From Public International Law to International Public Law: A Comment on the "Public Authority" of International Institutions and the "Publicness" of their Law

Comment by Stefan Kadelbach

I. Introduction

The entry onto a list of an individual or organization suspected of supporting international terrorism by a specialized sanctions committee of the UN Security Council and the effects thereon illustrate that the United Nations has the authority to take decisions which have consequences for individuals, such as travel bans and the seizing of financial assets.[1] The difficulties in reversing a sanctions listing and the reluctance

[1] *See*, inter alia, UN SC Resolutions 1267 of 15 October 1999 (Taliban), 1373 of 28 September 2001 (Taliban and Al-Qaida), 1455 of 17 January 2003

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of the Court of First Instance of the European Communities to exercise jurisdiction[2] have raised questions which sound familiar within a constitutional law context. The reason is that the sanctions are implemented like public international law in general, i.e. by a model in which decisions taken at an international level have to be transformed or adopted at the state or European Union level. The result is a lacuna with respect to the protection of fundamental rights: The United Nations has the authority to act, but offers no remedy. Member State courts dispose of the capacity to grant judicial protection, but feel restrained by UN law.

This phenomenon illustrates a change in perspective. Targeted sanctions were introduced in the 1990s. They are more efficient than previous economic sanctions such as comprehensive trade embargoes which hit the population, but did not affect those responsible. The new sanctions type had been tested in sanctions against individuals from the former Yugoslavia, Haiti, Libya, Sudan, Angola and Sierra Leone before the Taliban and Al-Qaida sanctions system was set up.[3] Even though they are, as a whole, less detrimental to human rights than other sanctions, individual rights violations, from a lawyer's point of view, can be better traced back to a specific act and a responsible authority, and might thus have triggered expectations which had not been directed against the Security Council before. This perspective on the process is not exclusively one of public international law, but one of public law as well.

The current volume offers a broad spectrum of fields where international institutions in a very wide sense take decisions which used to be the sole purview of states and which, in one way or another, affect individuals. Classical examples are the international announcement of arrest

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(reporting obligations of Member States), 1617 of 29 July 2005 (checklist of Member States actions to be taken); last update in SC Resolution 1822 of 30 June 2008.

[2] *See* CFI Cases T-306/01, *Al Barakaat v Council and Commission* [2005] ECR II-3533; T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649; T-253/02, *Ayadi v Council* [2006] II-2139; and T-49/04, *Hassan v Council and Commission* [2007] ECR II-52; appeals are pending, *see* opinion of Advocate General M. Poiares Maduro of 16 January 2008 in the *Kadi* Case (C-402/05 P) and of 23 January 2008 in the *Al Barakaat* Case (C-415/05 P) who pleads for reversal.

[3] Cf. UN SC Resolutions 820 of 17 April 1993 (Yugoslavia); 841 of 16 June 1993 (Haiti); 883 of 11 November 1993 (Libya); 1054 of 26 April 1996 (Sudan); 1127 of 28 August 1997 (Angola); 1132 of 8 October 1997 (Sierra Leone).

warrants by Interpol, health standards elaborated by the joint FAO and WHO Codex Alimentarius Commission or the registration of intellectual property rights by one of the WIPO protection systems. Others of a less obvious nature are mentioned in the rich case material of this publication. Even though international institutions with administrative powers have their antecedents in 19th century administrative unions, the abundance of such organizations and agencies as well as the mass, specificity and sophistication of the output they produce mark a new quality in comparison to the past.

Scholarly reactions to this phenomenon have been diverse. In the political sciences, global governance approaches took up the institutionalist tradition and started from the assumption that international organizations replace powers the national state has lost and possess the potential to confront the negative effects of globalization.[4] Similar projections are mirrored by the debate on the constitutionalization of public international law.[5] Other approaches go a step further and ask whether international institutions are equipped with the appropriate tools to fulfill such tasks, as do different variants of good governance theories[6] and the global administrative law school.[7] Finally, there are different normative perspectives on the development of a fundamental nature. From a social philosophical perspective, the system of international institutions raises

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[4] J.S. Rosenau, *Governance, Order and Change in the World, in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS, 1 *et seq*. (J.S. Rosenau & E.-O. Czempiel eds., 1992); M. ZÜRN, REGIEREN JENSEITS DES NATIONALSTAATS (1998).

