
From Public International to International Public Law: Translating World Public Opinion into International Public Authority

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Abstract

This article argues that increasing demands in world public opinion for legitimate and effective international institutions require a paradigm shift in public international law. There is a part of public international law that should be better understood as international public law because it enables and disciplines the pursuit of public interests by international institutions. We consider such activities as exercises of international public authority. The article elaborates our approach by way of a thorough discussion of other approaches to governance phenomena in international legal scholarship. It then carves out the notion of international public authority. This notion includes various types of soft and informal governance instruments with innovative compliance mechanisms as well as the activities of informal and hybrid institutions or network-like structures.

1 Cues from World Public Opinion

A significant part of world public opinion regards international institutions with considerable ambivalence; many of these institutions have become powerful, and quite a few of their activities raise serious doubts. Nonetheless, they should be vested with

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more powers in order to better further common interests.¹ World public opinion voices legitimacy concerns alongside regulatory demands – a tension that poses serious challenges for these institutions. We share this ambivalent view of international institutions and see that much academic writing supports it.² In response to the legitimacy concerns and regulatory demands, we propose a theory of international public law.

The purpose of our theory is to identify, reconstruct and develop that segment of public international law that governs the exercise of international public authority.³ Switching ‘public’ and ‘international’ is not a slip of the pen but expresses the overall thrust of our theory: to advance a public law paradigm in international law. Thereby, we aim at taking account of world public opinion in the language of international law. International public law stands for the reconstruction and development of the legal regimes governing the activities of international institutions in light of their publicness. In this way, legal scholarship may contribute to improving the legitimacy and the effectiveness of their activities.

Today, in the wake of globalization, international institutions, including classical international organizations such as the United Nations (UN) or the International Centre for the Settlement of Investment Disputes (ICSID), informal institutions such as the G7 and network-like structures such as certain regulatory bodies in the financial sector devise policies with huge domestic impact,⁴ be it through regulation, deregulation, adjudication, administration or the dissemination of information. The UN sanctions against Iraq contributed to the death of thousands.⁵ The UN Security Council lists persons suspected of terrorist activities, triggering a complete freeze of their assets with serious consequences for their lives.⁶ The World Bank and the International

¹ Zürn and Ecker-Ehrhardt, ‘Politisierung als Konzept der Internationalen Beziehungen’, in M. Zürn and M. Ecker-Ehrhardt (eds), *Die Politisierung der Weltpolitik* (2013) 7; Furia, ‘Global Citizenship, Anyone? Cosmopolitanism, Privilege and Public Opinion’, 19 *Global Society* (2005) 331. Much evidence is to be found in the detailed studies published at www.WorldPublicOpinion.org; for the USA, see Council on Foreign Relations, *US Opinion on International Institutions*, available at www.cfr.org/international-organizations-and-alliances/us-opinion-international-institutions/p20131 (last visited 22 December 2016).

² E.g., E. Benvenisti, *The Law of Global Governance* (2014); J. Brunnée and S. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (2010); Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’, 37 *New York University Journal of International Law and Policy* (NYUJILP) (2005) 663; Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, 15 *European Journal of International Law (EJIL)* (2004) 1; Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15; J. Klabbbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009).

³ The terminology is used in Kadelbach, ‘From Public International Law to International Public Law’, in A. von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions* (2010) 33.

⁴ E.g., J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012); K.E. Davis et al. (eds), *Governance by Indicators: Global Power through Classification and Rankings* (2012); J.E. Alvarez, *International Organizations as Law-Makers* (2005).

⁵ See Report of the Second Panel Established pursuant to the Note by the President of the Security Council (S/1999/100) of 30 January 1999, concerning the Current Humanitarian Situation in Iraq, UN Doc. S/1999/356, 30 March 1999, para. 45.

⁶ ECtHR, *Nada v. Switzerland*, Appl. 10593/08, Judgment of 12 September 2012; C.A. Feinäugle, *Hoheitsgewalt im Völkerrecht: Das 1267-Sanktionsregime der UN und seine rechtliche Fassung* (2011).

Monetary Fund have caused profound changes of domestic economic and social policies.⁷ The Organisation for Economic Co-operation and Development (OECD) regularly ranks states according to the academic performance of their schoolchildren, transforming education policy in many countries.⁸ Investment tribunals decide on whether domestic environmental regulation amounts to an indirect expropriation for which a host state is liable to a foreign investor.⁹ While international institutions are very present in some policy fields, they have little impact in others where international action is also called for – for example, in the field of climate change. The development of international institutions is obviously uneven, especially from the perspective of the global south as it is often in line with interests of the global north.¹⁰

To grasp the legitimacy concerns as well as the regulatory requests surrounding international institutions, we reconstruct their power as an exercise of international public authority. In a nutshell, the exercise of international public authority is the adoption of an act that affects the freedom of others in pursuance of a common interest.¹¹ This understanding helps single out activities that require grounds of legitimacy that go beyond the consent of member states to the institution's foundational act. Singling out those activities is a precondition for increasing their legitimacy. It also opens avenues for more effective regulation.¹²

Even though views within world public opinion may diverge on many important issues, it seems to be common ground that public authority should advance common interests and that it should do so in a way that merits obedience. Since these twin requirements, and their uneasy relationship, are the key characteristics for contemporary public law in most domestic legal orders, public law theories, doctrines and practical expertise may help in the development of international public law. Of

⁷ E.g., see Fix-Fierro and López-Ayllón, 'The Impact of Globalization on the Reform of the State and the Law in Latin America', 19 *Houston Journal of International Law* (1996–1997) 785, at 795; J.M. Serna de la Garza, *Impacto e implicaciones constitucionales de la globalización en el sistema jurídico mexicano* (2012) 111ff; Bradlow, 'The World Bank, the IMF, and Human Rights', 6 *Transnational Law and Contemporary Problems* (1996) 47.

⁸ von Bogdandy and Goldmann, 'Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA)', in K.E. Davis et al. (eds), *Governance by Indicators: Global Power through Classification and Rankings* (2012) 52.

⁹ Further examples in A. von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010); A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking* (2012). For the overall project that has been ongoing for 10 years, see www.mpil.de/de/pub/forschung/nach-rechtsgebieten/voelkerrecht/ipa.cfm (last visited 22 December 2016).

¹⁰ Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century', 14 *Oregon Review of International Law* (2012) 17; S. Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (2011).

¹¹ This, of course, is not a definition in the sense of a hard and fast rule for classifying and judging complex phenomena as one might expect from lawyers trained in the continental tradition; on that issue, see Reimann, 'The American Advantage in Global Lawyering', 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2014) 1, at 12–13, 21–23.

¹² Legitimacy and effectiveness are not opposing concepts. Effective political problem solving is a possible source of output legitimacy but certainly not sufficient under a public law paradigm. See the seminal F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999), at 6ff.

course, there are important differences between domestic and international public law, not least because the latter is not supported by one overarching state, nation or people. However, this does not impede learning across levels of governance. The establishment of the International Society of Public Law testifies to this possibility.¹³

The second part of this article elaborates the idea behind the public law approach by engaging with other conceptualizations of globalization and their repercussions on world public opinion in legal scholarship. The third part develops our theory of international public authority, which defines the object of international public law, and the fourth part of the article assesses our proposal in the light of current developments in global politics.

2 International Public Law in a Comparative Perspective

We present our theory of international public law in a Socratic way, engaging with the texts that guided our reflections. The first set of texts juxtaposes our approach to understandings informed by private law thinking. The second step engages with positions analysing law from an external – that is, sociological – viewpoint. The third step presents three approaches that fit neatly into the public law paradigm. Each of these approaches depicts certain aspects of that thinking. Our approach aims at combining their strengths and addressing some of their weaknesses.

A International Public Law versus the Private Law Paradigm

1 The Traditional Private Law Paradigm: Bilateralism, Coordination, Consent

In the past, the ‘public’ in public international law was explained by the fact that its main subjects are states – that is, public institutions – not because it governs the exercise of public authority.¹⁴ In fact, the very lack of public authority – that is, anarchy – was often seen as the defining feature of the international order.¹⁵ Accordingly, many consider public international law to be a horizontal order of co-existence based on consent.¹⁶ Thus, it mostly operates on the basis of a private law paradigm.

Surely, this paradigm has always attracted much critique.¹⁷ More recently, there are increasing signs that it is inadequate for many, if not most, parts of public

¹³ Weiler, ‘The International Society for Public Law’, 12 *International Journal of Constitutional Law (IJCL)* (2014) 1.

¹⁴ Janis, ‘Jeremy Bentham and the Fashioning of “International Law”’, 78 *American Journal of International Law (AJIL)* (1984) 405, at 408.

¹⁵ J. Austin, *The Province of Jurisprudence Determined* (1832), at 208; G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1821), at para. 333.

¹⁶ H. Triepel, *Völkerrecht und Landesrecht* (1899); L. Oppenheim, *International Law: A Treatise* (1905); J. Westlake, *International Law* (1904); G.F. von Martens, *A Compendium of the Law of Nations: Founded on the Treaties and Customs of the Modern Nations of Europe*, translated by William Cobbett (1802); more recent authors include Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* (1983) 413, at 441; Wedgwood, ‘The International Criminal Court: An American View’, 10 *EJIL* (1999) 93, at 99ff; Hillgruber, ‘Souveränität: Verteidigung eines Rechtsbegriffs’, 57 *Juristenzeitung* (2002) 1072.

¹⁷ Especially from the vantage point of natural law, J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (1872).

international law. In the attempt to cater to common interests, international law has developed a sophisticated institutional structure that is hard to reconcile with ideas of horizontal relations based on (state) consent alone.¹⁸ Our shift towards international public law rests on the conviction that the private law paradigm, due to its focus on self-interest and horizontal structures, is insufficient, in particular, when it comes to the operation of this institutional structure. International public law, by contrast, lays bare its authority, reads international law in relation to common interests and confronts problems of legitimacy.

