Some treaty regimes, for example CITES, or informal institutions, such as certain committees within the remit of the OECD, or the G8, are creatures of states which wield considerable political clout and whose acts raise concerns of legitimacy.<sup>33</sup> These are institutions in the sense of organizational sociology, though they might not have legal personality akin to an international organization.<sup>34</sup> Moreover, even in policy areas where there is a competent formal organization, public authority can be exercised through more or less informal bodies associated with it, but legally external to it, such as networks of domestic administrators.<sup>35</sup>

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<sup>31</sup> For a comparison of functionally equivalent private and public governance activities see Matthias Goldmann, *The Accountability of Private vs. Public Governance "by Information": A Comparison of the Assessment Activities of the OECD and the IEA in the Field of Education*, 58 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 41 (2008).

<sup>32</sup> Kingsbury (note 16).

<sup>33</sup> On the variety of entities that are not international organizations but exercise some sort of public authority, see PHILIPPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL ORGANIZATION* 16-7 (2001); Jan Klabbers, *The Changing Image of International Organizations*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 221, 236 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

<sup>34</sup> The early European Union provides a fine example. See Armin von Bogdandy, *The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System*, 36 COMMON MARKET LAW REVIEW 887 (1999).

<sup>35</sup> Examples from thematic studies include: Bettina Schöndorf-Haubold, in this volume; von Bogdandy & Goldmann (note 3). See also Christoph Möllers,

We consider that such institutions exercise public authority if they enjoy determining capacities as defined above. The uncertainty as to which legal subject is ultimately legally responsible for the exercise of authority appears, in our opinion, to be an insufficient reason to shield such institutions from the long arm of the law. This broad concept of international institutions is based on the empirical insight that many of the informal organizations operate largely as the less legalized brethren of formal organizations.<sup>36</sup> Additionally, it is supported by institutional practice: the operation and action of many informal institutions are governed by rules in a similar way to that of formal international organizations.<sup>37</sup>

In sum, we choose to focus on the exercise of international public authority in order to guide the attention to those activities that require normative justification. Put differently, any exercise of international public authority requires a public law framework. Our focus thus is broad and inclusive. It covers administrative as well as intergovernmental activities, even though the vast majority of activities under consideration in this project could be considered administrative in a heuristic sense.<sup>38</sup> We refrain from the notion of administration as the defining category since the scope and variety of activities that demand justification is broader. All public authority and not only administrative authority has to be legitimate. Moreover, using administration as the foundational concept is problematic as other concepts which usually give contour to it, such as constitution or legislative institutions and activities, are difficult to distinguish at the international level. Hence, the focus on the exercise of public authority more precisely identifies the relevant object.

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*Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung*, ZAÖRV 65 (2005), 351-389; Eyal Benvenisti, *Coalitions of the Willing and the Evolution of Informal International Law*, in *COALITIONS OF THE WILLING – AVANTGARDE OR THREAT?* 1 (Christian Callies, Georg Nolte & Peter-Tobias Stoll, 2007).

<sup>36</sup> See Anuscheh Farahat, in this volume.

<sup>37</sup> See *id.*; Christine Fuchs, in this volume.

<sup>38</sup> On such a concept of administration see Isabel Feichtner, in this volume.

## C. A Public Law Approach to the Exercise of International Public Authority

The public law approach focuses on constructing a legal understanding of, and developing a legal framework for, the exercise of international public authority. This includes the question of how to identify the applicable law in order to draw a line between legal and illegal exercises of authority, as well as the question of how to develop the applicable law in light of legitimacy concerns. We understand such interests as definitional with respect to *internal* legal approaches, in contrast to *external* approaches which investigate legal phenomena with various empirical or normative interests, e.g. focusing on their societal role and effects, or their history, or on their philosophical dimensions. While external approaches are insightful for the identification and development of the law relating to the exercise of authority by international institutions (C.I.), the functions of public law cannot be achieved without an internal approach (C.II.). Based on a review of the achievements of internal approaches, we will show how this public law approach is construed as a combination of the three dominant internal approaches (C.III.).

It should be stressed that internal and external approaches are not mutually exclusive, but ideally complement each other. While external approaches ensure that internal approaches do not become detached from the role of law in societal reality and the development of new normative phenomena, internal approaches participate in construing and applying the law as an operative “social infrastructure.” Moreover, internal and external arguments might intersect in the micro-structure of legal research to the point that they become difficult to distinguish. Yet, the overall outlook is fundamentally different.