[5] For an overview on the debate *see* S. Kadelbach & T. Kleinlein, *International Law – A Constitution of Mankind?*, 50 GERMAN YEARBOOK OF INTERNATIONAL LAW 303, 304 *et seq*. (2007).

[6] For further reference *see* J. Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 29 *et seq*. (2003).

[7] B. Kingsbury, N. Krisch & R.B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15 *et seq*. (2005); N. Krisch & B. Kingsbury, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 1 *et seq.* (2006).

doubt as to whether it is "just" and "fair".[8] International lawyers analyze institutions and their decisions with respect to their legitimacy.[9]

The "public law" theory guiding the present project attempts to combine these different approaches. It follows the institutionalist supposition of global governance theory in that it stresses the importance of international organizations as actors. It takes up the constitutionalist theory of continental international law doctrine by sharing the assumption that international organizations need a rule of law basis to build on. It is related to global administrative law in its belief in the steering quality of administrative law principles; and it assumes a substantial normative stance by starting from the premise that observing principles of public law enhance the legitimacy of decisions taken beyond the state level.

In the following sections, two aspects will be explored more closely. First, an effort will be made to assess how administrative law in a broad sense fits into the legal orders of international organizations in particular and into the realm of public international law in general (below, II.). Secondly, it will be asked to what extent the public law approach adds to existing public international law thinking in terms of the legitimacy of international decision-making (III.).

II. Administrative Law beyond State Administration

1. Preceding Developments

a) International Administrative Law

Looking for precedents for the present approach, the 19th century predecessors of today's international organizations deserve attention. Some of them, such as international river commissions, the Universal Postal Union and the International Telecommunications Union, were

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[8] R. Forst, Das Recht auf Rechtfertigung 328 *et seq*. (2007).

[9] *Delbrück* (note 6); A. von Bogdandy, *Globalization and Europe: How to Square Democracy and Globalization*, 15 EJIL 885 *et seq*. (2004); R. Wolfrum, *Legitimacy in International Law, in* The Law of International Relations – Liber Amicorum Hanspeter Neuhold, 471 *et seq*. (A. Reinisch & U. Kriebaum eds., 2007).

initially categorized as administrative unions.[10] Consequently, the law on which they operated was referred to as international administrative law at the beginning of the 20th century, particularly in Italian and Spanish legal writings.[11] However, the term was not used in a consistent fashion. Following a tradition which goes back to *Lorenz von Stein*, a different idea of *Internationales Verwaltungsrecht* evolved which comprised international administrative law as well as domestic administrative law dealing with international aspects.[12] Although the latter, known as administrative international law, refers to administrative law rules for the resolution of conflicts of laws,[13] the approach of *von Stein* always was to comprise the reality of administration as a whole, thus encompassing different sources of law in one concept.[14] Although apparently not sharing the Hegelian connotations of *von Stein's* concept, the idea of integrating national administrative law with international institutional law is at least not ruled out by the "public authority" approach.[15]

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[10] For an overview *see* R. Wolfrum, *International Administrative Unions, in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, vol. II, 1041 *et seq*. (R. Bernhardt ed., 1995).

[11] D. DONATI, I TRATTATI INTERNAZIONALI NEL DIRITTO COSTITUZIONALE, vol. I, 432, 437 *et seq*. (1906); U. Borsi, CARATTERE ED OGGETTO DEL DIRITTO AMMINISTRATIVO INTERNAZIONALE, 6 RIVISTA DI DIRITTO INTERNAZIONALE 368 *et seq*. (1912); J. Gascon y Marin, *Les transformations du droit administratif international*, 34 RECUEIL DES COURS 21 *et seq*. (1930).