Thinking in terms of international public law does not categorically replace the private law paradigm. Some fields and practices of international law may still be understood in analogy to contracts.¹⁹ What is more, the private law paradigm does provide tools to react to a changed reality.²⁰ First of all, private law instruments can further the common good. Contracts and property are essential to a functioning, welfare-enhancing economy; private law instruments like emissions rights might contribute to fighting climate change.²¹ Emmanuelle Jouannet has argued that even modern 'liberal' international law – that is, the contemporary international law of co-ordination that follows the private law paradigm – is not only based on sovereign equality but also on democracy and human rights.²² Eyal Benvenisti has used present-day private law theories in order to advance far-reaching proposals for the understanding and development of international law.²³ He presents states as trustees of humanity and reconstructs their sovereign control over a territory along progressive theories of private property.²⁴ However, this approach concerns relationships between states and foreign citizens under their jurisdiction. It does not deal with international institutions. Indeed, in his recent book, *The Law of Global Governance*, Benvenisti himself opts for global administrative law, thereby leaving the private law paradigm behind when he turns to international institutions.²⁵

2 *The New Contractualism of Rational Choice*

The private law paradigm will certainly live on, especially among (neo-)realist international lawyers who are sceptical of the prowess of international law, of international

¹⁸ N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *AJIL* (2014) 1. This development reaches back about one century. See in detail M. Goldmann, *Internationale öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (2015), at 19–93.

¹⁹ Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2004) 547.

²⁰ Cf. J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011). The ambivalent notion of 'law-making treaties' testifies to the travails of the private law paradigm, see C. Brölmann, 'Law-Making Treaties: Form and Function in International Law', 74 *Nordic Journal of International Law* (2005) 383.

²¹ See the sharp overview in Caruso, 'Private Law and State-Making in the Age of Globalization', 39 *NYUJILP* (2006) 1.

²² E. Jouannet, *The Liberal-Welfarist Law of Nations* (2012), at 205–215.

²³ Benvenisti, 'Collective Action in the Utilization of Shared Freshwater', 90 *AJIL* (1996) 384, at 415; Benvenisti, 'Sovereigns as Trustees of Humanity', 107 *AJIL* (2013) 295.

²⁴ Benvenisti, 'Collective Action' *supra* note 23, at 384–415.

²⁵ Benvenisti, *supra* note 2, (2014), at 79–80.

institutions and of legally curbing state power. From their viewpoint, a public law approach looks utterly misguided. Jack Goldsmith and Eric Posner caused a stir with such a view a decade ago.²⁶ According to them, authority beyond states is plainly impossible, as a matter of fact and for normative reasons. For democratic states, the domestic constituency is the only relevant factor. And governments are bound to do what is best for them. States are therefore unlikely to truly pursue common projects with other states, let alone cosmopolitan ones.²⁷ Any international obligation, even if it results from a freely concluded treaty, is suspicious since it constrains the domestic democratic process.²⁸ The criticisms of this approach are manifold. For example, it categorically denies that international commitments – in the form of a treaty or otherwise – could well be an expression of domestic democratic interests. It further disregards that international cooperation enables individual states to do together what they could not do alone. Finally, it only views international constraints as problematic and does not take into account the constraints that individual states would impose upon one another in the absence of international cooperation.

Other approaches share the attempt to link everything happening in the field of international law to a certain vision of human and state behaviour where self-interest constitutes the principal source of motivation.²⁹ Some of this research recognizes that it might be rational for self-interested states to confer tasks to international institutions with some degree of autonomy.³⁰ Yet even more differentiated rational choice approaches face serious critiques. They ultimately continue to take the maximization of state interests to be the main, if not single, reason for action. This yardstick is both unduly reductive and highly indeterminate.³¹

3 *Droit privé total: The Renewed Lex Mercatoria*

Approaches to international law based on systems theory do not consider society as an aggregate of individual actions and interests.³² But there is still little hope for an international public law. Systems theory assumes that society consists of different social systems (law, economics, politics and so on) that are sealed off in relation to one another. They also globalize at different speeds. The political system typically lags

²⁶ J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005).

²⁷ *Ibid.*, at 212.

²⁸ *Ibid.*, at 218–219.

²⁹ E.g., Dunoff and Trachtman, 'Economic Analysis of International Law', 24 *NYUJILP* (1999), at 1; A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

³⁰ E.g., Simmons, 'Money and the Law: Why Comply with the Public International Law of Money?', 25 *NYUJILP* (2000) 323; Trachtman, 'The Economic Structure of the Law of International Organizations', 15 *Chicago Journal of International Law* (2014) 162.

³¹ Koskenniemi, 'Global Governance and Public International Law', 37 *Kritische Justiz* (2004) 241, at 247ff; Cooney and Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade', 18 *EJIL* (2007) 523. The yardstick is helpfully modified in more recent research: van Aaken, 'Behavioral International Law and Economics', 55 *Harvard International Law Journal* (2014) 421, at 426, 432; Broude, 'Behavioral International Law', 163 *University of Pennsylvania Law Review (UPLR)* (2015) 1099, at 1116–1118.

³² In more detail, see von Bogdandy and Dellavalle, 'The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective', 4 *Transnational Legal Theory* (2013) 59.

behind.³³ For this reason, systems theory considers the idea of an overarching public order, which is central to public law thinking, as being hopeless. Instead, it places its bets on spontaneous interactions within the various social systems of world society.³⁴

The renewed *lex mercatoria* serves as a principal case in point.³⁵ Such a global legal regime is understood as developing in line with the rationality of its corresponding social system. The relationship between legal regimes reflects the profound contradictions and collisions that prevail in world society, thus giving rise to a global legal pluralism of different legal regimes.³⁶ Even the emergence of human rights as a – somehow – constitutional standard in international law remains limited to the political realm, thus to one functionally differentiated system of society and is far from being truly universal.³⁷ Collisions among different legal regimes may at best be tamed through mechanisms of horizontal coordination, by ‘reciprocal observation, anticipatory adaptation, cooperation, trust, self-commitment, reliability, negotiations, and a context of permanent reference to one another’.³⁸ The private law paradigm ought to explain this form of horizontal coordination.

System theoretical approaches are related to calls for private international law or a new transnational (or global) law as the appropriate legal response to global governance.³⁹ They argue that the increasing importance of private, informal and transnational phenomena, as well as all of the various hybrids they produce, renders public law approaches ill-suited, if not hopeless, to take care of common interests.⁴⁰ Indeed, strictly hierarchical and unitary conceptions of public law are no longer convincing. But there are good reasons to doubt that rules established between private actors can live on their own, whether factually or normatively speaking. The claim for the desirability of a ‘public’ dimension expresses the awareness and conviction that social interactions are, and should be, regulated by rules that emerge from discourses about common interests. Neither the ambitious political vision for peace and justice, nor the articulation and promotion of more specific common interests can be achieved by regimes based solely on spontaneous private ordering. In recognition of this, world public opinion places its hopes on the effective regulation by legitimate international institutions.

³³ N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), at 65ff, 92ff, 102ff.

³⁴ *Ibid.*, at 48ff.

³⁵ Seminal: Teubner, ‘Global Bukowina’: Legal Pluralism in the World Society’, in G. Teubner (ed.), *Global Law without a State* (1997) 3, at 6.

³⁶ *Ibid.*, at 40.

³⁷ G. Teubner, *Verfassungsfragmente: Gesellschaftlicher Konstitutionalismus in der Globalisierung* (2012), at 82–85.

³⁸ A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen: zur Fragmentierung des globalen Rechts* (2006), at 52; Teubner, *supra* note 37, at 225ff.

³⁹ For private international law, see Watt, ‘Private International Law Beyond the Schism’, 2 *Transnational Legal Theory* (2011) 347; for transnational law, see G.-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2009); for global law, see H. Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013).

⁴⁰ P. Zumbansen, ‘Transnational Legal Pluralism’, 1 *Transnational Legal Theory* (2010) 141; Calliess and Maurer, ‘Transnationales Recht: eine Einleitung’, in G.-P. Calliess (ed.), *Transnationales Recht* (2014) 1.

B *International Public Law versus Sociological Approaches*

1 *Global Governance and Transnational Legal Process*

The international public law approach shares three insights with global governance studies.⁴¹ First is the recognition of the significance of institutions and processes beyond the state. The most visible mark of their significance might be the degree of autonomy that international institutions enjoy *vis-à-vis* state governments.⁴² Second, research on global governance notes the importance of informality of many institutions, procedures and instruments. It stresses the need to go beyond established legal concepts that cannot grasp such informality.⁴³ Third, as is obvious from the use of the term ‘global’ rather than ‘international’, global governance emphasizes the multi-level character of processes and interactions. We share these three insights and agree that these mechanisms should not be neglected but, rather, be made the object of legal reconstructions. We also share the idea that a convincing concept of law must be broader and more differentiated than the classic triad of treaty, custom and general principles. And although we focus more narrowly on international phenomena, we have other levels of governance on the radar, especially because both the effectiveness and the legitimacy of international institutional activity, and of international public law, heavily depend on domestic public law.

However, global governance studies display serious normative and cognitive shortcomings endemic in many liberal international relation theories, many of which come into view through the prism of public law. Normatively speaking, global governance is mainly understood as a technocratic process concerned with ‘problem solving’.⁴⁴ It is focused on pursuing defined goals effectively but is rather silent about how to define goals or about how to strike inevitable normative balances when pursuing any single goal. What is more, a concern for the workings of power relations is largely absent.⁴⁵ On the cognitive side, global governance studies lack a conceptual framework for distinguishing and identifying those instruments that raise questions of legitimacy and those that do not.

The same may be said of transnational legal process.⁴⁶ The latter is characterized by an emphasis on law as a continuous process of consecutive decisions instead of a

⁴¹ Seminal: Rosenau, ‘Governance, Order, and Change in World Politics’, in J.N. Rosenau and E.-O. Czempiel (eds), *Governance without Government* (1992) 1.

⁴² I. Venzke, ‘International Bureaucracies from a Political Science Perspective: Agency, Authority and International Institutional Law’, in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 67.

⁴³ This distinguishes our approach from J. d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011), at 128–130.

⁴⁴ Koskeniemi, *supra* note 31, at 241. On the related liberal bias of international organizations, see Barnett and Finnemore, ‘The Power of Liberal International Organizations’, in M. Barnett and R. Duvall (eds), *Power in Global Governance* (2005) 161, at 163–169.

⁴⁵ Slaughter, ‘The Accountability of Government Networks’, 8 *Indiana Journal of Global Legal Studies* (2000–2001) 347.

⁴⁶ Koh, ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181; Reisman, ‘The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application’, in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005) 15, at 24–26.

stable system of rules.⁴⁷ It provides important insights as to why decisions are obeyed, whether for reasons of self-interest, identity or as a result of repeated interaction.⁴⁸ Much like global legal pluralism,⁴⁹ it accommodates the input of a host of new actors and develops a broader view on different sites for the generation of legal normativity beyond the classic realm of governmental interaction. Its main normative argument boils down to suggesting that the variety of many different processes sustains the normativity of the outcome. Precisely why this should be the case remains unclear.