### I. The Contribution of External Approaches

External approaches to international law have a strong tradition within the legal discipline,<sup>39</sup> and the different streams within this tradition provide valuable insights when analyzing the exercise of public authority.

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<sup>39</sup> In particular the sociological approach, see e.g. MAX HUBER, *DIE SOZIOLOGISCHEN GRUNDLAGEN DES VÖLKERRECHTS* (1928); Anne-Marie Slaughter, *International law and international relations*, 285 *RECUEIL DES COURS* 13 (2000).

One important stream of research is *transnational legal process*, which follows in the footsteps of American legal realism and grew out of the New Haven School.<sup>40</sup> It is characterized by an emphasis on law as a continuous process of consecutive decisions instead of a stable system of rules, and by a turn away from a state-centric concept of international law.<sup>41</sup> This stream provides important insights as to why decisions thus produced are obeyed, whether for reasons of self-interest, identity, or as a result of repeated interaction.<sup>42</sup> Thus, the screen of legal analysis is extended towards new processes and actors, yet at the expenses of normative certainty, as law is considered to be a sort of amorphous process.

Transnational legal processes have much in common with so-called *managerial approaches* which focus on questions of compliance and efficiency. For them, law is one of several means for the effective and efficient regulation of society.<sup>43</sup> Managerial accounts, which could also be termed as functional, prevail in the study of international institutions.<sup>44</sup> Similarly, albeit from an observer rather than a managerial angle, is the research on legalization that investigates the conditions under which states chose harder or softer forms of legal regulation.<sup>45</sup> A more recent

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<sup>40</sup> Harold Hongju Koh, *Transnational Legal Process*, 75 NEBRASKA LAW REVIEW 181 (1996); Michael W. Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 24-26 (Rüdiger Wolfrum & Volker Röben eds., 2005).

<sup>41</sup> Felix Hanschmann, *Theorie transnationaler Rechtsprozesse*, in NEUE THEORIEN DES RECHTS 347, 357 (Sonja Buckel, Ralph Christensen & Andreas Fischer-Lescano eds., 2006).

<sup>42</sup> Koh (note 40).

<sup>43</sup> Abraham Chayes & Antonia Handler Chayes, *On Compliance*, 47 INTERNATIONAL ORGANIZATION 175-205 (1993); Harold K. Jacobson & Edith Brown Weiss, *Compliance with International Environmental Accords*, 1 GLOBAL GOVERNANCE 119-48 (1995); COMMITMENT AND COMPLIANCE: THE ROLE OF NONBINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000). Similar is the research on new modes of governance. See e.g. David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUMBIA JOURNAL OF EUROPEAN LAW 1-26 (2006); HARD CHOICES, SOFT LAW (John Kirton & Michael Trebilcock eds., 2004).

<sup>44</sup> JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 17 *et seq.* (2005).

<sup>45</sup> Abbott & Snidal (note 26).



variant of the tradition is the *network approach* which puts the emphasis on the outcomes produced by network structures of different actors.<sup>46</sup> The network approach thus goes beyond state-centrism. On a different theoretical basis, approaches based on *systems theory* arrive at similar conclusions.<sup>47</sup>

All these approaches shift the focus of attention from formal to informal instruments and institutions and bring powerful governance mechanisms beyond the sources of Art. 38(1) ICJ Statute as well as actors without international legal personality in the focus of the international lawyer, which should not be neglected given their political significance. Their concept of law is much more differentiated than in classical international law. Blunt contestations of the normativity of international law seldom occur, whilst stressing its limitations. This project would be unthinkable without these insights, even though some external approaches, in particular managerial ones, share the technocratic bias of global governance, which entails the aforementioned problems.

## II. The Need for Internal Approaches

Nevertheless, external approaches alone do not suffice for framing international public authority.<sup>48</sup> Rather, the two fundamental functions of public law presuppose an internal approach to law: public law constitutes *and* limits public authority and that entails judgments that pertain to its legality.

At the moment, it is very difficult to construe a meaningful argument regarding the legality of an exercise of international public authority. Although many activities of international institutions operate on the basis of and through rules, there is often only a rudimentary legal framework constraining these activities.<sup>49</sup> This absence of legal stan-

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<sup>46</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>47</sup> GUNTER TEUBNER & ANDREAS FISCHER-LESCANO, *REGIME-KOLLISSIONEN* (2006).