[12] L. VON STEIN, DIE VERWALTUNGSLEHRE, DIE LEHRE VON DER INNEREN VERWALTUNG, part II, 94 *et seq*. (1866).

[13] K. NEUMEYER, INTERNATIONALES VERWALTUNGSRECHT, vol. IV, 28 *et seq*. (1936); K. VOGEL, DER RÄUMLICHE ANWENDUNGSBEREICH DER VERWALTUNGSRECHTSNORM 302 *et seq*. (1965); G. Hoffmann, *Internationales Verwaltungsrecht, in* BESONDERES VERWALTUNGSRECHT, 851, 864 *et seq*. (I. von Münch ed., 1985); cf. also C. OHLER, DIE KOLLISIONSORDNUNG DES ALLGEMEINEN VERWALTUNGSRECHTS (2005); contributions, *in* INTERNATIONALES VERWALTUNGSRECHT (A. Vosskuhle, C. Möllers & C. Walter eds., 2007).

[14] For an English summary *see* K. Vogel, *Administrative Law, International Aspects, in* Bernhardt (note 10), vol. I, 2nd ed., 1992, 22 *et seq*.

[15] *See also* S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 663, 684 *et seq*. (2005).

b) European Administrative Law

A second era of international administrative law started with the emergence of European administrative law. Executive powers of the Council, the Commission and European agencies as well as the demand for rules to govern the implementation of secondary Community law entailed the need to develop a common corpus of law. Initial impulses originated from such dispersed sources as treaty law, secondary Community legislation and, above all, principles developed by the European Court of Justice. European administrative law thus came about by an abstraction from the elements thus found and by analogies to general principles of national administrative laws.[16] In a second phase, the phenomenon of "Europeanization" of national administrative law found attention.[17] German legal doctrine suggested three different consequences, depending on the stance taken with respect to the general transfer of powers to the European Union: the expectation of a complete adaptation of national administrative law to European administrative law,[18] the contrary conclusion to limit European influences to fields where this is unavoidable,[19] or the federalization of administrative law, which means the separation of two administrative law subsystems, one of which being Europeanized, the other purely national.[20] A third phase of scholarly debate concentrated on comparative administrative law, which is a prerequisite for the establishment of a solid basis for the gen-

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[16] J. Schwarze, Europäisches Verwaltungsrecht 1988 (2nd ed., 2005).

[17] A. Hatje, Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung (1996); *contributions, in* Administrative Law under European Influence (J. Schwarze ed., 1996); English Public Law and the Common Law of Europe (M. Andenas ed., 1998).

[18] O. Bachof, *Die Dogmatik des Verwaltungsrechts vor den Gegenwartaufgaben der Verwaltung*, 30 Veröffentlichungen der Vereinigung Deutscher StaatsrechtsLehrer (VVDStRL) 193, 236 (1972).

[19] T. von Danwitz, Verwaltungsrechtliches System und Europäische Integration (1996).

[20] S. Kadelbach, Allgemeines Verwaltungsrecht unter europäischem Einfluß (1999); *id.*, *European Administrative Law and the Law of a Europeanized Administration, in* Good Governance in Europe's Integrated Market, 167 *et seq*. (C. Joerges & R. Dehousse eds., 2002); cf. also Trattato di diritto amministrativo europeo, vol. I, 15 *et seq*., 399 *et seq*. (M.P. Chiti & G. Greco eds., 1997); J.H. Jans et al., Inleiding tot het Europees bestuursrecht 19 *et seq*. (1999).

eration of common principles.[21] A synthesis of some of these perspectives conceives the European and national levels as a compound of administrative powers in a multi-level system where vertical and horizontal cooperation is the dominant obligation,[22] involving the need to define rules which resolve conflicts of competencies between the different actors and to find common legal principles which provide for the comparability of the systems involved, the basis for mutual recognition and the legitimacy of the decisions taken. European administrative law thus combines the abstraction method of the initial phase with conflict of law and comparative law approaches.