The public law approach responds to these limits of governance studies and transnational legal process with its focus on the exercise and justification of public authority. It thereby avails itself of the dual function of modern public law. Accordingly, public authority may only be exercised if it is based on an authorizing act (constitutive or enabling function), and its exercise controlled and limited by substantive and procedural standards (limiting function).⁵⁰ For this reason, public law helps to translate concerns about the legitimacy of governance activities into meaningful arguments of legality. Work under the concept of global governance or transnational legal process is typically insufficient for this purpose because it does not provide a basis for the identification of those acts that are critical. Nor does it show how those acts may be framed in terms of law.

2 Critical Approaches

The normative implications that many studies of global governance and theories of transnational legal process draw – the more actors and the more forms of law, the merrier – meets with a strong critique from perspectives that highlight diffuse governance processes and informality as a fig-leaf for the exercise of power.⁵¹ Whereas advocates of global governance studies, transnational legal process and global legal pluralism might view plurality and informality as mechanisms to break into the centres of state power, Martti Koskenniemi and others see it, above all, as the subjugation of that same power to vested economic interests. Against the move to informality, they uphold the legal form and formal language of the law as a possible shield against private power and a possible vehicle for progressive politics.⁵² They draw attention to how dominant interpretations in international law reflect power imbalances and entrench biases.⁵³

⁴⁷ Hanschmann, 'Theorie transnationaler Rechtsprozesse', in S. Buckel, R. Christensen and A. Fischer-Lescano (eds), *Neue Theorien des Rechts* (2006) 347, at 357.

⁴⁸ Koh, *supra* note 46.

⁴⁹ Cf. P. Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (2012).

⁵⁰ See E. Schmidt-Abmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (2004), at 16–18; N. Walker, *Intimations of Global Law* (2015), at 90–91. See also Kingsbury, 'International Law as Inter-Public Law', in H.S. Richardson and M.S. Williams (eds), *Moral Universalism and Pluralism* (2009) 167.

⁵¹ Chimni, *supra* note 2; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 115.

⁵² Koskenniemi, *supra* note 31, at 241; M. Koskenniemi, 'The Politics of International Law: 20 Years Later', 20 *EJIL* (2009) 7; with different background but similar direction, see Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review* (2007) 595.

⁵³ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, 2005); Kennedy, 'Theses about International Law Discourse', 23 *German Yearbook of International Law* (1980) 353.

But the language of law, they suggest, offers at least a marginal degree of resistance to such exercises of power in the name of economic efficiency or morality.⁵⁴ Even if one does not share Koskenniemi's fundamental scepticism about legitimizing the exercise of power through law, the critical approach forcefully underlines the epistemological and political challenges that legal scholarship has to meet.

Another important point stressed by critical scholarship is the political nature of the public-private divide. As Hans Kelsen has already shown with great clarity, the view that some fields are necessarily to be left to private ordering whereas only some others can be subject to public ordering is deeply ideological.⁵⁵ American critical legal studies and feminist scholarship, in particular, has deepened and elaborated this insight.⁵⁶ We agree that the public-private distinction has shielded and perpetuated relationships of dominance in the past and present by the pretence that they belonged to the private realm. But responses to this wrong can and should proceed without giving up the distinction in its entirety. First, the private sphere is certainly not immune against governmental interference. Second, in contemporary legal practice, the public-private distinction has lost its static character. The public sphere extends over whatever issue the competent institutions decide it to extend. The private sphere provides no safe haven for oppressive relationships. Third, as we argue in the next section, the public-private distinction continues to exercise an important function for the identification and formulation of common interests.⁵⁷

3 *International Public Law and the Need for Legal Doctrine*

Insights of political science and political theory remain external to the extent that these explanations and assessments usually cannot be processed in the operation of the legal system. According to an understanding shared by many legal traditions, public law scholarship also has an 'internal' or 'doctrinal' dimension, possibly its most important one, which is to evolve and manage the operative vocabulary of the law that constitutes and constrains public authority. Of course, this role of public law scholarship is different from one legal tradition to another, but it is certainly far more pronounced in most traditions than in the USA.⁵⁸ We understand doctrine and more external approaches to the law to be complementary, not adversarial.

The development of an operative legal vocabulary for international public authority is a pressing task. Most importantly, the frequent absence of elaborated legal standards leads to the unfortunate situation that international institutions exercise public authority that many might perceive to be illegitimate but cannot claim to be illegal for lack of such standards. The discourse on legality is out of sync with the discourse

⁵⁴ M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), at 495.

⁵⁵ H. Kelsen, *Reine Rechtslehre* (1934), at 109–114; H. Kelsen, *Pure Theory of Law*, translated by Max Knight (2nd edn, 1967), at 281–284.

⁵⁶ D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction', 130 *UPLR* (1981–1982) 1349, at 1352; N. Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (1989).

⁵⁷ In detail, see section 3.B.2 below.

⁵⁸ U. Kischel, *Rechtsvergleichung* (2015), at 101.

on legitimacy.⁵⁹ Too often, international law is silent about what world public opinion considers as dubious exercises of international public authority. Only internal approaches that provide criteria for the legality or illegality of specific acts can offer suggestions to rectify this dissonance. This gap between legality and legitimacy is deeply troubling. The experience of the state since early modernity, not only of liberal democracies, teaches how important it is that legitimacy concerns can be put forward, in principle, as issues of legality.⁶⁰ This is a core role of public law. It renders the translocation of legitimacy concerns into legal arguments and eventually into the normative fabric of social interaction possible. Indeed, world public opinion testifies to the problematic dissonance between legality and legitimacy.

Moreover, legal vocabulary is usually much more detailed and specific than that of other disciplines. Much of public law doctrine consists in elaborating the significance in concrete cases of the 'big ideas', such as human rights, checks and balances, rule of law, democracy and so on. It disentangles complex patterns into individual acts and actors and provides a frame that constitutes and constrains them. This has the important practical effect that not every single act of public authority needs to be investigated for want of legitimacy. Instead, acts that are legal are presumed to be legitimate – a presumption that can, and has often been, rebutted.⁶¹

A doctrinal approach not only serves normative but also cognitive purposes. The lack of a developed legal framework contributes to the amorphous image of international institutions, international policies and international normativity. Legal concepts and theories, developed to understand the law and to manage normative expectations, also play an important role for coming to terms with the social world. As shown for the domestic level of governance, public institutions, their policies and the normative operations within a society need and live within legal terminology (see, for example, the doctrines of contract, separation of powers, due process and so on). However, there is an absence of commensurate legal concepts regarding international institutions, policies and instruments. Not least, a lack of understanding and trust in the legitimacy of international law's dynamic core prevails, generally speaking, which is part of the ambivalence of world public opinion. Since traditional concepts such as sovereignty, sources of law or consent have lost so much of their explanatory purchase, international institutions, policies and instruments remain opaque. If their legal regime is uncertain, it is more likely that they do not fully achieve their regulatory objectives. Doctrinal elaborations therefore support the effectiveness of legal instruments.

⁵⁹ Koskenniemi, *supra* note 31, suggests that the reasons for this divergence of legality and legitimacy lies in the deformalization, fragmentation and the hegemonic traits of the current world order. On these aspects, see also Benvenisti and Downs, *supra* note 52, at 595. J. von Bernstorff and I. Venzke, 'Ethos, Ethics and Morality in International Relations', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009).

⁶⁰ On administrative review in socialist countries, e.g., G. Brunner, *Kontrollfunktion und Kontrollorgane in der Sowjetunion und in Mitteleuropa* (1967); on administrative review in Franco's Spain, see P.G. Pascual, *Los cuerpos de funcionarios de la administración pública española* (1960).

⁶¹ For a compelling argument in this regard, see C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (2013), at 4.

4 *Public Law Approaches: Institutional, Constitutional and Administrative Law*

Responding to the need for an internal, public law approach, a rich field of research has emerged to legally frame global governance. This field mainly consists of institutional, constitutional and administrative law approaches. By and large, they pursue the twofold intention of furthering the potential of international public authority while hedging its risks. None of these approaches laments the decline of the Westphalian order. Rather, they aim at rendering global governance more efficient as well as more legitimate. Institutional, constitutional and administrative approaches all develop aspects of international public law. While important differences exist between these approaches, the common ground is considerable, and we think that elaborating this common ground propels a better exchange of ideas. In particular, we suggest that they can all work well with, and gain from, the notion of international public authority.

(a) *International institutional law*

International institutional law focuses on international organizations as subjects of international law, describing both their externally relevant activities and their internal law with a view to carving out common principles embedded in the legal design and practices of all international institutions.⁶² For international public law, international institutional law provides a breakthrough as it features a concept that contains the first nucleus of international public authority. As is well known, according to international institutional law, an international organization requires the possibility of forming ‘a will of its own’ in the pursuit of its objectives.⁶³ This is to be understood against the former understanding, which viewed international organizations as permanent intergovernmental venues, hence, as part of the domestic administration of the member states.⁶⁴

The capacity of autonomous decision making of international institutions enables them to formulate common interests for their member states. In this respect, international institutional law was mainly developed according to a functionalist understanding of international institutions. As Jan Klabbers has recently shown, the functionalist orientation of international institutional law stems from the insight that nations are heavily interdependent and therefore inevitably need to cooperate in permanent, non-sporadic ways. Paul Reinsch, who Klabbers identifies as the first scholar of international institutional law, embedded this approach into a progress narrative. He believed that de-politicized, technical organizations would have a calming effect on overbearing national interests, which would eventually contribute to world peace.⁶⁵

⁶² C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005); J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2009); H.G. Schermers and N. Blokker, *International institutional Law: Unity within Diversity* (5th edn, 2011).

⁶³ Cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 75, para. 19; see also Schermers and Blokker, *supra* note 62, at para. 44. On the autonomy of international organizations, see R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy* (2011).

⁶⁴ Kennedy, ‘The Move to Institutions’, 8 *Cardozo Law Review* (1968) 841.

⁶⁵ Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’, 25 *EJIL* (2014) 645. See also Reinsch, ‘International Unions and Their Administration’, 1 *AJIL* (1907) 579.