<sup>48</sup> For a similar critique of the exclusivity of external approaches see Andreas Paulus, *Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts*, 67 *ZAÖRV* 695, 708-15 (2007).

<sup>49</sup> An excellent example are the G8 summits, see MARTINA CONTICELLI, *I VERTICI DEL G8* (2006).

dards leads to the difficult situation whereby international institutions exercise public authority which might be perceived as illegitimate, but nevertheless as legal – for lack of appropriate legal standards. Consequently, the discourse on legality is out of sync with the discourse on legitimacy.<sup>50</sup> While the legitimacy of, say, certain rules of the Codex Alimentarius may very well be cast into doubt, they are certainly not illegal, for they escape any relevant legal standard due to their non-binding character.<sup>51</sup> In reaction to this mismatch, some new concepts have been developed, like “accountability”<sup>52</sup> or “participation.”<sup>53</sup> They reflect shared concerns about the legitimacy of the activities of international institutions. Yet, there is hardly any shared understanding about their material content. Presently, these concepts do not provide accepted standards to determine legality, but are not much more than *partes pro toto* for the concept of legitimacy.

The divergence in judgments about legality and legitimacy has several serious consequences. First and foremost, the experience of liberal democracies teaches how important it is that legitimacy concerns can, in principle, be put forward as issues of legality. As has been emphasized above, this is exactly the central role of public law. Reconstructing and furthering the legal framework of public authority is not an end in itself but enables the channeling of legitimacy concerns into legal arguments and eventually into workable rules. This channeling has a rationalizing effect. It ensures that not every single act of public authority needs to be investigated for want of legitimacy. Instead, acts that are legal are generally presumed to be legitimate.

Second, the lack of a developed legal framework is at least partly responsible for the amorphous image of international institutions. For

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<sup>50</sup> Koskenniemi (note 11) suggests that the reasons for this divergence of legality and legitimacy lie in the deformalization, fragmentation, and the hegemonic traits of the current world order. On these aspects see also Eyal Benvenisti, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD LAW REVIEW 595 (2007); Matthias Goldmann, *Der Widerspenstigen Zähmung*, in NETZWERKE 225 (Sigrid Boysen et al. eds., 2007).

<sup>51</sup> Ravi Pereira, in this volume.

<sup>52</sup> See Erika de Wet, *Holding International Institutions Accountable*, in this volume.

<sup>53</sup> See Jochen von Bernstorff, in this volume; Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 LAW AND CONTEMPORARY PROBLEMS 109-26 (2005).

any understanding of international institutions by the general public, legal categories play an important role, as the domestic situation proves: the understanding of domestic public institutions rests largely on legal terminology based on doctrinal constructions. With respect to international institutions, there are hardly any legal concepts with analytical prowess to generate a general understanding. International institutions remain opaque.

Third, the lack of adequate legal concepts as well as the limited use of the legal/illegal dichotomy for judgments concerning legitimacy puts legal scholarship at the risk of being marginalized by other disciplines, in particular by economics and political science, when attempting to understand and frame world order. This would be a considerable loss, because legal scholarship has a specific, perhaps irreplaceable role in understanding and framing public authority. For these reasons, it is important to advance a legal approach to international public authority which is internal in the sense that it considers law as an autonomous discipline responsible, above all, for enabling judgments of legality.

### III. The Public Law Approach as a Combination of Internal Approaches

The proposed public law approach is based on a combination of the three main existing internal approaches to global governance phenomena: constitutionalization, administrative law perspectives, and international institutional law.<sup>54</sup> All of them formulate important insights for a public law approach: that constitutional sensibility as well as comparative openness to administrative law concepts should inform the analysis of the material at hand, and that international institutional law should be the disciplinary basis for further inquiries. We outline the public law approach by clarifying which insights of the three internal approaches we will adopt.

First, since the early 1990s, predominantly continental scholars have developed under the label of “constitutionalization” overarching principles of a world order based on the rule of law.<sup>55</sup> Deductive approaches can be encountered among them as well as inductive ones. These positions constitute the intellectual basis of much of the research which

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<sup>54</sup> For a reconstruction of the scholarship *see also* Ruffert (note 28).