This new corpus of administrative law at first glance looks like an incarnation of the *Steinian* concept,[23] but there are three factors which make a difference: Firstly, this development is not a mere product of legal scholarship, but a response to the practical needs of a multilevel administration; secondly, it is guided by an overarching legal order with agreed supremacy; and thirdly, there is an international court with compulsory jurisdiction, the ECJ, which has substantially contributed to the process.

With respect to the public law approach to international institutional law, a common feature is that there are international authorities which are vested by the states with administrative powers. For a comparison with European administrative law, it seems tempting to ask whether the three above-mentioned factors are necessary for bringing about an order of legal rules, principles and institutions of a similar character. Because of the uniqueness of European integration, an answer to this question would be speculative. At any rate, to stress the differences between the European and the international planes would not falsify the public law concept. However, in order to assess the usefulness and the likelihood of an identical process within the legal orders of organizations with a global reach, it is still useful to compare the conditions at both levels.

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[21] *See*, for instance, S. Cassese, Le basi del diritto amministrativo 53 *et seq*. (5th ed., 1998).

[22] E. Schmidt-Aßmann, Das allgemeine Verwaltungsrecht als Ordnungsidee 18 *et seq*. (1998; 2nd ed. 2006); T. Groß, *Verantwortung und Effizienz in der Mehrebenenverwaltung*, 66 VVDStRL152 *et seq*. (2007).

[23] As to European administrative law as a result of comparative thinking *see* L. von Stein, Die Verwaltungslehre, part I, viii *et seq*. (2nd ed., 1869).

c) Synthesis: International Public Law as Law of Multilevel Systems?

In the scholarly debate surrounding international public law, similar elements can be discerned like those contributing to European administrative law. Comparative institutional law derived common patterns of different international organizations, some of them are constitutional, others administrative in character.[24] Global administrative law concentrates on rules and principles which can be regarded as administrative law in itself. In the paper presented by *Nico Krisch* and *Benedict Kingsbury*,[25] the perspective vis-à-vis international organizations is an immanent one: the authors discern different agencies and functions which they recognize as administrative at the international level and ask by which principles their activities are guided. In a second step, the normative question is confronted as to whether the general application of principles such as accountability, participation and transparency measured against the pragmatic needs of the respective international institutions prove useful – or whether they rather entail deficiencies in effectiveness, preference for special interests or populism. The focus is on what can be found in the institutional framework; what may be external about it are the normative expectations by some observers with a similar scholarly interest. Hence, the public law approach distinguishes itself from the global administrative law theory in the strength of its normative intentions. Recent research, which investigates into the influences of international law on domestic administrative law[26] and the legitimacy of that process, opens a further dimension.[27] To integrate these trends to a single set of international public law norms appears to be a logical solution. The discursive potential of this hypothesis for the structuring of international regulating and decision-making procedures

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[24] *See* the explanation of the approach in H. SCHERMERS & N. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW, §§ 22 *et seq*. (4th ed., 2003).

[25] Above, note 7.

[26] C. TIETJE, INTERNATIONALITÄT DES VERWALTUNGSHANDELNS (2001); F. MAYER, DIE INTERNATIONALISIERUNG DES VERWALTUNGSRECHTS (2009, forthcoming); E. Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen,* 45 DER STAAT 315 *et seq*. (2006).

[27] W. Kahl, *Parlamentarische Steuerung der internationalen Verwaltungsvorgänge, in* ALLGEMEINES VERWALTUNGSRECHT – ZUR TRAGFÄHIGKEIT EINES KONZEPTS, 71 *et seq*. (H.-H. Trute et al. eds., 2008).

is substantial.[28] However, the evolution of such a corpus faces conditions which are not very favorable.