Two world wars later, David Mitrany advocated institutions that would provide welfare services to their members, among them many newly independent states.⁶⁶ Wolfgang Friedmann's seminal work on the law of cooperation epitomizes the underlying paradigm shift in the focus of international law from concerns regarding state sovereignty to the welfare of the citizens and the self-preservation of mankind.⁶⁷ While states would remain the principal subjects of international law, a supranational society created by global and regional international organizations with legal personality would rise to the level of an actor in its own right.⁶⁸ Recognizing the vertical structure of international institutional law and its focus on common interests, Philip Allott designated it as 'international public law'.⁶⁹

Today, international institutional law holds great potential as a framing device for international public authority since international organizations are of enormous significance for public affairs in times of global governance. It is no wonder that this stream of research has greatly evolved as of late.⁷⁰ New instruments, competencies and procedures of international organizations have come into its focus.⁷¹ In order to live up to the challenges of global governance, international institutional law could easily be extended so as to encompass not only the activities of international organizations in a strict sense but also the actions of less formalized institutions, such as the Organization for Security and Co-operation in Europe, or non-binding instruments.⁷²

The limits of the international institutional law approach lie elsewhere. Although this school of thought views the welfare of individuals as its overarching concern, it does not regard them as subjects of international law⁷³ and is unconcerned about their freedom.⁷⁴ Accordingly, the putatively technical character of their tasks – their advantage, according to Mitrany – shields them from requirements of additional legitimacy beyond state consent. The emergence of claims in world public opinion for such legitimacy shows that this view faces an increasing number of problems. Remarkably, Klabbers' textbook presents international institutional law as being caught up in the tension between autonomous international institutions and member states. He leaves no space for the role of individuals.⁷⁵ And, yet, he also builds on a strand of the public law approach that takes the individual most seriously – namely, constitutionalism.⁷⁶

⁶⁶ D. Mitrany, *A Working Peace System* (1943); Mitrany, 'The Functional Approach to World Organization', 24 *International Affairs* (1948) 350.

⁶⁷ W.G. Friedmann, *The Changing Structure of International Law* (1964), at 12.

⁶⁸ *Ibid.*, at 37ff, 213ff.

⁶⁹ P. Allott, *The Health of Nations: Society and Law beyond the State* (2002), at 297.

⁷⁰ See Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *EJIL* (2015) 9.

⁷¹ *Ibid.*, see also A. Boyle and C. Chinkin, *The Making of International Law* (2007); Pauwelyn, Wessels and Wouters, *supra* note 4. On competencies, see Ruffert, 'Zuständigkeitsgrenzen internationaler Organisationen im institutionellen Rahmen der internationalen Gemeinschaft', 38 *Archiv des Völkerrechts* (2000) 129; D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005).

⁷² A good example for how this can be done is Alvarez, *supra* note 4.

⁷³ Friedmann, *supra* note 67, at 40ff.

⁷⁴ Recently, Alvarez, 'Is Investor-State Arbitration "Public"?' Institute for International Law and Justice Working Paper no. 6 (2016).

⁷⁵ Klabbers, *supra* note 62.

⁷⁶ Cf. Klabbers, Peters and Ulfstein, *supra* note 2.

(b) Constitutionalism

The broadest strand of legal scholarship that deals with global governance phenomena from a public law perspective is constitutionalism.⁷⁷ Like international institutional law, it is driven by the intuition that a strictly horizontal conception of the international order needs to be supplemented by considerations for its more vertical structures.⁷⁸ In the language of constitutionalism, and in contrast to international institutional law, these structures amount to a common order encompassing the entire international community. Thus, with the exception of functionalist approaches,⁷⁹ most constitutional approaches ultimately base this order on the freedom of individuals and their capacity for self-determination.⁸⁰

Constitutionalism comprises a variety of strands. Whereas some authors use the constitutionalist approach to redefine the international legal order as a whole,⁸¹ others, closer to our concern, use it in order to legally frame activities of international institutions in light of first principles.⁸² Especially with regard to the latter, we see a noteworthy insight. Scholars in this camp advocate that activities of international institutions should be investigated in the light of the experience of domestic public (or constitutional) law in liberal democracies with its focus on freedom.⁸³ Accordingly,

⁷⁷ For its ancient roots, see Walker, *supra* note 50, at 87–88. For its thrust, see Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 579; see also the editorial Wiener *et al.*, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, 1 *Global Constitutionalism* (2012) 1.

⁷⁸ 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 Buergenthal in the *Case Concerning the Arrest Warrant of 11 April 2000 (DR Congo v. Belgium)*, Judgment, 14 February 2000, ICJ Reports (2002) 35, at 63.

⁷⁹ E.g., Dunoff and Trachtman, ‘A Functional Approach to International Constitutionalization’, in J. Dunoff and J. Trachtman (eds), *Ruling the World?* (2009) 3; International Law Association, Accountability of International Organisations, Final Report (2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9> (last visited 22 December 2016).

⁸⁰ Cf. A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2010), at 213; Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law’, 281 *Recueil des Cours* (1999) 9, at 161–162; Peters, ‘Humanity as the A and Ω of Sovereignty’, 20 *EJIL* (2009) 513.

⁸¹ Cf. Frowein, ‘Konstitutionalisierung des Völkerrechts’, in K. Dicke *et al.* (eds), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System* (2000) 427. This is classified as a semantic strategy, according to Diggelmann and Altwicker, ‘Is There Something Like a Constitution of International Law?’, 68 *ZaöRV* (2008) 623, at 632ff.

⁸² M. Ruffert and C. Walter, *Institutionalised International Law* (2015); Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia Journal of Transnational Law* (1998) 529; D. Cass, *The Constitutionalization of the World Trade Organization* (2005); Petersmann, ‘Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism’, in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006) 5.

⁸³ See, e.g., Peters, *supra* note 77, at 583–584. On freedom as the overarching concept of modernity, see Hegel, *supra* note 15; Berlin, ‘Two Concepts of Liberty’, in I. Berlin, *Four Essays on Liberty* (1969) 118; J. Rawls, *A Theory of Justice* (1972), para. 32; Preamble of the UN Charter: ‘We the peoples of the United Nations determined ... to promote social progress and better standards of life in larger freedom.’ The idea of freedom brings together both public and private law. See M. Auer, *Der privatrechtliche Diskurs der Moderne* (2014), 15ff.

constitutionalism suggests that many of the standards of domestic constitutional law may be instructive for the legal regimes of international public authority.⁸⁴ Obviously, overly simplistic analogies must be avoided when construing the public law framework of world society. However, this strand of constitutionalism rightly stresses the importance for international public law of core principles such as human rights, the rule of law and democratic inclusion.⁸⁵

While we share constitutionalism's core intuition about freedom and the concern for core principles, we depart from its more value-laden variants and, more generally, harbour some reservations about the use of the concept of constitution for the international level. Constitutionalism, like constitutionalization, somehow suggests a progression towards a global polity or even federal union that appears problematic.⁸⁶ It might suggest a degree of hierarchy, closure and a quest for ultimate reasons that is unattainable (only think of the dazzling question of a *pouvoir constituant* in world society).

Constitutional pluralism, however, does address this difficulty to some extent. Again, there is a wide variety of versions of constitutional pluralism. Some authors, like Neil MacCormick, understand constitutional pluralism as different constitutional levels within one hierarchical organization, similar to federal states.⁸⁷ This variety of pluralism brings into focus questions about the relationship between these communities.⁸⁸ While constitutional pluralism might help to adequately reconstruct the legal order of the European Union, it seems hardly convincing for the global level. Radical pluralist approaches, by contrast, deny the existence of any overarching universal legal rules or the idea of overcoming different fragmented global legal regimes.⁸⁹ Intermediate approaches take the citizens as the ultimate subjects of legitimacy and recognize that individuals are social beings who do not live in isolation but, rather, have many social relationships and affiliations. They may therefore belong to different communities at different levels at the same time.⁹⁰ This opens the possibility of tapping into domestic democratic processes in order to legitimize international public authority.⁹¹

⁸⁴ Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907.

⁸⁵ Kumm *et al.*, 'How Large Is the World of Global Constitutionalism?', 3 *Global Constitutionalism* (2014) 1; M. Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretical Inquiries* 8 (2007) 9, at 22.

⁸⁶ I. Kant, *Zum Ewigen Frieden* (1795).

⁸⁷ MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review (MLR)* (1993) 1.

⁸⁸ E.g., von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *IJCL* (2008), at 397; on the *Kadi* cases, see, e.g., M. Avbelj, F. Fontanelli and G. Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (2014). Court of First Instance, *Kadi v. Council and Commission (Kadi)*, Case T-315/01, Judgment of 21 September 2005.

⁸⁹ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2011).

⁹⁰ E.g., Walker, 'The Idea of Constitutional Pluralism', 65 *MLR* (2002) 317; Peters, 'Dual Democracy', in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009) 263; Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in J. Habermas, *The Divided West*, translated and edited by C. Cronin (2006), 115, at 141–142.

⁹¹ Habermas, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft', in W. Brugger, U. Neumann and Stephan Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (2008) 360, at 362.

Although we share with constitutional pluralism the pluralistic view of citizens and other communities as subjects of legitimacy, we are concerned about the limited capacity of such approaches to deal with questions of political inclusion. Constitutionalism focuses above all on the impact of governance arrangements on human rights. However, not every act that raises legitimacy concerns constitutes a human rights problem. That would be too narrow a focus. Constitutional approaches often lack a differentiated vocabulary to grasp hugely different phenomena of global governance.

(c) *Global administrative law*

A third approach to deal with the phenomena of global governance in a specifically legal way seeks inspiration from administrative law thinking rather than from constitutionalism. Here again, different varieties exist. Probably the most far-reaching one is the project of global administrative law, which suggests that much of global governance can be understood as administration and demands that it be regulated by administrative law principles such as transparency, participation, reasoned decision making and mechanisms of review.⁹² While some scholars aim at the deductive development of such principles,⁹³ others proceed inductively and use the normative reservoir of domestic or European administrative law.⁹⁴

The common denominator of this strand of research – the emphasis on domestic administrative law – bears a great potential for innovation. Our approach corresponds inasmuch as we stress the usefulness of intra-disciplinary exchange in legal studies: the study of the law of international public institutions should be informed by the study of domestic public institutions.⁹⁵ The full development of international law as international public law appears hardly feasible without building on national administrative legal insights and doctrines elaborated in the past century.

Our approach differs from the global administrative law approach as we regard it as being too ‘global’. It risks effacing or blurring the distinctions that are essential to the construction, evaluation and application of norms concerning public authority. Our very term international public law stresses that the validity, legality, legal effects and legitimacy of acts under international law depend on criteria that are specific to

⁹² Kingsbury, Krisch and Stewart, *supra* note 2, at 28; Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108 *AJIL* (2014) 211; recently see also Benvenuti, *supra* note 2; Walker, *supra* note 50, at 106.