<sup>55</sup> *Supra*, note 7.

goes beyond a strictly horizontal perception of the international order and consider it as (at least partly) vertical, showing traits of a public order of the international community.<sup>56</sup> Whereas some authors use the constitutionalist approach for a general construction of international law, others use it in order to develop a legal frame to tame governance activities of international institutions.<sup>57</sup> Although this stream has to battle with some serious problems, such as the reticence of the American, Chinese or Russian governments to such an understanding of international law,<sup>58</sup> and has stayed rather aloof from the concrete operation of international institutions, it inspires the present project. In particular, we take two elements from this approach. On the one hand, the activity of international institutions should be investigated with constitutionalist sensibility. It should be informed by the insights and concerns of constitutionalism as developed with respect to domestic institutions. This is not an argument for domestic analogies, but for comparisons that help to move beyond functionalism in the study of international institutions. Constitutionalism stresses the importance of principles such as individual freedom and collective self-determination as well as the rule of law.<sup>59</sup> On the other hand, we contend that the internal constitutionalization of international institutions, as proposed by the International Law Association,<sup>60</sup> holds much promise for responding to concerns emerging in the constitutionalist perspective: such internal

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<sup>56</sup> The contrast between horizontal and vertical perceptions of world order becomes apparent by cross-reading the Separate Opinion of President Guillaume and the Joint Separate Opinion of Judges Higgins, Kooijmans and Buerghental in the *Case Concerning the Arrest Warrant of 11 April 2000* (DR Congo v. Belgium), ICJ Reports 2002, 35 and 63.

<sup>57</sup> DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (2005); Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* 5 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

<sup>58</sup> In detail Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 *HARVARD INTERNATIONAL LAW JOURNAL* 223-242 (2006).

<sup>59</sup> Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 *THEORETICAL INQUIRIES* 22 (2007).

<sup>60</sup> INTERNATIONAL LAW ASSOCIATION, *ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS*, Final Report, 2004, available at: [http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm).

constitutionalization, based on the founding document of an international institution, would allow for the development of legal procedures, instruments and constraints in tune with the specificities of each regime.<sup>61</sup>

Second, towards the end of the 1990s, other scholars started to explore the potential of administrative thinking in order to understand public law in a globalized world. Within the research on global (or international) administrative law, four directions should be distinguished: research on the administration of territories by international institutions, such as Kosovo;<sup>62</sup> research on normative collisions between different domestic administrative legal orders;<sup>63</sup> research on the effects of international law on domestic administrative law;<sup>64</sup> and research dealing with the law applicable to governance mechanisms beyond the domestic level.<sup>65</sup> Within the fourth direction, which is of most relevance to the study of international institutions, different methodologies are employed for the legal analysis of such phenomena. While some aim at the deductive development of overarching principles of public law,<sup>66</sup> others proceed inductively and use the normative reservoir of domestic or

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<sup>61</sup> Jochen von Bernstorff, in this volume; Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, in this volume.

<sup>62</sup> On this see our former project, *Restructuring Iraq. Possible Models based upon experience gained under the Authority of the League of Nations and the United Nations*, 9 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (2005).

<sup>63</sup> For this category see e.g. Reimer (note 22); Markus Glaser, *Internationales Sozialverwaltungsrecht*, in INTERNATIONALES VERWALTUNGSRECHT 73 (Andreas Voßkuhle, Christoph Möllers & Christian Walter eds., 2007); Jürgen Bast, *Internationalisierung und De-Internationalisierung der Migrationsverwaltung*, in INTERNATIONALES VERWALTUNGSRECHT 279 (Andreas Voßkuhle, Christoph Möllers & Christian Walter eds., 2007); Ruffert (note 28). See also CHRISTOPH OHLER, DIE KOLLISIONSORDNUNG DES ALLGEMEINEN VERWALTUNGSRECHTS (2005).

<sup>64</sup> Sabino Cassese (note 53); CHRISTIAN TIETJE, INTERNATIONALISIERTES VERWALTUNGSHANDELN (2001).

<sup>65</sup> Most of the research assembled within the Global Administrative Law movement falls into this category. See Kingsbury, Krisch & Stewart (note 5); Esty (note 5).

<sup>66</sup> Benedict Kingsbury, *Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law*, 104 JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY 98 (2005).