First, it may be questioned whether international organizations and their member states constitute multilevel systems of a sufficiently intertwined density that they might be regarded as a compound with a multilevel administration.[29] In constitutional theory, a multilevel system presupposes structures in which law is produced autonomously at each level and public authority is exercised through shared responsibility. The concept is open enough to allow different degrees of intensity of mutual cooperation. But it is submitted that most international organizations are of a rather loose character so that they constitute different layers of authority combined with a public international law obligation of the member states to cooperate.[30] Thus, there is not much of a settled common ground for administrative law. This does not rule out that the constitutional law of the member states could demand a certain quality of legitimacy and therefore require an institutional administration which honors the rule of law and principles derived from it.

Secondly, in public international law the question of superiority is subject to a classical debate. Hence, whether the international legal order is superior to domestic law is an open question. Doubts are addressed by the theory of international constitutionalism to which the public law approach subscribes. Under the traditional monist/dualist paradigm, this is a matter of perspective. Courts in national legal orders which tend to avoid conflicts with international law obligations, as it is the case in many European states, may take a stance which privileges public international law, resolve conflicts of laws in its favor and may therefore come close to superiority. However, this may not be said of many states, and the legitimizing legal order is always at the national level.

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[28] S. Cassese, *The Globalisation of Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 973, 992 *et seq*. (2005); E. Benvenisti, *Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241 *et seq*. (2008).

[29] For a parallel analysis on the constitutional level *see* I. Pernice, *The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation, in* FESTSCHRIFT FÜR CHRISTIAN TOMUSCHAT, 973 *et seq*. (Pierre-Marie Dupuy et al. eds., 2006).

[30] With respect to ILO and WTO *see* C. MÖLLERS, GEWALTENGLIEDERUNG 287 *et seq*. (2005).

Thirdly, whether there is an international court with jurisdiction to develop common principles, as in the European Union, again depends on the chosen organization. Although the net of international judicial bodies and tribunals has become much denser than it was ever before, their tasks rarely permit much progressive development in that field. Some organizations, like the United Nations, have their own administrative law courts, but their jurisdiction is usually limited to disputes between the organizations and their officials.[31] Others like human rights courts as well as WTO and ICSID arbitration have produced abundant case law, but do not often have the opportunity to build upon the governance of international institutions.

To sum up, conditions for the emergence of international public law are not very favorable. The desirability of an administrative law based on the rule of law is hardly to be doubted, but, for the time being, the prospects for its development remain restricted to rules that can be derived from the logic of the respective organization's powers and rules. Common administrative law as a reservoir of supplementing rules, by contrast, are problematic, not only in terms of the conditions of their formation, but also with respect to their legitimacy. The most probable consequence of this state of affairs is a plurality of international administrative law systems. Thus, the concept of international public law faces a dilemma: To restrict it to the rules found in existing institutional law would perpetuate the unsatisfactory situation which is characterized by only rudimentary standards by which activities can be reviewed. To formulate substantial standards with a view at enhancing legitimacy and acceptability of the outcome would trigger the objection to announce norms with no sufficient basis in positive law.

2. Change in Paradigm: from Private Law to Public Law as a System of Reference

The problem of how to hold the different components of international public law together is difficult to address if the outcome is expected to be not merely analytical, but also of a normative nature. The intuition of traditional international law doctrine would be to ask how the corpus of public law demanded by the present approach would fit into the categories of sources.

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[31] SCHERMERS & BLOKKER (note 24), §§ 642 *et seq*.

One of the methods suggested is an inquiry by induction into the norms on the governance of international institutions, to distillate common principles from them and to transpose the resulting rules to other institutions. This would come close to what is called general principles of international law as one variant of general principles in the sense of Article 38 (1) lit. c of the Statute of the International Court of Justice. The second approach, comparative analysis, used to be recommended as the other method of finding general principles as well. To combine both is not unusual.[32] However, there are two caveats to be made with respect to this approach, both of which are closely connected.