⁹³ Kingsbury, ‘Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law’, 104 *Journal of International Law and Diplomacy* (2005) 98.

⁹⁴ Stewart, ‘US Administrative Law: A Model for Global Administrative Law?’, 68 *Law and Contemporary Problems* (2005) 63; Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’, 115 *Yale Law Journal* (2006) 1490; M. Savino, ‘EU ‘Procedural’ Supranationalism: On Models for Global Administrative Law’ (2006), available at www.law.nyu.edu/sites/default/files/upload_documents/gffsavinopaper.pdf (last visited 22 December 2016).

⁹⁵ This call for intra-disciplinary 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, is an obvious example. On intra-disciplinarity, see M. Jestaedt and O. Lepsius (eds), *Rechtswissenschaftstheorie* (2008).

the international legal order. Whenever a legal issue comes up with respect to any act, the first step to tackle it legally is therefore to determine the legal order to which it belongs. Moreover, 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 evokes a fusion of domestic administrative and international law that gives too little consideration to the fact that the validity and legal effects of international and domestic law follow very different rules.⁹⁶

In addition, global administrative law hinges on the imprecise concept of administration. It casts its net very widely and extends its scope to the whole range of activities and actors on various levels. While it taps into a public law repertoire, it applies its standards not only to entities that qualify as international organizations but also to those that straddle the public/private divide just as well as hybrid institutions or even private transnational bodies.⁹⁷ What is then understood as administration is also extremely wide and, notably, includes the activity of international courts and tribunals.⁹⁸

Global administrative law draws together very different institutions and acts that raise demands for legitimacy that are markedly different. Administrative principles may be the part of the cure for some, but not for all. In contrast to global administrative law, as well as to international institutional law and constitutionalism, we place the concept of international public authority on centre stage. It allows us to focus on the specific requirements of typical instruments. Indeed, global administrative law is already using the concept of authority, and our elaboration will continue on this path.⁹⁹

3 International Public Authority: The Object of International Public Law

A Five Key Elements of International Public Law

The comparative sketch of international public law yields five key elements of our theory of international public law. First, international public law is inspired by, and dependent on, domestic public law, but it is not fused with it. This approach caters for both the autonomy and the interdependence of the international and domestic legal orders; it does not merge them into one global (or transnational) law.

⁹⁶ This has remained unchanged in the recent symposium at the occasion of global administrative law's 10th anniversary, see 'Symposium: Through the Lens of Time: Global Administrative Law after 10 Years', 13 *IJCL* (2015) 463.

⁹⁷ Examples include the International Organization on Standardization or the Internet Corporation for Assigned Names and Numbers.

⁹⁸ Stewart and Ratton Sanchez Badin, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law', 9 *IJCL* (2011) 556.

⁹⁹ N. Krisch, 'The Structure of Postnational Authority', 13 February 2015, available at <http://ssrn.com/abstract=2564579> (last visited 22 December 2016); S. Cassese, 'Global Administrative Law: The State of the Art', 13 *IJCL* (2015) 465.

Second, although we understand world society as complex and pluralistic, we do not believe that these features render the formulation of common interests impossible. Rather, international public law provides the institutional framework for such public policies, even in the absence of a world state or other forms of deep political integration, such as the European Union.

A third distinctive feature is the centrality of the concept of international public authority. The public law approach focuses on the acts that claim to pursue common interests and therefore require a public law framework that ensures their legitimacy, regardless of their legal nature. International public law is the law applicable to the exercise of international public authority. International public law, therefore, excludes the strictly horizontal phenomena of public international law that do not claim to pursue common interests. It includes, however, phenomena that are beyond the source-based understanding of international law, such as the G7.

The concept of authority leads to a fourth core feature. It is defined by its impact on freedom. Freedom is the main rationale underlying the public law approach, both in its political dimension, which entitles people to collectively exercise public power, and in its individual dimension, which is reflected in human rights. International public law focuses on the impact of concrete acts upon freedom. Moreover, freedom provides guidance for the reconstruction of the public law framework. It needs to ensure that public authority respects freedom in its political or individual dimension.

Closely linked is a fifth feature. Our theory of international public law ought to enable doctrinal reconstructions translating complex social relationships into a language of legality. While we stress the need for theoretical reflection, we consider the eventual orientation of practice to be the leading, though certainly not exclusive, goal of legal scholarship. This sets the framework for the methodology that we adopt. We think that a focus on interpretation and doctrinal reconstruction is of particular help for advancing the practical uses of legal scholarship. Whereas few lawyers master techniques of social research or political theory, they globally share the techniques of interpreting and applying the law. For this reason, our theory for identifying international public authority will be framed in such a way that it can be interpreted and applied like other legal concepts.¹⁰⁰

Legal scholarship stands with respect to the conceptualization of international institutions approximately where it stood with respect to domestic institutions a century ago at the dawn of the modern administrative state.¹⁰¹ There is little more than the intuition that something new has come into existence, combined with a troubling impression of opaqueness and confusion. Although Georg Wilhelm Friedrich Hegel's statement that the Owl of Minerva only takes flight at dusk when the shades of night are gathering is a poetic exaggeration, the scholarly framing of new phenomena lags behind their actual development. The successful theorization of emergent realities is

¹⁰⁰ This, of course, implies that legal interpretation and construction are not only a mask of 'political' considerations.

¹⁰¹ Cassese, 'Is There a Global Administrative Law?', in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010) 761.

a slow process. Sound scholarship needs to be rooted in the concreteness of multifarious reality. At the same time, it must reach for parsimonious abstractions. In this double sense, it should be reconstructive. Patient observation and creative innovation should meet in spiralling, dialectical reasoning. Otherwise, to use a Kantian metaphor, the empirics (or legal practice) remains blind and theory (or doctrinal concepts) remains void.

At the beginning, a new scholarly approach faces the difficulty that there are only *old* concepts for *new* phenomena, which appear inadequate. One way to proceed is to craft new terms. Governance and accountability are fine examples. They have helped to identify the phenomena and the normative challenges. Yet they can hardly be fleshed out without being linked to the grand old concepts. And these concepts are like prima ballerinas: as soon as they appear on the scene, they take the limelight and outshine the new terms. Scholars have been seeking to adapt those grand concepts, such as sovereignty, legitimacy, constitutionalism, pluralism and, with an even clearer normative ambition, the rule of law, human rights and democracy. In this exercise, the very nature of the concepts comes to the fore: they receive meaning from their interaction. Accordingly, the entire conceptual web needs adaptation, a process to which the concept of authority came late.¹⁰²

The following two sections elaborate the concept of international public authority. The function of this concept is to identify acts of international institutions that should be legally reconstructed according to the public law paradigm because they advance common interests in a way that impacts upon the freedom of others. This allows for a novel, much broader legal reconstruction of complex social relationships.

B *International Public Authority*

1 *International Character*

Whether an act amounts to an exercise of international public authority, in contrast to domestic or supranational authority, depends on the provision it invokes as a legal basis, be it implicitly or explicitly. If this provision belongs to public international law, then such an exercise of authority is international. What then belongs to the realm of public international law? The established sources of treaties, custom and general principles provide guidance in most cases. Some acts, however, are based on soft legal instruments – for example, the Basel Accords by the Basel Committee on Banking Supervision. Soft law created by states or international institutions should be included in the canon of possible legal bases because, in the context of global governance, it often plays a functionally equivalent role to hard law.¹⁰³ The choice between soft law and hard law as a legal basis should not allow governments and international institutions to escape normative requirements, and, indeed, the respective legal regimes are often similar.¹⁰⁴

The insistence on the distinction between domestic and international law is criticized for being too limited.¹⁰⁵ We do not deny the global, multilevel or transnational

¹⁰² Enroth, 'The Concept of Authority Transnationalised', 4 *Transnational Legal Theory* (2013) 336.

¹⁰³ See section 3.C below.

¹⁰⁴ Cf. Goldmann, *supra* note 18, at 387ff.

¹⁰⁵ Cf. L. Viellechner, *Transnationalisierung des Rechts* (2013), at 287ff.

structure of many policies. However, we see the more narrow focus as justified by two main considerations. First, reconstructive legal scholarship needs to respond to the basic structures of the law. As we argued in respect to global administrative law, legal analysis and legal argument should distinguish between domestic and international law and, therefore, also between domestic and international authority.¹⁰⁶ This distinction is crucial to enabling a thorough analysis of the twin concerns of legitimacy and effectiveness in the pursuit of common interests. The validity, legality, legitimacy and legal effects of an act depend largely on the legal order to which it belongs. Likewise, whenever the question arises whether the protection of common interests requires additional forms of authority, then the challenge of making such authority legitimate and effective varies with the legal order in which it is rooted. Nobody will claim that the exercise of international authority is legitimized in a way that corresponds to the mechanisms that legitimize domestic authority. Neither a world parliament nor a world government exists. Domestic courts treat exercises of international public authority differently from domestic authority, thereby granting international institutions wider discretion.¹⁰⁷ Likewise, international institutions cannot regulate a certain issue in the same way as domestic institutions. Rather, they normally rely on the executive capacity of the domestic level.

The second argument for our focus rests on a principled consideration of political freedom. International law and international authority have a unique potential for political inclusion. If politics and policies are to serve several polities, there is no other legal order that is capable of achieving a similar degree of inclusion. Notwithstanding the many conceptual and practical challenges of democratizing international institutions, there are no viable alternatives in sight. Hegemony, informal governmental networks or outsourcing to private institutions fare much worse in this respect. Thus, our choice for international law as the legal order that has the potential to be the most inclusive polity echoes Winston Churchill's bon mot on democracy: 'It's the worst, except for all the others.'

2 Publicness

It is far more difficult to pin down what makes international authority public. Given the various meanings as well as trenchant critiques of the public–private distinction,¹⁰⁸ this difficulty is not surprising. Indeed, one might well succumb to doubt, especially in light of the messy complexities that mire global governance.¹⁰⁹ A distinction

¹⁰⁶ Von Bogdandy, Dann and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 1375, at 1393.

¹⁰⁷ E.g., *Kadi*, *supra* note 88; Bundesverfassungsgericht, *Bananas*, Case 2 BvL 1/97, Judgment of 7 June 2000; ECtHR, *Bosphorus v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005.

¹⁰⁸ See section 2.B.2 above.