European administrative law.<sup>67</sup> Again, others do not intend the development of overarching principles, but imagine that the actors involved in global governance will keep each other in check through mutual contestation.<sup>68</sup>

Even though no leading methodology for the development of global administrative standards has yet emerged, the common denominator of this strand of research, the emphasis on domestic administrative law, bears a great potential for innovation. Our approach therefore corresponds to these approaches inasmuch as we also stress the usefulness of *intradisciplinary* exchange in legal studies: the study of the law of international public institutions should be informed by the study of domestic public institutions.<sup>69</sup> The full development of international law as *public* international law appears hardly feasible without building on national administrative legal insights and doctrines elaborated in the past century. Public law, in order to have an impact on society, depends on bureaucracies and administrative law.

Again, this does not advocate drawing all too simple “domestic analogies”: the differences between domestic institutions and international institutions are too important. Precisely for that reason, our approach differs from that of *global administrative law* as we conceive it as too “global”: it risks to efface or to blur distinctions essential to the construction, evaluation and application of norms concerning public authority. Put differently, we wonder what would be the overarching legal basis of a global administrative law. Would it be general principles? Or would it have a status of its own, above positive law? The notion of *global administrative law* implies a fusion of domestic administrative and international law that does not give consideration to the fact that international legal norms and internal norms possess a categorically different “input legitimacy”: state consent versus popular sovereignty, ac-

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<sup>67</sup> Richard Stewart, *US Administrative Law: A Model for Global Administrative Law?*, 68 *LAW AND CONTEMPORARY PROBLEMS* 63 (2005); Esty (note 5); Mario Savino, *EU “Procedural” Supranationalism: On Models for Global Administrative Law*, paper presented at the NYU Global Forum on 13 December 2006, on file with the authors.

<sup>68</sup> Nico Krisch, *The Pluralism of Global Administrative Law*, 17 *EUR. J. INT’L LAW* 247 (2006).

<sup>69</sup> This call for intradisciplinary comparison and inspiration has been criticized. Yet, almost all elements of international law have been developed with an eye on domestic law. Private law, in particular contracts, are an obvious example.

ording to the classical understanding. A global approach thus glosses over and threatens to obscure this fundamental difference.

Finally, the institutional law of international organizations has been used as a basis for the analysis of new global governance phenomena. *International institutional law* focuses on the externally relevant activities of international organizations as opposed to its purely internal law like staff regulations.<sup>70</sup> While at the outset this law was specific to each international organization, legal scholarship is in the process of extracting common principles which address the concerns and hopes that give rise to this field.<sup>71</sup> Developing international institutional law holds a great potential for the legal framing of international public authority, as international organizations are of enormous practical significance for the conduct of public affairs in times of global governance.<sup>72</sup> It is therefore no wonder that this stream of research has greatly evolved of late in order to come to terms with the changes induced by global governance. New instruments, competencies and procedures of international organizations have come into its focus.<sup>73</sup>

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<sup>70</sup> CHITTHARANJAN FELIX AMERASINGHE, I THE LAW OF INTERNATIONAL CIVIL SERVICE (2nd ed. 1994).

<sup>71</sup> HENRY G. SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW (4th ed. 2003); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2002); NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANIZATIONS (2nd ed. 2005); SANDS & KLEIN (note 33), IGNAZ SEIDL-HOHENFELDERN & GERHARD LOIBL, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN EINSCHLIEßLICH DER SUPRANATIONALEN GEMEINSCHAFTEN (7th ed. 2000); PETER FISCHER & HERIBERT KÖCK, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN (3rd ed. 1997); HANDBOOK ON INTERNATIONAL ORGANIZATIONS (René-Jean Dupuy ed., 1988).

<sup>72</sup> See ALVAREZ (note 44).

<sup>73</sup> *Id.* See also ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW (2007); JURIJ D. ASTON, SEKUNDÄRGESETZGEBUNG INTERNATIONALER ORGANISATIONEN ZWISCHEN MITGLIEDSTAATLICHER SOUVERÄNITÄT UND GEMEINSCHAFTSDISZIPLIN (2005). Studies on individual instruments are too numerous to be mentioned. See the GAL bibliography (2006) compiled by Maurizia De Bellis, available at: <http://www.iilj.org/GAL/documents/GALBibliographyMDeBellisJune2006.pdf>. Many studies combine internal and external perspectives. On competencies see Matthias Ruffert, *Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft*, 38 ARCHIV DES VÖLKERRECHTS 129 (2000); DANESH SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS (2005).