The first observation means to insist on the obvious: it refers to what may be called the domestic analogy objection. General principles of law are a category which was originally adopted in the statutes of international courts as a supplementary method to fill lacunae if treaties or custom did not provide appropriate rules to decide a case.[33] This method of comparative analysis is widely seen as problematic, for it involves an element of choice for which the criteria are vague; a comparative view at other legal orders thus is at risk to re-invent the own environment.[34] In order to escape this objection, the consented general principles are usually of a rather abstract character such as *pacta sunt servanda*, *bona fide* interpretation of treaties, the principle that reparation has to be made for unlawfully caused damages etc. The vast majority of (if not all) general principles have meanwhile been incorporated into treaty or customary law and thereby found an additional basis. This remark is not to say that comparative administrative law is methodologically unsound as such; but in order to counter the domestic analogy objection, it must be done in an inclusive way, making selectivity explicit and giving reasons for it. Why, for instance, the British, French or German administrative law systems are considered to be bet-

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32 As to the difficulties of a strict distinction between general principles of law and general principles of international law *see* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 18 *et seq*. (6th ed., 2003).

33 M. Bogdan, *General Principles of Law and the Problem of Lacunae in the Law of Nations*, 46 NORDIC JOURNAL OF INTERNATIONAL LAW 37, 39 (1977); U. FASTENRATH, LÜCKEN IM VÖLKERRECHT 100 *et seq*. (1991).

34 G. GOTTLIEB, THE LOGIC OF CHOICE. AN INVESTIGATION OF THE CONCEPTS OF RULE AND RATIONALITY 103 (1968); *see also* G. Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL 411, 412 (1985).

ter sources for comparison than, for example, Chinese, Japanese or Russian law ought to be explained. The underlying assumption that systems based on the Western type constitutional state are, even for the purposes of public international law, more legitimate has to be addressed openly. The public law approach will therefore be confronted with arguments similar to constitutionalization theories of the past years.

The second remark refers to the distinction between public and private spheres. The change in paradigm involved in the public law theory deserves attention. Since *Grotius*, if not before, private law institutions have lent themselves to international law doctrine: Modern treaty law was initially developed along the lines of Roman contract law, titles to territory used to be derived from property law, the rules on state succession have roots in inheritance law, and state responsibility follows tort law thinking.[35] This is appropriate if subjects of international law are to be seen as equal. The "publicness" of classical public international law resulted from nothing more than the fact that the actors were states, but did not presuppose any legal hierarchy between them. To think in terms of public law suggests that there are superiors and entities or individuals who are their subjects. This assumption is problematic. Not only legal realists would object that whether between international organizations and their member states such a hierarchy is established depends on the distribution of powers between the organization and its member states. Regarding the UN, the permanent members of the Security Council would not look at this relationship in the same way as others. With respect to individuals as subjects of international organizations, there are very few institutions (save the European Union) with the competencies to impose obligations directly on individuals, and most of these powers are very exact.[36] Therefore, a very broad concept of "public authority" must be embraced which focuses on the impact of the decisions taken rather than on their legal effect. The criteria for drawing a line between "private" and "public" organizations still requires some refinement, however. If the disposition over public goods is the criterion, not only ICANN, but also international sports organizations such as IOC or FIFA are of interest. As with the Internet, global sporting events can be seen as public goods, and the right to or-

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[35] Cf. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW (1927).

[36] Examples are the river commissions already mentioned above (*see* note 10 and accompanying text) and the International Seabed Authority.

ganize them distributes political and economical advantages. In the end, the public law approach introduces a "public" element even for private international law institutions.[37] Apparently, even the question of what constitutes public good is guided by value choices for which criteria are yet to be found. In other words: The suggested public/private dichotomy is exposed to the criticism that it follows a predefined concept rather than being the result of the application of public law criteria.

III. Potential of International Public Law

1. Suitability of Public Law for International Organizations as a Concept of Legitimacy

The best argument for the suggested public law perspective would be if it had the potential to offer solutions other approaches cannot provide. This leads us to the question of what public law adds to other normative demands as derived from human rights, international constitutionalism and theories of legitimacy.