¹⁰⁹ Some even contest the feasibility of the distinction, see section 2.A.3 above. In addition, Sand, 'Globalization and the Transcendence of the Public/Private Divide: What Is Public Law under Conditions of Globalization?', in C. Mac Amhlaigh *et al.* (eds), *After Public Law?* (2013) 201, at 204ff; L. Casini, 'Down the Rabbit-Hole: The Projection of the Public/Private Distinction beyond the State', 12 *IJCL* (2014) 402, at 419ff.

of this kind arguably does more harm than good, for example, by leaving the exercise of power in the private realm out of sight.¹¹⁰ We agree that it is impossible to understand the cosmos of global governance without considering private and hybrid actors. Yet the importance of such actors does not render the public–private distinction useless but, rather, confirms its significance.

This dichotomy enables us to distinguish – to give but one example – entities as different as the UN and Blackwater (which is today known as Academi). It is undeniable that international institutions such as the UN or the World Bank operate under a different legal regime compared to transnational corporations. The public–private divide, with all of its problems, provides an important stock of knowledge to elaborate this difference. Granted, there are attempts at building overarching legal regimes, in particular, by using human rights.¹¹¹ But even if some aspects of human rights apply directly to private institutions,¹¹² a plethora of differences remain.¹¹³

The distinction between public and private law responds to a fundamental differentiation in modern societies. Most will agree that, whatever the eventual definitions, private action – in particular, private economic activity – and public action belong to different social spheres and must respond to different operational logics and justificatory requirements.¹¹⁴ Public and private law provide the legal frameworks for activities that follow different rationales. Most importantly, private law allows actors to act solely in pursuit of their self-interest, whereas public law requires a higher standard, often coined as the pursuit of a common interest. Though of continental European origin, the distinction has spread through the world of common law. It is important to note that the United Kingdom shares this understanding of public law.¹¹⁵ The experience of the USA is different, but no other legal order has a comparable tradition in regard to constitutional adjudication. And, even with respect to it, the 20th century witnessed the consolidation of administrative law.¹¹⁶ Of course, there have been attempts to overcome the public–private divide, the most notable example being state socialism, but its consequences were highly dysfunctional.

It is difficult to apply the distinction to global governance; however, that alone gives no reason to abandon it. The apparent hybridity of some institutions, often advanced

¹¹⁰ Fraser, *supra* note 56.

¹¹¹ Teubner, *supra* note 37; Viellechner, *supra* note 105.

¹¹² OECD Guidelines for Multinational Enterprises (2011), available at www.oecd.org/daf/inv/mne/48004323.pdf (last visited 22 December 2016). From the rich theoretical debate, see Watt, *supra* note 39, at 400–402.

¹¹³ Kischel, *supra* note 58, at 345ff.

¹¹⁴ This goes back to Hegel, *supra* note 15, at paras 182ff. For contemporary society, cf. T. Parsons, *The Structure and Change of the Social System* (1951); N. Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie* (1984); H. Arendt, *The Human Condition* (1958), at 22ff; recently, see A. Honneth, *Das Recht der Freiheit: Grundriß einer demokratischen Sittlichkeit* (2011), at 317ff.

¹¹⁵ Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law', in J.-B. Auby and M. Freedland (eds), *La distinction du droit public et du droit privé: regards français et britanniques* (2004) 101, at 105–106; see also Loughlin, 'The Nature of Public Law', in C. Mac Amhlaigh *et al.* (eds), *After Public Law?* (2013) 11, at 14–15.

¹¹⁶ Most notably in the Administrative Procedure Act of 1946, 60 Stat. 237; see Stewart, 'The Reformation of American Administrative Law', 88 *Harvard Law Review* (1974–1975) 1667.

as an argument against the distinction,¹¹⁷ rather reinforces it – any observation of hybridity requires an understanding of the individual components that render something hybrid. For instance, a hybrid car is a car that uses a combustion engine and an electric motor, and a mule is a cross between a horse and a donkey. There are, as always, difficult cases of qualification, but this does not undermine the utility of conceptual differentiations.

(a) *Publicness and common interest*

Concepts enable us to understand and deal with reality. Our overall aim is to provide a legal concept in line with calls in world public opinion for effective and legitimate international action that advances common, or public, interests. According to world public opinion, the public character of an act thus derives from its relation to common interests. It depends on the social sphere from which it originates. If the activity is part of the sphere where self-interest is a sufficient justification, the act is private; if it belongs to the sphere where common interests are predominant, it is public. We therefore define the publicness of international authority and international public law in accordance with the basic differentiation in modern societies. Of course, the differentiation is less clear in world society than in most domestic societies, but it should be apparent that the UN, the Basel Committee and the World Bank are categorically different from, say, Academi, Goldman Sachs or Exxon.

Contrasting this approach with other understandings of publicness further exposes its main thrust. In public international law, there is a widespread understanding that international law is public because it governs the relations between public institutions, with its opposite being private international law (or conflict of laws).¹¹⁸ But as global governance studies have shown, there are more actors involved than states. Another understanding uses the public–private distinction to define the competences of (domestic) administrative courts¹¹⁹ or a specific regime of (domestic) administrative responsibility.¹²⁰ This is also not an option for the international realm since such institutions or regimes hardly exist there.¹²¹ Closer to our interest is the definition whereby ‘public’ refers to a relationship of subordination not justified by direct consent.¹²² However, the convoluted structure of most instances of global governance makes it nearly impossible to define ‘publicness’ in terms of hierarchy or asymmetric

¹¹⁷ Alvarez, *supra* note 74.

¹¹⁸ On this, see section II.A.1 above.

¹¹⁹ Readers with a background in the common law should note that this function renders the public–private distinction highly important in many domestic legal orders.

¹²⁰ Mac Amhlaigh, ‘Defending the Domain of Public Law’, in C. Mac Amhlaigh *et al.* (eds), *After Public Law* (2012) 103ff (regarding para. 6 of the UK Human Rights Act, 1998, c. 42, which establishes responsibility for public entities only).

¹²¹ Exceptions include the administrative tribunals of international organizations. In detail, see Schermers and Blokker, *supra* note 62, at 462–467.

¹²² Rivero, ‘Existe-t-il un critère du droit administratif?’, 69 *Revue du droit public et de la science politique en France et à l’étranger* (1953) 279; Cassese, “‘Le droit tout puissant et unique de la société’: Paradossi del diritto amministrativo”, 59 *Rivista trimestrale di diritto pubblico* (2009) 879; Kelsen, *Pure Theory*, *supra* note 55, at 281ff.

relationships. Moreover, hierarchy and asymmetric relationships imply an element of 'authority', and we do not wish to equal publicness and authority.

According to yet another conception, an institution is public if it operates under a privileged legal regime. In the past, one function of public (or administrative) law was to protect administrative institutions against judicial review by the common courts. This definition is persuasive in light of the concerns articulated in world public opinion, given the broad immunity of international institutions in domestic courts and the scarcity of international review. Immunities raise doubts about the legitimacy of their acts. Indeed, some institutions advance policies that would not withstand the control of domestic courts, as the saga of the *Kadi* cases demonstrates.¹²³ However, this immunity derives from the international character of those institutions. Therefore, it would make little sense to also use this feature for defining publicness.

By contrast, in our context, it makes a lot of sense for publicness to turn on the pursuit of a common interest or common good.¹²⁴ This understanding comes with a considerable pedigree.¹²⁵ It already existed in antiquity, as reflected in the distinction in Roman law between *ius publicum* and *ius privatum*, although one should certainly not overlook the differences between Roman society and today's society.¹²⁶ For our purpose, the pursuit of a common interest hinges on the legal mandate, whatever its legal qualification, including soft law. We thus define an exercise of authority as public if the actor claims that the legal basis of the act mandates it to advance a common interest.

(b) *The claim to advance a common interest*

The definition lends itself to legal operationalization because it refers to the legal basis of an act and is therefore open to legal interpretation. The first interpretative step is to determine the norm that the actor invokes explicitly or implicitly as a legal basis, followed by an interpretation of that norm to determine if it requires the pursuit of a common interest. Other conditions of legality that the act must meet are not relevant for the purposes of its classification as public.

We focus only on the claim to have a mandate to pursue a common interest because the publicness criterion that we propose only defines the legal regime that determines the conditions for the legality of the act. In addition, for an act to qualify as public, it suffices that there is a reasonable presumption of acting under the claimed mandate. Whether the mandate actually exists and covers the activity is a different question –

¹²³ Cf. Avbelj, Fontanelli and Martinico, *supra* note 88; *Kadi*, *supra* note 88.

¹²⁴ Although we use 'common interests' and 'common good' as synonyms, we are aware that they are linked to different traditions of political and legal thought. See A.O. Hirschman, *The Passions and the Interests* (1977).

¹²⁵ E.g., J.-J. Rousseau, *Du contrat social ou Principes du droit politique* (1762), book 1, ch. VI and VII; Hegel, *supra* note 15, para. 258; Rawls, *supra* note 83, at 35ff. 201ff. Recently, see Best and Gheciu, 'Theorizing the Public as Practices: Transformations of the Public in Historical Contexts', in J. Best and A. Gheciu (eds), *The Return of the Public in Global Governance* (2014) 15, at 32.

¹²⁶ Arendt, *supra* note 114, at 38.

one of legality – which is to be settled subsequently in accordance with the respective substantive and procedural requirements. It does not affect its qualification as being public. As in the case of domestic legal orders, illegal exercises of public authority exist.¹²⁷ This is where our definition differs from Benedict Kingsbury and Megan Donaldson, who require that an act meets certain substantive or procedural principles in order to be considered public.¹²⁸

This complex definition serves another important function: to distinguish the common interest from the activities of public interest groups. Whereas such groups claim to further the common interest, they lack a specific mandate. Indeed, many public interest groups, such as Greenpeace or Transparency International, play an important role and contribute to the common interest. They may be mandated by their members, but they claim to advance interests of individuals that extend beyond their membership. International organizations, by contrast, are entitled to advance policies in the common interest. International as well as domestic law makes a clear difference in this respect. Of course, some might consider international organizations to be just as self-interested as private corporations and as demonstrating less public spirit than some non-governmental organizations. However, from a legal standpoint, the difference in the mandate to pursue the common interest is all too obvious.