In sum, constitutional, administrative and international institutional law approaches to global governance (and, thus, international institutions) share the aim of understanding, framing and taming the exercise of international public authority in the post-national constellation. None of these approaches laments the decline of the Westphalian order.<sup>74</sup> They rather aim at rendering the exercise of international public authority more efficient and legitimate. We therefore hold that these three internal approaches can be combined, using international institutional law as the basis for a framework of the exercise of public authority. We believe that the *law* of international institutions can place the analysis of the exercise of international public authority on a firm disciplinary basis. This assumption also rests on a degree of skepticism towards establishing an entirely new field of global or international administrative law.

In order to be commensurate to the challenge of global governance, international institutional law should encompass not only the activities of international organizations *sensu stricto* but also that of institutions with a different legal status, such as treaty regimes and informal regimes (e.g. the OSCE). A similar adaptation is necessary with respect to non-binding and non-deontic instruments. Further, international institutional law should integrate elements from the two other internal approaches. In particular, it should (1) reconstruct the exercise of international public authority by using comparative perspectives on the administrative scholarship; (2) develop a constitutionalist framework and proposing standards for critique concerning the procedures, instruments and accountability of international institutions when engaging in the exercise of public authority; and (3) reflect systematically on the interrelationships between different legal entities typical of contemporary governance, in particular the interrelations between international and domestic institutions. Since the combination contains elements of constitutionalist, administrative and institutionalist thinking focused on the phenomenon of public authority, this combination might be termed the *public law approach*.

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<sup>74</sup> For a well argued book hinting in that direction see CHRISTIAN SEILER, DER SOUVERÄNE VERFASSUNGSSTAAT ZWISCHEN DEMOKRATISCHER RÜCKBINDUNG UND ÜBERSTAATLICHER EINBINDUNG (2005).



## D. Thematic Studies and Cross-cutting Analyses: Our Research Design

On the basis of these conceptual premises, the research project of the Max Planck Institute was designed to have two layers: the conduct of thematic studies and their reflection in cross-cutting analyses. This final part shall outline the methodology and aims of these two layers.

### I. Selection of Thematic Studies

Our research is based on the understanding that the analysis of the exercise of international public authority should proceed from the special to the general.<sup>75</sup> Even though we can build on valuable existing scholarship, there is a need to collect new material and to take into account the wide variety of forms in which public authority beyond the nation-state is exercised today. The project is therefore based on inductive research. Several thematic studies, 17 in total,<sup>76</sup> analyze a variety of governance mechanisms within international institutions.

The selection of these thematic studies was guided mainly by two aspects. First, cases were selected to reflect the diversity of institutions with respect to their legal status. The thematic studies therefore include traditional international organizations with legal personality (e.g. ILO, UNESCO) but also treaty regimes (e.g. CITES, Kyoto Protocol) and networks of administration (e.g. Interpol). They also include organizations that are formed under private law insofar as they fall into one of the situations catalogued above<sup>77</sup> (e.g. in the case of ICANN or ICHEIC).<sup>78</sup> For the reasons given above, we consciously go beyond the traditional scope of international institutional law scholarship.<sup>79</sup>

Secondly, the thematic studies were selected to represent a wide array of mechanisms and instruments, with which public authority is exercised. Looking at the instruments an institution uses, hence the way it enacts

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<sup>75</sup> Ruffert (note 28), at 396.

<sup>76</sup> 16 of them are published in this volume.

<sup>77</sup> See Part B.III.

<sup>78</sup> On our understanding of international institutions, see part B.III.

<sup>79</sup> See SCHERMERS & BLOKKER (note 71), at § 30; SEIDL-HOHENVELDERN & LOIBL (note 71), at § 1.

its policies and influences its environment, provides a distinctive and tested public law approach. The thematic studies therefore include organizations that operate mainly through acts legally affecting individuals (e.g. UNHCR) or individual states (e.g. UNESCO), through issuing general rules or standards (e.g. CITES, FAO Code of Conduct for Fisheries), through mediation (OSCE High Commissioner) or through non-legal, real acts (e.g. the exchange of data by Interpol).

## II. Questionnaire and the Aim of the Studies

Inductive research is dependent on concepts by which we grasp the world of facts. Therefore, the inductive analysis of the thematic studies was based on a conceptual framework which was originally set out in a questionnaire.<sup>80</sup> As explained above, the disciplinary basis of our framework is international institutional law. As our focus is on the *exercise* of authority, we rather looked at the operative side of particular exercises of authority than at the setup of the institution. More specifically, the questionnaire directed the researchers to look at the exercise of public authority from four perspectives.