The present approach suggests that administrative law thinking enhances the rationality and legitimacy of international organizations. The rule of law benefit to be taken from such doctrinal methods in a continental sense is rationality and reliability,[38] and the hope is to expand that notion into the international sphere. Two methodological problems arise.

The first is the relationship between public law and its constitutional context. Public law encompasses two components, i.e. constitutional

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[37] How this solution relates to the private law theory of "global law without a state" (*see* G. TEUBNER, GLOBAL LAW WITHOUT A STATE (1997) cannot be addressed here; but the proposal to extend the reach of fundamental rights to private organisations alone does not necessarily contradict to it. However, a latent dissent appears to occur with respect to the impact of private and public lawmaking on the international plane in general*; see also* C. Tomuschat, *Möglichkeiten und Grenzen der Globalisierung, in* GLOBALISIERUNG UND ENTSTAATLICHUNG DES RECHTS, 21, 28 *et seq*. (J. Schwarze ed., 2008). Under national administrative law, this would not be seen as problematic; here, the transfer of tasks to private entities usually entails a loss of legal restraints, which the functional criteria applied by the "public law" approach on the international plane would avoid.

[38] Cf. MAX WEBER, RECHTSSOZIOLOGIE 69 (2nd ed., 1967).

and administrative law. Rules and principles which make the rule of law work and help to take individual rights seriously are primarily found in administrative law. The question how far they depend on constitutional principles is of guiding interest for the whole research agenda. The answer of continental law thinking would be to take fundamental constitutional principles at face value, such as the necessity that administrative decisions have to have a legal basis and be subject to legal review if individual rights are restricted, so that a system of institutions and rules may be built upon them. Another assumption from which different institutional initiatives of good governance have started would be that administration follows an intrinsic logic and rules of "good administration" can be developed independently, with a view of the specific tasks of an organization and without having to be derived from specific constitutional traditions. The former view is not easy to defend in an institutional environment with a global reach while the latter method is likely to produce only a thin net of rules and to provoke objections from a constitutional perspective.

The second methodological difficulty is to address the objection referred to above that the corpus of law which informs public law thinking is necessarily selective in contents. This problem can be the better confronted the closer the relationship to international standards is, most of which are found in international human rights. Thus, intradisciplinary discourse is not only promising between international institutional law and administrative law scholarship, it might also prove useful within the different branches of international law, in particular to investigate in how far the jurisprudence of international human rights' protection systems produces results suitable to be considered at the international level.

2. Reference Material – and the Targeted Sanctions Example

The work of international institutions opens a wide panorama on administrative activities in the widest sense. Seen against the background of national administrative law categories, one can recognize activities aiming at the maintenance of public order such as those of Interpol and Europol, welfare administration implemented by international development banks, and planning as designed and prepared by various OECD, UNDP or UNEP policy studies. Some of these decisions have more or less immediate external effects on individuals, others are regulatory in character. That public law thinking is useful in arriving at

more reasonable and more effective results is, as a hypothesis, very plausible. The answer to the question as to how far it ultimately proves useful must be reserved to individual studies. The merit of the public law approach is to openly state this and to comprehensibly assess how far modern international institutions have taken over functions which used to be the *domaine réservé* of states. However, not all of the examples selected are equally rewarding. Thus, it is doubtful whether activities with a strong high-politics impact can be properly addressed in this way. An example is the UN targeted sanctions mechanism. Although it might have been one of the starting points for the present undertaking, it is probably not the best case to convince us that the public law approach adds much to what what already exists.

The case study devoted to that problem suggests analyzing the listing and de-listing of individuals on the sanctions list as an administrative procedure and its decisions as administrative acts. It draws the conclusion that judicial review is necessary, but, as to date, deficient.[39] This conclusion is, in effect, hard to refute. The question is whether administrative law scholarship makes it more plausible than other normative reference systems.