Our understanding of what makes an act public begs the question regarding how to define a common or public interest in a pluralistic world society. As Kelsen, critical legal studies and feminism have shown, to define something as public is a highly political issue that has important repercussions.¹²⁹ Several possibilities come to mind. One might resort to a list of issues believed to be too important to be left to the private realm. However, such a criterion is too vague and too contested. Jeremy Waldron, similar to Kingsbury and Donaldson, suggests certain elements of the public rule of law. Among them are the idea of a rule by legal rules, the limitation of discretionary powers and the availability of legal review.¹³⁰ However, this approach certainly does not grasp what world public opinion sees as the core international common interests, namely poverty reduction, human rights advancement, environmental protection and economic stability.

In the end, it is only the public itself – that is, a community and its institutions – that can define common interests. An actor may thus claim to articulate a common interest if it is mandated to act on behalf of a community (including the international community). At first sight, this replaces one problematic definition with another one: what is a community? Two thousand years of political theory have dealt with this

¹²⁷ *Mutatis mutandis*, this idea has been applied by the International Court of Justice, in the *Certain Expenses of the United Nations (Article 7, paragraph 2, of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151. Only in cases of gravest shortcomings, the act is null and void. Cf. C-275/10, *Residex Capital IV CV v. Gemeente Rotterdam*, [2011] ECR I-13067.

¹²⁸ Kingsbury and Donaldson, 'From Bilateralism to Publicness in International Law', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest* (2011) 79, at 84.

¹²⁹ See section 2.B.2 above.

¹³⁰ Waldron, 'Public Rule of Law', NYU School of Law, Public Law Research Paper No. 14–41 (2014), available at <http://ssrn.com/abstract=2480648> (last visited 22 December 2016).

question.¹³¹ Given the deep cleavages in the discussion, it is advisable to rely on the law instead of tying the definition of publicness to a specific theory. This also allows for a plurality of approaches. At the same time, there is wide consensus that a community requires at least an institutional framework for the articulation of a common interest.¹³² That is a question of the interpretation of its mandate.

Our approach does not lead to academic science fiction: the term ‘international community’, though vague, is well established in international law and politics, as is the term ‘community interest’.¹³³ Of course, many theoretical and empirical questions persist. For example, one might debate whether the international community is a community of states or of individuals or whether the UN General Assembly is mandated to articulate its interests.¹³⁴ Be that as it may, there are certainly other communities, be they regional or functional, which may formulate common interests through their respective institutions. To sum up, publicness is established by reference to the legal mandate – hard or soft – that the act invokes explicitly or implicitly. If the mandate equips an international institution with the power to define and pursue a common interest, any authority that the institution might exercise in this frame should be qualified as public. But what is authority?

3 Authority

To provide an understanding of the authority for international institutions is just as intricate. Traditionally speaking, public authority is equated with state power, sovereignty and the legitimate means of coercion. On this account, international institutions would not exercise authority. However, many citizens experience international institutions as having a powerful impact on their lives. Our concept of international public authority is a scholarly response that elaborates such perceptions. It credits the fact that impact can have many faces other than physical coercion and overwhelming force, so that a broader definition of authority is needed.

Inspired by world public opinion and the core idea of the public law approach, we take freedom to be the decisive criterion for broadening the concept of authority. Authority is defined as the acts based on international law that impact other actors’ freedom. Such impact may materialize by changing a legal position or by legally obliging a person to act in a certain way or to suffer a sanction, but it may also be factual. The impact may affect humans not only individually but also – as is usually the case

¹³¹ For a review of recent proposals, see Koskenniemi, ‘Projects of World Community’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 8. Further, see A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001), at 9ff; for a definition of publicness on the basis of discourse theory, see Goldmann, ‘A Matter of Perspective. Global Governance and the Distinction between Public and Private Authority (and Not Law)’, 5 *Global Constitutionalism* (2016) 48.

¹³² Note that their capacity to articulate a common interest is the reason why international organizations enjoy legal personality. See Ruffert and Walter, *supra* note 82.

¹³³ Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *Recueil des cours* (1994) 221; Paulus, *supra* note 131, at 225ff; see also the International Law Commission, Articles on the Responsibility of International Organizations, Doc. A/66/10 (2011), Arts 33(1), 42(b), 48(1)(b).

¹³⁴ For a sceptical outlook, see Paulus, *supra* note 131, at 326–328.

with international public authority – collectively – that is, when an act addresses entities such as states.¹³⁵

To posit freedom as the guiding idea is, of course, a choice, but it is a reconstructive one that is supported by both theoretical reflection and legal developments. In many legal orders, public law is guided by this idea. Freedom, as we understand it, refers to the freedom of individuals – that is to say, both their private and their public freedom. The public freedom of individuals consists, on the most abstract level, in meaningful inclusion in the political process that determines the common interest. Private freedom embraces the full development of the individual.¹³⁶ This concept of freedom is far broader than that of liberty, which merely stands against interference with rights such as property rights.¹³⁷ It squares neatly with the triad of obligations to respect, protect and fulfil in contemporary human rights law.¹³⁸ Acts that impact on this freedom are so important that they require specific justification. The legal aspect of that justification is our topic.

Our understanding of international public authority as international law-based acts impacting other actors' freedom is broad, but it is distinct from yet broader concepts such as power, hegemony, dominance or leverage. Exercises of international public authority imply the claim to be mandated by international law to impact somebody else's freedom. As is the case with publicness, this does not mean that an illegal act would disqualify as an exercise of authority. There can be illegal exercises of authority, and the act might become the object of a legal dispute. In many legal orders, it is crucial that an exercise of public authority (*puissance public, öffentliche Gewalt*) can be challenged as illegal and quashed by appropriate institutions without losing its qualification as an exercise of public authority. Similarly, it is worth reminding our readers that this understanding of authority is to be distinguished from legitimacy: authority implies a rebuttable claim to legitimacy.¹³⁹ In this respect, our concept is in line with Joseph Raz's influential understanding of authority.¹⁴⁰

C *The Many Faces of International Public Authority*

What does it take to affect freedom? The authority of domestic public institutions rests, according to received wisdom, on their competence to use physical coercion

¹³⁵ See already von Bogdandy, Goldmann and Dann, *supra* note 106, at 1381–1382.

¹³⁶ The four freedoms of Roosevelt, see F.D. Roosevelt, Four Freedom Speech, State of the Union Address, 6 January 1941; see also the UN Charter, Preamble.

¹³⁷ Cf., however, our definition in von Bogdandy and Goldmann, 'Sovereign Debt Restructurings as Exercises of Public Authority: Towards a Decentralized Sovereign Insolvency Law', in C. Esposito, J.P. Bohoslavsky and Y. Li (eds), *Responsible Sovereign Lending and Borrowing: The Search for Common Principles* (2012) 39, at 47, which uses the term 'liberty'. This should be considered a mistake. In von Bogdandy, Dann and Goldmann, *supra* note 106, at 1381, we use the term freedom.

¹³⁸ Committee on Economic, Social and Cultural Rights, General Comment no. 12, 12 May 1999, para. 15; Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2001) 9, at 23–24.

¹³⁹ In international law, the two concepts are sometimes presented as synonymous, for example in the New Haven School, see Hathaway, 'America, Defender of Democratic Legitimacy', 11 *EJIL* (2000) 121. M. Reisman, *The View from the New Haven School of International Law* (1992).

¹⁴⁰ J. Raz, *The Authority of Law* (1979), at 5ff; J. Raz, *The Morality of Freedom* (1988), at 22ff, 53ff, 69.

to make a person or entity act as they command. Sometimes, acts of international institutions are backed up by credible means of coercion, such as some UN Security Council resolutions.¹⁴¹ However, this is not typically the case. We identify and explain three ‘softer’ and more common mechanisms through which international institutions might affect freedom.¹⁴²

1 *Clever Compliance Mechanisms*

One type of mechanism that often provides policies with ‘teeth’, so to speak, are financial sanctions or benefits. This form of power is well recognized at the international level. From the world of international adjudication, we note that a trade measure found to be in violation of international trade law may give rise to sensitive countermeasures.¹⁴³ A recent award of damages by ICSID amounted to approximately US \$2.3 billion.¹⁴⁴ It may be enforced in domestic courts. Such obligations hurt and impact freedom. Domestic legislatures might abstain from legislative projects for fear of expensive claims for damages. Financial benefits may have a comparable impact. Many countries have reformed important parts of their domestic law according to the policies of the Bank for International Reconstruction and Development and the International Monetary Fund (IMF) in order to qualify for the financial support they needed. International institutions use benefits as a means to force their policies upon states.¹⁴⁵

A further mechanism that ensures compliance is the threat to exclude a state from international cooperation if it does not heed the policies of international institutions. It rests on an important feature that undergirds international institutions’ authority: reputation. The failure to honour a decision by an international institution entails reputational costs that might be relevant even for heavyweight actors like the United States¹⁴⁶ or Russia.¹⁴⁷ Of course, all too often states – especially mighty ones – defy international decisions. But, in the present interdependent world, states depend far

¹⁴¹ See examples in note 5 (sanctions against Iraq) and note 6 (UN sanctions list) above. SC Res. 678 (1990). Some might doubt that these acts can still be considered as the public authority of an international institution. We assume that this is the case so long as the institution is not just a mask for one hegemonic state.

¹⁴² Comprehensively on mechanisms for extrinsic motivation. Goldmann, *supra* note 18, at 337–358.

¹⁴³ WTO, *United States – Subsidies on Upland Cotton – Report of the Appellate Body*, 21 March 2005, WT/DS267/AB/R, at 3.

¹⁴⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case no. ARB/06/11, Award, 5 October 2012.

¹⁴⁵ On International Monetary Fund (IMF) conditionality, see IMF Guidelines on Conditionality, 25 September 2002, available at www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.htm (last visited 22 December 2016).

¹⁴⁶ Helfer and Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, 107 *Yale Law Journal* (1997–1998) 273, at 278; Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’, 106 *AJIL* (2012) 225.

¹⁴⁷ On the Russian praxis of implementing ECtHR decisions, see A. Nußberger, ‘The Reception Process in Russia and Ukraine’, in H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 603.

more on international cooperation than before.¹⁴⁸ In order to avoid a reputational loss, actors are motivated to comply and thereby support the authority of the act in question.