First, it proposed to study the exercise of public authority from a procedure-focused understanding. We conceive such exercise primarily as a process, as *decision* and *policy-making*, and hence the role of international institutional law as structuring and channeling an ongoing process of preparing, taking and implementing decisions.<sup>81</sup> The analysis of

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<sup>80</sup> The questionnaire was not designed to provide a strict question-and-answer format. Rather, it was intended as a suggestion, proposing different avenues to approach the subject as well as suggesting the testing of new notions or concepts at the subject at hand. It was meant to be less a straight-jacket and more a walking stick or road map. If a notion or a question did not apply or did not make sense, the researchers were free to leave it out. The questionnaire's intention was hence rather to unify our perspectives and concentrate the attention to similar issues.

<sup>81</sup> Such procedural understanding of administrative action is typical of Anglo-American administrative law. See Richard Stewart, *The Reformation of American Administrative Law*, 88 HARVARD LAW REVIEW 1667 (1975). For its importance in German administrative law thinking, see Andreas Voßkuhle, *The Reform Approach in the German Science of Administrative Law: The "Neue Verwaltungsrechtswissenschaft,"* in THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE 89 (Matthias Ruffert ed., 2007).

the elaboration of specific actions is therefore given the same attention as the instrument which produces external effects.<sup>82</sup> Accordingly, the thematic studies sketch out the organizational framework of the institution, but invest equal attention to describe their processes at various stages. This includes an analysis of the procedural regime leading up to the governance activity, a deepened analysis of the adoption of the instrument or instruments by which the institution intends to cause external effects, a presentation of the means to implement the decisions and the instruments available to check the exercise of public authority by international institutions. Such procedural analysis reveals rather different forms of institutional action.

Secondly, the questionnaire framed the analysis also by paying special attention to the legal qualification of the instrument or instruments which have external effects and which therefore regularly raise the most serious legitimacy concerns.<sup>83</sup> It makes a difference, so the underlying assumption, whether an institution “governs” by assigning legal status,<sup>84</sup> by setting non-binding standards,<sup>85</sup> or by providing a framework for the mediation of consensual solutions.<sup>86</sup> In this respect the researchers rely on a specific tradition of continental legal scholarship that frames and structures the analysis of public authority according to the instruments used.<sup>87</sup>

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<sup>82</sup> As cross-cutting analysis on this aspect, see Jochen von Bernstorff, in this volume.

<sup>83</sup> “Instrument” in this context does not mean the constituting treaty or agreement but relates to the concrete acts by which institutions intend to reach their policy objectives.

<sup>84</sup> For example: refugee status by the UNHCR (see Maja Smrkolj, in this volume); the world heritage label by the UNESCO (see Diana Zacharias, in this volume); or the assumption of the connection to terrorist organizations by the UN Security Council Al-Qaeda Committee (see Clemens Feinäugle, in this volume).

<sup>85</sup> For example: Codex Alimentarius Commission (see Ravi Pereira, in this volume).

<sup>86</sup> For example: OSCE High Commissioner on Minorities (see Anuscheh Farahat, in this volume); OECD Multinational Enterprises (see Gefion Schuler, in this volume).

<sup>87</sup> Wolfgang Hoffmann-Riem, *Rechtsformen, Handlungsformen, Bewirkungsformen*, in II GRUNDLAGEN DES VERWALTUNGSRECHTS 885 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2007).

Thirdly, the questionnaire also inquired as to the substantive side of the institutional activity, adding yet another continental perspective.<sup>88</sup> It suggested analyzing the institution's specific mandate, the character of the norms that could provide material guidance and steer the institutions substantially, or pondering the question to what extent the institution is actually cut loose from (or autonomous of) the member states and the founding mission.

Finally, the exercise of international public authority requires taking into account a multi-level perspective. The exercise of international public authority mostly occurs in tandem with the exercise of domestic public authority. Moreover, international institutions not only rely on member states to gather information or implement their policies; they also cooperate in manifold ways with other organizations, be these other public international institutions or private non-governmental organizations. To grasp these increasingly dense and important mechanisms we therefore inquired into cooperation and cross-linkages with other organizations.<sup>89</sup>

What were the aims and expectations with regard to these thematic studies? Most importantly, they have to be seen as attempts at systematic and critical stocktaking. They intend to grasp their respective thematic field with as comprehensive a view as possible of the relevant legal rules, any accessible non-legal documents and the pertinent literature available. Their aim is thus first and foremost to carry out a diligent descriptive analysis, guided by the conceptual framework as laid down in the questionnaire. We hope to produce studies which might help other researchers to build on. In their analysis of the material, researchers were also encouraged to use comparative perspectives of domestic administrative law. Without intending any simple domestic analogies which would be naïve and mistaken, we do stress the usefulness of comparative research and intradisciplinary exchange.