Following the methodology of assessing general principles, the first step in finding applicable administrative law would be to analyze whether the institutional law of the UN itself offers elements from which principles might be inferred. The Charter provides the possibility to install an independent review body which, once established, would be in a position to produce binding decisions.[40] Whether or not to set up such a subsidiary organ, however, is up to the member states, i.e. a political question.

The hypothesis for the next step is that general principles, probably found in intra-disciplinary exchange and by comparative analysis, would lead to categories which trigger the expectation of introducing a procedure closer to the rule of law. The premise is that such categories are normative in character. Historically and functionally, this assumption is correct. However, the question is which direction their normativity takes, in other words, what follows from the identification of the

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[39] *See* C. Feinäugle, in this volume.

[40] The ICJ found that UN Charter law reflects a remote notion of checks and balances which rule out that an institution – like the General Assembly – can escape the binding consequences of a judicial body which it had entrusted with the task of legal review, *see* Opinion on the *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, ICJ Reports 1954, 47 (61).

sanctions committee's listing or non-delisting decisions as administrative acts. In authoritarian systems, the categorization of an administrative act historically had the use of finding a form in law which expressed the binding character of administrative decisions. In 19th century German legal doctrine, this notion was developed in analogy to judicial decisions, thus to stress the legal authority of the executive branch in the German Empire,[41] and there are administrative law systems represented by some of the Security Council members which still rest on such a fundament.

Obviously, this is not the idea with which the "public law approach" was launched; but it shows that under this approach administrative law is not so much a reference system for analysis as it is a tool for justifying normative conclusions. The conclusion at which the case study arrives is that any administrative act encroaching upon individual rights of private individuals must be subject to judicial review. In German municipal law this conclusion was the result of constitutional development. In the Weimar Republic, *Walter Jellinek* distinguished administrative acts systematically according to whether or not an action against them could be brought.[42] It was only after the *Grundgesetz* had entered into force that the decisive reason for using the administrative act concept was to find a reference point to which the consequence of procedural rights and judicial review could to be attached.[43]

In other words, approaching institutional law with "public law" criteria involves value judgments from normative systems which are external to it and is inclined to produce an idealized version of administrative law. The interesting question is how these judgments can be justified. It is therefore still questionable whether it is less promising to plead this particular case on the basis of human rights law, all the more so since credit must be given to the new category of smart sanctions in that it is better suited than others in avoiding the suffering of innocent people. To elaborate on the system from an international perspective would have the advantage of following a path already taken.

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41 O. Mayer, Deutsches Verwaltungsrecht, part I, 93 (3rd ed., 1923).

42 W. Jellinek, Verwaltungsrecht 247 *et seq*. (3rd ed., 1931).

43 H. Maurer, Allgemeines Verwaltungsrecht 189 *et seq.* (16th ed., 2006).

IV. Concluding Remarks

The normative implications of the public law approach open a promising field, even though they raise questions with respect to their justification, sources and methods. Objections are similar to those directed against some of the constitutionalization theories of the past years and which aim at the foundations of the implicit value judgments.

In order to avoid such criticism, it appears advisable to give more credit to the weaknesses of international law-making, i.e. its political character, its slow pace and the often very vague contents of an outcome. Thus, it appears feasible to develop principles of international public law if they can be based on, and further specify, elements already found in international institutional law, human rights law or general principles of law, all the more so those whose promotion is among the purposes of an international organization.

Intra-disciplinary exchange and comparative analysis offer a large reservoir of material which might inspire policy proposals. It is rewarding to enhance the awareness of the breadth and depth of activities with an impact on rights and prospects of individuals, to analyze them systematically and to stress the need of a more norm-oriented perspective on their activities. It therefore ought to use its potential in providing the responsible actors with material to restructure their procedural rules. The normative orientation of the concept may be criticized, but this can also be its strength in that it has the potential to open a debate on international governance with legal criteria and to put the burden of argument on the defense of some acts and procedures which are difficult to maintain.