According to this logic, it is also possible to argue that non-binding or even non-legal acts can amount to exercises of international public authority in that they impact freedom.¹⁴⁹ Whoever violates non-binding or non-legal instruments does not need to fear damages or reprisals. But they might face other, more indirect sanctions. The black list of uncooperative states in matters of money laundering set up by the Financial Action Task Force showed that the prospect of being on such a list even induces rising powers like China to respect the corresponding international standards.¹⁵⁰

2 *Semantic Authority*

The authority of international acts can also rest on their capacity to shape the terms of international discourse. An important example is the effect of international acts on the distribution of argumentative burdens.¹⁵¹ The function of precedents is illustrative. International judicial decisions are not considered binding beyond the parties to the dispute.¹⁵² And, yet, the dynamics of legal discourse and the normative expectation that like cases should be decided alike trigger argumentative burdens for those who wish to make a legal argument. A party that seeks redress in the context of world trade law against rules on wildlife protection will find itself compelled to base its reasoning on the Appellate Body report in *EC – Seals*, whether it agrees with the report or not.¹⁵³ Any legal counsel to a dispute will do her best to use all earlier reports that suit her position. Rather than saying that precedents are non-binding for non-disputing parties, counsel will argue with precedents to possibly spin them in their favour. In effect, they fight over the meaning of earlier decisions just as they fight over WTO agreements.

Judges and arbitrators are expected to respond to the arguments advanced by the parties. They even have a genuine interest in using precedents as they support their decisions and suggest coherence. Thus, the WTO Appellate Body held that WTO panels

¹⁴⁸ A.T. Guzmán, *How International Law Works: A Rational Choice Theory* (2008); D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000); Ho, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?', 5 *Journal of International Economic Law* (2002) 647, at 647. Against, see Burgstaller, 'Amenities and Pitfalls of a Reputational Theory of Compliance with International Law', 76 *Nordic Journal of International Law* (2007) 39.

¹⁴⁹ Presuming that all legal acts, hard and soft, are authoritative. Pauwelyn, Wessels and Wouters, 'Informal International Law as Presumptive Law: Exploring New Modes of Law-Making', in R. Liivoja and J. Petman (eds), *International Law-Making* (2014) 75 at 89.

¹⁵⁰ Heilmann and Schulte-Kulmann, 'Politikdiffusion im Schatten des Parteistaats: Die Integration Chinas in das internationale Regime zur Geldwäschebekämpfung', 51 *Politische Vierteljahresschrift* (2010) 251, at 261ff.

¹⁵¹ Venzke, 'Semantic Authority, Legal Change, and the Dynamics of International Law', 12 *No Foundations* (2015) 1.

¹⁵² Statute of the International Court of Justice 1945, 1 UNTS 993, Art. 59.

¹⁵³ WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body*, 22 May 2014, WT/DS400/AB/R.

should follow earlier decisions because they create legitimate expectations.¹⁵⁴ This testifies to the semantic authority of courts and similar international institutions – that is to say, the capacity to establish reference points for legal discourse.¹⁵⁵ Anyone making legal arguments needs to submit to such discursive constraints. They become part of the rules of the game.

In order to understand such authority, it is important to widen the view towards the social context and discursive construction of authority and not to limit it to the bilateral relationship suggested by the ‘command-and-obey’ logic underpinning traditional understandings of authority. Authority, in this sense, emerges when a broader social belief holds that *B* should do *x* because *A* said so.¹⁵⁶ Actors might even internalize the terms of the discourse. This brings us to issues of how power is exercised through cognitive frames.¹⁵⁷

3 Governance by Information

Acts of international institutions may further impact the freedom of others by influencing their knowledge and perceptions.¹⁵⁸ Governance by information has become a particularly important instrument on the global level. Michel Foucault has analysed its function in the modern state.¹⁵⁹ His research on *gouvernementalité* emphasizes that binding law is only one form of governing people. Once the modern state started aiming at governing the economy and people’s social life, it developed a multiplicity of further instruments in order to discipline people, to guide them and frame their mindsets.¹⁶⁰ Accordingly, instruments such as information and conceptual frames are highly significant for understanding authority.

On the international level, governance by information impacts a given policy field by creating pressure on, or shaping the cognitive framework of, policy makers through the collection, processing and dissemination of information.¹⁶¹ Many empirical studies

¹⁵⁴ Schill, ‘System Building in Investment Treaty Arbitration and Lawmaking’, in A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking* (2012) 133; see also A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014).

¹⁵⁵ I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), at 62–64.

¹⁵⁶ For a well-developed argument in this vein, see H.L.A. Hart, *The Concept of Law* (1994), at 254–259. See further I. Venzke, ‘Between Power and Persuasion: International Institutions’ Authority in Making Law’, 4 *Transnational Legal Theory* (2013) 354; d’Aspremont, *supra* note 43, at 192–194; Friedmann, *supra* note 67, at 71.

¹⁵⁷ E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (1974).

¹⁵⁸ Regarding the psychological foundations, see Ryan and Deci, ‘Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions’, 25 *Contemporary Educational Psychology* (2000) 54.

¹⁵⁹ M. Foucault, *Surveiller et punir. Naissance de la prison* (1975), at 36.

¹⁶⁰ M. Foucault, *L’herméneutique du sujet: Cours au Collège de France, 1981–1982* (2001), at 241–242; M. Foucault, *Sécurité, territoire, population* (1977–1978); M. Foucault, *Histoire de la sexualité* (1976).

¹⁶¹ E.g., Noaksson and Jacobsson, ‘The Production of Ideas and Expert Knowledge in OECD: The OECD Jobs Strategy in Contrast with the EU Employment Strategy’, 7 *Score Rapportserie* (2003) 32; Martens and Balzer, ‘Comparing Governance of International Organisations: The EU, the OECD and Educational Policy’, Transtate Working Paper No. 7 (2004).

have shown how such governance operates.¹⁶² Cognitive frames influence which facts we observe and consider important and how we react to them.¹⁶³ International institutions seek recourse to governance by information in order to advance international policies. Examples abound. The OECD provides comparative data about the performance of school policies. Its Program for International Student Assessment (PISA) publishes detailed reports every three years as well as a ranking list.¹⁶⁴ It also publishes the OECD Economic Outlooks, which provide important advice for macro-economic policy making,¹⁶⁵ while investment decisions are guided by the 'Doing Business' reports of the World Bank.¹⁶⁶ The UN Development Programme developed the Human Development Index indicating the level of development, assessing the overall outcome of domestic politics.¹⁶⁷ Indicators provide a powerful mechanism for policy making because they make data accessible and enjoy huge trust and press for policies suggested by the data.¹⁶⁸ At the very least, those who disagree are put under a severe burden of justification.

Of course, it is difficult to determine which information acts are influential enough that they constitute exercises of authority and should therefore be framed according to the public law paradigm. However, our theoretical framework, combined with information from the field, provides good guidance. Take the example of the PISA program of the OECD. Its impact on policy making rests both on long-term developments such as changing attitudes about education and on the immediate use of the survey data, for example, for the allocation of funding. A rough indicator of impact is the press coverage after the release of a new PISA report.¹⁶⁹ A more reliable indicator might be government reform projects that can be identified as direct or indirect consequences of PISA, especially if they differ from past educational policies. For PISA, a wealth of arguments justifies considering the publication of rankings as an exercise of public authority and, therefore, to reconstruct the legal framework according to the public law paradigm, not least because it concerns a sensitive policy field.

¹⁶² Jakobi and Martens, 'Diffusion durch internationale Organisationen: Die Bildungspolitik der OECD', in K. Holzinger, H. Jörgens and C. Knill (eds), *Transfer, Diffusion und Konvergenz von Politiken* (2007) 247.

¹⁶³ For a seminal overview, see Tversky and Kahneman, 'The Framing of Decisions and the Psychology of Choice', 211 *Science* (1981) 453; see also Chong and Druckman, 'Framing Theory', 10 *Annual Review of Political Science* (2007) 103.

¹⁶⁴ Program for International Student Assessment, available at www.oecd.org/pisa/ (last visited 22 December 2016).

¹⁶⁵ Schäfer, 'Resolving Deadlock: Why International Organisations Introduce Soft Law', 12 *European Law Journal* (2006) 194.

¹⁶⁶ Davis and Kruse, 'Taking the Measure of Law: The Case of the Doing Business Project', 32 *Law and Social Inquiry* (2007) 1095.

¹⁶⁷ Davis, Kingsbury and Merry, 'Indicators as a Technology of Global Governance', Institute for International Law and Justice Working Paper No. 2 (2010), at 22ff.

¹⁶⁸ See A. Rosga and M.L. Satterthwaite 'The Trust in Indicators: Measuring Human Rights', 27 *Berkeley Journal of International Law* (2009) 253.

¹⁶⁹ For such an approach, see Martens and Niemann, 'Governance by Comparison: How Ratings and Rankings Can Impact National Policy Making in Education', TranState Working Paper No. 139 (2010).

Which acts ultimately amount to exercises of international public authority hinges on the degree to which they impact freedom. Where to draw the line is a question of judgement or political choice. Our theoretical framework cannot substitute such judgement or choice, but it can inform it. Legal scholarship may then offer a set of standardized instruments that facilitate the identification of acts of international public authority and render a legal regime applicable to them, thereby ensuring a basic level of legitimacy.¹⁷⁰ This has been elaborated for the OECD PISA programme elsewhere.¹⁷¹

4 Outlook

Some might consider that the project of translating world public opinion into more legitimate standard instruments of stronger multilateral institutions is too reminiscent of the hopes triggered by the fall of the Berlin wall. Since then, concepts such as state power, bilateralism, geopolitics or realism have crept back to the forefront of global politics.¹⁷² Given the impotence of international institutions in the light of pressing crises such as the conflict in Eastern Ukraine, Syria or the refugee crisis on the Mediterranean Sea, a theory of international public authority might be regarded as insufficient and myopic. However, the public law approach neither suggests, nor implies, a progression to a harmonious world wisely regulated by illuminated international institutions. Far from it. As set out at the beginning, our basic stance reflects the ambivalence of world public opinion. More importantly, many international institutions, while impotent in some respects, continue to impact people's lives in many ways. The IMF, for instance, is far busier now than in the decade preceding the global financial crisis. And the negotiations for a Transatlantic Trade and Investment Partnership, whatever its ultimate fate, show that political projects for powerful international institutions are not a relict of the past. Many individuals have an acute awareness of international public authority. They mistrust the policies of international institutions while calling on them to improve their lot. The public law approach considers this as both a rational and a realist reaction and tries to give it a legal frame.

¹⁷⁰ On the concept of standard instruments, see Goldmann, *supra* note 18, at 399ff.

¹⁷¹ Von Bogdandy and Goldmann, *supra* note 8.

¹⁷² Mead, 'The Return of Geopolitics: The Revenge of the Revisionist Powers', 93 *Foreign Affairs* (2015) 69.