Finally, researchers were encouraged to add critical perspectives to the material at hand. We regard constitutional sensibility, i.e. awareness for the demands of constitutional thinking as a central component of analyzing global governance phenomena. At the same time, the project as a

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<sup>88</sup> On this difference in comparison to American scholarship, Oliver Lepsius, *Was kann die deutsche Staatsrechtslehre von der amerikanischen Rechtswissenschaft lernen?*, in STAATSLHRE ALS WISSENSCHAFT (supplement to DIE VERWALTUNG) 330 (Helmut Schulze-Fielitz ed., 2007).

<sup>89</sup> On these aspects in a cross-cutting perspective, see Armin von Bogdandy & Philipp Dann, in this volume.

whole does not subscribe to one uniform normative concept. Instead, we accept (and stress) the plurality of concepts and values. Researchers were therefore free to use individually chosen concepts.

### III. Cross-cutting Analyses

During the second stage of the project, cross-cutting analyses built on the thematic studies and used them to address more general themes of international institutional law under the public law approach. These analyses turned towards topics such as procedures, instruments and multilevel structure, enforcement and accountability and ultimately to “final” issues like legitimacy and principles.

Here too the intention was, first of all, one of stocktaking and comparative systematization. Given the immense heterogeneity of the institutions at hand and the lack of a common constitutional framework, readers will not find a great number of elaborate and universal doctrines in the cross-cutting studies. Instead, they rather try to develop systematizing perspectives on the material. Some of them explicitly state that general assumptions are not possible,<sup>90</sup> others make rather loose terminological offers and propose systematizing categories<sup>91</sup> and again others try to describe possible avenues or methodologies to reach more general categories.<sup>92</sup> Here again, the pluralism of our approach is manifest.

Going beyond our project, one could however ponder whether the construction of general doctrines would be desirable even in the long run. Different answers are possible. Some will certainly argue that such doctrines must remain overly thin or entirely useless, given that the international legal order is not on path to more integration but rather systemic fragmentation.<sup>93</sup> Others would doubt that at least in the foreseeable future such efforts could be fruitful and propose that energies should rather be directed to analyze particular regimes.<sup>94</sup>

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<sup>90</sup> See Jochen von Bernstorff, in this volume.

<sup>91</sup> See Armin von Bogdandy & Philipp Dann, in this volume; Erika de Wet, *Holding International Institutions Accountable*, in this volume.

<sup>92</sup> See von Bogdandy (note 61); Matthias Goldmann, in this volume.

<sup>93</sup> TEUBNER & FISCHER-LESCANO (note 47).

<sup>94</sup> Krisch (note 68).

Yet one can also argue that the development of common notions and concepts, able to “travel” from one regime to the next and eventually bridging them, is a fundamental function of any doctrinal work and a necessary contribution to the transparency and ultimately the legitimacy of institutional activities. This would be the approach most sympathetic to the traditions of German legal academia. In any event, these are not questions and tasks of here and now.

## E. The Underlying International Ethos

This research on the public authority of international institutions has a doctrinal tendency. Yet, as with any doctrine, it is informed by more general ethical and political premises, and we hold that doctrine should make them explicit. Briefly stated, the premise of this research is a normative vision of global governance as peaceful cooperation between polities, be they states or regional federal units, a cooperation which is mediated by global institutions which are *public* in the emphatic meaning, but remain at the same time *public international* in nature. These are propelled by national governments or the corresponding organs of regional groupings (preferably democratically accountable ones), which, however, would be no longer in a position to individually block the enactment or enforcement of international law. These international institutions would in turn be conscious of their largely state-mediated (and thus limited) resources of democratic legitimacy and respectful of the diversity of their constituent polities. A democratic global federation appears to be beyond the reach of our time, just like an international community dispensing with intermediate levels of governance such as the state; but there can be a better, more peaceful and more integrated world of closely and successfully cooperating polities governed by public international institutions, and we think that elaborating the public law character of international law is an essential precondition for this.